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LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS: A VIOLATION OF CUSTOMARY INTERNATIONAL LAW

INTRODUCTION

Henry Hill was convicted of aiding and abetting first degree murder in connection with events that transpired when he was sixteen years old.¹ Despite having already left the scene when the murder occurred and being evaluated to have the academic ability and mental maturity of a nine year old, Henry was sentenced to life imprisonment without the possibility of parole.² Emily F. was convicted of murdering her aunt, an event that occurred when she was fifteen years old.³ Emily told her doctor several times prior to the murder that she was having violent hallucinations triggered by a prescription antidepressant.⁴ Although Emily's psychiatrist testified that Emily "did not know the difference between right and wrong and was incapable of understanding the nature of her acts . . . because she was in a psychotic state," Emily was also sentenced to life imprisonment without the possibility of parole.⁵

Henry Hill and Emily F. are two of the more than 2,000 individuals in the United States currently serving sentences of life imprisonment without the possibility of parole for crimes they committed as children.⁶ Only about 12 juvenile offenders are serving the same sentence in the rest of the world combined.⁷ In addition to being rarely applied in other countries, the sentence of life without parole for juvenile offenders is expressly prohibited by the United Nations Convention on the Rights of the Child (CRC).⁸

1. AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 4 (2004), *available at* <http://www.aclumich.org/pubs/juvenilelifers.pdf> [hereinafter SECOND CHANCES].

2. *Id.*

3. AMNESTY INT'L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 43 (2005), *available at* <http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf> [hereinafter THE REST OF THEIR LIVES].

4. *Id.*

5. *Id.* at 44 (quoting *Iowa v. Fetters*, 562 N.W.2d 770, 772, 774 (Iowa Ct. App. 1997)) (internal quotation marks omitted).

6. *Id.* at 52.

7. *Id.* at 106.

8. United Nations Convention on the Rights of the Child art. 37(a), *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (*entered into force* Sept. 2, 1990) [hereinafter CRC].

Recently, there has been increased discussion about juvenile crime and punishment in general, and the imposition of life imprisonment without the possibility of parole in particular. Indeed, following the United States Supreme Court's 2005 decision in *Roper v. Simmons*, holding unconstitutional the application of the death penalty to juvenile offenders,⁹ some commentators have suggested that life imprisonment without the possibility of parole is unconstitutional as well.¹⁰ Based on Eighth Amendment jurisprudence, though, a constitutional challenge to such a sentence is unlikely to be successful even after *Simmons*.¹¹

However, the imposition of such sentences may be prohibited by international law.¹² Based on the near-universal rejection of life without parole

9. 543 U.S. 551, 578–79 (2005).

10. Elizabeth Cepparulo, *Roper v. Simmons: Unveiling Juvenile Purgatory—Is Life Really Better than Death?*, 16 TEMP. POL. & CIV. RTS. L. REV. 225 (2006); Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life without Parole after Roper*, 47 B.C. L. REV. 1083 (2006); Dirk van Zyl Smit, *The Abolition of Capital Punishment for Persons under the Age of Eighteen Years in the United States of America. What Next?*, 5 HUM. RTS. L. REV. 393, 400 (2005) (“The recognition that was given to the diminished culpability of juveniles in [*Simmons*] may in due course give rise to the re-evaluation of the proportionality of sentences of life without parole for juveniles.”).

Further, Justice Scalia's dissenting opinion in *Simmons* acknowledged that aspects of the majority's reasoning would render life without parole sentences for juvenile offenders unconstitutional as well:

It is also worth noting that, in addition to barring the execution of under-18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing them with life in prison without the possibility of release. If we are truly going to get in line with the international community, then the Court's reassurance that the death penalty is really not needed, since “the punishment of life imprisonment without the possibility of parole is itself a severe sanction” . . . gives little comfort.

Simmons, 543 U.S. at 623 (Scalia, J., dissenting) (internal citations omitted).

11. In holding that the juvenile death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment, the *Simmons* Court found that the “objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question” provided evidence of a “national consensus against the death penalty for juveniles.” *Simmons*, 543 U.S. at 564. Because forty-two states allow life without parole sentences for juvenile offenders, THE REST OF THEIR LIVES, *supra* note 3, at 25, the “national consensus” against the sentence is probably insufficient to support an Eighth Amendment challenge to it. For federal decisions upholding challenges to life imprisonment without the possibility of parole for juveniles before *Simmons*, see *Rice v. Cooper*, 148 F.3d 747, 752 (7th Cir. 1998), *cert. denied*, 526 U.S. 1160 (1999); *Harris v. Wright*, 93 F.3d 581, 584 (9th Cir. 1996). *But see* Cepparulo, *supra* note 10 (arguing that life without parole for juvenile offenders violates Eighth Amendment); Wayne A. Logan, *Proportionality and Punishment: Imposing Life without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681 (1998) (same); Massey, *supra* note 10 (same).

12. Vincent G. Levy argues that life imprisonment of juveniles violates international law for four reasons: (1) the procedures accorded juvenile offenders in the United States do not comply with the special procedures required by international agreements; (2) the sentence violates the CRC; (3) the sentence fails to emphasize rehabilitation or reintegration, in violation of

for youth offenders in other nations and the express prohibition of it in the CRC, the prohibition on life imprisonment without the possibility of release for juvenile offenders has become a matter of customary international law, and is binding on the United States.¹³

Part I of this Comment defines customary international law and identifies relevant disagreements over what counts as evidence of customary international law. Part II argues that the prohibition on life imprisonment of minors without the possibility of parole has become a rule of customary international law. Part III argues that this rule is binding on the United States, and life without parole sentences for juvenile offenders are invalid under international law.

I. CUSTOMARY INTERNATIONAL LAW IN GENERAL

A. *Definition of Customary International Law*

Customary international law is generally recognized as a source of international law independent of treaties.¹⁴ Therefore, if customary international law prohibits the imposition of life without parole sentences on juvenile offenders, “it might impose a legal obligation on the United States to eliminate this practice even if the United States is not obligated to do so by treaty.”¹⁵ Given the fact that customary international law imposes legal obligations on the United States, it is important to determine what customary international law is and how the existence of a customary norm is established.

Customary international law is commonly defined as “international custom, as evidence of a general practice as accepted as law.”¹⁶ The Restatement (Third) of Foreign Relations Law of the United States articulates that “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁷ Under

international agreements; and (4) life without parole sentences are per se disproportionate when imposed on juveniles. Vincent G. Levy, *Enforcing International Norms in the United States after Roper v. Simmons: The Case of Juvenile Offenders Sentenced to Life without Parole*, 45 COLUM. J. TRANSNAT'L L. 262, 269–81 (2007).

13. *See id.* at 273–77 (arguing that Article 37(a) of the CRC has crystallized into a norm of customary international law).

14. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987); *see also* Statute of the International Court of Justice art. 38 § 1, June 26, 1945, 59 Stat. 1031 (establishing international custom, international conventions, and the “general principles of law recognized by civilized nations” as types of international law).

15. Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 514 (2002) (discussing customary international law and the juvenile death penalty).

16. Statute of the International Court of Justice art. 38 § 1 cl. b; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6 (6th ed. 2003).

17. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2).

these formulations, customary international law has two elements: an objective element of general or consistent state practice, and a subjective element of acceptance as law or a sense of legal obligation.¹⁸ This subjective element is called “*opinio juris et necessitatis*” or “*opinio juris*.”¹⁹ Although the definition of customary international law is relatively straightforward, there is much disagreement over how to define and determine consistent state practice and *opinio juris*.

B. State Practice

For the prohibition on life without parole for juvenile offenders to be a matter of customary international law, the norm must satisfy the first element of customary international law: consistent state practice.²⁰ There is considerable disagreement over the levels of uniformity, consistency, and generality required for state practice and the types of evidence that can be used to establish it. Although the Permanent Court of International Justice has declared the practices of fewer than a dozen states to be matters of customary international law, a very large majority of states must at least acquiesce in the practice to satisfy the consistent practice requirement.²¹ Some scholars argue that state practice must be completely uniform for the practice to qualify as a norm of customary international law.²² However, Ian Brownlie indicates that “substantial uniformity,” as opposed to “complete uniformity,” is required.²³ Further, Jordan Paust argues that even violations of a norm of customary international law do not undermine the state practice requirement, provided that the violations do not become too widespread.²⁴

In addition to disagreement over the level of generality and uniformity required for state practice, there is debate over the types of evidence that can be used to show state practice. Some commentators argue for a broad range of

18. Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 123 (2006).

19. BROWNLIE, *supra* note 16, at 8.

20. Guzman, *supra* note 18, at 123.

21. Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 6–7 (1988).

22. See, e.g., Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99, 103 (1995–1996) (“[I]n order to be able to properly characterize a norm as a rule of customary international law, it must be true either that states very seldom violate the norm—such that the question of enforcement does not arise—or that the international legal system is prepared to employ its characteristic means of coercion in response to violations of the norm.”).

23. BROWNLIE, *supra* note 16, at 7; see also Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. INT'L & COMP. L. 147, 151 (1995–1996) (arguing that state practice “need only be general, not uniform”).

24. Paust, *supra* note 23.

acceptable evidence. For example, Brownlie identifies the following as material sources of custom:

diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.²⁵

In contrast, other commentators argue that only physical acts of states should be considered.²⁶ United States courts have considered judicial opinions, the works of text writers, treaties and other international agreements, domestic constitutions or legislation, executive orders, declarations or recognitions, draft conventions or codes, reports, and resolutions of international organizations in evaluating customary norms.²⁷

The issue of whether resolutions of international bodies, like the United Nations Commission on Human Rights, qualify as evidence of state practice is of particular relevance to the determination of whether life without parole sentences for juvenile offenders are prohibited by customary international law. While the United States Department of State considers government acts like treaties, executive agreements, federal regulations, federal court decisions, and internal memoranda to be evidence of state practice, it excludes from acceptable evidence resolutions of international bodies.²⁸ In contrast, several prominent theorists consider such resolutions to be permissible evidence of state practice. For example, Brownlie argues that when resolutions are concerned with general norms of international law, they constitute evidence of state opinion.²⁹

25. BROWNLIE, *supra* note 16 (internal citations omitted).

26. See Guzman, *supra* note 18, at 126.

27. JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 3–4 (1996).

28. Guzman, *supra* note 18, at 126. *But see* PAUST, *supra* note 27 (including “resolutions or decisions of international organizations” in a list of types of evidence United States courts have considered).

29. BROWNLIE, *supra* note 16, at 14–15. Brownlie explains:

In general these resolutions are not binding on member states, but, when they are concerned with general norms of international law, then acceptance by a majority vote constitutes *evidence* of the opinions of governments in the widest forum for the expression of such opinions. Even when they are framed as general principles, resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules.

Id.

Like resolutions of international bodies, the issue of whether multilateral human rights treaties constitute permissible evidence of state practice is particularly relevant to the status of the prohibition on life imprisonment of juvenile offenders as a rule of customary international law. R.R. Baxter proposes that treaties which on their face purport to be declaratory of customary international law should be accepted as legitimate evidence of state practice, and should carry a weight proportionate to the number of nations made party to the treaty.³⁰ Anthony D'Amato considers a treaty to be a "clear record of a binding international commitment that constitutes the 'practice of states' and hence is as much a record of customary behavior as any other state act or restraint."³¹ In contrast, Arthur M. Weisburd argues that even treaties that are declarative of custom at the time of their adoption do not provide evidence of consistent state practice because developments in actual state practice can result in customary law diverging from the law declared in the treaty.³² As previously noted, the United States Department of State considers treaties to be acceptable evidence of state practice.³³

A final issue relevant to the determination of whether customary international law prohibits sentencing juvenile offenders to life imprisonment without the possibility of parole is whether a consistent pattern of non-action can satisfy the state practice requirement. D'Amato distinguishes between two types of non-acts: failure to act because of discretion and failure to act because of legal obligation.³⁴ He argues that only the second type of non-acts provides permissible evidence of state practice. That is, "a state's failure to act when it has been given notice . . . that states have a duty to refrain from acting . . . is the only kind of non-act that can contribute to the formation of customary international law."³⁵ A treaty obligation can provide the requisite duty to refrain from action, and therefore non-action under a treaty obligation provides unambiguous evidence of state practice.³⁶

Clearly, there is much debate surrounding the meaning of and permissible evidence of the state practice element of customary international law. In the context of life imprisonment of minors, however, this element is satisfied even

30. R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 298 (1965-1966).

31. ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 104 (1971).

32. Weisburd, *supra* note 21, at 11, 20.

33. Guzman, *supra* note 18, at 126.

34. D'AMATO, *supra* note 31, at 62.

35. *Id.* at 82.

36. *Id.* at 162 ("Omissions of states—failures to act—are more ambiguous than treaties which prohibit certain actions. The treaty speaks with clarity that a state has agreed to abstain from an action, whereas mere abstention without a treaty does not necessarily mean that states feel a duty to abstain.").

under the most restrictive view of state practice. As Part II, *infra*, will illustrate, while dispute over the validity of resolutions and multilateral treaties as evidence of state practice is relevant to the status of life without parole sentences for juvenile offenders, the acts of states prohibiting or abstaining from the imposition of such sentences is probably sufficient to satisfy the state practice element independently of resolutions or treaties.

C. Opinio Juris

For the prohibition on life without parole sentences for juvenile offenders to be a rule of customary international law, the norm must also satisfy a second element, the subjective requirement of *opinio juris*.³⁷ This element requires that states follow a practice from a sense of legal obligation.³⁸ According to the International Court of Justice, *opinio juris* requires that “the acts concerned . . . be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”³⁹ Accordingly, a practice that is generally followed, but that states feel legally free to disregard, is not part of customary international law.⁴⁰

Just as with the state practice element of customary international law, there is disagreement over what qualifies as evidence of *opinio juris*. With respect to whether the *opinio juris* element is satisfied for a norm prohibiting life imprisonment without the possibility of release for juvenile offenders, the most

37. Guzman, *supra* note 18. Some scholars do not consider *opinio juris* to be a requirement for the development of customary international law. See BROWNLIE, *supra* note 16, at 8 n.30. However, the prevailing view is that the subjective requirement of *opinio juris* is necessary because there is a distinction between obligation and usage in state practice. *Id.* at 8. Legal obligation gives rise to customary international law, while “motives of courtesy, fairness, or morality” merely give rise to usage. *Id.*

Goldsmith and Posner reject the concept of *opinio juris* altogether. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999). Applying game theory concepts, they argue that international behavior is a function of national self-interest, not a sense of legal obligation. *Id.* at 1120. They are “skeptical of the existence of multilateral behavioral regularities that are typically thought to constitute [customary international law].” *Id.* at 1115. Goldsmith and Posner’s rejection of traditional conceptions of customary international law has been widely criticized. See, e.g., Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT’L L. 143 (2001), so this paper will focus on the prevailing view that *opinio juris* exists and is an element of customary international law.

38. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c (1987); see also *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20) (“The States concerned must . . . feel that they are conforming to what amounts to a legal obligation.”).

39. *North Sea Continental Shelf*, 1969 I.C.J. at 44.

40. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c.

important theoretical debate is that over whether multilateral treaties provide evidence of the requisite sense of legal obligation.

Weisburd advances a strict view of *opinio juris* and rejects the idea that treaties provide evidence of it. He argues that the only way to determine whether states see a particular rule as legally binding is to determine their belief as to the consequences of breaching the rule.⁴¹ That is, the state must “acknowledge . . . the right of states to whom it owes a putative duty to inquire about possible breaches of the duty and also acknowledge . . . its obligation to make reparation for any breaches of duty.”⁴²

Under this strict view, Weisburd argues that *opinio juris* requires that state practice be informed by a sense of legal obligation under international law separate from treaty commitments.⁴³ He writes, “it is easy to imagine circumstances in which a particular treaty not only fails to express *opinio juris*, but actually denies *opinio juris*, that is, provides evidence that the parties would reject any duty to behave as the treaty required had the treaty not been concluded.”⁴⁴ For example, treaties that impose obligations on states but either expressly or impliedly limit the right of parties to inquire into possible breaches and circumscribe legal remedies for breaches of the treaty obligations do not provide evidence of a sense of legal obligation.⁴⁵ Indeed, such treaties “seem to deny *opinio juris*.”⁴⁶

While Weisburd and others argue that treaties are not legitimate evidence of *opinio juris*, other scholars consider treaties to be sufficient evidence, and indeed, to generate norms of customary international law. After analyzing judicial decisions of the International Court of Justice and other international courts,⁴⁷ examples from state practice,⁴⁸ the opinions of scholars,⁴⁹ and

41. Weisburd, *supra* note 21, at 9.

42. *Id.* at 23.

43. *Id.* at 24. See also Bradley, *supra* note 15, at 514–15 (“It is unclear, however, whether the nations that have abolished the juvenile death penalty have done so out of a sense of legal obligation, or at least a sense of legal obligation that is separate from their various treaty commitments.”).

44. Weisburd, *supra* note 21, at 24.

45. *Id.* at 25–26.

46. *Id.* at 29. For example, Weisburd argues that the International Covenant on Civil and Political Rights (CCPR) denies *opinio juris*. *Id.* at 26–29. He claims that the CCPR limits the rights of parties to examine other parties’ conduct and provides no enforcement mechanism or prescriptive power to the Human Rights Committee it establishes. *Id.* at 26. He concludes that the CCPR denies *opinio juris* because it limits the rights of parties to investigate breaches of obligations in the treaty and precludes any duty of the parties to make good to any entity violations of the treaty. *Id.* at 29.

47. D’AMATO, *supra* note 31, at 113–28. D’Amato summarizes, “national and international courts have realized that treaties, far from being irrelevant to the content of international law, in fact are the records of state acts and commitments that continually shape, change, and refine the content of customary international law.” *Id.* at 128.

theoretical considerations,⁵⁰ D'Amato concludes that treaties supply the best evidence of the sense of legal obligation required for *opinio juris*.⁵¹ He writes, "[n]early all the substantive provisions in multilateral conventions contain formulations of norms of international law that meet all the requirements of articulation."⁵²

Brownlie also considers certain types of treaties as constituting evidence of *opinio juris*. "Law-making" treaties are those treaties that "create *general* norms for the future conduct of the parties in terms of legal propositions, and the obligations are basically the same for all parties."⁵³ Although law-making treaties are in principle binding only on parties, "the number of parties, the explicit acceptance of rules of law, and, in some cases, the declaratory nature of the provisions produce a strong law-creating effect at least as great as the general practice considered sufficient to support a customary rule."⁵⁴ Brownlie discusses the International Court of Justice's reasoning in the *North Sea Continental Shelf Cases* as an example of treaty obligations providing evidence of customary international law.⁵⁵ In those cases, the Court concluded that three articles of a relevant treaty had crystallized into rules of customary international law because they stated emergent or pre-existing customary law, showing that international covenants may provide evidence of a sense of legal obligation.⁵⁶

48. *Id.* at 128–38.

49. *Id.* at 138–49.

50. *Id.* at 149–66.

51. *Id.* at 160.

52. D'AMATO, *supra* note 31, at 160–61 (emphasis omitted). D'Amato argues that treaties go beyond merely providing evidence of *opinio juris*. He finds that treaties "themselves constitute or generate customary rules of law." Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1129 (1982). Limiting his discussion to genocide, torture, and slavery, he argues that multilateral conventions containing prohibitions on these practices "constitute evidence of customary law binding upon all states and not just the parties thereto." *Id.* No evidence apart from the conventions is required to establish the prohibitions as rules of customary international law. *Id.* The passage of time, or a "harden[ing]" process, is also unnecessary. D'AMATO, *supra* note 31, at 162–63. While D'Amato agrees that a treaty that has been in existence for a longer period is more persuasive evidence of custom, treaties generate customary international law at the moment of ratification. *Id.* at 163–64.

53. BROWNLIE, *supra* note 16, at 12. Although Brownlie does not mention the United Nations Convention on the Rights of the Child specifically, he does indicate that instruments like the Genocide Convention of 1948 and parts of the United Nations Charter are law-making treaties. *Id.* at 12–13.

54. *Id.* at 13.

55. *Id.*

56. *See id.* Brownlie questions the aspect of the International Court of Justice's reasoning that distinguishes among treaty articles based on the ability of states to make unilateral reservations to them: "With respect it may be doubted if the existence of reservations of itself destroys the probative value of treaty provisions." *Id.*

Clearly, there is intense debate over the status of treaties as evidence of *opinio juris*. The views of scholars like D'Amato and Brownlie, accepting treaty obligations as competent evidence of *opinio juris*, are more persuasive than the views of scholars like Weisburd, requiring a sense of legal obligation separate from treaty obligations. The basis of Weisburd's rejection of treaties as evidence of *opinio juris* is his focus on state-to-state remedies. While it may be true that multilateral human rights treaties do not always create state-to-state remedies, many scholars recognize that the process of sanctioning human rights violations involves more than just formal state-to-state action.⁵⁷ Private institutions, groups, and individuals also enforce the obligation of states not to violate human rights through diplomatic, ideologic, and economic strategies.⁵⁸

Further, the primary obligation under human rights treaties is not to other states, but rather to individuals.⁵⁹ For example, in contrast to Weisburd's assertion that the International Covenant on Civil and Political Rights (CCPR) denies *opinio juris* by limiting the rights of parties to examine other parties' conduct and by providing no enforcement mechanism,⁶⁰ this treaty actually does impose an obligation on states to provide a remedy for violations. Article 2 requires each state party to "ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy."⁶¹

Finally, Weisburd's reasoning that if a treaty does not explicitly provide a remedy it does not create an individual right and a corresponding legal obligation for the state is flawed.⁶² His argument confuses primary and remedial law.⁶³ The fact that a treaty does not create a private right of action against the state—that is, a remedy—does not mean that the treaty fails to create rights.⁶⁴ Individual treaty rights impose a legal obligation on states to comply with the treaty. Therefore, despite Weisburd's assertion that a treaty obligation alone is insufficient to express *opinio juris*, the nature of multilateral human rights treaties is such that their ratification creates strong evidence of it.⁶⁵

57. Paust, *supra* note 23, at 159–60.

58. *Id.* at 160–61.

59. *Id.* at 161.

60. *See* Weisburd, *supra* note 21, at 29.

61. International Covenant on Civil and Political Rights art. 2(3), Dec. 19, 1966, S. EXEC. DOC. C, D, E, F, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter CCPR].

62. *See* David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANSNAT'L L. 20, 36–37 (2006) (arguing that if a treaty provides for individual rights, then an individual whose rights have been violated is entitled to a remedy).

63. *See id.* at 29–31 (explaining primary and remedial law).

64. *See id.* at 34.

65. *See* Baxter, *supra* note 30, at 299 (emphasizing the special character of humanitarian treaties).

D. Persistent Objector Doctrine

If the prohibition on life without parole sentences for juvenile offenders satisfies both the state practice and *opinio juris* elements of customary international law, it is binding on all states, even those whose practices are not in line with the norm.⁶⁶ The only exception to this rule is the persistent objector doctrine, the “widely accepted” notion “that nations that persistently object to a customary international norm while it is being developed are not bound by the norm.”⁶⁷ While the persistent objector doctrine is not completely uncontroversial, it is “as close to a settled proposition as one can find in international law.”⁶⁸ Indeed, the International Court of Justice and the Inter-American Commission on Human Rights have accepted it.⁶⁹ The Restatement (Third) of Foreign Relations Law of the United States also adopts the doctrine:

Although customary law may be built by the acquiescence as well as by the actions of states . . . and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.⁷⁰

Therefore, if the United States were to meet the requirements of the persistent objector doctrine, it would not be bound by the rule of customary international law prohibiting life imprisonment without the possibility of release for juvenile offenders.

To be considered a persistent objector and be permitted to opt out of a customary rule, a state must meet two conditions: “[f]irst, the state must object when the rule is in its nascent stage, and continue to object afterwards;” and second, the state’s objection must be consistent.⁷¹ Lynn Loschin suggests a useful analytical model to determine whether an objecting state should be permitted to opt out of a norm of customary international law as a persistent objector. This model, which will be discussed in detail in Part III, *infra*, analyzes whether a state is bound by a treaty or a peremptory norm and balances the nature of the norm with the nature of the objection.⁷²

Applying this model to the (purported) rule of customary international law prohibiting the application of the death penalty to juvenile offenders before *Roper v. Simmons*, Loschin concluded that the United States’ objection to that

66. Bradley, *supra* note 15; see Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT’L L. & POL’Y 147, 149 (1996).

67. Bradley, *supra* note 15, at 516.

68. *Id.*

69. *Id.*

70. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987).

71. Loschin, *supra* note 66, at 150–51.

72. *Id.* at 161–68.

norm did not meet the requirements of persistent objection.⁷³ In contrast, Bradley argued that the United States had reached persistent objector status with respect to this norm. He outlined a history of United States objection to prohibitions on the death penalty and the juvenile death penalty, and concluded that:

at least since the late 1970s, the United States has declined to agree to treaty provisions that would outlaw the execution of juvenile offenders, has repeatedly stated before international bodies (such as the Inter-American Commission on Human Rights and the ICCPR's Human Rights Committee) that it objects to an international law ban on the practice, and has continued to allow for the execution of juvenile offenders domestically in the face of international pressure to end the practice.⁷⁴

The history of the United States' objection to prohibitions on the juvenile death penalty will illuminate the failure of the United States to object to the prohibition on life imprisonment of minors.

II. PROHIBITION ON LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS IS A RULE OF CUSTOMARY INTERNATIONAL LAW

Given the permissible and relevant evidence of state practice and *opinio juris*, customary international law prohibits the imposition of life imprisonment without the possibility of parole on juvenile offenders. This sentence is widely imposed in the United States, with at least 2,225 youth offenders serving life without parole sentences in 2004,⁷⁵ but rarely imposed in the rest of the world, with only 9 to 12 youth offenders serving such sentences in other countries.⁷⁶ The sentence is expressly prohibited by the CRC,⁷⁷ a treaty to which 192 states are parties.⁷⁸ The widespread state practice of prohibiting life without parole for minors, the CRC's rejection of this sentence, and the history and acceptance of the CRC show that the prohibition of such sentences for juvenile offenders has become a matter of customary international law, and as such, is binding on the United States.

73. *Id.* at 171.

74. Bradley, *supra* note 15, at 520–35.

75. THE REST OF THEIR LIVES, *supra* note 3, at 25.

76. *Id.* at 106. Human Rights Watch obtained data relating to international practice by examining the reports of 166 countries to the United Nations Committee on the Rights of the Child. For the 53 states that failed to report to the Committee on their practices under Article 37, Human Rights Watch reviewed articles covering recent sentencing decisions and interviewed the UNICEF Child Protection Officer in the state, criminal defense attorneys, judges, criminal justice nongovernmental organizations, and the press. *Id.* at 105 n.312.

77. CRC, *supra* note 8.

78. THE REST OF THEIR LIVES, *supra* note 3, at 99.

A. *State Practice*

The first element of customary international law is an objective one: general and consistent state practice.⁷⁹ This requirement is satisfied for the norm prohibiting life without parole for juvenile offenders, as evidenced by the small number of states that currently have youth offenders serving such sentences, the limited number of states whose penal codes allow for such sentences, and the great number of states whose penal codes expressly prohibit such sentences. A widely ratified treaty and statements by international bodies condemning life without parole for youth offenders provide additional evidence of state practice.

In stark contrast to the United States, almost all other countries in the world avoid sentencing juvenile offenders to life without parole. Based on a review of state reports to the Committee on the Rights of the Child and, when necessary, interviews with governmental and non-governmental organizations,⁸⁰ Amnesty International and Human Rights Watch determined that only four states currently have youth offenders serving life sentences without the possibility of parole.⁸¹ South Africa has four juvenile offenders, Tanzania has one, Israel has between four and seven, and the United States has over two thousand.⁸²

Among states that currently do not have juvenile offenders serving life without parole sentences, only about twenty provide for this sentence in their penal codes. Amnesty International and Human Rights Watch report that the penal codes of Antigua and Barbuda, Australia, Brunei, Burkina Faso, Cuba,

79. Guzman, *supra* note 18, at 123.

80. THE REST OF THEIR LIVES, *supra* note 3, at 105 n.312.

81. *Id.* at 106. Human Rights Watch was able to obtain data on state practice regarding life imprisonment of juvenile offenders for 154 states. *Id.* at 104–05. Although there may be a danger that states did not accurately report the number of juvenile offenders serving life without parole sentences, this danger is reduced by the fact that the Committee on the Rights of the Child reviewed the reports and considered the independent reports of nongovernmental organizations. See CRC, *supra* note 8, art. 45.

Further, any state that did misrepresent the status of juvenile offenders in its justice system may have done so because it knew that life without parole sentences for such offenders violated its international legal obligations, providing additional evidence of state practice and *opinio juris*. Cf. Lisa L. Hajjar, *Torture and the Future*, GLOBAL & INT'L STUDIES PROGRAM, U.C. SANTA BARBARA (Oct. 1, 2004), available at <http://repositories.cdlib.org/gis/5/> (arguing that states deny engaging in torture because torture is forbidden under international law).

Overall, even if the numbers contained in the Amnesty International/Human Rights Watch report and in this paper are not exact, they were obtained through the best efforts of researchers and Committee on the Rights of the Child members. The number of states that refrain from sentencing juveniles to life without parole is so high that the state practice element of customary international law would be satisfied even if the number of states that do sentence juveniles is higher than four.

82. THE REST OF THEIR LIVES, *supra* note 3, at 25, 106.

Dominica, Kenya, Saint Vincent and the Grenadines, Solomon Islands, and Sri Lanka technically allow life imprisonment without the possibility of release for child offenders.⁸³ Additionally, the Committee on the Rights of the Child has expressed concern that the laws of the following states theoretically allow life imprisonment for juvenile offenders, even if such sentences are not imposed in practice:⁸⁴ Bangladesh (children over seven),⁸⁵ Belgium (children sixteen to eighteen),⁸⁶ Belize (children over nine),⁸⁷ China,⁸⁸ Japan,⁸⁹ Liberia (children sixteen to eighteen),⁹⁰ and the Netherlands and Aruba (children sixteen to eighteen).⁹¹ In many of these states, it is unclear whether juvenile offenders sentenced to life imprisonment are ever eligible for parole or release.⁹² Further, the sentence is rarely used in most of these countries.⁹³

The penal codes of the remaining states either do not provide for life imprisonment of juvenile offenders or expressly prohibit this sentence.⁹⁴ The

83. *Id.* at 106–07.

84. For a compilation of concluding observations of the Committee on the Rights of the Child, organized by state and article under consideration, see CYNTHIA PRICE COHEN, *JURISPRUDENCE ON THE RIGHTS OF THE CHILD* (2005).

85. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Bangladesh*, ¶ 77(b), U.N. Doc. CRC/C/15/Add.221 (Oct. 27, 2003) [hereinafter *Bangladesh*].

86. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Belgium*, ¶ 11, U.N. Doc. CRC/C/15/Add.38 (June 20, 1995) [hereinafter *Belgium*].

87. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Belize*, ¶ 70, U.N. Doc. CRC/C/15/Add.252 (Mar. 31, 2005).

88. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: China (including Hong Kong and Macau Special Administrative Regions)*, ¶ 89, U.N. Doc. CRC/C/CHN/CO/2 (Nov. 24, 2005).

89. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Japan*, ¶ 53, U.N. Doc. CRC/C/15/Add.231 (Feb. 26, 2004) [hereinafter *Japan*].

90. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Liberia*, ¶ 66, U.N. Doc. CRC/C/15/Add.236 (July 1, 2004) [hereinafter *Liberia*].

91. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: The Kingdom of the Netherlands (Netherlands and Aruba)*, ¶¶ 58–59, U.N. Doc. CRC/C/15/Add.227 (Feb. 26, 2004) [hereinafter *Netherlands and Aruba*].

92. *THE REST OF THEIR LIVES*, *supra* note 3, at 106–07. The Committee on the Rights of the Child does not specify whether the penal codes of Bangladesh, Belgium, Japan, or the Netherlands and Aruba allow for the possibility of parole for life sentences. *Bangladesh*, *supra* note 85; *Belgium*, *supra* note 86; *Japan*, *supra* note 89; *Netherlands and Aruba*, *supra* note 91.

93. *THE REST OF THEIR LIVES*, *supra* note 3, at 106–07.

94. Although an express legal prohibition on life without parole for juvenile offenders provides the most compelling evidence of state practice, the silence of a penal code with respect

Federal Republic of Germany's Juvenile Justice Act does not allow persons under eighteen to be sentenced to life imprisonment, with or without parole.⁹⁵ Austria, Ireland, Switzerland, and Sweden also prohibit life without parole for juvenile offenders.⁹⁶ Additionally, at least twenty-nine African countries prohibit life without parole for juveniles under the age of eighteen,⁹⁷ and seven other African countries prohibit the sentence for juveniles under sixteen.⁹⁸ The United Kingdom forbids "imprisonment for life" for juvenile offenders convicted of murder, but allows detention "for the duration of Her Majesty's pleasure."⁹⁹ In *Hussain v. the United Kingdom*, the European Court of Human Rights held that juveniles sentenced to imprisonment "during Her Majesty's pleasure" were entitled to review by a parole board after they served a certain

to this sentence also provides persuasive evidence. The fact that a state has not contemplated life without parole for juvenile offenders in its legislation may indicate that it would never consider imposing this sentence. Indeed, the Committee on the Rights of the Child has rarely expressed concern that the failure of a state's penal code to expressly prohibit life imprisonment for juvenile offenders may allow such sentences to be imposed. The Committee did express this concern in its observations on Zimbabwe, Guatemala, and Trinidad and Tobago. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Zimbabwe*, ¶ 21, U.N. Doc. CRC/C/15/Add.55 (June 7, 1996) [hereinafter *Zimbabwe*]; Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Guatemala*, ¶ 15, U.N. Doc. CRC/C/15/Add.58 (June 7, 1996); Comm. on the Rights of the Child, *Consideration of Reports Submitted by the States Parties under Article 44 of the Convention: Concluding Observations: Trinidad and Tobago*, ¶ 73(b), U.N. Doc. CRC/C/TTO/CO/2 (Mar. 17, 2006).

95. DIRK VAN ZYL SMIT, *TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW* 138 (2002).

96. *SECOND CHANCES*, *supra* note 1, at 21.

97. These countries are Algeria, Angola, Benin, Botswana, Burundi, Cameroon, Cape Verde, Chad, Cote d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Guinea, Guinea-Bissau, Lesotho, Libya, Madagascar, Mali, Mauritius, Morocco, Mozambique, Namibia, Niger, Rwanda, Sao Tome and Principe, Togo, Tunisia, and Uganda. *THE REST OF THEIR LIVES*, *supra* note 3, at 105 n.315. Amnesty International and Human Rights Watch also include Liberia and Zimbabwe in the list of African states that prohibit life without parole for all juvenile offenders. *Id.* As noted, the Committee on the Rights of the Child found that Liberia allows this sentence for sixteen and seventeen year old offenders. *Liberia*, *supra* note 90. The Committee also expressed concern that Zimbabwe's penal code lacked a clear prohibition of life imprisonment without the possibility of release. *Zimbabwe*, *supra* note 94.

98. Amnesty International and Human Rights Watch list six of these countries: Comoros, Congo (Brazzaville), Ethiopia, Ghana, Madagascar, and Senegal. *THE REST OF THEIR LIVES*, *supra* note 3, at 105 n.316. Liberia also prohibits life without parole for under-sixteen offenders. *See Liberia*, *supra* note 90.

99. *THE REST OF THEIR LIVES*, *supra* note 3, at 107 n.324; VAN ZYL SMIT, *supra* note 95, at 125 (quoting Murder (Abolition of Death Penalty) Act of 1965).

number of years.¹⁰⁰ That is, British law forbids life imprisonment without the possibility of release.

Further, for many states, the prohibition on life without parole for juvenile offenders in Article 37(a) of the CRC¹⁰¹ is equivalent to a prohibition in their domestic codes. These states “view a treaty as part of their internal law once it enters into force internationally.”¹⁰² In a survey of nineteen diverse states,¹⁰³ “[n]early two-thirds . . . consider treaties to operate directly as domestic law under certain circumstances.”¹⁰⁴ Although an analysis of the interaction of treaty obligations and domestic law for all states is beyond the scope of this Comment, the number of surveyed states that consider treaty obligations to automatically have the effect of domestic law suggests that the domestic law of many states prohibits life without parole sentences for juvenile offenders as a result of their ratification of the CRC.

The number of states that do not have juvenile offenders serving life without parole sentences and the number that do not provide for this offense in their penal codes provide sufficient evidence to satisfy the state practice requirement of customary international law. As noted, a practice need not be universal to qualify as a general state practice.¹⁰⁵ Because only 4 states currently have juvenile offenders serving sentences of life imprisonment without the possibility of parole and about 170 states do not allow for this sentence, there is substantial uniformity in state practice. Further, the failure to sentence juvenile offenders to life without parole and the failure to allow for this sentence in penal codes is the type of non-action that qualifies as evidence of state practice. Failure to act because of a legal obligation, like that imposed by a treaty, “is the only kind of non-act that can contribute to the formation of customary international law.”¹⁰⁶ Because Article 37(a) of the CRC imposes a legal duty on states to ensure that life imprisonment without the possibility of release is not imposed on juvenile offenders,¹⁰⁷ the non-action of states in not imposing this sentence is permissible evidence of state practice.

Although the action of states in prohibiting and refraining from sentencing juvenile offenders to life without parole is sufficient to satisfy the state practice

100. *Hussain v. United Kingdom*, 22 Eur. Ct. H.R. 1, 23 (1996); VAN ZYL SMIT, *supra* note 95, at 125.

101. CRC, *supra* note 8.

102. Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, in NATIONAL TREATY LAW AND PRACTICE 1, 40 (Duncan B. Hollis et al. eds., 2005).

103. The nineteen states are Austria, Canada, Chile, China, Colombia, Egypt, France, Germany, India, Israel, Japan, Mexico, the Netherlands, Russia, South Africa, Switzerland, Thailand, the United Kingdom, and the United States. *Id.* at 5.

104. *Id.* at 41.

105. See BROWNLIE, *supra* note 16, at 7; Paust, *supra* note 23.

106. D'AMATO, *supra* note 31, at 82, 162.

107. CRC, *supra* note 8.

element, statements of international bodies and Article 37(a) of the CRC provide additional evidence of state practice. The United Nations Commission on Human Rights has adopted several resolutions reaffirming that a prohibition on life without parole for juvenile offenders enjoys consistent state practice. In 2002 and 2004, the Commission adopted resolutions “urg[ing] States to ensure that under their legislation and practice neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age.”¹⁰⁸ In 2005, the Commission called upon all states to “ensure compliance with the principle that depriving children of their liberty should be used only as a measure of last resort and for the shortest appropriate time, in particular before trial, recalling the prohibition of life imprisonment without possibility of release.”¹⁰⁹

Further, in 2006, the Human Rights Committee reprimanded the United States for its practice of sentencing juvenile offenders to life imprisonment without the possibility of release in its concluding observations on the compliance of the United States with the CCPR: “The State party should ensure that no such child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentences.”¹¹⁰

Finally, Article 37(a) of the CRC obligates state parties to ensure that life imprisonment without the possibility of release is not imposed on juvenile offenders.¹¹¹ The fact that 192 states are parties to the CRC¹¹² provides evidence of consistent state practice in prohibiting life without parole sentences for minors.

108. Comm’n on Human Rights Res. 2004/43, ¶ 11, U.N. Doc. E/CN.4/RES/2004/43 (Apr. 19, 2004); Comm’n on Human Rights Res. 2002/47, ¶ 19, U.N. Doc. E/CN.4/RES/2002/47 (Apr. 23, 2002) (emphasis omitted).

109. Comm’n on Human Rights Res. 2005/44, ¶ 27(c), U.N. Doc. E/CN.4/RES/2005/44 (Apr. 19, 2005).

110. Human Rights Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observation of the Human Rights Committee: United States of America*, ¶ 34, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006) (“The Committee notes with concern reports that forty-two states and the Federal government have laws allowing persons under the age of eighteen at the time the offence was committed, to receive life sentences, without parole, and that about 2,225 youth offenders are currently serving life sentences in United States prisons. The Committee, while noting the State party’s reservation to treat juveniles as adults in exceptional circumstances notwithstanding articles 10(2)(b) and (3) and 14(4) of the Covenant, remains concerned by information that treatment of children as adults is not only applied in exceptional circumstances. The Committee is of the view that sentencing children to life sentence without parole is of itself not in compliance with article 24(1) of the Covenant.”).

111. CRC, *supra* note 8.

112. Comm. on the Rights of the Child, *Report on the Forty-Second Session*, ¶ 1, U.N. Doc. CRC/C/42/3 (Nov. 3, 2006) [hereinafter *Report on the Forty-Second Session*].

Although the resolutions adopted by the Commission on Human Rights, the statement issued by the Human Rights Committee, and the provision on life without parole in the CRC provide evidence of state action prohibiting life without parole for juvenile offenders, these expressions of opinion are not necessary to establish the state practice element of customary international law. The overwhelming number of states that do not have juvenile offenders serving life without parole sentences and that do not allow for or expressly prohibit such sentences provides sufficiently strong evidence to conclude that state practice has reached the level of uniformity, consistency, and generality to satisfy the first element of customary international law.

B. *Opinio Juris*

The second element of customary international law, *opinio juris*, requires that states must follow a practice from a sense of legal obligation.¹¹³ As discussed in Part I, *supra*, one of the most controversial aspects of *opinio juris* is what qualifies as evidence of it. The *opinio juris* element of the norm prohibiting life without parole for juvenile offenders is most easily satisfied if one accepts the validity of treaties as evidence of it. The prohibition on life without parole for juvenile offenders in the CRC, together with other provisions of that treaty, provides evidence that states refrain from imposing such sentences out of a sense of legal obligation. In addition to the treaty provision itself, the drafting history of the CRC and the widespread ratification of it provide further evidence of *opinio juris*.

Several international instruments implicate the issue of life imprisonment without the possibility of release for child offenders, including the CCPR¹¹⁴ and the European Convention on Human Rights.¹¹⁵ These documents provide

113. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c (1987).

114. CCPR, *supra* note 61. The CCPR acknowledges the need for special treatment of children in the criminal justice system and emphasizes the importance of rehabilitation. Article 10(3) mandates the separation of youth offenders from adults, Article 14(4) provides that criminal procedures for children shall “take account of the age and the desirability of promoting their rehabilitation,” and Article 24(1) provides that each child shall have “right to such measures of protection as are required by his status as a minor.” *Id.* art. 10(3), 14(4), 24(1).

The United Nations Human Rights Committee has stated that the practice of sentencing child offenders to life without parole “is of itself not in compliance with article 24(1) of the [CCPR].” Human Rights Comm., *supra* note 110. The Committee noted that the United States entered a reservation to treat juveniles as adults in exceptional circumstances, but remained “concerned by information that treatment of children as adults is not only applied in exceptional circumstances.” *Id.* To the extent the CCPR indirectly prohibits life without parole for minors, this prohibition remains binding on the United States despite its reservation.

115. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]. Under Article 3 of the ECHR, “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” *Id.* art. 3.

some evidence that states refrain from sentencing juvenile offenders to life without parole out of a sense of legal duty. However, the CRC is the first international instrument to expressly prohibit this sentence,¹¹⁶ so it provides the strongest evidence of *opinio juris*.

Article 37(a) of the CRC provides that state parties shall ensure that “[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”¹¹⁷ Article 37 also obligates states to ensure that the “arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”¹¹⁸ Clearly, the language of Article 37 of the CRC prohibits life without parole sentences for juvenile offenders. Under a view accepting multinational treaties as evidence of *opinio juris*, the obligation of states under the CRC to ensure that such sentences are not imposed provides sufficient evidence of *opinio juris* to establish that this obligation is a matter of customary international law.¹¹⁹

The view that treaties do not provide evidence of *opinio juris* is unpersuasive in the context of the CRC. Despite Weisburd’s claim that treaties circumscribe legal remedies for breach of treaty obligations,¹²⁰ the provisions of the CRC impose a legal obligation on state parties to respect and ensure the rights set forth in the Convention. Article 2 provides that “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination,”¹²¹ and Article 4 provides that “State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.”¹²² These provisions show that the CRC does not circumscribe remedies; rather, it requires states to undertake “all” measures for the implementation and protection of rights mentioned in the Convention. Further, the CRC expressly

The European Court of Human Rights intimated in *Hussain v. the United Kingdom* that life without parole for minors might violate this article:

A failure to have regard to the changes that inevitably occur with maturation would mean that young persons detained under section 53 would be treated as having forfeited their liberty for the rest of their lives, a situation which . . . might give rise to questions under Article 3 . . . of the Convention.

Hussain v. United Kingdom, 22 Eur. Ct. H.R. 1, 25 (1996).

116. WILLIAM SCHABAS & HELMUT SAX, ARTICLE 37: PROHIBITION OF TORTURE, DEATH PENALTY, LIFE IMPRISONMENT AND DEPRIVATION OF LIBERTY 6 (2006).

117. CRC, *supra* note 8.

118. *Id.* art. 37(b).

119. As discussed in Part I, *supra*, many scholars are of this view. See D’AMATO, *supra* note 31, at 160; BROWNIE, *supra* note 16, at 12–13.

120. See Weisburd, *supra* note 21, at 29.

121. CRC, *supra* note 8, art. 2(2).

122. *Id.* art. 4.

provides for monitoring and sanctioning violations of the obligations imposed within it beyond the state-to-state model contemplated by Weisburd. Article 45 allows the Committee on the Rights of the Child¹²³ to invite nongovernmental organizations and other United Nations organs to report on the implementation of the Convention.¹²⁴ Through investigation and reporting, these organizations can play an important role in enforcing the obligations of states under the CRC.¹²⁵ Taken together, the express prohibition of life imprisonment without the possibility of release in Article 37(a), the obligations imposed on state parties to enforce the rights guaranteed in the CRC, and the role of nongovernmental organizations in monitoring state compliance with the CRC show that this treaty imposes a legal duty on states. Thus, the Convention provides strong evidence that states avoid sentencing juveniles to life without parole out of a sense of legal obligation, satisfying the *opinio juris* element of customary international law.

Although the provision of the CRC prohibiting life imprisonment without the possibility of release for juvenile offenders is itself sufficient to establish *opinio juris*, the drafting history of the CRC and the widespread ratification of it provide further evidence that states prohibit life without parole out of a sense of legal obligation. The drafting of the CRC began in 1979,¹²⁶ and the prohibition of life imprisonment was first proposed in 1986.¹²⁷ The 1986 proposal stated, in relevant part, “State parties shall, in particular, ensure that: . . . [c]apital punishment or life imprisonment is not imposed for crimes committed by persons below eighteen years of age.”¹²⁸ Notably, the draft referred to “life imprisonment” in general, without any reference to the possibility of parole or release.¹²⁹ The representative of Japan expressed concern over the reference to life imprisonment, indicated that his delegation would not agree to the prohibition of it, and suggested deletion of the entire provision.¹³⁰ The Canadian representative then suggested qualifying the

123. The Committee on the Rights of the Child is the body established by the CRC “[f]or the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention . . .” *Id.* art. 43(1).

124. *Id.* art. 45.

125. See Paust, *supra* note 23, at 160–61.

126. Sharon Detrick, *Introduction to THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE “TRAVAUX PREPARATOIRES”* 1 (Sharon Detrick ed., 1992) [hereinafter Detrick]. The reports of all of the CRC working groups are reprinted in Detrick’s book. See generally *id.*

127. U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child*, ¶ 99, U.N. Doc. E/CN.4/1986/39 (Mar. 13, 1986) [hereinafter *Report of Working Group 1986*], reprinted in Detrick, *supra* note 126, at 464.

128. *Id.*

129. *Id.*

130. *Id.* ¶ 104.

prohibition with the words “without the possibility of release.”¹³¹ The representative of the United States indicated that her delegation disagreed with the entire reference to capital punishment and life imprisonment, and focused her remarks on the reference to persons below eighteen years of age.¹³² The Working Group concluded its discussion of life imprisonment by adding the phrase “without the possibility of release” to the draft under discussion.¹³³

In 1989, the Working Group resumed consideration of life imprisonment. The Working Group had before it the text adopted at the first reading, which provided, “having regard to the relevant provisions of international instruments, the States Parties to the present Convention shall, in particular, ensure that: . . . capital punishment or life imprisonment without possibility of release is not imposed for crimes committed by persons below 18 years of age.”¹³⁴ The Working Group also had before it a proposal of Venezuela, which did not specifically address life imprisonment.¹³⁵ After a general debate over the first reading text and the Venezuela proposal, “in which it became obvious that there was a total lack of consensus,” the Chairman of the Working Group appointed an open-ended drafting group, of which the United States was a participant, to coordinate with Venezuela.¹³⁶ The drafting group was able to submit a new proposal, which stated, “[n]either capital punishment nor life imprisonment [without possibility of release] shall be imposed for offences committed by persons below 18 years of age.”¹³⁷ The representative of Portugal introduced the coordinated proposal by indicating that:

the drafting group had endeavored to draw up a text consistent with the instruments adopted in this field by the United Nations, dividing the various independent situations which required protection into two articles. The new article 19 therefore covered situations such as the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the death penalty or life imprisonment.¹³⁸

In discussing the coordinated proposal, the representatives of Austria, the Federal Republic of Germany, Senegal, and Venezuela suggested that the

131. *Id.*

132. *Report of Working Group 1986*, *supra* note 127, ¶ 105. The United States delegation’s comments will be discussed in more detail in Part III, *infra*.

133. *Id.* ¶ 106.

134. U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child*, ¶ 533, U.N. Doc. E/CN.4/1989/48 (Mar. 2, 1989) [hereinafter *Report of Working Group 1989*], reprinted in Detrick, *supra* note 126, at 470.

135. *Id.* ¶ 535.

136. *Id.* ¶ 536.

137. *Id.*

138. *Id.* ¶ 537.

bracketed language, “without the possibility of release,” be deleted.¹³⁹ The representatives of China, India, Japan, Norway, the Union of Soviet Socialist Republics, and the United States argued that the language should be retained.¹⁴⁰ Seeking to achieve consensus, the representatives of China, the Federal Republic of Germany, the Netherlands, and Venezuela suggested that the entire reference to life imprisonment be deleted, a suggestion opposed by the representative of Senegal.¹⁴¹ Finally, the delegations that had proposed deletion of the phrase “without the possibility of release” agreed to retain the words.¹⁴² In the end, the Working Group adopted a provision saying that “[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age.”¹⁴³

The drafting history of what would become Article 37(a) of the CRC is important for several reasons. First, the history reveals the importance attached to the prohibition on life imprisonment of juvenile offenders by some delegations. In the 1989 discussions, there was “a total lack of consensus”¹⁴⁴ over the Venezuela proposal, which was silent on life imprisonment, and the draft adopted at the first reading, which prohibited life imprisonment without the possibility of release. Even after a consequent redrafting of the provision on juvenile justice, the prohibition on life imprisonment remained.¹⁴⁵ Further, the most intense debate over the life imprisonment provision concerned not the inclusion of language prohibiting the sentence itself, but rather the inclusion of the limiting phrase “without the possibility of release.”¹⁴⁶ The focus of the discussions in the drafting process indicates that the prohibition on life imprisonment was accepted as necessary and important to the drafters of the CRC.

Second, the drafting history reveals that the prohibition on life imprisonment was meant to reflect existing international law. As the representative from Portugal indicated, the drafters considered the prohibition of life imprisonment to be consistent with previous instruments adopted by the United Nations. This perception, even while disputed by commentators,¹⁴⁷ indicates that the statement on life imprisonment was intended to be

139. *Report of Working Group 1989*, *supra* note 134, ¶ 541.

140. *Id.*

141. *Id.* ¶ 542.

142. *Id.* ¶ 543.

143. *Id.* ¶ 545.

144. *Report of Working Group 1989*, *supra* note 134, ¶ 536.

145. *Id.*

146. *See id.* ¶¶ 541–43.

147. *See* SCHABAS & SAX, *supra* note 116, at 9–10 (arguing that the statement by Portugal’s representative was “only partially true” because “the reference to life imprisonment was very much a matter of progressive development of the law, and no prior text existed on this subject.”).

declarative of existing law, like the treaty provisions accepted as evidence of customary international law in the *North Sea Continental Shelf Cases*.¹⁴⁸ The drafters' explanation that the prohibition on life without parole reflected previous international agreements makes Article 37(a) strong evidence of the sense of legal obligation required under *opinio juris*.

In addition to the history of the CRC, the widespread ratification and acceptance of the treaty provides evidence of *opinio juris*. According to Cynthia Price Cohen, who participated in the drafting of the CRC, "the [CRC] has received precedent-setting global support."¹⁴⁹ Compared with previous United Nations human rights treaties, more nations participated in the signing ceremony on the day the CRC was opened for signature, more nations have ratified the CRC, and the CRC went into force in the least amount of time.¹⁵⁰ In short, "[n]ot even the [CRC]'s most enthusiastic supporters could have predicted the extent to which it has been embraced by the international community or the speed with which it has become a legally binding treaty."¹⁵¹ There are currently 192 parties to the CRC.¹⁵² Only the United States and Somalia are not parties, although both states are signatories.¹⁵³ No state has registered a reservation to the prohibition on life imprisonment without the possibility of release in Article 37(a).¹⁵⁴

The drafting history of the CRC and the near-universal ratification of it produce "strong law-creating effect" under Brownlie's explanation of law-making treaties.¹⁵⁵ Brownlie states that "the number of parties, the explicit acceptance of rules of law, and, in some cases, the declaratory nature of the provisions produce a strong law-creating effect . . ."¹⁵⁶ All but two states in the world are parties to the CRC, the drafters of the CRC expressed that the prohibition on life without parole was consistent with prior United Nations agreements, and Article 37 declares that states shall ensure that life imprisonment without the possibility of release is not imposed on juvenile offenders. Therefore, the prohibition on life without parole in the CRC has

148. See *supra* notes 55–56 and accompanying text.

149. Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 185, 185 (2006).

150. *Id.*

151. Cynthia Price Cohen & Howard A. Davidson, *preface* to CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW iii (Cynthia Price Cohen & Howard A. Davidson eds., 1990).

152. *Report on the Forty-Second Session*, *supra* note 112.

153. THE REST OF THEIR LIVES, *supra* note 3, at 99.

154. *Id.* While some states have entered reservations or declarations referencing Article 37, none have reserved the right to sentence juvenile offenders to life without parole. *Id.* at 99 n.291. See also *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (acknowledging that no ratifying country has entered a reservation to Article 37(a)).

155. See BROWNIE, *supra* note 16, at 13.

156. *Id.*

strong law-creating effect and is strong evidence that states refrain from sentencing juveniles to such sentences under a sense of legal obligation. On the basis of Article 37 of the CRC itself, as well as with consideration of the drafting history and the number of state parties to the treaty, the *opinio juris* element of the norm prohibiting life without parole for juvenile offenders is satisfied. Because the state practice element of this norm is also satisfied, customary international law prohibits the imposition of life imprisonment without the possibility of parole for juvenile offenders, and this prohibition is binding on all states.

III. THE PROHIBITION ON LIFE WITHOUT PAROLE SENTENCES FOR MINORS IS BINDING ON THE UNITED STATES: THE UNITED STATES IS NOT A PERSISTENT OBJECTOR

Customary international law prohibits the sentencing of juvenile offenders to life imprisonment without the possibility of parole.¹⁵⁷ The United States is bound by this rule unless it can prove that it has opted out under the persistent objector doctrine.¹⁵⁸ As discussed in Part I, *supra*, the United States must have objected when the rule was in its nascent stage and continued to object afterwards, and its objection must be consistent.¹⁵⁹

Before determining whether the United States objected to the rule prohibiting life without parole for juvenile offenders when it was in its nascent stage, it is necessary to identify when the norm crystallized into customary international law. There is strong evidence that the norm developed during the drafting of the CRC and crystallized in 1990, when the CRC entered into force.¹⁶⁰ The speed with which the CRC took legal effect and the number of states that signed the day it was opened for signature¹⁶¹ indicate that the practice of states was sufficiently uniform and the sense of legal obligation was present for the prohibition of life without parole for juvenile offenders to be a matter of customary international law when the CRC entered into force. At the very latest, the norm crystallized into customary international law in 2002, when the United Nations Commission on Human Rights began adopting resolutions urging states to ensure that juvenile offenders not be sentenced to life imprisonment without the possibility of release.¹⁶² The condemnation of life imprisonment in 2002 and in subsequent resolutions¹⁶³ provides evidence that a prohibition of this sentence was accepted as a norm of international law

157. See *supra* Part II.

158. See Bradley, *supra* note 15; Loschin, *supra* note 66.

159. Loschin, *supra* note 66, at 150–51.

160. See Cohen & Davidson, *supra* note 151.

161. See Cohen, *supra* note 149.

162. Comm'n on Human Rights Res. 2002/47, *supra* note 108.

163. See *supra* notes 108–10 and accompanying text.

by that year. Given the lack of explicit and consistent objection to the norm by the United States, however, the United States does not qualify as a persistent objector regardless of when the norm crystallized into customary international law.

Loschin suggests a five-step model to determine whether a state should be bound by a norm of customary human rights law.¹⁶⁴ Application of this model to the norm prohibiting life imprisonment without the possibility of parole for juvenile offenders shows that the United States should not be allowed to opt out under the persistent objector doctrine.

A. *Is the United States Bound by a Treaty or is the Norm Peremptory?*

Before analyzing the customary norm and the United States' objection to it, it is necessary to determine whether a treaty obligation binds the United States and whether the norm is a peremptory one.¹⁶⁵ The CRC is the only international instrument to explicitly prohibit life without parole for juvenile offenders.¹⁶⁶ Because the United States has not ratified this treaty, it is not bound by it.¹⁶⁷ The United States is bound by the CCPR, which contains general language implicating life without parole for juveniles.¹⁶⁸ However, the CCPR is probably not sufficiently specific to bind the United States to a prohibition on life without parole for juvenile offenders absent a rule of customary international law. Likewise, the norm is not peremptory because it has not achieved the status of *jus cogens*. Few human rights norms have been so universally accepted that they are conclusively binding on all states,¹⁶⁹ and the prohibition on life without parole for juvenile offenders concededly is not among them.

B. *Nature of the Norm Prohibiting Life without Parole Sentences for Juvenile Offenders*

Because neither treaty obligations nor *jus cogens* conclusively determine whether the United States is obligated to prohibit life without parole for juvenile offenders, the next step is to determine the history and substance of

164. Loschin, *supra* note 66, at 163–66.

165. *See id.* at 163–64.

166. SCHABAS & SAX, *supra* note 116.

167. Cohen, *supra* note 149, at 197. Cohen notes that the “treaty still languishes somewhere in the White House, never having been sent to the Senate for advice and consent.” *Id.* at 198.

168. *See supra* note 114.

169. Loschin, *supra* note 66, at 163–64. The Restatement lists seven practices, the prohibition of which has achieved the status of *jus cogens*: genocide; slavery; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and a consistent pattern of gross violations of internationally recognized rights. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

the norm prohibiting life imprisonment of juvenile offenders.¹⁷⁰ The relevant factors are whether “the norm emerge[d] over a long period of time, providing ample opportunity for the state to object, or was . . . an ‘instant norm’ that arose due to . . . a multilateral treaty;” and whether “the norm affect[s] . . . the quality of life of all citizens . . . or is . . . a specific rule that affects just a few . . . under specific circumstances.”¹⁷¹ The norm prohibiting life imprisonment without the possibility of parole may be an instant norm under Loschin’s analysis in that it probably crystallized with the adoption of the CRC.¹⁷² However, the drafters of the CRC considered the prohibition on life imprisonment to be consistent with previous human rights instruments,¹⁷³ suggesting that the norm did not arise suddenly. Further, even if the norm crystallized quickly, the United States had ample opportunity to object during its development. The United States was heavily involved in the drafting process of the CRC,¹⁷⁴ and could have objected to the norm during the several year drafting process of Article 37(a).

With respect to the importance of the norm prohibiting life without parole for juvenile offenders, although the prohibition does not affect the quality of life of all citizens because not all children will be subjected to the criminal judicial system, the norm is still important. The special needs of juveniles are widely recognized by commentators,¹⁷⁵ human rights organizations,¹⁷⁶ and the CRC.¹⁷⁷ Also, the speed with which the CRC became a legally binding treaty and the “precedent-setting global support”¹⁷⁸ for it suggests that the norms contained within the CRC are important to the state parties.

C. *Nature of the United States’ Objection*

The next step in determining whether the United States is bound by the rule of customary international law prohibiting life imprisonment without the possibility of release for juvenile offenders is to consider the quality and quantity of the United States’ objection, with reference to the forms the objection has taken, whether domestic legislation or court decisions are consistent with the objection, whether there are internal indications that the United States has changed position on the issue, and how long the United

170. See Loschin, *supra* note 66, at 164.

171. *Id.*

172. See *supra* notes 160–61 and accompanying text.

173. *Report of Working Group 1989*, *supra* note 134, ¶ 537.

174. See generally Cohen, *supra* note 149 (providing firsthand account of the role of the United States in drafting the CRC).

175. See, e.g., Victor Streib & Bernadette Schrempp, *Life without Parole for Children*, CRIM. JUST., Winter 2007, at 4, 4–6.

176. See, e.g., THE REST OF THEIR LIVES, *supra* note 3, at 45–51.

177. CRC, *supra* note 8, preamble.

178. Cohen, *supra* note 149.

States has objected to the rule.¹⁷⁹ Generally, “louder” forms of objection that explain the objector’s position are more likely to qualify as persistent objection than passive and ambiguous statements or objection in the form of silence.¹⁸⁰ Also, “[t]he state must object during the formative stage of the norm to qualify as a persistent objector.”¹⁸¹

1. Form of the United States’ Objection

To the extent that the United States has objected to the norm prohibiting life without parole for juvenile offenders, its objection has taken the form of passive and ambiguous statements. To understand the nature of the United States’ objection, it is necessary to examine its role in drafting the CRC in general and Article 37(a) in particular. The United States was very active in the drafting process of the CRC, both in proposing new articles and in influencing the textual editing of almost every article.¹⁸² Indeed, “U.S. influence was so strong that some people referred to the [CRC] as the ‘U.S. child rights treaty.’”¹⁸³ The debate over the text of Article 38, dealing with children and armed conflict, illustrates the influence of the United States in the consensus-focused drafting process of the CRC. In reviewing the text adopted at the first reading, one state proposed increasing the minimum age for participation in combat from fifteen years to eighteen years.¹⁸⁴ The United States opposed this suggestion, and the disagreeing delegations deliberated for several days.¹⁸⁵ Although a majority of the states agreed to increase the minimum age to eighteen years, the United States delegation persistently refused to agree to this change.¹⁸⁶ Ultimately, “[s]ustained U.S. opposition to this deviation . . . resulted in the adoption of fifteen as the minimum age for participation in combat. A single delegation had prevented this text from being adopted, even though all other delegations were in complete agreement.”¹⁸⁷ Clearly, the consensus process gave the United States power to insist that certain rights not be included in the CRC, and the United States was willing to exercise this power.

In contrast to the United States’ role in influencing the language and protections in Article 38, the United States did not exert its power to prevent the prohibition on life without parole in Article 37(a). The first discussions of

179. See Loschin, *supra* note 66, at 164–66.

180. *Id.* at 165–66.

181. *Id.* at 166.

182. Cohen, *supra* note 149, at 190.

183. *Id.*

184. *Id.* at 191.

185. *Id.*

186. *Id.*

187. Cohen, *supra* note 149, at 191.

life imprisonment took place in 1986.¹⁸⁸ While the representative of Japan indicated that his delegation would not go along with the prohibition on life imprisonment in the draft under discussion and proposed its deletion,¹⁸⁹ the representative of the United States merely expressed her delegation's disagreement with the entire subsection under discussion.¹⁹⁰ Specifically, she argued that the reference to "'persons below eighteen years of age' was too arbitrary and proposed its deletion."¹⁹¹ In response to statements by observers from Amnesty International and the International Commission of Jurists that eighteen years was the age accepted in various international instruments, the United States representative said that:

the United States . . . did not consider subparagraph (b) as drafted to be an appropriate general rule but that she would not insist on her amendment and block consensus, provided it was understood that the United States maintained its right to make a reservation on this point and that it was implicitly understood that a child committing an offence which, if committed by an adult, would be criminal could be treated as an adult.¹⁹²

Although the representative of the United States challenged the subsection containing a prohibition on life imprisonment, she focused her remarks on the minimum age and not on the prohibition on life imprisonment itself.

Again, in 1989, the United States delegation expressed general opposition to the subsection containing the prohibition on life imprisonment, but did not expressly oppose the reference to this sentence. Although the United States representative argued for retention of the words "without the possibility of release,"¹⁹³ the United States was not among the four states that suggested that the entire reference to life imprisonment be omitted from the paragraph under discussion.¹⁹⁴ Just as in 1986, the United States representative reserved the right of his country to enter a reservation to the article prohibiting capital punishment and life imprisonment without the possibility of release for offences committed by persons below eighteen years, but did not express opposition to the reference to life imprisonment in particular.¹⁹⁵

The comments, proposals, and reservations of the United States delegation in the drafting process of Article 37 do not qualify as "loud" forms of objection sufficient to establish a claim of persistent objection. While the United States wielded its power to block consensus in order to prevent a change in the

188. *Report of Working Group 1986*, *supra* note 127.

189. *Id.* ¶ 104.

190. *Id.* ¶ 105.

191. *Id.*

192. *Id.*

193. *Report of Working Group 1989*, *supra* note 134, ¶ 541.

194. *Id.* ¶ 542.

195. *Id.* ¶ 544.

minimum age for combat,¹⁹⁶ it did not take advantage of its power to insist on the deletion of the prohibition on life without parole for juvenile offenders.¹⁹⁷ Further, even the statement of the United States delegation reserving the right of the United States to enter a reservation to Article 37 did not explain and discuss the United States' position. The only specific explanation the United States' delegation provided focused on the arbitrariness of the age of eighteen, not on the penalties prohibited. The tremendous influence of the United States in the drafting of the CRC, which was so strong that some people referred to the CRC as the "U.S. child rights treaty,"¹⁹⁸ shows that the United States had ample time and power to object to the prohibition on life imprisonment without the possibility of parole. Because the United States did not insist on the deletion of the prohibition, it did not persistently object to the developing norm.¹⁹⁹

The refusal of the United States to ratify the CRC also does not qualify as an objection to the norm prohibiting life imprisonment without the possibility of release for juvenile offenders. As Loschin notes, "[s]ilence should be presumed acquiescence, not objection."²⁰⁰ Although many commentators view Article 37(a) as one of the main obstacles to United States ratification of the CRC,²⁰¹ refusal to ratify constitutes objection in the form of silence. Because the White House has not submitted the CRC to the Senate,²⁰² there is little evidence of the President's or the Senate's positions on Article 37(a)'s prohibition on life without parole for juvenile offenders.

Finally, the United States' statements regarding the juvenile death penalty, which some commentators have argued constitute persistent objection with

196. Cohen, *supra* note 149, at 191.

197. Concededly, the United States may have chosen not to use its negotiating power to block the rights secured in Article 37(a) because it knew it would enter a reservation to this provision. Still, the state must have objected more stringently and explicitly to opt out of the binding customary norm that has developed out of the CRC.

198. Cohen, *supra* note 149, at 190.

199. In addition to not sufficiently opposing the prohibition on life without parole during the drafting of the CRC, the United States also did not enter a reservation to Article 37 when it signed the treaty. SCHABAS & SAX, *supra* note 116, at 11. The failure of the United States to enter a reservation to the CRC when it did enter a reservation to the article of the CCPR prohibiting the juvenile death penalty "contributes to the argument that it was not a 'persistent objector' to the emergence of a customary legal norm prohibiting . . . life imprisonment of young offenders without the possibility of parole." *Id.* Of course, the fact that United States formulated the reservation to the CCPR at the time of ratification rather than signing weakens this argument.

200. Loschin, *supra* note 66, at 165.

201. See, e.g., Evelyn Brown Remple & Mark E. Wojcik, *Capital Punishment and Life Sentences for Juvenile Offenders*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 277 (Jonathan Todres et al. eds., 2006).

202. Cohen, *supra* note 149, at 198.

respect to the norm prohibiting that sentence,²⁰³ do not qualify as persistent objection to the norm prohibiting life without parole. Bradley outlines the statements, reservations, and positions articulated by the United States with respect to the juvenile death penalty since the 1970s.²⁰⁴ All of these objections are specific to the death penalty; none mentions life without parole.²⁰⁵ Further, the latter sentence was not yet heavily used at the time the United States most stringently opposed challenges to the juvenile death penalty.²⁰⁶ Therefore, it is unlikely that the United States was attempting to opt out of the norm prohibiting life without parole as well as the norm prohibiting capital punishment with its statements and reservations to the CCPR. The United States' purported objection to the norm prohibiting the juvenile death penalty does not allow it to opt out of the norm prohibiting life imprisonment for juvenile offenders.

Overall, the United States has not engaged in "loud" forms of objection to the norm prohibiting life without parole sentences for juvenile offenders because it has repeatedly failed to explain and discuss its position.

2. Consistency of Objection with Domestic Legislation and Court Decisions

The existence of domestic legislation and court decisions consistent with an objection is another factor in the quality and quantity of a state's objection.²⁰⁷ Although there is no clear statement of the United States' objection to the norm under discussion, presumably the United States would assert its right to impose life imprisonment without the possibility of parole, regardless of the age of the offender. The legislation and court decisions of the federal government and of the states are generally consistent with the United States' objection. Forty-two states allow juvenile offenders who are tried as adults to be sentenced to life without parole.²⁰⁸ Federal courts have upheld such sentences,²⁰⁹ and the United States Supreme Court has refused to review the constitutionality of them.²¹⁰

203. See Bradley, *supra* note 15, at 535.

204. *Id.* at 525–35.

205. *Id.*

206. THE REST OF THEIR LIVES, *supra* note 3, at 31–34 (showing that rates of life without parole sentences for juvenile offenders jumped in the period between 1996 and 2000). The United States ratified the CCPR with a reservation specific to the juvenile death penalty in 1992. Bradley, *supra* note 15, at 532.

207. Loschin, *supra* note 66, at 165.

208. THE REST OF THEIR LIVES, *supra* note 3, at 25.

209. See, e.g., Rice v. Cooper, 148 F.3d 747 (7th Cir. 1998), *cert. denied*, 526 U.S. 1160 (1999); Harris v. Wright, 93 F.3d 581 (9th Cir. 1996).

210. See, e.g., Rice v. Carter, 526 U.S. 1160 (1999).

3. Internal Indications that the United States has Changed Position

Despite the widespread legislative and judicial acceptance of life without parole sentences for juvenile offenders within the United States, there has been some movement away from these sentences in recent years. According to data gathered by Amnesty International and Human Rights Watch, the number of youth offenders sentenced to life without parole in the United States peaked at 152 in 1996 and has steadily declined since then.²¹¹ In 2000, the last year for which data is available, 91 juvenile offenders were sentenced to life without parole,²¹² a number that is less than sixty percent of the number sentenced in 1996. Of course, the decreased usage of life without parole sentences does not necessarily indicate that the United States has changed its position in terms of its right to sentence youth offenders to such sentences.

4. Length of Time the United States has Objected

The United States must have objected during the formative stage of the norm prohibiting life imprisonment without the possibility of parole for juvenile offenders to qualify as a persistent objector.²¹³ If the norm crystallized in 1990, when the CRC entered into force, the United States must have consistently objected during the drafting of the treaty. As noted, the United States failed to insist on the deletion of the language referring to life imprisonment, despite its demonstrated ability to block revisions that had otherwise universal support, and did not explain its position on life imprisonment. Therefore, the United States failed to make persistent, loud objections during the formation of the norm. Even if the norm prohibiting life without parole for juvenile offenders did not crystallize until 2002, when the Commission on Human Rights began adopting resolutions urging states to ensure that juvenile offenders are not subject to that sentence, the United States failed to object during the formation of the norm. The United States has not ratified the CRC and has not clearly expressed its objection to the norm prohibiting life without parole.²¹⁴

211. THE REST OF THEIR LIVES, *supra* note 3, at 32.

212. *Id.*

213. *See* Loschin, *supra* note 66, at 166.

214. The United States has not responded to the merits of a petition filed with the Inter-American Commission on Human Rights challenging mandatory sentences of life without parole for juvenile offenders. Email from Cynthia Soohoo, Director, Bringing Rights Home Project, Columbia Law School, to author (Aug. 6, 2007, 09:12 CST) (on file with author). On behalf of thirty-two juvenile offenders serving life without parole sentences in Michigan, the American Civil Liberties Union and the American Civil Liberties Union of Michigan have filed a petition with the Inter-American Commission on Human Rights alleging that sentences of life imprisonment without the possibility of parole for juvenile offenders violate the American Declaration of the Rights and Duties of Man's right to special protection for children under Article VII; protection against cruel, infamous, or unusual punishment under Article XXVI; right

D. Balancing the Importance of the Norm and the Nature of the Objection

The final step in the determination of whether the United States is bound by the norm prohibiting life without parole sentences for juvenile offenders is to balance the importance of the norm with the nature of the United States' objection.²¹⁵ As discussed above, the norm carries great importance in terms of the number of states that have followed it and the widespread acceptance of the special needs of juveniles.²¹⁶ Also, the United States has had ample opportunity to challenge the norm (and to insist that it not be included in the CRC), but has failed to consistently, explicitly, and loudly object. Unlike the United States' long-standing and consistent objection to the norm prohibiting the juvenile death penalty, which some commentators argued was sufficient to allow the United States to opt out of the norm,²¹⁷ the United States' objection to the norm prohibiting life without parole for juvenile offenders is not sufficient to exempt the United States from this customary rule. Balancing the importance of the norm and the nature of the United States' objection, it is clear that the United States has failed to meet the high standard required to qualify as a persistent objector and opt out of the norm.²¹⁸ Therefore, the United States is bound by the rule of customary international law prohibiting life without parole sentences for juvenile offenders.

CONCLUSION

The norm prohibiting life imprisonment without the possibility of parole for child offenders has become a matter of customary international law, and is binding on the United States. This norm satisfies both the state practice and *opinio juris* requirements of customary international law. The overwhelming number of states that do not impose this sentence in practice or allow it in their penal codes, statements by international human rights bodies, and an express provision prohibiting life without parole for juvenile offenders in the widely-ratified CRC prove that there is widespread state practice in compliance with the norm. Also, the provisions of the CRC are sufficient to show that states avoid sentencing juvenile offenders to life without parole out of a sense of legal obligation. The importance of the prohibition of this sentence and its

to humane treatment under Article I; and guarantees of due process under Articles XVIII, XXIV, XXV, and XXVI. Petition Alleging Violations of the Human Rights of Juveniles Sentenced to Life Without Parole in the United States of America, at 22–23 (*submitted* Feb. 21, 2007), available at http://www.aclu.org/images/asset_upload_file326_24232.pdf. The United States' response to this petition may provide an articulation of its position on the customary norm prohibiting life without parole sentences for juveniles.

215. Loschin, *supra* note 66, at 166.

216. See *supra* notes 175–78 and accompanying text.

217. See, e.g., Bradley, *supra* note 15, at 520–35.

218. See Loschin, *supra* note 66, at 166.

consistency with existing law, both apparent in the legislative history of the CRC, and the near-universal ratification of the CRC provide additional evidence of *opinio juris*. Regardless of the view of customary international law and the types of evidence accepted to establish it, the prohibition on life without parole for juvenile offenders has become a matter of customary international law.

The United States is bound by this rule and cannot opt out under the persistent objector doctrine because it failed to consistently and explicitly object during the formation of the norm and has not consistently objected since the norm crystallized into customary international law. Therefore, the United States is under an international legal obligation to stop sentencing child offenders to life imprisonment without the possibility of parole, and must conform its treatment of juvenile offenders to the treatment of children by the overwhelming majority of other nations in the world.

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