THE UNITED STATES' CHOICE TO VIOLATE INTERNATIONAL LAW BY ALLOWING THE JUVENILE DEATH PENALTY

I. INTRODUCTION

A. *Overview of Analysis*

The United States Supreme Court did not grant certiorari to Michael Domingues, an individual sentenced to death for a

crime he committed as a juvenile.[1] The Nevada Supreme Court upheld his sentence of capital punishment.[2] However, by allowing the execution of Michael Domingues and other juvenile offenders, the United States chose to violate international treaties, customary international law, and *jus cogens*.[3] In *Domingues v. State*, Domingues argued he should be resentenced because capital punishment for juvenile criminal offenders violates the International Covenant on Civil and Political Rights ("ICCPR").[4] The decision of the Nevada Supreme Court to ignore Domingues' claim for the enforcement of international treaty law and the U.S. Supreme Court's decision to deny certiorari shows the arrogance and self-important attitude with which the United States makes international decisions. Through its denial of certiorari, the United States knowingly chose to overlook international treaty law, customary international law, and *jus cogens* when a violation is being made within its states.

B. History

In 1972, the Supreme Court found the death penalty unconstitutional in *Furman v. Georgia*,[5] a decision based primarily on the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the U. S. Constitution.[6] Four years later, after the state of Georgia revised

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1. *See* Domingues v. Nevada, 528 U.S. 963 (1999). Domingues committed the crime for which he was sentenced at the age of sixteen. *See* Domingues v. State, 961 P.2d 1279, 1279 (Nev. 1998).

2. *See* Domingues v. State, 961 P.2d at 1280.

3. *See Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, art. 37, at 171, U.N. Doc. A/44/49 (1989); American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI/1.1, doc. 65 rev. 1 corr. 2, ch. 2, art. 4, para. 5 (Jan. 7, 1970); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, para. 2, 999 U.N.T.S. 171, 147-75 [hereinafter ICCPR]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 75 U.N.T.S. 287, 330 [hereinafter Geneva Convention]. *See also* discussion *infra* Part III.

4. Domingues v. State, 961 P.2d at 1279-80; ICCPR, *supra* note 3, at 175.

5. 408 U.S. 238, 239-40 (1972).

6. *See* Elizabeth Gray, Comment, *Death Penalty and Child Rape: An Eighth Amendment Analysis*, 42 ST. LOUIS U. L.J. 1443, 1449-50 (1998) (discussing the Eighth Amendment's protection against cruel and unusual punishment as interpreted by the

its capital sentencing statutes, the Supreme Court held the death penalty was not unconstitutional per se in *Gregg v. Georgia*.[7] Twenty-five years later, the death penalty is still on the books, and states continue to execute individuals under their capital sentencing statutes.[8] Looking specifically at the execution of juveniles or individuals who committed their crimes while under the age of eighteen, the United States is only one of seven countries to execute juveniles in the past decade.[9]

As to its international responsibilities in this area, in 1992 the United States became a party to the ICCPR, an international human rights treaty.[10] Article 6 of the ICCPR deals with sentencing juveniles to death, stating the death penalty "shall not be imposed for crimes committed by persons below eighteen years of age . . . ."[11] However, when the U. S. Senate ratified this treaty, it reserved the right "subject to its Constitutional constraints, to impose capital punishment on any person . . . including such punishment for crimes committed by persons below eighteen years of age."[12]

This reservation by the Senate is pertinent because it may

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concurring opinions in *Furman*).

7. *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976); Gray, *supra* note 6, at 1451.

8. *See* Justice Center Web Site, University of Alaska Anchorage, *Focus on the Death Penalty: History and Recent Developments*, *available at* http://www.uaa.alaska.edu/just/death/ history.html (last updated July 19, 2001). Thirty-eight states have the death penalty. *Id*. The twelve states without the death penalty are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *Id.*

9. Edward F. Sherman, Jr., Note, *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, 73 (1994). The six other countries are Barbados (which has since raised the minimum age to eighteen), Iran, Iraq, Nigeria, Bangladesh, and Pakistan. *Id*. at 73 n.19.

10. *Status of Ratifications of the Principal International Human Rights Treaties*, Office of the U.N. High Commissioner for Human Rights, *available at* http://www.unhchr.ch/html/menu3/ b/a_ccpr.htm (as of Sept. 20, 2001). S*ee* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely,* 65 U. CIN. L. REV. 423, 423 (1997).

11. ICCPR, *supra* note 3, at 175.

12. 138 CONG. REC. S4781, S4783 (daily ed. Apr. 1992), *cited in* Connie de la Vega & Jennifer Fiore, *The Supreme Court of the United States Has Been Called upon to Determine the Legality of the Juvenile Death Penalty in* Michael Domingues v. Nevada, 21 WHITTIER L. REV. 215, 217 (1999).

disallow the application of Article 6 of the ICCPR to U.S. state governments.[13] The Supremacy Clause of the Constitution of the United States provides that "all 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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[14] Under the Supremacy Clause, U.S. state governments should not be able to enforce the death penalty against individuals who committed their crimes while under the age of eighteen because such enforcement would violate Article 6 of the ICCPR, a treaty to which the United States is a party.[15] However, the Senate reserved the right under the treaty for the states to continue their capital sentencing as they had done previously, making the validity of that reservation the focus of much attention.[16]

II. STATEMENT OF FACTS

A. Fact Summary

On October 22, 1993, Michael Domingues murdered a woman and her young son in their Nevada home during a burglary.[17] At the time of the murder, Domingues was sixteen years old.[18] A jury convicted Domingues of one count of burglary, one count of robbery with the use of a deadly weapon, one count

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13. Domingues v. State, 961 P.2d 1279, 1280-81 (Nev. 1998) (discussing the Senate's reservation of the right to impose the death penalty).

14. U.S. CONST., art. VI, cl. 2.

15. *See* de la Vega & Fiore, *supra* note 12, at 217-19 (arguing the reservation is not binding and the United States and its states are in violation of the ICCPR).

16. *See id.*; *see also* Domingues v. State, 961 P.2d at 1280-81 (Springer, C.J. & Rose, J., dissenting) (questioning the validity of the Senate's reservation); de la Vega, *supra* note 10, at 432, 461 (discussing the view of the Human Rights Committee, the body created to enforce compliance with the ICCPR, that the Senate's reservation is incompatible with the object and purpose of the ICCPR); William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 814, 823 (1998) (noting the objection of several European states to the Senate's reservation); Sherman, *supra* note 9, at 71, 75-76 (contending that it is unclear whether the Senate's reservation is incompatible with the object and purpose of the ICCPR).

17. Domingues v. State, 961 P.2d at 1279.

18. *Id.*

of first degree murder, and one count of first degree murder with the use of a deadly weapon in August 1994.[19] Domingues, then seventeen years old, was sentenced to death for each of the two murder convictions.[20] His convictions and sentence were upheld by the Nevada Supreme Court.[21] Domingues appealed to the United States Supreme Court, who denied certiorari.[22]

B. Majority Opinion

The Nevada Supreme Court summarized the issue in *Domingues* as whether a Nevada statute[23] is superceded by the ICCPR.[24] By negative inference, the Nevada statute allows an individual who commits a crime at the age of sixteen years or older to be sentenced to death.[25] Domingues appealed his death sentence, arguing his illegal sentence should be corrected because it violated the ICCPR and customary international law.[26]

The court stated the ICCPR contained a reservation, made by the Senate during its ratification, which reserved the United States' right to impose the death penalty on individuals under the age of eighteen under existing or future laws.[27] Therefore, the ICCPR did not supercede existing Nevada death sentencing law.[28] The court held this reservation negated Domingues' claim that he was illegally sentenced.[29] The court noted other jurisdictions' laws allowed the death penalty to be imposed upon individuals under the age of eighteen and those laws had

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19. *Id.*

20. *Id.*

21. *Id.* (citing the court's prior decision in Domingues v. State, 917 P.2d 1364, 1378 (Nev. 1996)).

22. Domingues v. Nevada, 528 U.S. 963 (1999).

23. NEV. REV. STAT. 176.025 (1999).

24. *See* Domingues v. State, 961 P.2d at 1279.

25. *See* NEV. REV. STAT. 176.025 (1999) ("A death sentence shall not be imposed or inflicted upon any person convicted of a crime now punishable by death who at the time of the commission of such crime was under the age of 16 years.").

26. *See* Domingues v. State, 961 P.2d at 1279.

27. *See id.* at 1280.

28. *See id.*

29. *Id.*

withstood the U.S. Supreme Court's constitutional scrutiny.[30] The court further held Domingues' death sentence was legally imposed under the Nevada statute and could be carried out.[31]

C. Prior Case History Cited in the Majority Opinion

The court briefly mentioned two cases[32] used by Domingues to argue the district court could correct a facially illegal sentence.[33] The court rejected this argument and instead focused on a U.S. Supreme Court case that upheld death penalty laws imposed upon minors in other jurisdictions.[34]

In *Stanford v. Kentucky*,[35] the U.S. Supreme Court reviewed a Kentucky case and a Missouri case in which the defendants were sentenced to death for murders committed while the defendants were under the age of eighteen.[36] The defendants brought arguments based upon the Eighth Amendment's protection against cruel and unusual punishment.[37] The Court held sentencing juveniles to death did not constitute cruel and unusual punishment as defined by evolving standards of decency.[38] The appellants in *Stanford* did not raise the issue of whether sentencing juveniles to death violated international treaty law, and therefore, the Court did not address that issue.[39] The court in *Domingues* cites to *Stanford* in determining the Nevada statute and other such laws withstand "constitutional scrutiny."[40]

D. Dissenting Opinions

Two judges, Chief Justice Springer and Justice Rose

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30. *See id.*

31. *See id.*

32. Edwards v. State, 918 P.2d 321 (Nev. 1996); Anderson v. State, 528 P.2d 1023 (Nev. 1974).

33. *See* Domingues v. State, 961 P.2d at 1280.

34. *See id.*

35. 492 U.S. 361 (1989).

36. *See id.* at 365-68.

37. *Id.* at 368.

38. *See id.* at 378-80.

39. *See id*. at 368-69.

40. *See* Domingues v. State, 961 P.2d 1279, 1280 (Nev. 1998).

dissented.[41] Chief Justice Springer briefly stated that he based his disapproval of the majority opinion on the disregard of the usual treatment given to international treaties.[42] Since the ICCPR is a treaty to which the United States is a party, it should be treated as all others and should become the "'supreme law of the land.'"[43] Chief Justice Springer refused the majority's interpretation of the treaty and the Senate reservation because he did not believe the United States should impose the death penalty on minors, as do such countries as Iran, Iraq, Bangladesh, Nigeria, and Pakistan.[44]

Justice Rose dissented based upon the notion that an issue this convoluted, important, and far-reaching should be given a full evidentiary hearing, which was not permitted by the district court.[45] Justice Rose entertained the idea that the Senate's reservation of the ICCPR might not be valid.[46] Focusing upon this possibility, Justice Rose believed a full evidentiary hearing in federal court with expert testimony would be a better way to resolve this issue, but as the appeal was in state court, remand for a full hearing on the validity of the Senate's reservation was the best option.[47]

III. ANALYSIS

A. Incompatibility with the Object and Purpose of the ICCPR

The U.S. Department of State recognizes the Vienna Convention on the Law of Treaties[48] ("Vienna Convention") as the guiding authority on current treaty law, even though the United States is not a party to the treaty.[49] Article 19 of the

41. *Id.* (Springer, C.J. & Rose, J., dissenting).

42. *See id.* (Springer, C.J., dissenting).

43. *Id.* (quoting the majority opinion).

44. *Id*. at 1280-81.

45. *See id.* at 1281 (Rose, J., dissenting).

46. *See id.*

47. *See id.*

48. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

49. *See* SENATE COMMITTEE ON FOREIGN RELATIONS, VIENNA CONVENTION ON THE LAW OF TREATIES, S. EXEC. DOC. NO. 92-1, at 1 (1971); s*ee* de la Vega & Fiore, *supra*

Vienna Convention states a party "may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty."[50] Human rights treaties are unlike traditional multilateral treaties in that their object and purpose are not a reciprocal exchange of rights between the contracting states.[51] Instead, parties who seek to protect human rights within their own jurisdiction as well as in other contracting jurisdictions create human rights treaties.[52] The ICCPR has a similar purpose—to protect the rights of citizens within a nation's own boundaries, including the right to life for juvenile criminal offenders.[53] The United States' reservation to the ICCPR, specifically Article 6, contradicts this purpose by attempting to forego the protection of juvenile criminal offenders under the guise of allowing states to uphold existing laws.[54]

Using this logic, the United Nations Human Rights Committee ("Human Rights Committee") concluded that, under the Vienna Convention, the United States' reservation to Article 6 is invalid because it contradicts the object and purpose of the ICCPR.[55] The object and purpose of the ICCPR is "to protect the right to life through prohibiting the imposition of the death penalty on juvenile offenders," and because the U.S. Senate's reservation contradicts this purpose, the reservation is void.[56] If the reservation is void, U.S. states are bound by Article 6 of the ICCPR as they would be bound, under the Supremacy Clause, by any other international treaty ratified by the U.S. Senate.[57] Therefore, upholding Nevada's death sentencing statute as

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note 12, at 218.

50. Vienna Convention, *supra* note 48, at 336-37.

51. *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, 754 (1998).

52. *See id.* at 754- 55.

53. *See id.* at 755.

54. *See id.* at 755-56, 758.

55. *See Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., para. 14, U.N. Doc. CCPR/C/79/Add. 50 (1995); de la Vega & Fiore, *supra* note 12, at 217-18.

56. *See* de la Vega & Fiore, *supra* note 12, at 218.

57. *See* U.S. CONST. art. VI, cl. 2.

applied to juveniles in *Domingues v. State* violates the ICCPR, regardless of the United States' reservation.[58] Though the exact reason is unknown, on May 3, 2001, the U.N. voted to unseat the United States from the Human Rights Committee.[59] This ousting of the United States from the Human Rights Committee might have been caused by the United States' disregard for international treaties and the United Nations.[60]

B. Self-Executing Treaties

Besides the reservation, the U.S. Senate also chose not to make the treaty self-executing.[61] A self-executing treaty becomes the supreme law of the land without any further aid in the form of legislation to implement the provisions of the treaty.[62] By not declaring the ICCPR self-executing, the Senate took away from individuals the right to base a private cause of action on any of the treaty clauses.[63] Without the Senate's declaration, Article 6 would have been self-executing because a treaty provision is generally self-executing if it involves the rights and duties of individuals and its language is clear.[64] Therefore, Article 6 would be self-executing because it involves the rights of individuals not to be arbitrarily deprived of life, and its language prohibiting the imposition of the death penalty on juveniles is clear.[65] Even if the ICCPR is not self-executing, the Senate intended this

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58. *See* Domingues v. State, 961 P.2d 1279, 1280 (Nev. 1998); de la Vega & Brown, *supra* note 51, at 755-56.

59. Thalif Deen, *Politics: U.S. Ouster From Rights Body Reflects Hostility*, INTER PRESS SERV., May 4, 2001, *available at* 2001 WL 4803751.

60. *See* Grace Sung, *Can America Still Count on Europe?*, KOREA HERALD, June 5, 2001, available at 2001 WL 20829289.

61. *See* de la Vega, *supra* note 10, at 456.

62. *See* Cele Hancock, *The Incompatibility of the Juvenile Death Penalty and the United Nation's Convention on the Rights of the Child: Domestic and International Concerns*, 12 ARIZ. J. INT'L & COMP. L. 699, 714 (1995) (quoting Foster v. Nielson, 27 U.S. 253, 314 (1829)).

63. *See* Marian Nash, *Contemporary Practice of the United State Relating to International Law*, 89 AM. J. INT'L L. 589, 590 (1995).

64. *See* de la Vega & Fiore, *supra* note 12, at 220.

65. *See id.*; ICCPR, *supra* note 3, at 174 (stating unequivocally that "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . . .").

declaration to apply only to private causes of action.[66] Therefore, individuals like Domingues should be able to use the ICCPR as a defensive tool to enforce its provisions and challenge their provisions, even if they could not use it as an affirmative cause of action to sue the state of Nevada.[67] However, the Nevada Supreme Court chose not to accept the ICCPR as a valid defense.[68]

C. Customary International Law

In addition to its violation of the ICCPR, the United States is in violation of customary international law by reserving the right for its states to execute juvenile criminal offenders.[69] Customary international law "is an emerging form of international law and is considered by some to be equivalent to treaty law or federal common law," which would indicate that it is binding on the different nations.[70] Customary international law is defined as law that "results from a general and consistent practice of states [which is] followed by them from a sense of legal obligation."[71] Such a definition sets two criteria which must be fulfilled before customary international law may exist: state practice and *opinio juris*, which means the nation believes the certain way of doing things is actually mandatory and required by international law.[72]

The restriction on imposition of the death penalty on juvenile offenders satisfies the criteria of customary international law.[73] The first criterion requires widespread acceptance of a practice by many nations of the prohibition of the juvenile death penalty.[74] Currently only six countries impose the death penalty on juveniles, and the United States is the only

66. *See* de la Vega & Fiore, *supra* note 12, at 220.

67. *See id.* at 220-21.

68. *See* Domingues v. State, 519 U.S. 1279, 1280 (Nev. 1998).

69. *See* de la Vega & Fiore, *supra* note 12, at 221-23.

70. Hancock, *supra* note 62, at 718.

71. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

72. *See* de la Vega & Brown, *supra* note 51, at 756.

73. *See* de la Vega & Fiore, *supra* note 12, at 221.

74. *See id.*

country to have executed juveniles in 1998 and 1999.[75] In the last three years there have only been twelve executions of juvenile offenders, eight of which were in the United States.[76] Besides these six nations, all other countries have either abolished the juvenile death penalty or enacted legislation to prohibit the execution of juveniles.[77] Therefore, prohibition of the juvenile death penalty has been accepted by most nations, thereby satisfying the first criterion.[78]

The second criterion demands that nations prohibiting the juvenile death penalty do so because they believe such a prohibition is mandatory according to customary international law.[79] No less than four international agreements prohibit the juvenile death penalty:[80] ICCPR, Article 6;[81] Convention on the Rights of the Child, Article 37;[82] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Article 68;[83] and American Convention on Human Rights, Chapter 2, Article 4, Section 5.[84] With most nations having signed one or more of the four treaties prohibiting the execution of juvenile offenders, it would seem the second criterion, which requires nations to believe their prohibitions on the juvenile death penalty are required by customary international law, is satisfied.[85] In

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75. *Id.* at 221-22.

76. Mike Tolson, *Killer Executed Despite Protests, Age Controversy*, HOUS. CHRON., Oct. 23, 2001, at A19.

77. de la Vega & Fiore, *supra* note 12, at 221-22.

78. *See id.*

79. *See id.* at 221.

80. *See id.*

81. ICCPR, *supra* note 3, at 175.

82. Convention on the Rights of the Child, *supra* note 3, at 171 ("[C]apital punishment . . . shall [not] be imposed for offences committed by persons below eighteen years of age.").

83. Geneva Convention, *supra* note 3, at 330 ("[T]he death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.").

84. American Convention on Human Rights, *supra* note 3, at 2 ("Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age . . . .").

85. *See* de la Vega & Fiore, *supra* note 12, at 221-23 (stating "prohibition of the juvenile death penalty is clearly established as a customary international norm" and most nations have ratified the Convention on the Rights of the Child).

addition to the treaties, the Inter-American Commission on Human Rights and the Human Rights Committee have stated there is a customary international norm prohibiting the execution of juvenile offenders, though both groups have been hesitant in setting the minimum age at eighteen.[86] Even though the groups hesitate to declare a minimum age, each of the four treaties has set the minimum age at eighteen.[87] During its consideration of the United States' reservation to the ICCPR, the Human Rights Committee concluded the reservation was invalid, which further evidences a customary international norm prohibiting the juvenile death penalty.[88]

Most nations have both signed and ratified the Convention on the Rights of the Child, though the United States is only a signatory.[89] The Vienna Convention dictates that a government that has signed, but not yet ratified a treaty must still "refrain from acts which would defeat the object and purpose of the treaty . . . until it shall have made its intention clear not to become a party . . . ."[90] The United States has signed the Convention on the Rights of the Child and should refrain from executing juveniles because this defeats the object and purpose of the treaty—to protect the rights of children.[91] However, the Nevada Supreme Court in *Domingues* chose not to adhere to customary international law and instead decided against a full consideration of the ratification of the ICCPR and the Senate's reservation when it upheld Domingues's death sentence.[92]

Some argue that the notion of customary international law is not a good idea.[93] These critics argue to allow a majority of nations to dictate the norms of other nations, making those norms binding on all states, would usurp the power of countries

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86. *See* Schabas, *supra* note 16, at 813.

87. *See id.*; *supra* text accompanying notes 81-84.

88. *See id.* at 814.

89. *See* de la Vega & Fiore, *supra* note 12, at 222, 224-25.

90. Vienna Convention, *supra* note 48, art. 18, at 336.

91. *See* de la Vega & Fiore, *supra* note 12, at 224.

92. *See* Domingues v. State, 961 P.2d 1279, 1280 (Nev. 1998) (Rose, J., dissenting).

93. *See* Hancock, *supra* note 62, at 720-722 (discussing the reluctance of U.S. courts to use customary international law as a basis for deciding domestic controversies).

to legislate domestic issues.[94] Furthermore, new customary international laws might supersede existing treaties or customary laws, which could confuse nations as to their duties and obligations in the international realm.[95]

Critics also argue the United States, as a persistent objector, should not be held to customary international law concerning the death penalty and juvenile offenders.[96] Nations who have consistently objected to the norm are labeled persistent objectors and are not bound by customary international laws.[97] Arguably, the United States is not a persistent objector to the practice of executing juveniles for the following reasons: (1) the United States did not object to the prohibition at the drafting of the American Convention on Human Rights; (2) the United States did not object to the prohibition when signing and ratifying the Fourth Geneva Convention; and (3) the United States signed, though did not ratify, the Convention on the Rights of the Child, which contained the prohibition.[98] As a persistent objector, the United States would not be bound by customary international law prohibiting the juvenile death penalty; however, the United States is probably not a persistent objector because it has not consistently disavowed the prohibition.[99]

D. Customary International Law and U.S. Courts

U.S. courts have been reluctant to use customary international law when adjudicating domestic disputes.[100] The Supreme Court held international law concerns the United States' international obligations, not its domestic rights and duties.[101] The Fifth Circuit has held an individual has no standing to bring a cause of action under the ICCPR,[102] though

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94. *See id.* at 719-20.

95. *See id.* at 720.

96. *See id.* at 719.

97. *See* de la Vega & Fiore, *supra* note 12, at 223.

98. *See id.* at 223-24.

99. *See id.*; de la Vega & Brown, *supra* note 51, at 758-59.

100. *See* Hancock, *supra* note 62, at 720.

101. Skiriotes v. Florida, 313 U.S. 69, 72-73 (1941), *cited in* Hancock, *supra* note 62, at 720.

102. Dickens v. Lewis, 750 F.2d 1251, 1254 (5th Cir. 1984), *noted in* Hancock,

one might find this decision may be based on the lack of self-execution discussed *supra* and not due to the court's failure to recognize customary international law as a cause of action.[103] Thus, an individual would probably not be successful in using customary international law as a cause of action.

One reason U.S. courts have chosen not to use customary international law in domestic disputes might be their reluctance to be involved in matters of political question.[104] Under the political question doctrine, courts may not interfere in areas already reserved by the Constitution for the other political branches.[105] The Supreme Court, in deciding not to grant certiorari in *Domingues*, might have decided prohibiting the juvenile death penalty based on customary international law was a matter best left up to Congress, the branch of government in charge of dealing with foreign affairs.[106] Therefore, it would be up to Congress or the executive branch to establish a prohibition on the juvenile death penalty.[107]

In *Domingues*, the Nevada Supreme Court relied upon *Stanford v. Kentucky*,[108] a case in which the U.S. Supreme Court reviewed a matter that could have been inspected through an international lens.[109] However, Justice Scalia and a majority of the Court refused to look outside of U.S. decency standards to determine the definition of cruel and unusual punishment.[110] Justice Brennan dissented, recognizing that in the world

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supra note 62, at 720.

103. *See* James D. Wilets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 COLUM. HUM. RTS. L. REV. 33, 40-41 (1995) (noting the ICCPR is not self-executing, which indicates it may not create a cause of action for its violation).

104. *See* Hancock, *supra* note 62, at 721.

105. *See id.* (citing Baker v. Carr, 369 U.S. 186, 209 (1962)).

106. *See* U.S. CONST. art. II, § 2, cl. 2; Hancock, *supra* note 62, at 722.

107. *See* Hancock, *supra* note 62, at 722.

108. *See* Domingues v. State, 961 P.2d 1279, 1280 (Nev. 1998) (citing Stanford v. Kentucky, 492 U.S. 361 (1989)).

109. *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, 1336-37 (1993); Stanford v. Kentucky, 492 U.S. 361 (1989).

110. *See Stanford*, 492 U.S. at 369 & n.1, *quoted in* Nanda, *supra* note 109, 1336-37.

community, "the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved."[111] Even so, the majority of the Court chose to limit the standards governing domestic disputes to standards observed in the United States only.[112]

E. Jus Cogens

The Vienna Convention, Article 53, defines *jus cogens* as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[113] *Jus cogens* norms are different from customary international law in that *jus cogens* norms may not be avoided by a persistent objector state and they prevail over and invalidate any conflicting international rule of law.[114] Article 53 of the Vienna Convention sets four criteria for identifying *jus cogens*: (1) the norm is one of general international law; (2) it is accepted by the international community as a whole; (3) it is immune from derogation; and (4) it is modifiable only when a new norm on the same level comes along.[115]

The prohibition of the juvenile death penalty satisfies the four criteria and therefore reaches the level of a *jus cogens* norm.[116] The prohibition against executing juvenile offenders meets the first criterion as a norm of general international law, which has been argued above.[117] The second criterion, acceptance by the international community as a whole, requires a large majority of countries, not just a simple majority, to accept the prohibition as true.[118] Only five countries continue to execute juvenile offenders; thus, a very large majority of nations have

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111. *Id.* at 390 (Brennan, J., dissenting), *quoted in* Nanda, *supra* note 109, at 1337.

112. *See id.* at 369.

113. Vienna Convention, *supra* note 48, at 344.

114. *See* de la Vega & Brown, *supra* note 51, at 759-60.

115. *See id.* at 760 (citing Vienna Convention, *supra* note 48, at 344).

116. *See id.* at 760-61.

117. *See supra* notes 74-88 and accompanying text.

118. *See id.* at 760.

accepted the prohibition as a norm.[119] The prohibition meets the third criterion as well because it is not derogable.[120] Article 4 of the ICCPR states that Article 6, the prohibition article, as well as six other articles, are not derogable.[121] Article 4 belies the intent of the nations to keep the prohibition non-derogable.[122] The fourth criterion allows modification of the *jus cogens* norm only by a new norm of the same status.[123] The prohibition also seems to meet the fourth criterion because there is no new norm advocating the execution of juvenile offenders.[124]

Additional factors in determining a *jus cogens* norm include the strength and conviction of the supporting states and the significance of the opposing states.[125] The juvenile death penalty appears to be a perfect example of a *jus cogens* norm because such a large majority of the countries support the prohibition.[126] Only five countries oppose the prohibition, and although the United States is a formidable force in establishing international law, its opposition is not enough to overcome the establishment of a *jus cogens* norm.[127]

Though the U.S. courts do not usually look at customary international law in making their decisions for reasons discussed *supra*,[128] at least one court has decided to enforce *jus cogens* norms.[129] The Ninth Circuit Court of Appeals held torture to be a violation of *jus cogens*, and recognized *jus cogens* norms "do not depend solely on the consent of states for their binding force . . . ."[130] If the Supreme Court had granted certiorari to

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119. *See id.* at 760-761.

120. *Id.* at 761.

121. ICCPR, *supra* note 3, at 174, *cited in* de la Vega & Brown, *supra* note 51, at 761.

122. de la Vega & Brown, *supra* note 51, at 761.

123. *See id.*

124. *See id.*

125. *Id.* (quoting Jonathan A. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 542 (1993)).

126. *See id.*

127. *See id.*

128. *See supra* notes 100-10 and accompanying text.

129. *See* de la Vega & Fiore, *supra* note 12, at 227.

130. Siderman de Blake v. Argentina, 965 F.2d 699, 714-16 (9th Cir. 1992), *cited in* de la Vega & Fiore, *supra* note 12, at 227-28. The court later found there was no

Domingues,[131] the Ninth Circuit's decision would have provided the support for a finding that the juvenile death penalty violates *jus cogens*.[132] Ultimately, the Nevada Supreme Court looked to the decision in *Stanford v. Kentucky* and the Supreme Court's overarching support of U.S. standards when deciding *Domingues* had no defense under the ICCPR.[133]

IV. CONCLUSION

The United States has been called the world's police force.[134] Citizens of the United States see themselves as superior to lesser countries, particularly third world countries whose customs seem barbaric. Unfortunately, now the United States has a barbaric custom—the execution of juvenile criminal offenders. However, there are no police strong enough or bold enough to change the custom. The United States arguably has violated international treaty law, specifically the ICCPR, in addition to violating customary international law and *jus cogens*.[135] The Human Rights Committee took the bold step of declaring the U.S. reservation to the ICCPR incompatible with the object and purpose of the ICCPR and recommended the reservation be withdrawn.[136] However, the United States did not withdraw the reservation, and instead the U.S. Supreme Court has allowed Michael Domingues, a juvenile offender, to be sentenced to death by denying certiorari.[137]

The United States does not plan to amend its ways to

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jurisdiction over Argentina. *Id.* at 714.

131. Domingues v. Nevada, 528 U.S. 963 (1999).

132. *See Siderman de Blake*, 965 F.2d at 714-16.

133. *See* Domingues v. State, 961 P.2d 1279-80 (Nev. 1998). In *Stanford v. Kentucky*, "the U.S. Supreme Court held that the imposition of the death penalty on a person who murders at sixteen or seventeen years of age does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Stanford v. Kentucky, 469 U.S. 361, 380 (1989).

134. *See* Alice Snyder, Letter, *We Should Support Peace Keeping Forces*, GAZETTE, Feb. 8, 2001, *available at* 2001 WL 6763395; Michael Dwyer, *US Should 'Share Part of Blame*,' AUSTRALIAN FIN. REV., Sept. 13, 2001, *available at* 2001 WL 27344138.

135. *See supra* notes 99-124 and accompanying text.

136. de la Vega & Brown, *supra* note 51, at 766.

137. *See* Domingues v. Nevada, 528 U.S. 963 (1999).

comply with the ICCPR.[138] One critic astutely noted, "The United States ratified the ICCPR merely to justify its stance in holding other countries to 'western standards' when it suits the United States to do so."[139] The United States seems more than willing to promote itself as a country concerned with human rights, and it signs treaties in this effort.[140] However, embedded in those signatures are loopholes, like reservations,[141] denial of self-executing status,[142] or refusal to ratify,[143] that allow the United States to continue an act in which no other industrialized nation takes part.[144] Regardless of one's feeling on the death penalty, it is important to understand that juveniles, individuals who are not legally allowed to vote, drink, or even smoke, are being executed. It is difficult to understand how a country who feels minors lack the mental capacity to make decisions as to their own health and well-being can believe minors have the mental capacity to understand their actions—actions for which they may be executed. Such inconsistencies in the United States' human rights agenda are probably behind the United Nations' decision to remove the United States from the Human Rights Commission.[145] With such a bold move by the United Nations, there is room to wonder in what direction the United States will venture in the human rights realm.

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138. *See* de la Vega & Brown, *supra* note 51, at 770.

139. *Id.*

140. *See id*.

141. *See supra* note 56 and accompanying text.

142. *See supra* note 63 and accompanying text.

143. *See supra* notes 89-91 and accompanying text.

144. *See supra* note 116 and accompanying text.

145. *See* Deen, *supra* note 59.

*This Casenote won the Greenberg, Peden, Siegmyer, & Oshman, P.C. Writing Award.