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They Dropped the Ball: The Failure of the Nevada Supreme Court to Consider the Impact of the ICCPR's Ban on Capital Punishment for Juvenile Offenders in *Domingues v. State*

I. Introduction

Most of us are familiar with Amnesty International and the organization's ongoing campaigns against worldwide abuses of human rights. We may be familiar with current campaigns in Kosovo, for example, or in South Asia and Rwanda. War crimes, child prostitution and female genital mutilation are obvious and horrific human rights violations. But Amnesty International does not only target these kinds of violations and the third world environment in which they are occurring. Americans may be surprised to learn that, in October 1998, Amnesty International began a year-long investigation of human rights violations in the United States.¹ Our continued use of the death penalty, generally,² and on juvenile offenders, specifically,³ were among those issues at the focus of the investigation.

This Comment will address the continued use of the death penalty against juvenile offenders in the United States. The focus will be on a recent Nevada Supreme Court case, *Domingues v. State*. This case presented a direct challenge to the legality of death penalty sentences for juvenile offenders under an international treaty called the International Covenant on Civil and Political Rights ("Covenant"). Before addressing the case, however, a brief discussion of some important background material will help put the topic in to a workable context. A brief

1. William Raspberry, *Human Rights Violations in the U.S.?*, TULSA TRIB. & TULSA WORLD, Oct. 15, 1998, at 17.

2. Amnesty International, *USA Rights For All B Overview* (visited Jan. 5, 1999) <<http://www.rightsforall-usa.org/intro/index.html>>.

3. Raspberry, *supra* note 1.

history of the use of the death penalty in this country will be followed by a discussion concerning the current United Nations position on the issue. The Comment will then address the Covenant itself and examine the circumstances surrounding its ratification in the United States. Constitutional concerns are pervasive throughout this issue and so an examination of relevant Supreme Court decisions will be included. The Comment will conclude by analyzing the state of Nevada's Supreme Court decision in the case of *Domingues v. State*.

II. Background

A. Use of the Death Penalty in the United States

The death penalty has always been used as punishment in the United States.⁴ Its use saw a brief hiatus in 1972 when the Supreme Court ruled, in *Furman v. Georgia*, that because its use was "capricious and arbitrary" the death penalty violated the Eighth Amendment and was unconstitutional.⁵ In 1976, however, the Court held in *Roberts v. Louisiana* that the death penalty was not *per se* unconstitutional.⁶ As long as its use is not "capricious and arbitrary," the court held, the death penalty does not violate the Constitution.⁷ The use of capital punishment in this country has been growing steadily since the *Roberts* decision was handed down.⁸ One scholar attributes the rise in the use of the death penalty in the United States to "a widespread fear of crime, coupled with the belief that only traditional disciplinary solutions—such as the death penalty—can cure society's ills."⁹

More than 20,000 murders occur in the U.S. every year.¹⁰ As of 1992 only about half of these cases result in convictions.¹¹ Of

4. See U.S. CONST. amend. V. The text of the amendment begins by stating that "[n]o person shall be held to answer for a capital, or otherwise infamous crime" This language clearly contemplates capital punishment as an acceptable form of punishment. *Id.*

5. See *Furman v. Georgia*, 408 U.S. 238 (1972).

6. See *Roberts v. Louisiana*, 428 U.S. 325 (1976).

7. See *id.*

8. Tom Phillips, *Capital Punishment Revival (End of the Rope, part 3)*, CONTEMP. REV., Vol. 272, No. 1587, Apr. 1998 at 181.

9. *Id.*

10. Andrew Stevens, *U.S.A.: Andrew Steven's America — Primeval Fear Stirs the Lynch Mob — Why Executions are Increasing*, OBSERVER REUTER TEXTLINE, Apr. 19, 1992 at 16.

11. *Id.*

those cases that result in a conviction, only about 300 individuals are sentenced to death.¹² This uneven application of the death penalty sparked a United Nations report that the capital punishment system in America.¹³ Senegalese investigator Bacre Waly Ndiaye charged in his report that the United States still applies the death penalty in an Aunfair, arbitrary and discriminatory way.”¹⁴ Race, ethnic origin and economic status, according to Ndiaye, were the key determinants regarding imposition of the death penalty.¹⁵

B. The United Nations Human Rights Commission and the Death Penalty

The United Nations has continued to advocate abolishment of the death penalty in all countries.¹⁶ In April 1998 the United Nations Human Rights Commission passed a resolution against the death penalty, calling for states to “establish a moratorium on executions, with a view to completely abolishing the death penalty.”¹⁷ Twenty-six of the commission’s fifty-three member countries approved the resolution while thirteen members, including the United States, voted against it.¹⁸ In a statement explaining the U.S. stance on the resolution, George Moose, ambassador at the U.S. permanent mission in Geneva, said that “[w]e believe that in a democratic society, the criminal justice system, including the punishments prescribed for the most serious crimes, should reflect the will of the people freely expressed.”¹⁹ His reference, of course, was to the will of the people of the United States, as separate and apart from the will of the world as a whole. This distinction is key to those opposed to full U.S. compliance with the Covenant.

Although resolutions passed by the U.N. Human Rights Commission do not have the force of law they represent political and ethical condemnation.²⁰ This condemnation stems from

12. *Id.*

13. Elif Kaban, *US Rejects UN Executions Charge as “Severely Flawed,”* AAP NEWSFEED, Apr. 15, 1998, available in LEXIS, Nationwide General News.

14. *Id.*

15. *Id.*

16. *UN Death Penalty Resolution Puts US Into Camp of Authoritarian Regimes*, AGENCE FRANCE PRESSE, Apr. 3, 1998.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

growing world disapproval of any use of the death penalty—Amnesty International reports that one hundred and three countries have abolished the death penalty entirely in law or in practice, while ninety-one still sanction its use.²¹ The United States is one of only two western countries with industrialized economies that maintains capital punishment laws on the books; Japan is the other country.²² Further, only six countries have executed juvenile offenders under the age of eighteen since 1990: Iran, Nigeria, Pakistan, Saudi Arabia, Yemen and the United States.²³

III. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (Covenant) represents what was an early effort by the international community to give force to the principles of human rights embodied in the United Nations Charter²⁴ and the Universal Declaration of Human Rights.²⁵

The process of U.S. ratification²⁶ of the Covenant began with Eleanor Roosevelt.²⁷ She chaired the early sessions of the United Nations Commission on Human Rights during its initial

21. *Id.*

22. *UN Death Penalty Resolution Puts US Into Camp of Authoritarian Regimes*, *supra* note 16.

23. *Id.*

24. *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, 31 I.L.M. 645, 649 (1992). See THE UNITED NATIONS AND HUMAN RIGHTS, 1945-1995, Volume VII, The United Nations Blue Book Series at 143. Chapter 1, Article 1(3) of the United Nations Charter states that one of the purposes of the United Nations is “[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” *Id.*

25. *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, *supra* note 24. See THE INTERNATIONAL BILL OF RIGHTS, THE COVENANT ON CIVIL AND POLITICAL RIGHTS 372 (Louis Henkin ed., 1981). Article Three of the Universal Declaration of Human Rights states that “[e]veryone has the right to life, liberty, and security of person.” *Id.*

26. To “ratify” means to “authorize or otherwise approve, retroactively, an agreement or conduct either expressly or by implication.” BLACK’S LAW DICTIONARY 872 (Abridged 6th ed. 1991).

27. 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, 278 (1995).

preparation of the treaty.²⁸ The Covenant was adopted unanimously by the United Nations General Assembly on December 16, 1966, and entered into force on March 23, 1976.²⁹ The United States, however, did not ratify the treaty until 1992.³⁰

Despite Mrs. Roosevelt's early work in support of this issue, U.S. ratification of the international agreement did not come quickly as a series of administrations would not ratify the Covenant.³¹ Although President Carter made an attempt to ratify the instrument and submitted it to the Senate for its advice and consent, the matter was dropped again under the Reagan Administration.³² No further action was taken concerning the covenant until George Bush was elected President.³³

A. *Federalism Concerns about U.S. Ratification of the Covenant*

One likely explanation for this delay in ratification is due to the issue of federalism.³⁴ Criminal procedure and the use of the death penalty fall to the individual states to administer, limited only by Constitutional guidelines.³⁵ The Supreme Court has held that the states' use of the death penalty for juvenile offenders does not violate the Constitution.³⁶ Accordingly, the federal government has been unwilling to force the states into compliance with the Covenant's international standards regarding use of the death penalty as a punishment for juvenile offenders.³⁷

1. *The U.S. Supreme Court and the Death Penalty for Juvenile Offenders (Stanford v. Kentucky).*—The Supreme Court has officially upheld the constitutionality of the death penalty for juvenile offenders aged sixteen and seventeen.³⁸ Congress has

28. *Id.*

29. *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, *supra* note 24 at 645.

30. *Id.*

31. Schabas, *supra* note 27, at 278.

32. *Id.*

33. *Id.*

34. See generally Peter J. Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567 (1997).

35. See U.S. CONST. amend. X. The text of the amendment states that A[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." *Id.*

36. *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, *supra* note 24, at 650.

37. Spiro, *supra* note 34.

38. *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, *supra* note 24, at 650. See

taken the position that to allow the Covenant to restrict the state's use of such penalty allows the Covenant to contravene a Constitutional right.³⁹ The Supreme Court did not rule, however, that a state's right to impose the death penalty on juvenile offenders stands at the level of being a Constitutional right.⁴⁰ The Supreme Court's decision in *Stanford v. Kentucky* states simply that imposing capital punishment for murders committed at 16 and 17 years of age does not violate the Constitution.⁴¹ A quick look at the reasoning behind both the majority and dissenting opinions in this case can be helpful in understanding U.S. reluctance to comply with the Covenant.

a. *The majority opinion.*—Justice Scalia wrote for the majority in the *Stanford* opinion and began his analysis by stating that a particular punishment violates the Eighth Amendment only if it constitutes “one of ‘those modes or acts of punishment . . . considered cruel and unusual at the time that the Bill of Rights was adopted’.”⁴² The death penalty for juvenile offenders, he noted, was acceptable at the time that the Bill of Rights was adopted.⁴³

An interesting consideration made in the opinion dealt with whether the use of capital punishment on juvenile offenders could be considered contrary to the “evolving standards of decency that mark the progress of a maturing society.”⁴⁴ The opinion rejected any contention that the sentencing practices of other countries were relevant in consideration of these standards.⁴⁵ Statutes

generally *Stanford v. Kentucky*, 492 U.S. 361 (1989).

39. *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, *supra* note 24, at 650.

40. *See Stanford*, 492 U.S. at 380 (1989).

41. *See id.* The case held, specifically, that the imposition of the death penalty on juvenile offenders aged 16 or over does not offend the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.*

42. *Id.* at 368 (*citing* *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

43. *Id.* Justice Scalia pointed out that at the time of the incorporation of the Bill of Rights “the common law set the rebuttable presumption of incapacity to commit felonies (which were punishable by death) at the age of 14.” *Id.*

44. *Id.* at 369 (*citing* *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

45. *Id.* at 370. Justice Scalia wrote that although “the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well, they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.” *Id.*

passed by a society's elected representatives, he suggested, should be the first and most persuasive consideration as to a society's standard of decency.⁴⁶ Justice Scalia, in other words, believes that the will of the majority should govern the Court's consideration of this issue.⁴⁷ And the will of the American people, he believed, did not forbid the imposition of capital punishment for juvenile offenders.⁴⁸ Again, we see an insistence that the will of the American people be viewed as separate and distinct from the will of the rest of the world.

b. *The dissenting opinion.*—Justice Brennan rejected this logic outright. He argued, with concurrence from Justices Marshall, Blackmun and Stevens, that the majority's approach "would largely return the task of defining the contours of Eighth Amendment protection to political majorities."⁴⁹ Further, Brennan observed that the Supreme Court has long recognized the relevance of contemporary standards of decency in other countries to Eighth Amendment analysis.⁵⁰ Within the world community, he noted, the imposition of the death penalty for juvenile crimes has been overwhelmingly disapproved.⁵¹

2. *Justice Blackmun, the Law of Nations, and the Death Penalty for Juvenile Offenders (Stanford v. Kentucky).*—Justice Blackmun has spoken on numerous occasions about the subject of international standards and their effect on United States law.⁵² At

46. *Id.*

47. 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, 1326 (1993).

48. *See Stanford*, 492 U.S. at 380.

49. *Id.* at 391 (Brennan, J., dissenting). To this end Brennan noted that "the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Id.* at 391-392 (citing *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943)).

50. *Id.* at 389 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 830-831 (1988), *Enmund v. Florida*, 458 U.S. 782, 796 (1982), *Coker v. Georgia*, 433 U.S. 584, 596 (1977), *Trop v. Dulles*, 356 U.S. 86, 102 (1958)).

51. *Id.* Over 50 countries, including all of Western Europe, have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason. Of the nations that retain capital punishment, a majority prohibits the execution of juveniles. *Id.*

52. *Justice Blackmun Addresses ASIL Annual Dinner*, AMERICAN SOCIETY OF INTERNATIONAL LAW NEWSLETTER, Mar. 1994.

the 1994 Annual Dinner of the American Society of International Law, for example, he discussed at length the role that the "law of nations" should play in United States law.⁵³ "The early architects of our nation", he said, "were experienced diplomats who appreciated that the law of nations was binding on the United States."⁵⁴ The Constitution itself, as well as the early history of the country, clearly suggests that the founding fathers intended for international laws and standards to be considered as part of United States law.⁵⁵ The Constitution, for example, gives Congress the power to Adefine and punish . . . [o]ffenses against the Law of Nations.⁵⁶ It also further identifies international treaties as part of "the supreme Law of the Land."⁵⁷

Justice Blackmun traced a string of early Supreme Court cases that confirm an intent to incorporate international laws and standards into U.S. jurisprudence.⁵⁸ In the 1873 case of *Chisholm v. Georgia*, for example, Chief Justice John Jay observed that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations."⁵⁹ An 1804 case further held that Congress should never act in a way that violates the law of nations if an alternative exists.⁶⁰ Perhaps most telling, in a series of cases in the 1880's, the Court established that treaties exist on the same level as federal law and that if they conflict the one enacted more recently will control.⁶¹ Given this background, Justice Blackmun viewed the decision in *Stanford v. Kentucky* as a failure of the court to enforce this country's obligations under international law.⁶²

53. *See id.*

54. *Id.*

55. *See id.*

56. *Id.* See U.S. CONST. art. I, § 8, cl. 10.

57. Justice Blackmun Addresses ASIL Annual Dinner, *supra* note 52. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and 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 of Laws of any State to the Contrary notwithstanding.").

58. Justice Blackmun Addresses ASIL Annual Dinner, *supra* at note 52.

59. *See id.* (citing *Chis olm v. Georgia*, 2 Dall. 419, 474).

60. *See id.* (citing *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804)).

61. *See id.* (citing to Head Money Cases, 112 U.S. 580 (1884); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *The Chinese Exclusion Case*, 130 U.S. 581, 600, 602-603 (1889)).

62. *See id.*

Refusing to consider international practice in construing the Eighth Amendment is convenient for a Court that wishes to avoid conflict between the death penalty and the Constitution. But it is not consistent with this Court's established construction of the Eighth Amendment. If the substance of the Eighth Amendment is to turn on the "evolving standards of decency" of the civilized world, there can be no justification for limited judicial inquiry to the opinions of the United States. Interpretation of the Eighth Amendment, no less than that of treaties and statutes, should be informed by a decent respect for the global opinions of mankind.⁶³

B. United States Ratification of the Covenant

During the Bush Administration, the U.S. Senate Foreign Relations Committee held a public hearing on November 21, 1991 and unanimously gave its advice and consent to the ratification of the Covenant on April 2, 1992.⁶⁴ Pursuant to a list of reservations, understandings and declarations, the United States deposited its instrument of ratification on June 8, 1992.⁶⁵ The decision to finally ratify the Covenant was certainly compelled by the role the United States has adopted in the international arena in regard to the protection of human rights.⁶⁶ The failure to ratify, in the eyes of many, cast doubt on U.S. commitment to human rights and overshadowed attempts to promote them in other countries.⁶⁷

1. *The Reservations, Understandings and Declarations.*—The rights guaranteed in the Covenant closely parallel those of the U.S. Constitution and the Bill of Rights.⁶⁸ The Reservations, Understandings and Declarations were adopted as a package, however, to ensure that the Covenant does not require action inconsistent with the U.S. Constitution.⁶⁹ Some of the

63. *Id.*

64. *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, *supra* note 24, at 649.

65. *See Generally* 138 Cong. Rec. S4781-01 (1992).

66. *See id.*

67. *Id.* The Senate Foreign Relations Committee, in its address to the President recommending ratification of the Covenant, noted that, "[f]ailure to ratify the covenant has blemished our record and cast doubt, in some quarters, about the seriousness of our commitment to human rights." *Id.*

68. *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, *supra* note 24, at 649.

69. *Id.* at 649. One scholar has characterized the five principles guiding the United States' attachment of this package as follows: 1) The United States will not undertake any treaty obligation that it will not be able to carry out because it

Reservations are justifiable where the U.S. standard is already in place and offers more protection than the standard articulated in the Covenant.⁷⁰ Article Twenty of the Covenant, for example, prohibits propaganda for war and advocacy of national, racial or religious hatred.⁷¹ This provision clearly restricts the rights to freedom of speech and expression protected by the First Amendment.⁷²

Article Six of the Covenant, however, deals with the issue of capital punishment.⁷³ Article Six reads as follows:

- 1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
- 2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
- 3) When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorize

is inconsistent with the United States Constitution; 2) United States adherence to an international human rights treaty should not effect B or promise C change in existing U.S. law or practice; 3) The United States will not submit to the jurisdiction of the International Court of Justice to decide disputes as to the interpretation or application of human rights conventions; 4) Every human rights treaty to which the United States adheres should be subject to a "federalism clause" so that the United States could leave implementation of the convention largely to the states; 5) Every international human rights agreement should be "non-self-executing." Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

70. See *id.* at 342.

71. THE INTERNATIONAL BILL OF RIGHTS, THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 25 at 387. Article Twenty states that: 1) Any propaganda for war shall be prohibited by law; and 2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. *Id.*

72. See U.S. CONST. Amend. I. But see Henkin, *supra* note 69 at 342. Henkin explains that had the executive branch wanted to avoid entering a reservation to Article 20 it may have simply entered an "understanding" that Article 20 only required a state party to prohibit speech that incites to unlawful action. As this reading would be a plausible interpretation of Article 20, it could, so understood, have been implemented by the United States under the Constitution. *Id.*

73. THE INTERNATIONAL BILL OF RIGHTS, THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 25 at 380-381.

any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6) Nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.⁷⁴

The U.S. has accepted without reservation the ban on using the death penalty against pregnant women.⁷⁵ It is important to note that this does not represent a real concession since such executions have never been an accepted practice at either the federal or the state level.⁷⁶

The Reservation does not reserve the right to continue utilizing capital punishment for persons below eighteen years of age.⁷⁷ The text of the reservation states that, “[t]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.”⁷⁸ Interestingly, the scope of the statement is actually much broader than necessary to achieve the purpose of allowing the continued use of the death penalty against those 16 and older.⁷⁹ By its terms the United States reserved not only the right to execute a person

74. *Id.*

75. *See United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, *supra* note 24, at 649.

76. *Id.* Members of the Senate commented that “[l]egislation giving effect to the Covenant’s prohibition against executions of pregnant women will not be required, since neither the Federal nor the state governments in fact carry out executions until after the birth of the condemned woman’s child.” *Id.*

77. *Id.* at 654.

78. *Id.*

79. Henkin, *supra* note 69 at 344.

who committed a capital crime at age 16 or 17, but also the right to execute a child, of any age.⁸⁰

2. *Public Reaction to the Reservations, Understandings and Declarations to the Covenant.*—Numerous different human rights organizations and educational institutions expressed opposition to the Senate's decision to include the reservation to the Covenant's ban on the execution of juvenile offenders.⁸¹ Amnesty International, for example, expressed its concern in a letter to the Hon. Claiborne Pell, Chairman of the Senate Foreign Relations Committee in 1992.⁸² Although Amnesty International had concerns about all of the Reservations, Declarations, and Understandings introduced by the Administration, its members felt particularly strongly about the reservation to Article Six.⁸³ Among other things, they stated that, "[a]rticle Six guarantees one of the most fundamental rights protected by the ICCPR—the right to life—and its provisions are among those which may never be derogated from in any circumstances."⁸⁴ Other notable organizations expressing concern were the faculties of Yale and the University of Florida Law Schools.⁸⁵

3. *Congressional Justification for Ratifying the Covenant with the Reservations, Understandings, and Declarations.*—The Senate Foreign Relations Committee, in making its decision to ratify the Covenant, acknowledged the importance of adhering to internationally recognized standards of human rights.⁸⁶ It noted that the U.S. record in this regard has been generally good but still refused to support adherence to an international standard that differs from U.S. law.⁸⁷ It is interesting to note that the Committee did seem to believe, although it was reluctant to openly advocate it, that compliance with the international standard may be appropriate.⁸⁸ To this end, the committee stated, "it may be

80. *Id.*

81. *See Generally* 138 Cong. Rec. S4781-01.

82. *Id.*

83. *See id.*

84. *Id.* The members of Amnesty International refer in this statement to Article 4(2) of the Covenant itself: "No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision." THE INTERNATIONAL BILL OF RIGHTS, THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 25 at 380.

85. *See* 138 Cong. Rec. S4781-01.

86. *See id.*

87. *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, supra* note 24, at 649.

88. *See id.*

appropriate and necessary to question whether changes in U.S. law should be made to bring the United States in to full compliance at the international level.”⁸⁹ Consistent with this is the federal death penalty’s own exception for juvenile offenders.⁹⁰ As one scholar has noted, “[i]f the United States were a unitary state, we would likely have no death penalty for juvenile offenders.”⁹¹

The federal government has continued to contend, however, that it is not the federal government’s business to interfere with criminal sentencing guidelines of the states, regardless of international human rights concerns.⁹² Congress believed that adhering to the Convention with the inclusion of questionable Reservations would allow the U.S. to participate with greater credibility and effectiveness in promotion human rights reforms.⁹³ The Committee did note that the Reservations did not preclude states from eventually modifying their laws to reflect standards of the Covenant.⁹⁴

IV. The Case of *Domingues v. State*

A. *The Trial and First Appeal*

In October 1993, sixteen-year old Michael Domingues waited for Arjin Pechpo and her four-year old son, Jonathan, behind the front door of their home in Las Vegas.⁹⁵ Upon their arrival Domingues strangled Pechpo with a cord.⁹⁶ He then forced Jonathan into the tub with Pechpo’s body, filled the tub with water, and threw a hair dryer into the water in an attempt to electrocute him.⁹⁷ When that failed to kill the child Domingues stabbed him to death.⁹⁸ At trial, his girlfriend testified that Domingues’ intention had been to kill Pechpo and steal her car.⁹⁹

89. *Id.*

90. *See id.*

91. Spiro, *supra* note 34 at 575.

92. *See id.*

93. *See United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, supra* note 24, at 649.

94. *See id.*

95. *Domingues v. State*, 917 P.2d 1364, 1369 (Nev. Sup. Ct. May 30, 1996).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1370 (summarizing various discussions she had with Domingues on the night of the murders, [his girlfriend] recounted Domingues’ admissions about the crimes).

In August 1994, Domingues was convicted of one count of burglary, one count of robbery with the use of a deadly weapon, one count of first degree murder and one count of first degree murder with the use of a deadly weapon.¹⁰⁰ At the age of seventeen, he was sentenced to death for each of the two murder convictions.¹⁰¹ In 1996, Domingues took his first appeal to the Supreme Court of Nevada, contesting ten different rulings on the part of the trial court.¹⁰² The Supreme Court affirmed the trial court, deciding that any error committed by the lower court had been harmless in nature and upheld the sentence of death.¹⁰³

B. The Second Appeal—Applying The Covenant

Domingues then took a second appeal to the Supreme Court of Nevada by filing a motion for correction of an illegal sentence on the basis of Article 6 of the Covenant.¹⁰⁴ The question in front of the Nevada Supreme Court was whether a Nevada statute,¹⁰⁵ which allows for imposition of the death penalty on defendants who are at least sixteen years of age at the time of the capital offense, should be superseded by Article Six of the Covenant.¹⁰⁶ Domingues argued that the Senate's Reservation was invalid and

100. *Domingues v. State*, 961 P.2d 1279 (Nev. Sup. Ct. July 31, 1998).

101. *Id.*

102. *Domingues*, 917 P.2d at 1364. The assignments of error alleged by Domingues were as follows: 1) the corpus delicti rule required the prosecutor to show that the defendant had actually used a deadly weapon; 2) the convictions for robbery with a deadly weapon and murder with a deadly weapon were not supported by evidence; 3) material harm had occurred by the limiting of the defendants cross-examination of one of the witnesses; 4) the testimony of the father of the defendant's girlfriend regarding separate and independent offenses was not properly admitted; 5) color photographs of the autopsy and crime scene were not properly admitted; 6) the prosecutor's statements constituted prosecutorial misconduct; 7) evidence of defendant's prior bad acts was not properly admitted in the penalty phase; 8) the evidence was insufficient to establish torture as an aggravating circumstance for imposition of the death penalty; 9) the error in instructing the jury on torture as an aggravating factor affected the result; and 10) the imposition of the death penalty was excessive. *Id.*

103. *Id.*

104. *Domingues*, 961 P.2d at 1280.

105. NEV. REV. STAT. § 176.025 (1967). The text of the statute reads "[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. As to such person, the maximum punishment that may be imposed shall be life imprisonment." *Id.* (emphasis added).

106. *Domingues*, 961 P.2d at 1280.

that the prohibition against imposing capital punishment on juvenile offenders is the supreme law of the land.¹⁰⁷ As a result each individual state has the responsibility to obey its provisions.¹⁰⁸

1. *The Majority Holding.*—The court declined to address the substance of Domingues' argument.¹⁰⁹ It summarily rejected the possibility that the Senate's Reservation of the states' right to impose the death penalty on juvenile offenders is invalid.¹¹⁰ Because such laws have withstood Constitutional scrutiny the Court did not feel compelled to explore the issue any further.¹¹¹ In the end the Court rejected Domingues' appeal in a three to two vote.¹¹²

2. *The Dissenting Opinions.*—Two Justices dissented in this opinion because the majority refused to address what they felt to be the main issue of the case: what is the effect of the Covenant's adoption on the laws of and within the United States.¹¹³ Justice Springer focused his analysis on the fact that because international treaties ordinarily become the supreme law of the land, the state has an independent responsibility to conduct itself in a manner consistent with the terms of the treaty.¹¹⁴ This being so, the state cannot consider itself to be in compliance with the treaty while rejecting one of its most vital terms.¹¹⁵

Justice Rose took a slightly different path and focused his analysis on the fact that the district court should have considered whether the Senate's reservation was valid.¹¹⁶ He believed that the district court should have given this issue a full hearing and that the Nevada Supreme Court should have remanded the question to that court for such purpose.¹¹⁷ According to Justice Rose there is more than enough evidence that the U.S. Reservation to Article 6 of the Covenant may be invalid.¹¹⁸ Article 4, Section 2 of the Covenant, in particular, states that [n]o derogation from Articles

107. *Id.*

108. *Id.*

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

110. *Id.*

111. *Id.*

112. Ed Vogel, *Court Rejects Appeal by Condemned Killer*, LAS VEGAS REVIEW-JOURNAL, Aug. 1, 1998, at 3B. *See also Domingues*, 961 P.2d at 1280.

113. *Domingues*, 961 P.2d at 1280.

114. *See id.* at 1280-81 (Springer, J., dissenting).

115. *See id.*

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

117. *Id.*

118. *See id.*

6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.”¹¹⁹ Also, the Restatement (Third) of Foreign Relations Law states that, “[a] state may enter a reservation to a multilateral international agreement unless . . . the reservation is incompatible with the object and purpose of the agreement.”¹²⁰ There is reason to consider, according to Justice Rose, that the prohibition of the death penalty against juvenile offenders is an integral part of the treaty.¹²¹

According to one scholar, reservations to human rights treaties are generally tolerated if they do not deprive the provision of its basic purpose.¹²² This limited leniency is allowed to facilitate the possibility of ratification by states that generally respect the obligations of the instrument but fail to comply on one or another small point.¹²³ The Human Rights Committee has determined that reservations to provisions of the Covenant that are also customary international law are not allowed.¹²⁴ Many believe that support has not yet been sufficiently demonstrated to establish juvenile executions as violative of a customary international norm.¹²⁵ Such a norm does appear, however, to be emerging.¹²⁶

All of these questions support Justice Rose’s belief that the case should have been remanded to determine whether the U.S. is even a party to the Covenant. If the Reservation to Article 6 is found to be invalid, and any invalid reservation can be separated from ratification of the treaty, then the United States would still be bound by the Covenant and subject to its ban on capital punishment for juvenile offenders.¹²⁷ If, however, the reservation is found to be invalid, and cannot be separated from the

119. *Domingues*, 961 P.2d at 1281. See Article 4(2) of the Covenant, THE INTERNATIONAL BILL OF RIGHTS, THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 25 at 380.

120. *Domingues*, 961 P.2d at 1281. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 313 (1)(c) (1987).

121. See *Domingues*, 961 P.2d at 1281.

122. Schabas, *supra* note 27.

123. See *id.*

124. See *id.*

125. See *id.*

126. See *id.*

127. See Schabas, *supra* note 27.

ratification of the treaty, then the United States may not be a party to the Covenant at all.¹²⁸

V. The Nevada Supreme Court Abandoned Its Duty

The court in *Domingues* failed in its responsibility to consider the very important issues at stake in the case. The Reservation to Article 6 of the Covenant allows states to continue using the death penalty on juvenile offenders because the Supreme Court has held that such use does not violate the Constitution. It is clear that the federal government does not support the substance of the Reservation as it has banned the use of the death penalty on juvenile offenders in its own criminal system. The federal government's decision to include the Reservation, therefore, was driven by what it considered to be its obligation to allow the individual states room to shape their own criminal sentencing policies. The right to execute juvenile offenders, however, is not a Constitutional right. Therefore, it is questionable whether the federal government was bound to make the reservation to Article Six on this basis.

Even if the Reservation was necessary, out of deference to the individual states, the Nevada Supreme Court should have taken this opportunity to consider for itself what relevance the Covenant should have. This Comment does not wholly reject the logic of the majority opinion in *Stanford*. American standards of decency in the issue of Eighth Amendment analysis should carry considerable weight. As it seems, the will of the American people did not forbid the imposition of capital punishment for juvenile offenders at the time of the *Stanford* decision.

There seems, however, to be a rising indication of public disapproval for the death penalty.¹²⁹ One juror, after delivering a death sentence in Texas in 1998, commented on the difficulty of making the decision: "When I walked back into the jury room after delivering the verdict, I felt like a murderer."¹³⁰ Although public approval for the death penalty in general continues to hover around 70%, that support is arguably far less solid than it seems.¹³¹ When offered as one of several different alternatives,

128. *See id.*

129. *See* Amnesty International, *USA Campaign B Rights For All, Reports, briefings and focus* (visited Dec. 5, 1999) <<http://www.rightsforall-usa.org/info/report/r06.htm#top>>

130. *Id.*

131. *Id.*

such as life imprisonment without possibility of parole, that percentage drops dramatically.¹³² In light of this, and given the extreme nature of capital punishment generally, the question is one that should be continually reconsidered. By taking the Reservation to Article 6 of the Covenant the federal government left that responsibility to the states. The Nevada Supreme Court missed a perfect opportunity for doing so in its summary treatment of *Domingues v. State*.

VI. Conclusion

The use of the death penalty has long been a staple of United States criminal sentencing and the Supreme Court has upheld the constitutionality of its use on juvenile offenders. The International Covenant on Civil and Political Rights was ratified in the U.S. in the midst of this environment. Accordingly, ratification of the instrument occurred with the addition by Congress of a package of Reservations, Understandings, and Declarations. Of note was the Reservation allowing the continued execution of juvenile offenders in this country despite the strict ban contemplated in the Covenant.

The recent Nevada case, *Domingues v. State*, directly challenged the legality of death penalty sentences for juvenile offenders under the Covenant. The Nevada Supreme Court summarily declined to address the substance of the appeal by relying on the Reservation to Article 6 of the Covenant. There are serious questions, however, as to the validity of the reservation.

Further, the federal government's decision to include the Reservation was driven by its obligation to allow the individual states room to shape their own criminal sentencing policies. The Senate Committee has indicated, however, that it believes that compliance by the states, with the international standard, is in order. The federal government itself has banned the use of the death penalty on juvenile offenders.

Even if the reservation was necessary, out of deference to federalism, the Nevada Supreme Court should have taken this opportunity to consider for itself what relevance the Covenant should have. In the U.S., there seems to be a rising indication of public disapproval for the death penalty in general. The disapproval of the international community is evident. This trend,

132. *Id.*

in light of the extreme nature of capital punishment, should mandate that the question be continually reconsidered. The Nevada Supreme Court abdicated its responsibility to do so and missed a perfect opportunity in its summary treatment of *Domingues v. State*.

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