

KILLING KIDS: THE IMPACT OF DOMINGUES V. NEVADA ON THE JUVENILE DEATH PENALTY AS A VIOLATION OF INTERNATIONAL LAW

Abstract: This Note examines the debate over the legality of the juvenile death penalty, and concludes that the use of the juvenile death penalty in the United States represents a flagrant transgression of international human rights law. Several forms of international law, including a number of multilateral human rights treaties, customary international law and *jus cogens* prohibit the execution of children below the age of eighteen. The existence of these contrary legal obligations demands that the United States abandon its vigilante stance and bring its practices into conformity with the greater international community.

INTRODUCTION

Over the last decade, the issue of juvenile violence has received significant public attention.¹ Tragedies such as those that occurred in Littleton, Colorado and Little Rock, Arkansas, have generated heightened concern over bloodshed amongst America's young. The anger and pain provoked by these highly publicized displays of juvenile violence have been reflected in the words and deeds of politicians who call for tougher approaches to crime and increasingly severe criminal sanctions.² As a result, the juvenile justice system, founded on the idea that childhood is a distinct stage of life, has slowly been dismantled.³ The century-old notion of children and adolescents as less culpable and more amenable to rehabilitation has given way to a harsher reality where child criminals are frequently indistinguishable from their

¹ See Victor Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1973-June 2000* (last modified June 2000) <<http://www.law.onu.edu/faculty/streib/juvdeath.html>>.

² See Richard Dieter, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.* (last modified Oct. 1999) <<http://www.deathpenaltyinfo.org/international-report.html>> (noting numerous calls by politicians to lower age of death eligibility, even to as low as eleven); NATIONAL CAMPAIGN TO ABOLISH THE DEATH PENALTY, *The U.S. leads the world in killing kids* (visited Apr. 15, 2000) <<http://www.ncadp.org>> (noting that in 1996 Mississippi sought the death penalty for juveniles as young as thirteen).

³ Margaret Talbot, *What's Become of the Juvenile Delinquent*, N.Y. TIMES MAG., Sept. 10, 2000, at 41.

adult counterparts.⁴ Since 1992, forty-five states have passed or amended legislation making it easier to prosecute juveniles as adults.⁵ Not only are more children being transferred out of the juvenile system and into the adult criminal system, but today, more juveniles are receiving the ultimate sanction—the death penalty.⁶

In January 2000 three juvenile offenders⁷ were put to death.⁸ As of October 2000, seventy-four more awaited their fate on death row.⁹ The United States crossed a significant barrier in 1999 when Sean Sellers became the first sixteen-year-old offender executed in over forty years.¹⁰ Explaining this increase in juvenile death sentences and executions, Texas juvenile delinquency expert Billy Bramlett noted that death sentences suit the citizenry “fed up with the expense of crime, the fear of crime, the devastation of crime and just the senselessness of crime.”¹¹ Indeed, the majority of Americans continue to support the death penalty—even as applied to children.¹²

Nonetheless, while executions in the United States in the modern era¹³ have continued to climb, this fact is in direct contrast to movement within the greater international community.¹⁴ The United

⁴ *Id.*

⁵ *Id.*

⁶ See Streib, *supra* note 1. Thirty-three juvenile offenders were under death sentences at the close of 1983, compared to seventy-four juvenile offenders today: a 124% increase. See also Dieter, *supra* note 2 (explaining that executions in 1999 will reach record numbers, including execution of more juvenile offenders).

⁷ As used throughout this Note, the term “juvenile offender” describes an individual who committed a crime before the age of eighteen—the most common age dividing line between juvenile and criminal courts. See Streib, *supra* note 1. Due to the lengthy appeals process, actual executions of juvenile offenders typically occur years after the sentencing, when the defendant is no longer a juvenile. See *id.*

⁸ See DEATH PENALTY INFORMATION CENTER (last modified Sept. 27, 2000) <<http://www.deathpenaltyinfo.org/dpicexec00.html>> [hereinafter DPIC].

⁹ See DPIC, *supra* note 8 (visited Oct. 7, 2000) at <<http://www.deathpenaltyinfo.org/juvchar.html>>; Streib, *supra* note 1.

¹⁰ See Dieter, *supra* note 2; L. Romano, *Reaching Out as Time is Running Out*, WASH. POST, Jan. 22, 1999, at A8. Despite pleas from Desmond Tutu, the ABA, and other religious and human rights leaders, and despite documented mental illness, Sellers was executed in Oklahoma in 1999. See Dieter, *supra* note 2.

¹¹ See Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty*, 32 U.S.F.L. REV. 735, 742 (1998).

¹² See AMNESTY INTERNATIONAL, *Death Penalty News*, AI Index: ACT 53/05/00, Dec. 1999. Amnesty International reports may be found on the World Wide Web at <<http://www.amnesty.org/ailib/themes/indxdp.htm>>.

¹³ The “modern” American death penalty era began when new death penalty statutes were passed following the Supreme Court’s 1972 decision in *Furman v. Georgia*, which in effect struck down all then-existing death penalty statutes. See Streib, *supra* note 1, at n.2.

¹⁴ See Dieter, *supra* note 2; Streib, *supra* note 1.

States currently stands nearly alone in a world where executing people for crimes committed as children is considered a major human rights violation.¹⁵ This international legal and moral consensus against the juvenile death penalty is symbolized in large part by express provisions in a number of multilateral human rights treaties.¹⁶ Despite claiming an authoritative stance on international human rights issues, the United States has declined to ratify several of these treaties and has reserved the right not to implement important provisions of other treaties, in an effort to maintain discretion over the execution of juvenile offenders.¹⁷

Given America's tendency to condemn human rights violations on foreign soil, it is imperative that the United States begin to examine the legally-sanctioned practices that present similar human rights concerns here at home—the juvenile death penalty. The United States' position on the juvenile death penalty is both embarrassing and hypocritical.¹⁸ More significantly, however, the vigilante stance the United States has assumed violates existing international law prohibiting the juvenile death penalty.¹⁹ America, therefore, no longer has the discretion to continue to move in the opposite direction of an international consensus that has rejected the juvenile death penalty on human rights grounds.²⁰

The existence of international law prohibiting the execution of children demands that the U.S. Supreme Court address the glaring violation that current U.S. practice presents. In 1999, when Michael Domingues petitioned the Court for review of his juvenile death penalty case, the Court requested the Solicitor General to present the U.S. government's position with respect to the legality of juvenile executions under international law.²¹ Richard Dieter, death penalty scholar and executive director of the Death Penalty Information Center, captured the significance of this request noting, "[t]he Clinton

¹⁵ See Dieter, *supra* note 2.

¹⁶ See *infra* notes 90–102 and accompanying text.

¹⁷ See *infra* notes 90–102 and accompanying text.

¹⁸ See Dieter, *supra* note 2.

¹⁹ See, e.g., Victor Streib, *The Juvenile Death Penalty in the United States and Worldwide*, 4 LOY. POVERTY L. J. 173, 174 (1998); Dieter, *supra* note 2; Cathleen E. Hull, Comment, "Enlightened by a Humane Justice": An International Law Argument Against the Juvenile Death Penalty, 47 U. KAN. L. REV. 1079, 1081 (1999).

²⁰ See, e.g., Streib, *supra* note 19, at 174; Hull, *supra* note 19, at 1081.

²¹ See *Domingues v. Nevada*, 961 P.2d 1276 (Nev. 1998), request for Solicitor General's Brief filed, 119 S. Ct. 2044 (June 7, 1999) (No. 98–8324) [hereinafter Request for Solicitor General's Brief].

Administration [has] a unique opportunity to directly affect U.S. policy on [this] issue. . . ."²² Unfortunately, the U.S. Solicitor General's October 1999 brief made it overwhelmingly clear that the government continues to support the use of the juvenile death penalty, despite contrary international indications.²³

This Note explores the use of the juvenile death penalty in the United States within the context of international law, concluding that the U.S. practice of executing juvenile offenders represents a significant violation of international human rights law.²⁴ Section I reviews the background of the juvenile death penalty in the United States and considers several of the rationales offered for banning the practice.²⁵ The Section further considers the constitutional challenges and multilateral treaties that specifically address the juvenile death penalty.²⁶ Section II provides a brief discussion of the sources and foundations of international law to serve as a basis for understanding the manner in which international law applies to the juvenile death penalty.²⁷ Section III discusses the case of *Domingues v. Nevada*, in which a juvenile offender sentenced to death by the Supreme Court of Nevada petitioned the U.S. Supreme Court for review on international law grounds.²⁸ The Section evaluates the persuasiveness of the arguments presented both by the Petitioner, as well as by the Solicitor General—whose recommendation for denial of certiorari was accepted by the Court.²⁹ This case serves as an example of how international law is increasingly relevant to death penalty challenges and demonstrates the government's position on this important issue.³⁰ Section IV presents an analysis of the international law arguments, highlighting deficiencies in the Solicitor General's recommendation and arguing that the Supreme Court should have granted certiorari to review these critical international law issues.³¹ Section V argues that foreign practice must be acknowledged as an indicator of evolving

²² Dieter, *supra* note 2.

²³ See Solicitor General's Amicus Brief on Behalf of the United States, *Domingues v. Nevada*, 961 P.2d 1279 (Nev. 1998) (No. 98-8327) [hereinafter Solicitor General's Brief].

²⁴ See *infra* notes 208-336 and accompanying text.

²⁵ See *infra* notes 33-67 and accompanying text.

²⁶ See *infra* notes 68-101 and accompanying text.

²⁷ See *infra* notes 102-149 and accompanying text.

²⁸ See *infra* notes 150-156 and accompanying text.

²⁹ See *infra* notes 160-207 and accompanying text.

³⁰ See *infra* notes 160-207 and accompanying text.

³¹ See *infra* notes 208-297 and accompanying text.

standards of decency and that the Court should reconsider the constitutionality of the juvenile death penalty.³²

I. HISTORY AND BACKGROUND OF THE JUVENILE DEATH PENALTY

A. History

Although the death penalty has been imposed sparingly in juvenile cases, the number of children sentenced to death in the United States is nonetheless significant.³³ Since the first execution of a juvenile offender in 1642 in Plymouth County, Massachusetts, 357 individuals have been executed in the United States for juvenile crimes.³⁴ In the twenty-six months between April 1998 and June 2000, eight juvenile offenders were executed in the United States.³⁵ Although juvenile executions account for only a small number of total executions nationwide, the percentage of such executions appears to be rising.³⁶

Currently, thirty-eight states and the federal government have statutes authorizing the death penalty.³⁷ Of those thirty-nine death penalty jurisdictions, twenty-four permit the execution of juvenile offenders.³⁸ In contrast, as of October 1999, at least 144 nations prohibited, by treaty or legislation, the juvenile death penalty.³⁹ Consequently, the United States is one of only six countries known to have

³² See *infra* notes 298-336 and accompanying text.

³³ See Streib, *supra* note 1.

³⁴ See *id.*

³⁵ See *id.*; DPIC, *supra* note 8 (last modified Sept. 2000) at <<http://www.deathpenaltyinfo.org/facts.html#Executions>>. Seventeen juvenile offenders have been executed during the modern era of the American death penalty and as of June 2000, 196 juvenile death sentences have been imposed. See Streib, *supra* note 1.

³⁶ See Streib, *supra* note 19. Juvenile executions constitute approximately 1.8% of approximately 19,000 confirmed American executions since 1608. See *id.* Since the reinstatement of the death penalty in 1976, juvenile executions have accounted for approximately 3% of executions. See *id.*

³⁷ See Streib, *supra* note 1.

³⁸ See *id.* Of the thirty-nine death penalty jurisdictions, fifteen have expressly chosen the age of eighteen at the time of the offense as the minimum age for death penalty eligibility. See *id.* Four jurisdictions have chosen the age of seventeen as the minimum. See *id.* The remaining twenty states use the age of sixteen as the minimum age, either through an express age in the statute or by court ruling. See *id.*

³⁹ See Dieter, *supra* note 2. Ironically, some of the countries which prohibit the use of the death penalty on juveniles are the same countries that are frequent targets of U.S. human rights criticism: South Africa, China, Syria, Cuba. See AMNESTY INTERNATIONAL, *The Death Penalty Worldwide: Developments in 1999*, AI Index: ACT 50/04/00, Apr. 2000 [hereinafter *Death Penalty Worldwide*].

executed a juvenile offender in the last decade.⁴⁰ Moreover, the United States leads the world in juvenile executions, having executed as many juvenile offenders in the last decade as the other five countries combined.⁴¹

B. Rationale Behind the Movement to Ban the Juvenile Death Penalty

A variety of different beliefs and concerns have motivated the greater international community to prohibit the juvenile death penalty. For one, it has been widely recognized that many children who turn to violent crime have suffered childhood's fraught with abuse, impoverishment and neglect.⁴² Amnesty International recently reported that "[t]he background of the majority of juvenile offenders executed since 1990 was one of serious emotional or material deprivation."⁴³ The story of Joseph Cannon, executed in July 1998 for a murder committed as a juvenile, highlights the way in which a juvenile offender's background may affect one's perception of their criminal conduct.⁴⁴ As a result of a serious car accident, physical and mental disabilities left Joseph Cannon unable to function in the classroom and eventually led to his expulsion from school at the age of seven.⁴⁵ After that point, Joseph received no further formal education.⁴⁶ By the time he turned ten, he was diagnosed with organic brain damage.⁴⁷ Severe depression led him to attempt suicide at fifteen, at which time he was diagnosed as schizophrenic and borderline mentally retarded.⁴⁸ Throughout his life, Joseph repeatedly was subjected to se-

⁴⁰ See *Death Penalty Worldwide*, *supra* note 39, at Table of Juvenile Offenders.

⁴¹ See *id.* Between January 1990 and December 1999, executions of individuals for crimes committed under age eighteen were as follows: Iran (5), Nigeria (1), Pakistan (2), Saudi Arabia (1), Yemen (1) and the U.S. (10). See *id.* As of October 2000, the United States had executed an additional four juvenile offenders. See DPIC, *supra* note 8, (last modified Sept. 2000) at <<http://www.deathpenaltyinfo.org/facts.html#Executions>>. While only one juvenile was executed internationally since 1997, eight juvenile offenders were executed in the United States during the same period. See *Death Penalty Worldwide*, *supra* note 39, at Table of Juvenile Offenders; DPIC, *supra* note 8 (last modified Sept. 2000) at <<http://www.deathpenaltyinfo.org/facts.html#Executions>>. Ebrahim Qorbanzadeh, the single juvenile executed internationally, was executed in Iran in October 1999. See *Death Penalty Worldwide*, *supra* note 39, at Table of Juvenile Offenders.

⁴² See AMNESTY INTERNATIONAL, *Juveniles and the Death Penalty*, AI Index: ACT 50/11/98, Nov. 1998 [hereinafter *Juveniles and the Death Penalty*].

⁴³ *Id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *Juveniles and the Death Penalty*, *supra* note 42.

⁴⁸ See *id.*

vere sexual abuse from male relatives.⁴⁹ So brutal and abusive was his upbringing that Joseph excelled more on death row, where he learned to read and write for the first time, than he ever had outside prison walls.⁵⁰

Joseph's 1998 execution demonstrates an alarming truth about the vast majority of children sentenced to death: childhood crimes represent not only a juvenile's terrible mistake, but also the drastic failures of families, schools and social systems.⁵¹ Shocking in its own right, the greater tragedy presented by Joseph's example rests in the fact that the majority of juvenile offenders sentenced to death share similarly depraved and abused backgrounds.⁵² A study conducted by the *American Journal of Psychiatry* of fourteen juvenile offenders on death row reinforces this assertion.⁵³ Of the fourteen juveniles studied, only two had I.Q. scores higher than ninety; every one of them had suffered severe head trauma during childhood; all had deep psychiatric problems; and only two were spared extreme physical or sexual abuse as children.⁵⁴ Only five of the juveniles studied had had the benefit of these psychological evaluations *before* standing trial.⁵⁵ This has contributed to the belief, accepted by the majority of the international community, that a juvenile offender's culpability frequently is diminished.⁵⁶ This belief is one of many which has inspired numerous international organizations and treaties to condemn and prohibit the juvenile death penalty.⁵⁷

In addition, the international prohibition against executing juvenile offenders recognizes that the practice does not logically comport with the traditional justifications for capital punishment.⁵⁸ Theories such as deterrence and retribution fall short of justifying capital pun-

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.*; *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982)).

⁵² See *Juveniles and the Death Penalty*, *supra* note 42; Christopher Hitchens, *Old Enough to Die*, VANITY FAIR, June 1999, at 80.

⁵³ See Dorothy Ottow Lewis, et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584 (1988).

⁵⁴ Lewis, *supra* note 53, at 584-89.

⁵⁵ See *id.*; Hitchens, *supra* note 52, at 80.

⁵⁶ See *Juveniles and the Death Penalty*, *supra* note 42; Vega, *supra* note 11, at 744-45.

⁵⁷ See Streib, *supra* note 1.

⁵⁸ See Etta J. Mullin, *At What Age Should They Die? The United States Supreme Court Decision with Respect to Juvenile Offenders and the Death Penalty*, *Stanford v. Kentucky and Wilkins v. Missouri*, 16 T. MARSHALL L. REV. 161, 186-88 (1990).

ishment when considering the unique attributes of juvenile offenders.⁵⁹ With respect to deterrence, scientific studies consistently fail to find convincing evidence that the death penalty deters crimes more effectively than other punishments.⁶⁰ Recognizing this fact, U.S. Attorney General Janet Reno recently noted: "I have inquired for most of my adult life about studies that might show that the death penalty is a deterrent. And I have not seen any research that would substantiate that point."⁶¹ Deterrence is arguably even less persuasive when considering a juvenile offender, given evidence of the inability of children to comprehend long-term consequences.⁶² Psychological and sociological reports show that juveniles live in an "intense present" whereby the "past and future seem pallid by comparison."⁶³

The retributive theory similarly is flawed.⁶⁴ As Justice Brennan noted in his dissent to the 1989 case of *Stanford v. Kentucky*, "Retribution as a justification for executing offenders very much depends on the degree of their culpability. Executing juveniles does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."⁶⁵ Similarly, the American Bar Association recently noted, "retribution . . . seems difficult enough for a government to justify where adult offenders are involved . . . vengeance against children for their misdeeds seems quite beyond justification. . . ."⁶⁶ Additional considerations, such as inadequate access to counsel, poverty and race discrimination provide further impetus for the decision embraced by the greater international community to stop sentencing children to death.⁶⁷

⁵⁹ See *id.*

⁶⁰ See AMNESTY INTERNATIONAL, *Facts and Figures on the Death Penalty*, AI Index: ACT 50/02/99, Apr. 1999 [hereinafter *Facts and Figures on the Death Penalty*].

⁶¹ See DPIC, *supra* note 8 (visited Oct. 7, 2000) at <<http://www.deathpenaltyinfo.org/whatsnew.html>>. In addition, *Time Magazine* reported that 52% of Americans do not believe that the death penalty deters people from committing crime. See *id.*

⁶² See Mullin, *supra* note 58, at 188 ("Juveniles live for the moment and tend to act out of impulse rather than coldly calculating the risk").

⁶³ See *Thompson*, 487 U.S. at 837 (noting that likelihood that teenage offender has made the kind of cost-benefit analysis that attaches any weight to possibility of execution is so remote as to be virtually nonexistent); Vega, *supra* note 11, at 744.

⁶⁴ See Mullin, *supra* note 58, at 187.

⁶⁵ See 492 U.S. 361, 403 (1989) (Brennan, J., dissenting) (quoting *Enmund v. Florida*, 458 U.S. 782, 800-01 (1982)).

⁶⁶ See AMNESTY INTERNATIONAL, *Betraying the Young: Children in the US Justice System*, AI Index: ACT 51/60/98, Nov. 1998 [hereinafter *Betraying the Young*].

⁶⁷ See, e.g., Vega, *supra* note 11, at 746-47; Streib, *supra* note 1, at 13. This Note in no way attempts an exhaustive analysis of these many rationales. It is sufficient merely to ac-

C. Constitutional Challenges to the Juvenile Death Penalty

Although U.S. policy remains unaffected by the aforementioned rationales for prohibiting the juvenile death penalty, these concerns have received the attention of the U.S. Supreme Court over the course of the past two decades.⁶⁸ The Court's opinions in *Thompson v. Oklahoma* and *Stanford v. Kentucky* evidence the complicated, controversial nature of this debate.⁶⁹

In 1988, the U.S. Supreme Court's 5-4 decision in *Thompson* held that the death penalty was unconstitutional as applied to a fifteen-year-old child.⁷⁰ There, the juvenile offender, in concert with three adults, participated in the brutal murder of his former brother-in-law.⁷¹ The Court evaluated the constitutionality of the juvenile death penalty in light of the Eighth Amendment's ban on "cruel and unusual punishment," following the guidance of the 1958 decision of *Trop v. Dulles*.⁷² In *Trop*, the Court found that in considering the parameters of the Eighth Amendment, future judges should be guided by "evolving standards of decency that mark the progress of a maturing society."⁷³ Based on this, the *Thompson* Court explained that the applicable standard under which to judge the juvenile death penalty must be progressive, informed and enlightened by humane justice.⁷⁴

In applying this guidance to the *Thompson* facts, the Court looked to both legislative enactments and jury determinations as indicators of whether evolving standards of decency required preventing Oklahoma from imposing the death penalty on a fifteen-year-old defendant.⁷⁵ The Court also emphasized that the views of the international community are relevant in determining whether punishment is cruel

knowledge the variety of motivations that have inspired provisions prohibiting the juvenile death penalty within several major human rights treaties.

⁶⁸ See *Stanford*, 492 U.S. at 361; *Thompson*, 487 U.S. at 815.

⁶⁹ See 492 U.S. at 361; 487 U.S. at 815.

⁷⁰ See 487 U.S. at 838.

⁷¹ See *id.* at 819.

⁷² See *id.* at 821; 356 U.S. 86, 101 (1958). The Eighth Amendment provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments inflicted*." U.S. CONST. amend. VIII (emphasis added).

⁷³ See *Thompson*, 487 U.S. at 821 (quoting *Trop*, 356 U.S. at 101).

⁷⁴ See *id.* at 823 (quoting *Weems v. United States*, 217 U.S. 349, 373-74 (1910), which noted "[t]he [cruel and unusual punishment clause] . . . may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as published opinions become enlightened by humane justice.").

⁷⁵ See *id.* at 822.

and unusual.⁷⁶ The review of these several indicators of contemporary standards of decency led the Court to conclude that because of their age and relative immaturity, juveniles are incapable of acting with the degree of culpability necessary to justify the death penalty.⁷⁷ The Court therefore held that sentencing juvenile offenders below the age of sixteen to death violated the Eighth Amendment by offending civilized standards of decency.⁷⁸

Only a year later, in 1989, the Court again addressed an Eighth Amendment challenge to juvenile executions in *Stanford v. Kentucky*.⁷⁹ Although the Court's reasoning was similar to that in *Thompson*, the *Stanford* plurality reached the opposite conclusion, finding that no historical or modern consensus forbid the imposition of capital punishment on sixteen or seventeen-year-olds.⁸⁰ Consequently, the Court held that the juvenile death penalty did not offend the Eighth Amendment's prohibition against cruel and unusual punishment.⁸¹ In *Stanford*, the juvenile offender was sentenced to death for a murder he committed at the age of seventeen.⁸² Although the Court again considered whether the juvenile death penalty violated evolving standards of decency, the Court focused primarily on the abundance of state statutes permitting juvenile executions as evidence of these standards.⁸³ The Court reasoned that since death penalty statutes are passed by elected representatives, these statutes are indicative of a public consensus in support of the juvenile death penalty.⁸⁴ The Court rejected the petitioner's contention that public opinion polls and views of interest groups should also be considered as indicators of a consensus.⁸⁵ Moreover, in contrast to the reasoning of the *Thompson*

⁷⁶ See *id.* at 831 n.31. Amnesty International, the International Human Rights Group, the ABA and the American Law Institute (ALI) contributed to amicus briefs opposing the juvenile death penalty. See Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1332-34 (1993). Other professional organizations also filed briefs opposing the juvenile death penalty. See *id.* at 1334.

⁷⁷ See *Thompson*, 487 U.S. at 836-37. As part of this consideration, the Court noted that Oklahoma, the state of original jurisdiction, recognized a basic distinction between juveniles and adults—in Oklahoma, minors cannot vote, sit on a jury, marry without parental consent, or purchase alcohol or cigarettes. See *id.* at 823-24.

⁷⁸ See *id.* at 838.

⁷⁹ See 492 U.S. at 361.

⁸⁰ See *id.* at 380; *Thompson*, 487 U.S. at 838.

⁸¹ See *Stanford*, 492 U.S. at 380.

⁸² See *id.* at 365.

⁸³ See *id.* at 370-71.

⁸⁴ See *id.* at 370.

⁸⁵ See *id.* at 377.

Court just one year earlier, the *Stanford* Court specifically declined to take into account the sentencing practices of other countries, noting, "it is the American conceptions of decency that are dispositive."⁸⁶ Based on these "American conceptions," the Court held that sentencing the seventeen-year-old defendant to death did not constitute cruel and unusual punishment.⁸⁷ In so holding, the *Stanford* Court developed the standard that remains applicable today: in the United States, the juvenile death penalty is constitutional as applied to sixteen and seventeen-year-old defendants.⁸⁸

D. Multilateral Treaties Prohibiting the Imposition of the Juvenile Death Penalty

In contrast to the Supreme Court's decision in *Stanford*, the consensus of the international community points toward strictly prohibiting the practice of executing juvenile offenders.⁸⁹ This consensus is reflected in a number of multilateral treaties explicitly prohibiting the imposition of the juvenile death penalty.⁹⁰ The United States has signed several treaties which include such prohibitions, but has managed to avoid compliance with these terms by either refusing to ratify the treaty or, as in the case of the International Covenant on Civil and Political Rights ("ICCPR"), by making reservations to the provisions prohibiting the juvenile death penalty.⁹¹

The ICCPR, an outgrowth of the Universal Declaration of Human Rights, constitutes the cornerstone of modern international human rights law, seeking to recognize the inherent dignity and inalien-

⁸⁶ *Stanford*, 492 U.S. at 370 n.1. Unlike *Thompson*, the *Stanford* Court was not persuaded by the numerous *amicus* briefs filed by organizations opposing the death penalty. See Nanda, *supra* note 76, at 1334-35. In his dissent, Justice Brennan indicates that the plurality considered the development of a consensus too narrowly and advocates considering the views of organizations with expertise on the issue and the choices of governments elsewhere in the world. See *Stanford*, 492 U.S. at 384 (Brennan, J., dissenting).

⁸⁷ See *Stanford*, 492 U.S. at 380.

⁸⁸ See *id.*

⁸⁹ See *id.*; *Betraying the Young*, *supra* note 66.

⁹⁰ See International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 172 (1976) [hereinafter ICCPR]; The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 TIAS 3516, 3365 [hereinafter The Fourth Geneva Convention]; American Convention on Human Rights, *concluded* Nov. 22, 1969, 1114 U.N.T.S. 123, *reprinted in* BURNS H. WESTON ET AL., SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL LAW AND WORLD ORDER, 453-68 (1997) [hereinafter ACHR]; Convention on the Rights of the Child, *concluded* Nov. 20, 1989, 30 I.L.M. 1448, *reprinted in* BURNS H. WESTON ET AL., SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL LAW AND WORLD ORDER 562-87 (1997) [hereinafter CRC].

⁹¹ See Dieter, *supra* note 2.

able rights of all people by guaranteeing certain civil and political freedoms.⁹² Among the rights provided by the treaty, Article 6(5) specifies that the "[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age. . . ."⁹³ Article 4 of the ICCPR makes this provision nonderogable, even in times of public emergency "which threaten the life of the nation. . . ."⁹⁴ This "non-derogability" provision essentially means that while parties to the treaty may take measures deviating from their obligations to many of the provisions of the treaty, the drafters deemed Article 6(5), the juvenile death penalty provision, to be of such paramount importance to the mission of the treaty that no derogation was permissible.⁹⁵ Despite this command, the Senate's 1992 ratification of the ICCPR was made subject to certain reservations, understandings and declarations ("RUDs") among which was a reservation to Article 6(5) stating: "the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person . . . including . . . persons below eighteen years of age."⁹⁶

The United States' reservation to Article 6(5) is significant, not only for the substance of the reservation itself, but also because it manifests the solitary stance of the United States on this issue: the United States is currently the only country among the treaty's 144 signatories with a reservation to Article 6(5).⁹⁷ Sincere dissatisfaction with the United States' refusal to comply with Article 6(5) has been expressed not only by international organizations, but similarly by eleven foreign nations who have filed complaints with the Human Rights Commission (the commission in charge of monitoring compliance with the terms of the ICCPR).⁹⁸

⁹² See ICCPR, *supra* note 90; William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 277 (1995). The Universal Declaration of Human Rights, adopted by the U.N. General Assembly in 1948, proclaimed a series of political, civil, economic, social and cultural rights as a universal standard. See Dieter, *supra* note 2.

⁹³ ICCPR, *supra* note 90, art. 6(5).

⁹⁴ See *id.* art. 4(3).

⁹⁵ See *id.* art. 4(2).

⁹⁶ See 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992) at S4783. The United States ratified the ICCPR in 1992, over two decades after its adoption by the General Assembly in 1966. See *id.*

⁹⁷ See Dieter, *supra* note 2; Schabas, *supra* note 92, at 290.

⁹⁸ See Dieter, *supra* note 2. These objecting countries are among the United States' closest allies: France, Sweden, Belgium, Denmark, Finland, Germany, Italy, Netherlands, Norway, Portugal and Spain. See *id.*

The ICCPR is not the only treaty demonstrating U.S. unwillingness to comply with the international consensus against the juvenile death penalty. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention"), ratified by the United States in 1955, similarly forbids the imposition of the death penalty on "protected persons" below the age of eighteen.⁹⁹ In addition, the American Convention on Human Rights ("ACHR") and the Convention on Rights of the Child ("CRC") explicitly prohibit the death penalty for individuals whose crimes were committed below the age of eighteen.¹⁰⁰ While the United States participated in the drafting and signing of both of these treaties, it has been unwilling as yet to ratify.¹⁰¹

II. SOURCES AND FOUNDATIONS OF INTERNATIONAL LAW

International law generally is considered to be derived from the sources listed in Article 38 of the Statute of the International Court of Justice ("ICJ").¹⁰² These sources, regarded as substantial means for the determination of rules of law, include: international conventions and established rules expressly recognized by contesting states; international custom, as evidence of a general practice accepted as law; general principles of law recognized by civilized nations; and judicial decisions and teachings of the most highly qualified publicists of the various nations.¹⁰³

The first source listed in Article 38, "international conventions," is simply another name for treaties.¹⁰⁴ Treaties are international agreements containing the *mutual* promises of signatory states—as such, they represent an especially strong source of international law.¹⁰⁵ International treaties signed and ratified by the United States

⁹⁹ See The Fourth Geneva Convention, *supra* note 90. The Fourth Geneva Convention, dated August 12, 1949, was signed by 154 nations, including the United States, who ratified the treaty in July 1955. *See id.* This treaty has limited applicability because it only comes into force during times of war or occupation. *See id.* As an indication of an international consensus it is nonetheless persuasive. *See id.*

¹⁰⁰ See ACHR, *supra* note 90, art. 4(5); CRC, *supra* note 90, art. 37(a).

¹⁰¹ See Dieter, *supra* note 2.

¹⁰² See BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 76 (1997). The ICJ, popularly known as the World Court, is the principal judicial organ of the U.N. *See id.*

¹⁰³ See Statute of the International Court of Justice, concluded June 26, 1945, 59 Stat. 1031, reprinted in BURNS H. WESTON ET AL., SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL LAW AND WORLD ORDER 36 (1997) [hereinafter ICJ Statute].

¹⁰⁴ See ICJ Statute, *supra* note 103; WESTON, *supra* note 102, at 77.

¹⁰⁵ See WESTON, *supra* note 102, at 77.

are laws of the United States and are supreme over the laws of the several states.¹⁰⁶ State law must yield whenever it is inconsistent with, or impairs, the policy or provisions of a treaty or international agreement.¹⁰⁷

As international relations have grown increasingly complex, so too have international treaties. Interpreting the thousands of obligations and duties imposed by these multiple treaties is made even more difficult by the fact that parties to treaties will occasionally qualify their consent to be bound by "reserving" specific treaty provisions.¹⁰⁸ In essence, a reservation indicates a country's desire to be bound by the treaty in general, with the exception of the particular provision to which it reserved against.¹⁰⁹ This creates an extremely complicated situation, particularly with respect to multilateral treaties, because not all parties necessarily will agree on the permissibility of the reservation.¹¹⁰ Such debate concerning the legality of reservations is often guided by the Vienna Convention on the Law of Treaties ("Vienna Convention").¹¹¹ This agreement, created with the intent of codifying the development of treaty law, represents a valuable source for interpreting treaties given the array of complicated questions that frequently arise.¹¹²

Beyond creating legal obligations between signatory nations, treaties may occasionally give rise to the creation of customary international law, binding even on non-party states.¹¹³ Customary international law is the result of practices consistently followed by the majority of states because of a sense of legal obligation.¹¹⁴ Specifically, a norm attains the status of customary international law only if two conditions are met: the norm must be (1) reflected in the general practice of nations;¹¹⁵ and (2) a sense of legal obligation ("*opinio ju-*

¹⁰⁶ See U.S. CONST. art. VI.

¹⁰⁷ See *U.S. v. Pink*, 315 U.S. 203, 230-31 (1942).

¹⁰⁸ See WESTON, *supra* note 102, at 91.

¹⁰⁹ See *id.*

¹¹⁰ See *id.* at 91-92.

¹¹¹ See *id.* at 92; The Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331 reprinted in BURNS H. WESTON ET AL., SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL LAW AND WORLD ORDER 69 [hereinafter Vienna Convention].

¹¹² See Vienna Convention, *supra* note 111.

¹¹³ See ICJ Statute, *supra* note 103; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. i (1987) [hereinafter RESTATEMENT].

¹¹⁴ See ICJ Statute, *supra* note 103, art. 38; RESTATEMENT, *supra* note 113, § 102(2).

¹¹⁵ See RESTATEMENT, *supra* note 113, § 102. A "practice" need not be universally followed in order to contribute to the creation of customary law. See *id.* cmt. b. Moreover, the

ris") must have attached.¹¹⁶ Even when these two conditions are met, however, a country that indicates its dissent from a particular practice or norm *while the law is still in the process of development*, is not bound by the rule, even after it matures.¹¹⁷

The U.S. Supreme Court has recognized international custom as a time-honored and essential component of binding international law.¹¹⁸ As early as 1900, in *The Paquete Habana*, the Court held that international custom provided solid legal grounds for prohibiting the capture of a foreign vessel.¹¹⁹ In *Paquete*, a Cuban fishing vessel was captured by a U.S. steamship and sold at auction as a prize of war.¹²⁰ Although no domestic law prohibited the capture, the Court reasoned that as a result of ancient usage among civilized nations, "what originally may have rested in custom or comity, courtesy or concession . . . [had become] . . . a settled rule of international law" prohibiting the capture of coastal fishing vessels.¹²¹ Despite acknowledging several occasions where the custom was ignored over the course of history, the Court nonetheless concluded that the practice had evolved into international law that the United States was bound to obey.¹²²

Eighty years later, in 1980, the Second Circuit's decision in *Filartiga v. Pena-Irala* likewise found customary international law to be controlling.¹²³ In *Filartiga*, the court held that deliberate torture perpetrated under the color of official authority violated universally accepted norms of international law.¹²⁴ The *Filartiga* case considered whether the United States had jurisdiction over two non-citizens for violent conduct they had undertaken as Paraguayan governmental officials.¹²⁵ In answering this jurisdictional question, the court examined whether the alleged conduct violated customary international

practice of states that builds customary international law may include what states do through international organizations. *See id.* Rep. Note 2. For example, United Nations General Assembly resolutions and declarations may, in some circumstances, contribute to the process of forming international law. *See id.*

¹¹⁶ *See id.* § 102. Explicit evidence of a sense of legal obligation (e.g., by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions. *See id.*

¹¹⁷ *See id.* § 102 cmt. d. Historically such dissent and consequent exemption from a principle has been rare. *See id.*

¹¹⁸ *See The Paquete Habana*, 175 U.S. 677, 707-08 (1900).

¹¹⁹ *See id.* at 694, 708.

¹²⁰ *See id.* at 679.

¹²¹ *Id.* at 694.

¹²² *See id.* at 707-08.

¹²³ *See* 630 F.2d 876, 880 (2d Cir. 1980).

¹²⁴ *See id.*

¹²⁵ *See id.* at 880, 886. The aliens, citizens of the Republic of Paraguay, were served with process within U.S. borders. *See id.* at 879.

law.¹²⁶ Acknowledging the universal condemnation of torture found in numerous international agreements, multiple declarations of the United Nations General Assembly, as well as the general renunciation of torture as an instrument of official policy by virtually all the nations of the world, the court held that torture violated an established norm of international human rights law.¹²⁷ Both of these cases indicate the willingness of U.S. courts to find the existence of binding international law even when its formation is not signified by explicit documents and terms.

The existence of international consensus, such as that discussed in *Paquete* and *Filartiga*, likewise is important to the third source of law identified by Article 38 of the ICJ: "general principles of law recognized by civilized nations," commonly referred to as *jus cogens*.¹²⁸ Article 53 of the Vienna Convention defines *jus cogens* as a standard "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."¹²⁹ Thus, *jus cogens* generally is considered to be derived from values held fundamental by the international community—an ideal of a "good per se."¹³⁰ *Jus cogens* is distinct from customary international law because it is nonderogable—a country cannot avoid compliance with a *jus cogens* norm by refusing to consent to its application.¹³¹ As a result, *jus cogens* prevails over and invalidates international agreements and other rules of international law in conflict with its own nonderogable principles, in this sense representing the strongest and most compelling source of international law.¹³²

¹²⁶ See *id.* at 880.

¹²⁷ See *id.* The court indicated that the right to be free of torture has become part of customary international law evidenced by the Universal Declaration of Human Rights. See *id.* at 882. The court found that the resolution created an expectation of adherence, and insofar as the expectation was gradually justified by State practice, it may by custom become recognized as laying down rules binding on the states. See *id.* at 883.

¹²⁸ See 630 F.2d at 883; ICJ Statute, *supra* note 103, art. 38.

¹²⁹ Vienna Convention, *supra* note 111, art. 53.

¹³⁰ See David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 351 (1988) (noting that *jus cogens* is based on a rational ideal of the good per se, in contrast to *jus dispositivum*, which is based merely on the fortuitous or self-interested choice of participating states).

¹³¹ See Vienna Convention, *supra* note 111, art. 53; RESTATEMENT, *supra* note 113, § 102 rep. note 6 (noting that being recognized by the international community of states as a whole means "by a very large majority of states, even if over the dissent of a very small number of states").

¹³² See RESTATEMENT, *supra* note 113, § 102 cmt. k; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992) (noting that *jus cogens* norms enjoy the highest status within international law).

Evidence of the force of *jus cogens* as a source of international law is further supported by U.S. common law.¹³³ In 1992, in *Siderman v. Republic of Argentina*, the Ninth Circuit went even further than the Second Circuit's *Filartiga* decision, holding that the prohibition against torture had attained the status of a *jus cogens* norm.¹³⁴ *Siderman* involved the horrific actions of a violent and brutal anti-Semitic military junta that ruled Argentina following the government of Maria Peron.¹³⁵ Seventy-five year old Jose Siderman was kidnapped, beaten and tortured for seven days by members of the military junta.¹³⁶ The Ninth Circuit reasoned that Argentina was not entitled to the immunity afforded most sovereign acts because the prohibition against official torture had attained the status of *jus cogens*—no derogation from the norm was permissible.¹³⁷ Certain human rights have been specifically identified as *jus cogens* norms by the *Third Restatement of Foreign Relations Law*.¹³⁸ These include: genocide, slavery, murder, torture, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized human rights.¹³⁹ The *Restatement* provides, and cases have so held, that any international agreement violating these peremptory norms is void.¹⁴⁰

These three sources of international law—treaties, customary international law and *jus cogens*—all operate to establish human rights standards throughout the world. Before considering which sources of law specifically prohibit the juvenile death penalty, it is first imperative to understand the unique character of human rights law.¹⁴¹ While international jurisprudence traditionally insisted that the individual was not a "subject" of international law, modern international laws have created obligations for states in relation to natural persons.¹⁴² Increasingly, international human rights agreements create obligations and responsibilities for states with respect to all individuals subject to their jurisdiction, including their own nationals.¹⁴³ This reflects a general

¹³³ See *Siderman*, 965 F.2d at 717.

¹³⁴ See *id.*

¹³⁵ See *id.* at 703.

¹³⁶ See *id.*

¹³⁷ See *id.* at 718, 723.

¹³⁸ See RESTATEMENT, *supra* note 113, § 702.

¹³⁹ See *id.*

¹⁴⁰ See *id.* § 702 cmt. n; *Siderman*, 965 F.2d at 717.

¹⁴¹ See Schabas, *supra* note 92, at 312–13.

¹⁴² See RESTATEMENT, *supra* note 113, intro. note, Part VII.

¹⁴³ See *id.*; Schabas, *supra* note 92, at 311.

consensus that how states treat individuals, including their own citizens, is not the state's business alone, but is instead a matter of international concern and the proper subject for regulation by international law.¹⁴⁴

The unique character of human rights law, however, creates particular enforcement problems, particularly with respect to the aforementioned treaty reservation process.¹⁴⁵ Although reservations are an accepted feature of treaty law, they are fundamentally unsuited for human rights treaties.¹⁴⁶ The reservation technique was developed in the context of multilateral treaties concerned with preserving the reciprocity of obligations between contracting states.¹⁴⁷ In the context of human rights treaties, however, none of the parties are exchanging rights or benefits, and reciprocity has no place.¹⁴⁸ This diminished reciprocal character makes a country's ability to enforce treaty provisions and human rights law extremely difficult, because unlike traditional multilateral agreements, individual states have no coercive power.¹⁴⁹

III. DOMINGUES V. NEVADA

On October 22, 1993, sixteen-year-old Michael Domingues murdered a woman and her four-year-old son.¹⁵⁰ In August 1994, a Nevada jury found Domingues guilty of two counts of first-degree murder.¹⁵¹ At seventeen years of age, Domingues was sentenced to death for each of these murder convictions.¹⁵² On appeal, in 1996, the Supreme Court of Nevada affirmed the trial court's convictions and sentence.¹⁵³ The defendant then filed a motion for correction of an illegal sentence, contending that the execution of a juvenile offender violates the ICCPR and customary international law.¹⁵⁴ The District Court denied the defendant's motion and, in a 3-2 decision, the Supreme Court of Nevada upheld the District Court's conviction and death sentence, concluding that the Senate's express reservation to the

¹⁴⁴ See RESTATEMENT, *supra* note 113, intro. note, Part VII.

¹⁴⁵ See Schabas, *supra* note 92, at 310-13.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 311.

¹⁴⁸ See *id.* at 312.

¹⁴⁹ See *id.* at 310-13.

¹⁵⁰ See *Domingues v. Nevada*, 961 P.2d 1279, 1279 (Nev. 1998).

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See *id.*

ICCPR preserved the United States' right to impose the death penalty on juveniles.¹⁵⁵ The Supreme Court of Nevada failed to explicitly address whether the reservation itself is valid, or whether the execution of juveniles violates customary international law.¹⁵⁶

On March 1, 1999, Michael Domingues filed a petition with the United States Supreme Court requesting certiorari to consider his claims that the juvenile death penalty violates the ICCPR, customary international law and *jus cogens*.¹⁵⁷ Upon reviewing this petition, the Court asked the Solicitor General to file an amicus brief presenting the U.S. government's view of its international obligations related to the use of the juvenile death penalty.¹⁵⁸ As international legal issues surrounding the juvenile death penalty begin to receive heightened attention, the *Domingues* petition and the response elicited from the Solicitor General serve as key examples of the different sides of this important debate.¹⁵⁹

A. *Petition for Writ of Certiorari on Behalf of Michael Domingues*

As noted above, Michael Domingues' Petition for Certiorari ("the Petition"), filed with the U.S. Supreme Court, argues that Nevada is prohibited from imposing the death penalty on juveniles in light of the ICCPR, customary international law and *jus cogens*.¹⁶⁰ In addressing the alleged violations of the ICCPR, the Petition focuses on the invalidity of the United States' reservation to Article 6(5)—the provision prohibiting the juvenile death penalty.¹⁶¹ This claim is premised on the fact that if the reservation is determined to be invalid, the United States will be deemed to have accepted the terms of the treaty

¹⁵⁵ See *Domingues*, 961 P.2d at 1280.

¹⁵⁶ See *id.* Two dissenting Justices, compelled by concern over the validity of the reservation to the ICCPR, supported a more thorough investigation of the Petitioner's claim. See *id.* at 1280–81 (Springer, C.J., and Rose, J., dissenting). Chief Justice Springer noted the glaring incongruity of the United States becoming a party to the ICCPR while simultaneously rejecting one of its most vital terms. See *id.* (Springer, C.J., dissenting). Justice Rose, noted that the complexity of the issue before the court deserved a full hearing on the effect of the U.S. reservation to the ICCPR, with the penultimate issue being whether the Senate's reservation was valid in light of the nonderogability clause. See *id.* at 1281 (Rose, J., dissenting).

¹⁵⁷ See Petition for Certiorari at 8, *Domingues v. Nevada*, 961 P.2d 1276 (Nev. 1998) (No. 98–8327) [hereinafter Cert. Petition].

¹⁵⁸ See Request for Solicitor General's Brief, *supra* note 21, at 2044.

¹⁵⁹ See Cert. Petition, *supra* note 157; Solicitor General's Brief, *supra* note 23.

¹⁶⁰ See Cert. Petition, *supra* note 157, at 8.

¹⁶¹ See *id.* at 20–26.

in its entirety, including Article 6(5).¹⁶² The Petition first contends that the language of ICCPR prohibits any reservation to Article 6(5), emphasizing that the Article is specifically made nonderogable by the treaty's terms.¹⁶³ As previously noted, while the ICCPR provides for derogation from a number of its provisions in times of "public emergency," Article 4 explicitly prohibits derogation from Article 6(5), even in extreme circumstances.¹⁶⁴ The Petition further asserts that the U.S. reservation to Article 6(5) violates the "object and purpose" of the ICCPR.¹⁶⁵ The Vienna Convention on the Law of Treaties explains that any reservation that is "incompatible with the object and purpose of the treaty" is invalid.¹⁶⁶ Again relying on the nonderogation clause of Article 4, the Petition argues that Article 6(5) is of such paramount importance to the treaty as a whole that any reservation to its terms undoubtedly violates the object and purpose of the agreement.¹⁶⁷

Furthermore, the Petition alleges that even if the reservation were valid in substance, the Senate's reservation to the juvenile death penalty provision was an unconstitutional violation of the separation of powers doctrine.¹⁶⁸ Relying on *Clinton v. New York*, a 1998 U.S. Supreme Court decision that held the line-item veto unconstitutional, the Petition argues that the Senate's ICCPR reservation process suffered from deficiencies similar to those found in *Clinton*.¹⁶⁹ In *Clinton*, the Court held that the President, acting alone, did not have the constitutional authority under Article 1, section 7 (the Presentment Clause) to alter the content of a bill by vetoing individual line-items.¹⁷⁰ The Petition contends that allowing the Senate to unilaterally alter the provisions of the ICCPR represents precisely the same consti-

¹⁶² See *id.* at 26.

¹⁶³ See *id.* at 23-24; *supra* notes 95-96 and accompanying text.

¹⁶⁴ See Cert. Petition, *supra* note 157, at 23-24; *supra* notes 95-97 and accompanying text.

¹⁶⁵ See Cert. Petition, *supra* note 157, at 25-26.

¹⁶⁶ See *id.*; Vienna Convention, *supra* note 111.

¹⁶⁷ See Cert. Petition, *supra* note 157, at 25-26.

¹⁶⁸ See *id.* at 20-22.

¹⁶⁹ See *id.* at 22; 524 U.S. 417, 421 (1998).

¹⁷⁰ See Cert. Petition, *supra* note 157, at 22; *Clinton*, 524 U.S. at 439-50. The Presentment Clause states: "Every Bill which shall have passed the House . . . and the Senate, shall, before it becomes a Law, be presented to the President . . . if he approves he shall sign it, but if not he shall return it, with his Objections, to that House in which it shall have originated, who shall . . . proceed to reconsider it. . . ." U.S. CONST. art. I, § 7. The *Clinton* Court interpreted the Presentment Clause to mean that the President had no option to simply alter the bill on his own, thereby making new law. See 524 U.S. at 439-50; Cert. Petition, *supra* note 157, at 22.

tutionally-prohibited activity rejected in *Clinton*.¹⁷¹ Moreover, the Petition argues that the Treaty Clause provides further evidence of the unconstitutionality of the Senate's ratification, because the clause does not contain any language suggesting that the Senate can "particularly consent" to a treaty by placing conditions on it that materially alter a treaty proffered by other nations.¹⁷²

In addition to the arguments asserting the invalidity of the U.S. treaty reservation, the Petition further proposes that international custom provides alternative grounds for finding the practice of the juvenile death penalty illegal.¹⁷³ The Petition claims that a consensus against the juvenile death penalty has been clearly established by the significant number of countries that refuse to partake in the "unconscionable act [of executing juvenile offenders]," and also by the many treaties and U.N. Resolutions codifying this prohibition.¹⁷⁴ The Petition emphasizes that the records from the drafting of the ICCPR indicate that Article 6 indeed was considered by the drafters to be a codification of existing customary international law.¹⁷⁵

Finally, the Petition uses the fact that the ICCPR makes Article 6(5) nonderogable to argue that the prohibition against the juvenile death penalty has risen to the level of *jus cogens*.¹⁷⁶ Not only is there an international consensus prohibiting the juvenile death penalty, but the nonderogation provision of Article 4 supports the conclusion that departure from the consensus is prohibited.¹⁷⁷ The Petition notes that in addition to the ICCPR, other international human rights treaties similarly have made the provision prohibiting the juvenile death penalty nonderogable, further emphasizing this quality.¹⁷⁸ Moreover, both the Inter-American Commission and the United Nations Special Rapporteur have each concluded that the juvenile death penalty is a *per se* violation of *jus cogens*.¹⁷⁹

¹⁷¹ See Cert. Petition, *supra* note 157, at 22.

¹⁷² See *id.* at 6-7. The Treaty Clause provides that the president shall have the power "by and with the Advice and Consent of Senate, to make Treaties. . ." U.S. CONST. art. II, § 2.

¹⁷³ See Cert. Petition, *supra* note 157, at 11-17.

¹⁷⁴ See *id.* at 17.

¹⁷⁵ See *id.* at 14.

¹⁷⁶ See *id.* at 18.

¹⁷⁷ See *id.*

¹⁷⁸ See Cert. Petition, *supra* note 157, at 18.

¹⁷⁹ See *id.* at 18, 19. The Inter-American Commission monitors compliance with the American Declaration of Rights and Duties of Man, a resolution adopted by the Organization of American States (OAS). See Donald Fox, *Inter-American Commission on Human Rights Finds United States in Violation*, 82 AM. J. INT'L L. 601, 601-02 (1988).

Based on the aforementioned considerations, Domingues' Petition for certiorari concludes that the juvenile death penalty is prohibited by three sources of international law: treaty, custom and *jus cogens*.¹⁸⁰ The Petition further asserts that while judges in every state are bound to apply international law, the Nevada Supreme Court's decision upholding the death penalty as applied to Domingues, was part of a pattern of state courts' "lack of awareness of United States international obligations."¹⁸¹ The Petition thus concludes that it is precisely this failure of state courts to recognize and adhere to such significant international obligations that makes the issue of the juvenile death penalty particularly ripe for Supreme Court resolution.¹⁸²

B. *The Government's Response to the Petitioner's International Law Claims:
Amicus Brief Filed by the Solicitor General*

In October 1999, Solicitor General Steven Waxman filed an amicus brief ("the Brief") on behalf of the United States, recommending that certiorari be denied in the case of *Domingues v. Nevada*.¹⁸³ The Brief first addresses the validity of the Senate's reservation to ICCPR Article 6(5), asserting that the reservation does *not* present a constitutional problem, as alleged by the Petitioner.¹⁸⁴ The Solicitor General focuses on the language of the Treaty Clause to the U.S. Constitution, which provides that treaty ratification is based upon the "advice and consent of the Senate."¹⁸⁵ Thus, the Brief concludes that any alterations offered by the Senate rest on solid constitutional ground.¹⁸⁶ More significantly, the Brief contends that the reservations to the ICCPR were in fact suggested by the President himself, adopted verbatim by the Senate, thereby distinguishing the process at issue in *Domingues* from that of the "line-item veto" found unconstitutional in *Clinton v. New York*.¹⁸⁷

The U.S. is a member of OAS and has ratified the OAS charter. *See id.* In 1987, the Inter-American Commission found that two juvenile executions in the United States violated Article I of the American Declaration of Rights and Duties of Man ("Every human being has the right to life. . .") insisting that the rule prohibiting the execution of juvenile offenders had acquired the authority of *jus cogens*. *See id.*

¹⁸⁰ *See* Cert. Petition, *supra* note 157, at 32-33.

¹⁸¹ *Id.* at 9.

¹⁸² *See id.* at 11.

¹⁸³ *See* Solicitor General's Brief, *supra* note 23, at 7.

¹⁸⁴ *See id.* at 3.

¹⁸⁵ *See id.*

¹⁸⁶ *See id.* at 3-4.

¹⁸⁷ *See* Solicitor General's Brief, *supra* note 23, at 3; 524 U.S. at 439-50.

The Solicitor General goes on to address the Petitioner's claim that the reservation to Article 6(5) was invalid in light of the non-derogation clause and the "object and purpose" of the ICCPR.¹⁸⁸ The Brief asserts that there is no correlation between the derogability of a right and its importance or centrality to the treaty, contending that several "profound" rights were *not* made nonderogable, such as the right against arbitrary arrest.¹⁸⁹ Thus, the Brief concludes that the mere fact that Article 6(5) is nonderogable does not suggest that a reservation to its terms offends the treaty's object and purpose.¹⁹⁰ Furthermore, the Brief argues that if the parties had intended to prohibit a reservation to Article 6(5), they would have done so "explicitly . . . rather than . . . obliquely."¹⁹¹ Given that the drafters of the ICCPR chose not to expressly declare that any reservations to Article 6(5) would be deemed invalid, the Solicitor General determines that the reservation at issue is controlling as a matter of domestic law, emphasizing that courts have no authority to add provisions that were not adopted by the other branches.¹⁹² The Brief suggests that if other nations are dissatisfied with the U.S. reservation, those nations may voice their opposition.¹⁹³ While the Brief acknowledges that eleven states have in fact made formal objections, it notes, "not one of the states have declared that the treaty is not in effect between them and the U.S."¹⁹⁴

In order to address the Petitioner's customary international law argument, the Brief begins by distinguishing the *Paquete Habana* case from the *Domingues* case in an effort to show that the customary international law argument is inapplicable to *Domingues*.¹⁹⁵ The Brief suggests that the *Paquete* decision is distinct because it articulated a rule in a subject area—the adjudication of prizes of war—in which federal courts traditionally devised rules in a common law manner.¹⁹⁶ The Brief argues that in contrast, with respect to the juvenile death penalty, the Court had no occasion to determine the circumstances in

¹⁸⁸ See Solicitor General's Brief, *supra* note 23, at 4.

¹⁸⁹ See *id.* at 5.

¹⁹⁰ See *id.*

¹⁹¹ *Id.*

¹⁹² See *id.* at 4.

¹⁹³ See Solicitor General's Brief, *supra* note 23, at 4.

¹⁹⁴ *Id.*

¹⁹⁵ See *id.* at 5; *supra* notes 119–123 and accompanying text discussing the *Paquete* decision and its implications with respect to customary international law.

¹⁹⁶ See Solicitor General's Brief, *supra* note 23, at 5.

which customary international law might preempt a state statute in an area within the usual purview of the States, such as criminal law.¹⁹⁷

Moreover, the Brief suggests that the *Domingues* case does not present an appropriate vehicle for the Court to address customary international law issues.¹⁹⁸ The Solicitor General draws this conclusion from what he regards as a deficiency in the lower courts' records which he finds to lack probative materials concerning the development of customary international law.¹⁹⁹ In light of this deficiency, the Brief asserts that there is nothing for the Court to refer to in deciding whether international consensus exists prohibiting capital punishment of juveniles, and whether such consensus, if it does exist, reflects a sense of legal obligation requisite for the finding of customary law.²⁰⁰ The Solicitor General suggests that the Court is likely to "benefit from the reasoned decisions of lower courts," emphasizing that the Supreme Court of Nevada did not even address the customary international law issue.²⁰¹ In addition, the Brief argues that given the Executive Branch's primary responsibility for conducting foreign relations, the courts should defer to the Executive Branch regarding whether a rule of customary international law is presently binding on the United States.²⁰² Finally, the Solicitor General indicates that even if a customary norm against the imposition of the juvenile death penalty *does* exist, the United States is exempt from its terms as a "persistent objector."²⁰³

The Solicitor General superficially addresses the issue of *jus cogens*, asserting for the second time that the *Domingues* case does not present the appropriate vehicle for addressing the far-reaching contention that the juvenile death penalty violates a *jus cogens* norm.²⁰⁴ The Solicitor General contends that neither the record nor the Supreme Court of Nevada's decision illuminate whether a *jus cogens* norm has developed against the juvenile death penalty.²⁰⁵ Thus, the Solicitor General recommended that the U.S. Supreme Court deny Michael Domingues' petition for writ of certiorari.²⁰⁶ The Supreme

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

²⁰⁰ See *id.* at 6.

²⁰¹ See Solicitor General's Brief, *supra* note 23, at 6.

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See *id.* at 7.

²⁰⁵ See *id.*

²⁰⁶ See Solicitor General's Brief, *supra* note 23, at 7.

Court, apparently persuaded by this argument, denied the Domingues petition on November 1, 1999.²⁰⁷

IV. ANALYSIS: WHY THE U.S. SUPREME COURT SHOULD HAVE GRANTED CERTIORARI TO MICHAEL DOMINGUES

In light of the many powerful, compelling arguments made in Domingues' petition, the U.S. Supreme Court should have granted certiorari to provide guidance in the field of international law.²⁰⁸ While the Solicitor General's arguments are clear and concise they lack sufficient substance to adequately counter the weighty human rights violations alleged by the Petitioner. A major flaw in the government's position, set forth by the Solicitor General, was its failure to recognize the legal limits of the treaty reservation process.²⁰⁹ Although the Solicitor General referenced the Vienna Convention as the source of law *establishing* reservations as an accepted feature of treaty law, he failed to adequately address the fact that the Convention also *prohibits* reservations that conflict with a treaty's object and purpose.²¹⁰ The Solicitor General clearly overlooked Article 19 of the Vienna Convention which provides: "[a] State may . . . formulate a reservation *unless* . . . the reservation is incompatible with the object and purpose of the treaty."²¹¹ Given the ICCPR's fundamental purpose of recognizing the "inherent dignity and equal and inalienable rights of all members of the human family," there is a strong argument that a reservation to *any* of these inalienable rights—such as the right to be free from the juvenile death penalty—violates the treaty's object and purpose.²¹²

Even acknowledging that reservations to substantive provisions in human rights treaties are not universally deemed unacceptable, the language of the ICCPR provides extremely persuasive evidence that the drafters considered Article 6(5) fundamental to the object and purpose of the treaty as a whole.²¹³ In choosing to make Article 6(5)

²⁰⁷ *Domingues v. Nevada*, 961 P.2d 1279, (Nev. 1998) *cert denied*, 526 U.S. 1156 (U.S. Nov. 1, 1999) (No. 98-8327).

²⁰⁸ *See Domingues*, 961 P.2d at 1281 (Rose, J., dissenting) (noting that federal court that deals with federal law on daily basis might be better equipped to address issues of international law).

²⁰⁹ *See* Solicitor General's Brief, *supra* note 23, at 4.

²¹⁰ *See id.*

²¹¹ Vienna Convention, *supra* note 111, § 2 art. 19(c) (emphasis added).

²¹² *See* ICCPR, *supra* note 90.

²¹³ *See generally* Schabas, *supra* note 92, at 292, 294-302.

one of a small number of nonderogable provisions, the drafters emphasized its importance to the treaty.²¹⁴ The *Third Restatement of Foreign Relations* specifically states that a country may not reserve against a provision from which reservation is prohibited.²¹⁵ What is the non-derogation provision if not an express prohibition against reservation?

It is difficult to comprehend the Solicitor General's contention that the drafters could have prohibited reservation to Article 6(5) explicitly rather than "obliquely" through the use of the nonderogation clause.²¹⁶ The statement: "no derogation shall be made from Article 6 . . ." appears perfectly direct and concise—it does not seem in any way oblique.²¹⁷ Moreover, there is no practical difference between stating "no reservations to Article 6" and "no derogation from Article 6."²¹⁸ In all likelihood, the drafters reasonably assumed that the nonderogation clause served the same purpose as alternative language prohibiting a reservation to Article 6. Furthermore, while the Solicitor General is correct in noting that certain other important rights were not made nonderogable, this fact only bolsters the conclusion that Article 6(5) was of paramount importance—among a host of other critical rights, the drafters chose to designate Article 6(5) as nonderogable, furthering the position that the provision prohibiting the juvenile death penalty is central to the object and purpose of the ICCPR.²¹⁹

The Human Rights Committee ("the Committee"), the committee created to monitor compliance with the ICCPR, supports the conclusion that the nonderogation of Article 6(5) was of critical importance.²²⁰ Not only did the Committee explicitly state that countries may not reserve the right to execute children without violating the object and purpose of the treaty, but in 1995 it issued a report confirming that the United States' reservation to Article 6(5) was invalid.²²¹ According to scholar Nguyen Quoc Dinh, when a human

²¹⁴ See generally *id.*

²¹⁵ See RESTATEMENT, *supra* note 113, § 313 (1)(a).

²¹⁶ See Solicitor General's Brief, *supra* note 23, at 5.

²¹⁷ See ICCPR, *supra* note 90, art. 4(2).

²¹⁸ See *id.*

²¹⁹ See Solicitor General's Brief, *supra* note 23, at 5.

²²⁰ See United Nations Human Rights Committee, *General Comment No. 24(52) Relating to Reservations*, 15 HUM. RTS. L. J. 464-65 (1994) [hereinafter *Human Rights Committee Comments*].

²²¹ See *id.*; Cert. Petition, *supra* note 157, at 24; Vega, *supra* note 11, at 755. In reaction to the Committee's vote regarding the invalidity of reservations to Article 6, the U.S. Senate threatened to withhold funds slated for U.S. participation in the work of the Committee. See Dieter, *supra* note 2.

rights treaty creates a control body, such as the Committee, that body should be entitled to determine the legality of reservations.²²² In enacting the ICCPR all signatories, including the United States, agreed to permit the Committee to monitor compliance with the treaty's terms.²²³ Such acquiescence would have been meaningless and misleading had the United States merely intended to ignore Committee conclusions and act contrary to their recommendations.

Further evidence of the incompatibility of the U.S. reservation to the ICCPR may be found in opinions issued by the Inter-American Court on Human Rights.²²⁴ The Inter-American Court issued an advisory opinion concerning Guatemala's reservation to the ACHR stating specifically, "a reservation which was designed to enable the State to suspend *any of the non-derogable fundamental rights* must be deemed to be *incompatible with the object and purpose* of the Convention and, consequently, not permitted by it."²²⁵ The Inter-American Court explained that implicit in their opinion was the view that requiring reservations to be compatible with a treaty's object and purpose is of greater importance to human rights treaties, where reciprocity provides no protection for the individual against a reserving state.²²⁶

Despite the many explicit manifestations that the reservation to Article 6(5) violates the object and purpose of the ICCPR, the Solicitor General fails to substantively address the issue. He merely notes "[e]ven if there were merit to [the arguments that the reservation is ineffective for violating the treaty's object and purpose] . . . that would not mean that Article 6(5) should be enforced by a domestic court in the face of the United States' reservation."²²⁷ Essentially, the Solicitor General suggests that regardless of the legality of the reservation, it should be controlling as a matter of domestic law.²²⁸ Such strict deference to the Executive Branch on this issue defies logic. One can envision an extension of the Solicitor General's argument that con-

²²² See Schabas, *supra* note 92, at 315.

²²³ See ICCPR, *supra* note 90, Part IV; Cert. Petition, *supra* note 157, at 24.

²²⁴ See Edward Sherman, *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT'L L. J. 69, 79 (1994).

²²⁵ Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of Sept. 8, 1983, Inter-Am. Ct. H.R., ser. A: Judgments and Opinions, No. 3 (1983), *reprinted in* 23 I.L.M. 320, 341 (1984); see Sherman, *supra* note 224, at 79.

²²⁶ See Sherman, *supra* note 224, at 79.

²²⁷ Solicitor General's Brief, *supra* note 23, at 4.

²²⁸ See *id.*

done even more atrocious human rights violations, as long as the President and Senate concur to reserve such provisions in an international human rights treaty. Moreover, the Solicitor General's contention seems to fly in the face of the American system of checks and balances, ignoring the unlikelihood that the Executive Branch will perceive its own violations.²²⁹ Similarly, by claiming that courts lack authority to add provisions that were not adopted by other branches, he also ignores the fact that the Court is not called upon to *add* the juvenile death penalty provision to the ICCPR.²³⁰ Indeed, the provision is well embedded and, as previously noted, quite central to the existing treaty.²³¹ The Court is merely asked to examine the legality of a U.S. reservation negating an *existing provision*, an issue well within the Court's province.²³² The fundamental constitutional law principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is," allows for judicial interpretation in this context, and is conspicuously ignored by the Solicitor General.²³³

As an additional defense of the U.S. reservation, the Solicitor General notes that other nations are in a position to protest the reservation to Article 6(5) by declining to recognize themselves as being in treaty relations with the United States.²³⁴ His reliance on this form of protest fails to acknowledge the unique character of human rights treaties, rendering such a suggestion highly impractical.²³⁵ As previously noted, international human rights treaties are distinct from traditional multilateral treaties because they are not created to accomplish the reciprocal exchange of rights for mutual benefit.²³⁶ Parties to human rights treaties do not confer benefits onto one another, but instead onto their own citizens, making it perfectly illogical to suggest that a country protest the U.S. reservation by making its own reservations.²³⁷ If conforming countries suddenly were to start executing their own juvenile offenders, not only is this unlikely to influence U.S.

²²⁹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (reviewing executive order to possess and operate nation's steel mills).

²³⁰ See Solicitor General's Brief, *supra* note 23, at 4.

²³¹ See ICCPR, *supra* note 90, art. 6(5).

²³² See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²³³ See *id.* (noting further that if two laws conflict with each other, the courts must decide on the operation of each).

²³⁴ See Solicitor General's Brief, *supra* note 23, at 4.

²³⁵ See *supra* notes 146-150 and accompanying text discussing the unique character of human rights law.

²³⁶ See *supra* notes 146-150 and accompanying text; Schabas, *supra* note 92, at 311; Sherman, *supra* note 224, at 79.

²³⁷ See Schabas, *supra* note 92, at 311.

behavior, it clearly is contrary to the intent of the ICCPR.²³⁸ Similarly, if protesting countries were to declare the treaty not in effect between themselves and the United States, the only measurable result would be a dramatic decline in the treaty's overall applicability.²³⁹ Although this strategy may achieve results where parties to a traditional multi-lateral treaty are conferring benefits onto each other and thus have significant bargaining power, it probably would be ineffective in coercing U.S. compliance, because the United States does not stand to lose any tangible benefit. Thus, the Solicitor General's suggestion that other nations decline to recognize themselves as being in treaty relations with the United States is fundamentally ill-suited in the context of international human rights agreements.²⁴⁰

If the reservation is invalid, recognized sources of international law—including legal scholarship, case law and state practice—require that the United States be bound by the treaty as a whole, including Article 6(5).²⁴¹ As noted by Judge R. St. John MacDonald of the European Court of Human Rights, “[t]o exclude the application of an obligation by reason of an invalid reservation is in effect to give full force and effect to the reservation.”²⁴² A reservation found invalid under international law has no independent validity and the separate states of the United States are bound by the Supremacy Clause to enforce the provisions of the treaty *in its entirety*.²⁴³ Consequently, U.S. states currently are bound by the ICCPR as a whole, which prohibits the execution of juvenile offenders.

When the issue of U.S. legal obligations under the ICCPR is combined with the strength of the Petitioner's customary international law claim, the argument in favor of granting certiorari is even more compelling.²⁴⁴ The norm against the juvenile death penalty

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ See Solicitor General's Brief, *supra* note 23, at 4. Furthermore, while the Solicitor General seems to belittle the fact that only eleven countries have formally objected to the U.S. reservation, since objecting to a reservation has no legal consequence, it is quite likely that many objections are never made. See *Human Rights Committee Comments*, *supra* note 220, at 465.

²⁴¹ See Schabas, *supra* note 92, at 324.

²⁴² See *id.* at 317.

²⁴³ See U.S. CONST. art. VI. The Supremacy Clause reads in relevant part. “[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . .” *Id.* (emphasis added).

²⁴⁴ See *supra* notes 174–176 and accompanying text discussing creation of customary law and Petitioner's customary international law claim.

clearly fulfills the three specific components that contribute to the development of customary international law: (1) the custom is reflected in the practice of nations (2) a sense of legal obligation, or *opinio juris*, has attached, and (3) the United States is not exempt as a "persistent objector" to the norm.²⁴⁵ Although it often is difficult to quantify at what point a general practice evolves into a customary norm, international consensus against the juvenile death penalty is easily perceived.

For instance, this first element of the customary international law doctrine easily is established by the fact that the United States has the dubious distinction of being one of only six countries still imposing the juvenile death penalty, and is moreover, the world leader in juvenile executions.²⁴⁶ The fact that five other countries engage in this reprehensible practice is insufficient to destroy the norm; as the *Third Restatement* notes, "a practice can be general even if it is not universally followed."²⁴⁷ Similarly, as the *Paquete* case demonstrated, custom can evolve into law despite occasions when the custom is not adhered to.²⁴⁸ In August 1999, the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary executions confirmed that this consensus indeed had evolved, noting that governments which continue to use the death penalty against minors "are particularly called upon to bring their domestic legislation into conformity with international legal standards."²⁴⁹

Similarly, an agreement among a large number of parties can indicate the existence of consensus, giving rise to a new customary rule of law binding even on non-party states.²⁵⁰ The ICCPR, CRC, ACHR and Fourth Geneva Convention all have provisions specifically prohibiting the execution of children for crimes committed before the age of eighteen.²⁵¹ In particular, the ICCPR and the CRC have received

²⁴⁵ See RESTATEMENT, *supra* note 113, § 102.

²⁴⁶ See *Death Penalty Worldwide*, *supra* note 39, at Table of Juvenile Offenders; AMNESTY INTERNATIONAL, *Action at the United Nations*, AI Index: 53/04/99, Sept. 1999 [hereinafter *Action at the UN*].

²⁴⁷ See RESTATEMENT, *supra* note 113, § 102 cmt. b.

²⁴⁸ See 175 U.S. at 707-08.

²⁴⁹ See *The Death Penalty Worldwide*, *supra* note 39 (emphasis added).

²⁵⁰ See RESTATEMENT, *supra* note 113, § 324 cmt. e; ICJ Statute, *supra* note 102, art. 38.

²⁵¹ CRC, *supra* note 90, art. 37(a) ("Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age"); ACHR, *supra* note 90, art. 4(5) ("Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age"); The Fourth Geneva Convention, *supra* note 90, art. 68 ("[T]he death penalty may

near universal endorsement, with 144 and 191 signatories respectively, providing an especially strong indication of international consensus against the juvenile death penalty.²⁵² Moreover, these treaties are not merely mild expressions of human rights law; the ICCPR in particular is considered the most important human rights treaty in existence.²⁵³ The U.S. State Department praised it as "the most complete and authoritative articulation of international human rights law that has emerged in the years following World War II."²⁵⁴ The authority of this treaty not only makes U.S. refusal to abide by its terms more embarrassing, but likewise makes the consensus more obvious. When such a complete articulation of human rights is produced it can be assumed to represent an international consensus.

Others indications of international consensus include United Nation resolutions such as Safeguard 3 and Resolution 1999/4.²⁵⁵ Safeguard 3, of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, was adopted by the U.N. Economic and Social Council in 1984.²⁵⁶ The Safeguard notes, "[p]ersons below 18 years of age at the time of the commission of the crime shall not be sentenced to death"²⁵⁷ Similarly, the U.N. Sub-Commission on the Promotion and Protection of Human Rights adopted Resolution 1999/4 in August 1999, condemning "unequivocally the imposition and execution of the death penalty on those aged under 18 at the time of the commission of the offence."²⁵⁸ Resolution 1999/4 draws attention specifically to the United States' isolated position on the juvenile death penalty, noting that in 1998 the United States was the only country known to have executed a juvenile offender.²⁵⁹

not be pronounced against a protected person who is under eighteen years of age at the time of the offence").

²⁵² See Dieter, *supra* note 2 (noting near universal endorsement of ICCPR). Although Norway and Ireland originally reserved against Article 6 of the ICCPR, Norway has since withdrawn its reservation and Ireland has abolished the death penalty entirely. See Schabas, *supra* note 92, at 290-91; *Juveniles and the Death Penalty*, *supra* note 42, at 2 (noting that as of November 1998, 191 states had become parties to CRC). Indeed, the U.S. and Somalia are the only parties not to have ratified the CRC. See Dieter, *supra* note 2.

²⁵³ See Dieter, *supra* note 2.

²⁵⁴ See *id.*

²⁵⁵ See *Juveniles and the Death Penalty*, *supra* note 42; *Action at the United Nations*, *supra* note 246.

²⁵⁶ See *Juveniles and the Death Penalty*, *supra* note 42.

²⁵⁷ See *id.* Although this resolution is not legally binding, its adoption by the General Assembly (resolution 39/118) without a vote, was a sign of strong consensus among nations that its provisions should be observed. See *id.*

²⁵⁸ See *Action at the United Nations*, *supra* note 246.

²⁵⁹ See *id.*

United Nations' resolutions are recognized both by the *Third Restatement* and by U.S. case law as contributing to the formation of customary norms.²⁶⁰ The volume and weight of these many indicators proclaims the truth about the practice of the juvenile death penalty: from all angles, all across the world, the execution of juvenile offenders is being prohibited, leaving the United States as the most flagrant transgressor of this prohibition.

Although consensus may be adequately perceived through observations of general practice within the international community, it is slightly more difficult to establish the second element necessary for the creation of customary law: *opinio juris*.²⁶¹ This is because it can be difficult to distinguish between habitual practices that are regarded as binding "legal obligations" and those that result simply from courtesy or diplomatic protocol.²⁶² Typically, in the human rights field, practices that are made legally binding are deemed such because of a shared sense of moral reprehensiveness of the practice.²⁶³ Most likely, therefore, the prohibition against the juvenile death penalty is rooted in a deep sense of moral condemnation for the practice, based on many of the previously discussed notions—the backgrounds of juvenile offenders, their relative culpability and the justifications for capital punishment.²⁶⁴ It may be argued that *opinio juris* is thus implicated by the shared sense of moral condemnation that has compelled most countries to create laws and treaties prohibiting the juvenile death penalty.²⁶⁵

The establishment of *opinio juris* does not require explicit evidence.²⁶⁶ Instead, a sense of legal obligation may be inferred by acts or omissions.²⁶⁷ In this instance, a sense of legal obligation may be inferred from the fact that the majority of countries have ceased to perform juvenile executions, coupled by the fact that multiple provisions of human rights treaties unequivocally forbid the practice.²⁶⁸ These

²⁶⁰ See *Filartiga*, 630 F.2d at 128; RESTATEMENT, *supra* note 113, § 102, rep. n.1 (noting that U.N. resolutions contribute to the process of forming customary international law and demonstrate consensus).

²⁶¹ See Nanda, *supra* note 76, at 1333 (noting Joan Hartman's observation that *opinio juris* poses the most troubling problem in constructing an intellectually honest and convincing theory for customary human rights norms).

²⁶² See Vega, *supra* note 11, at 757.

²⁶³ See *id.*

²⁶⁴ See generally Nanda, *supra* note 76, at 1333–34.

²⁶⁵ See *id.* at 1333.

²⁶⁶ See RESTATEMENT, *supra* note 114, § 102.

²⁶⁷ See *id.*

²⁶⁸ See *id.*

treaties can be assumed to reflect the intentions of the drafters—the countries of the world—that the treaty provisions universally be applied as binding international law.²⁶⁹ In choosing to include the juvenile death penalty provision, therefore, the drafters recognized the existence of a legal obligation to refrain from executing juveniles.²⁷⁰ Significantly, evidence within the preparatory work of the ICCPR, conclusively indicates that the drafters considered Article 6 to be merely a codification of existing customary law.²⁷¹

Accepting the establishment of the first two elements of customary international law (state practice and *opinion juris*) the only remaining question concerns the assertion that a country who has persistently objected to a norm is not bound by its terms.²⁷² Despite the Solicitor General's suggestion, the United States cannot hide behind the claim of "persistent objector."²⁷³ Although the United States' refusal to ratify the ACHR and CRC and its reservations to the ICCPR could suggest the United States has acted as an objector, such an argument ignores the underlying requirements of persistent objection in international law.²⁷⁴ In order to qualify as a persistent objector, a nation must protest a norm *during the process of its creation*, thus making the United States' 1992 reservation to the ICCPR meaningless under persistent objector analysis.²⁷⁵ At the time of the negotiation, drafting and opening for signature of the ICCPR and the ACHR, not only did the United States fail to protest, but U.S. policy at the time actually indicated support for prohibiting the juvenile death penalty.²⁷⁶ During this critical time period, the United States had *discontinued* its use of the death penalty on juvenile offenders.²⁷⁷ The United States only resurrected the juvenile death penalty *after* it had signed the ICCPR, although before it had ratified the treaty.²⁷⁸ Once a country signs a treaty, however, it implicitly agrees that it will follow the terms of the treaty and not pass laws that contradict treaty provisions—despite the

²⁶⁹ See *id.* at 1333–34; Vega, *supra* note 11, at 757.

²⁷⁰ See generally Nanda, *supra* note 76, at 1333–34; Vega, *supra* note 11, at 757.

²⁷¹ See Cert. Petition, *supra* note 157, at 14. The preparatory works to the ICCPR reflect the drafters' discussions during the treaty formation process and therefore serve as supplementary means of interpretation, similar to legislative histories. See *id.*

²⁷² See RESTATEMENT, *supra* note 113, § 102.

²⁷³ See Solicitor General's Brief, *supra* note 23, at 4.

²⁷⁴ See RESTATEMENT, *supra* note 113, § 102 cmt.

²⁷⁵ See Vega, *supra* note 11, at 758–59.

²⁷⁶ See *id.*

²⁷⁷ See *id.*; Nanda, *supra* note 76, at 1332. From 1964 to 1983, the U.S. did not execute a single juvenile. See Nanda, *supra* note 76, at 1319.

²⁷⁸ See Vega, *supra* note 11, at 759.

fact that the treaty technically is not the law of the land until ratified.²⁷⁹ Given the apparent acquiescence evidenced by national practice, and lacking any contrary evidence of documented protest, international law prohibits the United States from labeling itself a persistent objector.²⁸⁰

Reinforcing this conclusion, the United States actually supported the U.N. General Assembly resolution recognizing Article 6 as expressing a "minimum standard" for all member states.²⁸¹ Similarly, during the drafting of the ACHR, not only did the United States fail to object to the prohibition of the death penalty for juvenile offenders, but rather the United States argued that setting a specific age limit went against the trend of abolishing the death penalty altogether.²⁸² These statements indicate that, far from protesting the norm, the United States adhered to the norm's standards.

It is significant that the Solicitor General's brief barely addresses the substance of these customary international law arguments, instead relying on the distinction between the current debate and the use of customary international law in the *Paquete* case.²⁸³ The Brief accurately points out that in this context the Court would need to find, not only that customary international law controls, but that it overrides specific state statutes enacted to legalize the death penalty.²⁸⁴ This fact, however, in no way indicates that such a finding is impossible.²⁸⁵ State law must yield when it is inconsistent with international law. Moreover, the Solicitor General's assertions regarding deficiencies in the lower court's record and redundant separation of powers arguments appear to be attempts to avoid addressing the substance of the customary international law argument.²⁸⁶ The repeated suggestion that "courts should defer to the position of the Executive Branch as to whether a rule of customary international law is presently binding on the United States. . . ." again ignores the fact that the

²⁷⁹ See *id.*; Vienna Convention, *supra* note 111, art. 18 (noting that a state is obliged to refrain from acts which would defeat the object and purpose of the treaty when it has signed the treaty and has not clearly made known any intention not to become a party to the treaty).

²⁸⁰ See Vienna Convention, *supra* note 111, art. 18; Vega, *supra* note 11, at 759.

²⁸¹ See J. JOYCE, CAPITAL PUNISHMENT: A WORLD VIEW 196-217 (1961).

²⁸² See Vega, *supra* note 11, at 758.

²⁸³ See Solicitor General's Brief, *supra* note 23, at 5.

²⁸⁴ See *id.*

²⁸⁵ See *id.*

²⁸⁶ See *id.* at 5-6.

issue is a legal question, clearly within the province of the courts.²⁸⁷ Indeed, deferring to the Executive Branch as the Solicitor General recommends is more likely to violate the separation of powers given that the Executive Branch is unlikely to adequately perceive its own violations of international law.²⁸⁸ Common law has shown that the judiciary is indeed the proper branch to decide when a norm has evolved into customary international law, just as it did in *Paquete* and *Filartiga*.²⁸⁹

Moreover, while the Solicitor General suggests that the Court delay review until a more complete record has been developed, he neglects to perceive the circularity of this recommendation.²⁹⁰ Given the documented pattern of state courts' lack of awareness of U.S. international obligations, such a record is unlikely to ever develop and state courts will continue to look for federal guidance before addressing this issue.²⁹¹ In addition, relying on state courts to decide novel issues of international law, creates a major risk that international law will not be applied uniformly.²⁹² As recognized by the Human Rights Committee, the absence of formal mechanisms for the implementation of treaty rights in the United States may lead to an unsatisfactory application of the human rights treaties throughout the country.²⁹³ This most certainly undermines the recognized need for uniformity and federal supremacy in the interpretation of international law.²⁹⁴ Phillip Jessup, former judge and noted international law scholar, cautioned that, given this need for uniformity, rules of international law should not be left to divergent and perhaps parochial state interpretations.²⁹⁵ Until the U.S. Supreme Court addresses the pressing issue of the juvenile death penalty within the context of international law, it remains likely that such an absence of uniformity will continue to exist. It is also problematic that lower courts, like the Supreme Court of Nevada, will continue to avoid addressing the complicated international law

²⁸⁷ *Id.*; see *Marbury*, 5 U.S. at 177.

²⁸⁸ See *Marbury*, 5 U.S. at 177.

²⁸⁹ See 175 U.S. at 694; 630 F.2d at 880.

²⁹⁰ See Solicitor General's Brief, *supra* note 23, at 5-6.

²⁹¹ See Cert. Petition, *supra* note 157, at 9. It is similarly questionable whether elected state judges have sufficient political independence to decide *against* their constituents (who generally support the death penalty) despite the demands of international law.

²⁹² See *id.*

²⁹³ See *id.* (referencing United Nations, Human Rights Committee, Comments on the United States of America, U.N. Doc. CCPR/79/Add.50 (1995)).

²⁹⁴ See *Banco Nacional de Cuba v. Sabbatine*, 376 U.S. 398 (1964).

²⁹⁵ See Phillip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 740-43 (1939).

arguments in juvenile death penalty cases until they receive guidance on the issue.²⁹⁶ As Justice Rose of the Supreme Court of Nevada noted in her dissent to *Domingues*: "A federal court that deals with federal law on a daily basis might be better equipped to address these issues. . . ."²⁹⁷ In order to promote consistency and uniformity and to provide the guidance sought by lower courts, particularly in light of the extreme gravity of the issues involved, the U.S. Supreme Court should have granted certiorari to Michael Domingues.

V. THE FUTURE OF THE JUVENILE DEATH PENALTY DEBATE

While the *Domingues* Petition highlights a number of persuasive, ripe legal issues that should be addressed by the U.S. Supreme Court, the Petition also has flaws.²⁹⁸ To the extent that the Petition attempted to set forth all potentially relevant arguments on Domingues' behalf, it was successful. The next petitioner, however, may be better served by eliminating certain weaker arguments in order to emphasize the most compelling grounds for review. Most significantly, Domingues' legislative argument—which criticizes the Senate's ratification process—is unpersuasive in comparison to his allegations focusing on the object and purpose of the ICCPR.²⁹⁹

By asserting an unconvincing argument regarding the ratification process, the Petitioner opened the door to forceful rebuttal from the Solicitor General, which likely captured the Court's attention in considering the opposing perspectives.³⁰⁰ The Solicitor General summarily attacked the Petition's assertion that the ICCPR ratification was invalid.³⁰¹ His observation that the reservation to Article 6(5) did not originate in the Senate, but rather was submitted to the Senate by the President himself and adopted by the Senate verbatim, persuasively confronts the Petitioner's contention that the Senate unconstitutionally omitted or modified any part of the treaty.³⁰² Moreover, as the Brief notes, the Senate has the constitutional authority to reserve its consent to part of a treaty negotiated by the President: the Constitu-

²⁹⁶ The Supreme Court of Nevada declined to even address the customary international law or *jus cogens* argument presented by Domingues. See *Domingues*, 961 P.2d at 1279-81.

²⁹⁷ *Id.* at 1281 (Rose, J., dissenting).

²⁹⁸ See Cert. Petition, *supra* note 157.

²⁹⁹ See *id.* at 5-8.

³⁰⁰ See Solicitor General's Brief, *supra* note 23, at 3-4.

³⁰¹ See *id.* at 3.

³⁰² See *id.*; Cert. Petition, *supra* note 157, at 5-6.

tion provides that the President "shall have Power by and with the Advice and consent of the Senate, to make Treaties. . . ." ³⁰³ Thus, the President enters into a treaty only after the Senate has provided its feedback—if the President objects to the reservations imposed by the Senate, then he need not accept the Senate's "advice." ³⁰⁴ The Brief convincingly distinguishes the ICCPR ratification process from the line-item veto found unconstitutional in *Clinton*, noting in particular that the Senate's practice of attaching reservations to its consent to treaties has extensive historical pedigree, dating back to the Jay Treaty of 1794. ³⁰⁵

The Petitioner's contention that the juvenile death penalty violates *jus cogens* similarly rests on ambiguous legal ground because the juvenile death penalty is arguably distinguishable from other norms that have attained the status of *jus cogens*. ³⁰⁶ In certain respects, this argument may be quite forceful—if the practice does indeed violate a *jus cogens* norm, there is no possible justification for U.S. actions—however, it is possible to articulate and organize this argument better than it was framed in the Domingues Petition. ³⁰⁷ *Jus cogens* has been described as, "those rules which derive from principles that the legal conscience of mankind deems absolutely essential to coexistence in the international community." ³⁰⁸ This statement is obviously powerful and extreme, as are the acts identified by the *Restatement* as violations of *jus cogens*: genocide, slavery, murder, torture, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized human rights. ³⁰⁹ These practices arguably are distinguishable from the practice of the juvenile death penalty. There is a strong argument that juvenile offenders eligible for the death penalty cannot necessarily be labeled "innocents" in the same sense as victims of genocide or torture. It may be extremely difficult to convince a factfinder—privity to the sordid details of a brutal crime perpetrated by a juvenile defendant—that the juve-

³⁰³ U.S. CONST. art. II, § 2 (emphasis added); see Solicitor General's Brief, *supra* note 23, at 3.

³⁰⁴ See Solicitor General's Brief, *supra* note 23, at 3.

³⁰⁵ See *id.* at 4 (referencing the Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, 8 Stat. 116).

³⁰⁶ See Cert. Petition, *supra* note 157, at 18–20; RESTATEMENT, *supra* note 113, § 702.

³⁰⁷ See Cert. Petition, *supra* note 157, at 18–20.

³⁰⁸ See Karen Parker, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 415 (1989) (quoting statement made by Mexican delegate to the U.N. Conference on the Law of Treaties) (emphasis added).

³⁰⁹ See RESTATEMENT, *supra* note 113, § 702.

nile death penalty truly is equivalent to the norms specified in the *Third Restatement* or implicated by U.S. common law.³¹⁰

On the other hand, while imposing punishment for a severe crime is distinct from acts of genocide, there are nonetheless forceful arguments supporting its inclusion as a *jus cogens* norm. For one, there is significant data to sustain the conclusion that the administration of the death penalty reflects a pervasive pattern of "systematic racial discrimination."³¹¹ This century, seventy-five percent of all juvenile offenders executed were African American.³¹² The U.N.'s Special Rapporteur made similar observations following his 1997 visit to the United States, decrying the evident racial bias in the use of the death penalty.³¹³ Similarly, the U.S. Justice Department's review of the federal death penalty, released in September 2000, indicated numerous racial disparities.³¹⁴ In particular, the report noted that eighty percent of the cases submitted by federal prosecutors for death penalty review involved racial minority defendants.³¹⁵ These facts lend support to an argument that the juvenile death penalty represents not a *new* category of *jus cogens*, but instead a violation of the existing *jus cogens* norms prohibiting systematic racial discrimination.³¹⁶ A similar argument exists with respect to the final *jus cogens* norm noted by the Restatement: gross violations of internationally recognized human rights.³¹⁷ As previously noted, many countries prohibit the juvenile death penalty on human rights grounds and the continuance of its use in the United States currently may be, or certainly may become, a gross violation of these internationally recognized human rights standards.

A number of scholars and several human rights organizations agree with the notion that the juvenile death penalty violates *jus co-*

³¹⁰ See *id.*; *Siderman*, 965 F.2d at 717.

³¹¹ See RESTATEMENT, *supra* note 113, § 702; NATIONAL CAMPAIGN TO ABOLISH THE DEATH PENALTY, *The U.S. leads the world in killing kids* (visited Apr. 15, 2000) <<http://www.ncadp.org>>.

³¹² See NATIONAL CAMPAIGN TO ABOLISH THE DEATH PENALTY, *The U.S. leads the world in killing kids* (visited Apr. 15, 2000) <<http://www.ncadp.org>>; see also, Streib, *supra* note 1.

³¹³ See Dieter, *supra* note 2. The International Commission of Jurists also noted, "the administration of capital punishment in the United States continues to be discriminatory and unjust. . . ." See *id.*

³¹⁴ See DPIC, *supra* note 8 (visited Oct. 7, 2000) at <<http://www.deathpenaltyinfo.org/whatsnew.html>>.

³¹⁵ See *id.*

³¹⁶ See RESTATEMENT, *supra* note 113, § 702.

³¹⁷ See *id.*

gens.³¹⁸ Although the United States is not a party to the ACHR (because it has not yet ratified the treaty), as a member of Organization of American States (OAS), the United States is subject to the recommendations of the Inter-American Commission on Human Rights.³¹⁹ In 1987, the Commission found the United States in violation of *jus cogens* for the execution of two juvenile offenders, James Roach and Jay Pinkerton, both 17 at the time of their offenses.³²⁰ Although opinions of the Inter-American Commission are not binding, the recommendation nonetheless represents an interpretation by an authorized body of independent experts of an international agreement to which the United States is a party.³²¹ Therefore, while there are distinct uncertainties surrounding the advancement of a *jus cogens* argument, it is nonetheless worthy of assertion as an additional basis on which to allege the illegality of the juvenile death penalty. A future petitioner, however, should specifically tailor the argument to emphasize either the inherent racial discrimination or gross violations of human rights norms implicated by the juvenile death penalty.

Finally, future petitioners will be the lucky beneficiaries of passing time, which in the case of the juvenile death penalty, may be an influential factor. As time passes and the custom against the juvenile death penalty continues to gain momentum and recognition, not only will this strengthen the Petitioner's customary international law argument, but it will open the door for renewed constitutional challenges. Inherent in any discussion of customary norms is the fact that these "customs" reflect an evolving standard of decency, thus returning the death penalty discussion to the constitutional issues raised in *Thompson and Stanford*.³²² Although the constitutionality of the juvenile death penalty already has been addressed by the Court, the very standard chosen by which to gauge cruel and unusual punishment—evolving standards of decency—demands that the issue be reconsidered to reflect changes as the world "evolves."³²³ By virtue of the terminology, the Court clearly recognized that the standard by which a practice is evaluated should grow in order to reflect changes in soci-

³¹⁸ See Nanda, *supra* note 76, at 1329.

³¹⁹ See *id.*

³²⁰ See *id.*; The Inter-American Commission found the existence of *jus cogens* based on the fact that the norm against the juvenile death penalty is accepted by the member states of the OAS. See Fox, *supra* note 179, at 602.

³²¹ See Fox, *supra* note 179, at 603.

³²² See 492 U.S. at 361–405; 487 U.S. at 815–39.

³²³ See *supra* notes 71–87 and accompanying discussion of the *Stanford* and *Thompson* challenges.

ety's perceptions and attitudes.³²⁴ Indeed, the *Stanford* Court only reached the conclusion it did after considering whether a "modern societal consensus" forbidding the juvenile death penalty existed.³²⁵ There is a strong argument that what might not have existed as a modern consensus in 1989, has evolved into such today. As noted in *Weems*, "[t]ime works changes, brings into existence new conditions and purpose. . . ."³²⁶ Although there remains the hurdle presented by the *Stanford* decision—that "American standards of decency are dispositive"—changing compositions within the Court and an increasingly international world, increase the possibility that evolving standards of decency may be interpreted in a broader sense.³²⁷ As U.S. Supreme Court Justice Breyer recently noted in consideration of a death penalty case, "[the Supreme Court] has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own. . . ."³²⁸

Similarly, as we move ahead in time, it is possible that state courts will become increasingly aware of their obligations under international law and a record evidencing the conflict of the juvenile death penalty with international law will evolve. Although as early as the *Paquete* case, Justice Gray noted: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . ." this clearly is not always the case today.³²⁹ Nonetheless, the failure of the state courts to uphold international law appears to be receiving greater attention.³³⁰ In 1998, on the fiftieth anniversary of the U.N. Universal Declaration of Human Rights, President Clinton felt compelled to note: "It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, *fully to respect and implement its obligations under the international human rights treaties to which it is a party*, including the

³²⁴ See *Stanford*, 492 U.S. at 380.

³²⁵ See *id.*

³²⁶ See 217 U.S. at 373-74.

³²⁷ See 492 U.S. at 370.

³²⁸ *Knighit v. Florida*, No. 98-9741, 1999 U.S. Lexis 7479, *16 (1999) (Breyer, J. dissenting).

³²⁹ 175 U.S. at 700; 961 P.2d 1281, (Rose, J., dissenting).

³³⁰ See Cert. Petition, *supra* note 157, at 9 (noting the failure of Supreme Court of Nevada to enforce treaty was consistent with pattern of lack of awareness of United States international obligations).

ICCPR. . . ."³³¹ International legal scholars and commentators have observed the necessity and importance of enforcing international law obligations in all courts of this country.³³² Recently, Justice O'Connor emphasized this fact noting, "domestic courts should faithfully recognize the obligations imposed by international law."³³³

In addition, an increasing need to ensure that international obligations are upheld may arise from the costs sure to accrue from persistent U.S. violations of this international standard. Costs to the United States will include loss of leadership and prestige, endangerment of U.S. citizens abroad, disrespect for international law and a lost opportunity to be part of a fundamental change in the status of human rights at the start of the twenty-first century.³³⁴ Similarly, as emphasized by German Justice Minister Herta and Paul Daehring, the United States may be forced to recognize that "respecting international laws cannot be a one-way street."³³⁵ The United States depends on international cooperation and, therefore, the costs of continued human rights violations may soon become too great to bear. As the stakes become higher, there will be increasing pressure for state courts to observe these international obligations. This pressure may produce the more thorough record that the Solicitor General favors prior to granting certiorari.³³⁶

CONCLUSION

It has been said that, "the quality and future of society and the degree to which human dignity values are fulfilled may be measured by the protection . . . accorded young members of the population."³³⁷ Despite paying lip service to the idea that children are entitled to special protection and care, the U.S. government has significantly failed

³³¹ See DPIC, *supra* note 8, (visited Apr. 13, 2000) at <<http://www.deathpenaltyinfo.org/dpic/dicind.html>>.

³³² See Cert. Petition, *supra* note 157, at 9.

³³³ See *id.* at 9-10 (quoting Sandra Day O'Connor, *Federalism of Free Nations*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18 (1996) and noting further, "[t]he Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.").

³³⁴ See Dieter, *supra* note 2.

³³⁵ See *id.* at 21. This statement was made in the process of announcing a suit against the United States in the International Court of Justice for the execution of two German nationals in September 1999. See *id.*

³³⁶ See Solicitor General's Brief, *supra* note 23, at 5-6.

³³⁷ Lung-chu Chen, *The United Nations Convention on the Rights of the Child: A Policy-Oriented Overview*, 7 J. HUM. RTS. 16, 19 (1989).

to ensure that the legal rights of children are respected. The United States has declined to ratify two key human rights treaties and has reserved against an essential provision in the ICCPR, one of the most important human rights treaties currently in existence. The United States similarly refuses to acknowledge indications that customary international law and *jus cogens* prohibit the juvenile death penalty.

Nowhere is the United States in such clear and direct conflict with international law as with the execution of juvenile offenders. The international community has adopted minimum standards to govern the conduct of states based on the precept that human rights are an international responsibility, not simply an internal matter. Legally, the United States cannot continue to resist these international standards and the judiciary is the proper branch to demand U.S. adherence. Despite contrary claims, the United States is bound by the ICCPR in its entirety, and is similarly bound by customary international law, to prohibit the practice of executing juvenile offenders. Currently, the United States remains stubbornly committed to its position on this issue. With hope, however, the next Petitioner can benefit from information in the Solicitor General's brief and use this knowledge to persuade the Court that the time has come to demand U.S. compliance.

ERICA TEMPLETON