

In the Supreme Court of the United States

MICHAEL DOMINGUES, PETITIONER

v.

STATE OF NEVADA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEVADA*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

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QUESTION PRESENTED

Whether a State of the United States is prohibited from imposing capital punishment on an offender who committed the capital offense when he was 16 years old because such punishment would violate Article 6(5) of the International Covenant on Civil and Political Rights, customary international law, or a *jus cogens* peremptory norm of international law.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The text of the International Covenant on Civil and Political Rights (ICCPR) was adopted by the General Assembly of the United Nations on December 16, 1966. See ICCPR, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. Article 6(5) of the ICCPR provides that “[s]entence 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.” 999 U.N.T.S. at 175, 6 I.L.M. at 370.

President Carter signed the ICCPR on behalf of the United States on October 5, 1977. On February 23, 1978, the President submitted the ICCPR to the Senate for its advice and consent, along with several proposed conditions. See *Four Treaties Pertaining to Human Rights*, Feb. 23, 1978, S. Exec. Docs. C, D, E, and F,

95th Cong., 2d Sess. III-IV, XI-XV (1978) (S. Exec. Docs.). Those conditions included a proposed reservation to Article 6(5) of the ICCPR, stating that “[t]he United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment.” *Id.* at XII. The President’s proposed conditions also included a declaration that the substantive provisions of the ICCPR are not self-executing. See *id.* at VI. The Senate Foreign Relations Committee held hearings on the ICCPR in 1979, but it did not make a recommendation at that time to the full Senate. See S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 2 (1992).

On August 8, 1991, President Bush urged the Senate Foreign Relations Committee to renew its consideration of the ICCPR with a view toward giving its advice and consent to ratification. See S. Exec. Rep. No. 23, *supra*, at 2. President Bush also proposed a set of reservations, understandings, and declarations similar to those proposed by President Carter, including the following reservation to Article 6(5):

The 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.

Id. at 11. President Bush also proposed a declaration that “the provisions of Articles 1 through 27 of the Covenant are not self-executing.” *Id.* at 9.

The Senate gave its advice and consent to ratification of the ICCPR on April 2, 1992. 138 Cong. Rec. 8070-8071 (1992). In its resolution of ratification, the Senate adopted verbatim the entire package of conditions pro-

posed by President Bush, including the reservation to Article 6(5) and the declaration that the ICCPR is not self-executing. *Ibid.* On June 8, 1992, the United States deposited its instrument of ratification, along with the package of conditions including the reservation to Article 6(5), with the United Nations. See Multilateral Treaties Deposited With the Secretary-General: Status as at 31 Dec. 1995, at 122, 130, U.N. Doc. ST/LEG/SER.E/14 (1996).

2. After a jury trial in the Eighth Judicial District Court of Nevada, Clark County, petitioner was convicted of first-degree murder, first-degree murder with use of a deadly weapon, burglary, and robbery with use of a deadly weapon. Petitioner was sentenced to death pursuant to Nev. Rev. Stat. § 176.025 (1997). See Pet. App. A1-A2. The Supreme Court of the State of Nevada affirmed the conviction and sentence on direct appeal, 917 P.2d 1364, and this Court denied certiorari, 519 U.S. 968 (1996).

Petitioner then moved in the state trial court for correction of an illegal sentence. Petitioner argued that, because he was 16 years old at the time he committed his offenses, his execution would violate Article 6(5) of the ICCPR and customary international law. The state trial court denied petitioner's motion, and petitioner appealed. Pet. App. A3. On appeal, petitioner again argued that his execution would violate both the ICCPR and customary international law; he did not specifically claim, however, that his execution would violate a *jus cogens* norm of international law. See Pet. Opening Br. 15-17, *Domingues v. Nevada*, Case No. 29896 (June 16, 1997).

The Supreme Court of Nevada affirmed the trial court's decision. Pet. App. A1-A4. The court concluded that the Senate's express reservation to Article 6(5) of the ICCPR "negates [petitioner's] claim that he was

illegally sentenced.” *Id.* at A3.¹ The court did not specifically address petitioner’s claim based on customary international law.

DISCUSSION

Petitioner contends that his death sentence for murder must be set aside because he was 16 years old when he committed the offense. Petitioner has not argued that the Constitution prohibits the capital punishment of a 16-year-old offender. Cf. *Stanford v. Kentucky*, 492 U.S. 361 (1989) (rejecting Eighth Amendment challenge to imposition of capital punishment against 16-year-old offender). Rather, petitioner makes three claims based on sources of international law. First, he contends that his sentence violates Article 6(5) of the ICCPR, which prohibits the imposition of capital punishment on an offender who was under 18 years old at the time of his crime. Second, he argues that a rule of customary international law bars the death penalty for 16-year-old offenders, and that principle preempts the application of Nevada’s death penalty statute to his case. Third, he contends that the prohibition under customary international law against the death penalty for 16-year-old offenders has risen to the level of a *jus cogens* or peremptory norm, from which no derogation is permitted under international law. In our view, petitioner has identified no issue of law that merits this Court’s review in this case, nor any basis for relief from the judgment of the Nevada Supreme Court.

1. Petitioner first contends that his death sentence contravenes Article 6(5) of the ICCPR. As we have explained (pp. 2-3, *supra*), when the Senate gave its

¹ The court also took note of the fact that, at the time of ratification, the Senate declared the ICCPR to be non-self-executing. Pet. App. A2. The court, however, did not rely on that declaration in rejecting petitioner’s claim.

advice and consent to ratification of the ICCPR, it entered a reservation to Article 6(5), reserving the right of the United States to impose capital punishment for crimes committed by persons less than 18 years of age. Petitioner maintains, however, that the Senate's reservation is invalid as a matter of both United States constitutional law and international treaty law, that the United States is bound by all of Article 6(5), including the prohibition against capital punishment for 16-year-old offenders, and that the domestic courts of the United States must therefore apply Article 6(5) to invalidate his death sentence. Those contentions are incorrect.

a. Petitioner first argues (Pet. 5-6, 20-23) that the Senate's reservation to Article 6(5) is invalid under the United States Constitution because, under separation of powers principles, the Senate may not give its selective consent to treaty provisions negotiated by the President. Petitioner argues that a Senate reservation to part of a treaty that the President submits to the Senate for its advice and consent is akin to a presidential line-item veto of congressional legislation, which this Court held unconstitutional in *Clinton v. City of New York*, 524 U.S. 417 (1998). That argument is flawed for several reasons.

First, the separation of powers claim advanced by petitioner is not presented in this case. Petitioner overlooks that the reservation to Article 6(5) did not originate in the Senate. Rather, that reservation was submitted to the Senate by the President as part of the President's request for the Senate's advice and consent to the ICCPR, and was adopted by the Senate without change. See pp. 1-2, *supra*. Accordingly, the Senate in no sense vetoed or modified any part of the treaty submitted to it by the President for advice and consent.

Rather, it gave its consent to the treaty in the precise form submitted to it by the President.

Second, the Senate has the constitutional authority to reserve its consent to part of a treaty negotiated by the President. The Constitution provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” U.S. Const. Art. II, § 2, Cl. 2. The President “make[s]” a treaty after the Senate has provided its advice and consent, not before that advice and consent process, when the treaty is negotiated. If the President objects to reservations imposed by the Senate as a condition to its consent to a treaty that the President has negotiated, then the President need not accept the Senate’s partial consent to the treaty. The President may decline to deposit an instrument of ratification to the treaty and thereby decline to “make” the treaty. See Restatement (Third) of the Law of the Foreign Relations of the United States § 303 cmt. d (1987) (Restatement); see also *id.* § 303 rep. note 3 (noting President Taft’s refusal to make arbitration treaties after Senate demanded unwelcome reservations). If, however, the President agrees to the Senate’s reservations and “make[s]” the treaty after the Senate has attached reservations to its consent (as was the case with the ICCPR, see pp. 2-3, *supra*), then those reservations become part of the treaty insofar as the treaty is to be applied in United States courts. *Id.* § 314.

Unlike the Presidential line-item veto invalidated in *Clinton v. City of New York*, *supra*, the Senate’s practice of attaching reservations to its consent to treaties also has an extensive historical pedigree, dating to at least the Jay Treaty of 1794 between the United States and Great Britain. See Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, 8 Stat. 116. Moreover,

although this Court has never squarely decided whether the Senate may attach reservations to its consent to a treaty, the Court has noted that practice on several occasions without indicating any disapproval or questioning of its validity.² Accordingly, the United States' reservation to Article 6(5) of the ICCPR is valid as a matter of United States constitutional law.

b. Petitioner also argues that, even if the Senate's reservation to Article 6(5) is valid as matter of United States constitutional law, it is not valid as a matter of the international law of treaties, and so the United States must be deemed to have accepted all of Article 6(5) without reservation, including the prohibition against capital punishment for offenders under 18 years of age. Petitioner does not challenge generally the authority of the United States under international law to reserve ratification to parts of treaties. Indeed, reservation is a well-established feature of treaty law and practice by which a state may decline to accept certain provisions of a treaty. See Vienna Convention on the Law of Treaties (Vienna Convention), May 23, 1969, art.

² See *James v. Dravo Contracting Co.*, 302 U.S. 134, 148 (1937) (noting that “it is familiar practice for the Senate to accompany [its consent to treaties] with reservations”); see also *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 326-327 (1994) (noting that the Senate had given its consent to a tax treaty with the United Kingdom subject to a reservation); *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983) (noting that the Senate had attached a reservation to consent to a proposed tax treaty); see also *United States v. Stuart*, 489 U.S. 353, 374-375 (1989) (Scalia, J., concurring in the judgment) (“the Senate * * * may, in the form of a resolution, give its consent [to a treaty] on the basis of conditions”); *Power Auth. v. FPC*, 247 F.2d 538, 541 (D.C. Cir.) (“Unquestionably the Senate may condition its consent to a treaty upon a variation of its terms.”), vacated as moot, 355 U.S. 64 (1957).

2(1)(d), 1155 U.N.T.S. 332, 333, 8 I.L.M. 679, 681,³ see also Restatement § 313. Rather, petitioner argues that the reservation to Article 6(5) is invalid because the ICCPR elsewhere makes Article 6(5) nonderogable in times of emergency (Pet. 23-24), and because the reservation is alleged to be incompatible with the object and purpose of the ICCPR (Pet. 25-26).

Even if there were merit to those arguments as a matter of international treaty law, that would not mean that Article 6(5) should be enforced by a domestic court in the face of the United States' reservation. A reservation in which the President and the Senate have concurred is controlling as a matter of domestic law, and prevents the provision of the treaty to which the reservation was taken from being part of the "Treat[y] made * * * under the authority of the United States" that would bind the States under the Supremacy Clause. U.S. Const. Art. VI, Cl. 2. The President, with the concurrence of the Senate, has the constitutional authority to "make" treaties, and the courts have no authority to add provisions to treaties that were not adopted by the other Branches. See *The Amiable Isabella*, 19 U.S. (Wheat.) 1, 71 (1821). If other nations are dissatisfied with the reservations attached by the United States to its ratification of a treaty, they may present a diplomatic protest or may decline to recognize themselves as being in treaty relations with the United States, but that is a matter between states and not for judicial resolution. Accordingly, where the United States has ratified a treaty subject to a reservation exempting it from a particular provision of the treaty, the courts may

³ Although the United States has not ratified the Vienna Convention, it is generally considered to be consistent with current treaty law and practice as recognized in the United States. See Restatement Pt. III, introd. note at 144-145.

not give effect to the provision to which reservation is made on the ground that the reservation violates international law. Cf. *Head Money Cases*, 112 U.S. 580, 598-599 (1884) (if Congress enacts a statute that is inconsistent with a prior treaty, courts must give effect to the statute rather than the treaty).

In any event, petitioner's challenges to the validity of the reservation fall wide of the mark. Petitioner argues that the reservation to Article 6(5) is invalid under the law of treaties because it is contrary to the "object and purpose" of the ICCPR. See Vienna Convention, art. 19(c); Restatement § 313(1)(c). Of the 149 states that are parties to the ICCPR, 11 have objected to the United States' reservation to Article 6(5), and nine of the 11 have objected on the ground that the reservation violated the ICCPR's object and purpose. See *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 Dec. 1994*, U.N. Doc. ST/LG/SER.E/13 (1995). Not one of the states that lodged an objection stated that, because of the United States' reservation, it does not recognize the ICCPR as being in force between itself and the United States. State practice therefore supports the conclusion that the United States' reservation to Article 6(5) is valid as a matter of treaty law. See Vienna Convention, art. 20(4)(b) (objection by a contracting state to another state's reservation to part of a treaty does not prevent the treaty from entering into force unless such an intention "is definitely expressed by the objecting State").⁴

⁴ Moreover, to be contrary to the "object and purpose" of a treaty, a reservation must be incompatible with the agreement as a whole. The United States' reservation to Article 6(5) is not contrary to the overall object and purpose of the ICCPR. The ICCPR guarantees a panoply of civil and political rights including, among others, the right to self-determination, the right to equal protec-

Petitioner also argues that, because the ICCPR makes Article 6(5) nonderogable in times of emergency, see ICCPR art. 4(2), Article 6(5) must be so fundamental to the treaty that no reservation may be taken to it. There is no necessary correlation under the ICCPR, however, between the nonderogability of a right and its importance or centrality to the treaty. Several rights of profound importance, such as the right against arbitrary arrest and detention (protected by Article 9(1)) and the right to be informed of the nature of criminal charges brought against one (protected by Article 14(3)(a)), are not made nonderogable under the ICCPR. If the parties to the Covenant had intended to prohibit reservations to Article 6(5), they could have so provided explicitly, as authorized by Article 19(b) of the Vienna Convention, rather than doing so obliquely (as petitioner argues) by making the article nonderogable in times of national emergency. Accordingly, as a matter of treaty law, the United States' reservation to Article 6(5) is valid and effective.

c. Petitioner also contends (Pet. 27-32) that the Senate's declaration that the ICCPR is not self-executing is invalid, and that individuals may invoke Article 6(5) defensively in a U.S. criminal proceeding, even though Congress has not enacted any legislation to implement Article 6(5).⁵ Because, as we have explained, the

tion of the law, the right to be free from slavery, the right not to be subjected to torture, the right to a fair trial, freedom of religion, and freedom of assembly. The United States accepted the vast majority of the rights safeguarded by the ICCPR. The fact that the United States entered a reservation to Article 6(5), which concerns only one feature of the system of human rights protected by the ICCPR, does not suggest that the United States rejected the treaty's overall object and purpose.

⁵ Since early in our history, the courts have distinguished between "self-executing" and "non-self-executing" treaties. As a

United States is not bound by Article 6(5)'s prohibition against capital punishment for juvenile offenders, this case does not present an occasion for the Court to determine whether, or to what extent, provisions of the ICCPR may be enforced by a court at the request of a private party in the absence of implementing federal legislation. For the same reason, this case presents no occasion for the Court to decide whether domestic courts are bound by a declaration by the Senate in its resolution of ratification that a treaty is not self-executing, or whether a determination that a treaty is not self-executing includes a determination that a treaty provision may not be invoked as a defense to a criminal proceeding.

2. Petitioner also contends (Pet. 11-17) that customary international law prohibits Nevada from imposing capital punishment on one who was 16 years old at the time of his offense. This case, however, does not present an appropriate vehicle for this Court's review of that issue. In addition, petitioner's claim cannot in any event proceed past the threshold, in light of actions by the United States Government in international fora objecting to the asserted rule of customary international law on which petitioner relies.

a. Customary international law has been defined as "international law result[ing] from a general and consistent practice of states followed by them from a sense of

general matter, if a treaty is self-executing, then it requires no legislation to make its provisions operative, and those provisions may be enforced by domestic courts in at least some circumstances. If a treaty is non-self-executing, then it may be enforced in domestic courts only to the extent that its provisions are implemented by statute. See *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992); *Cook v. United States*, 288 U.S. 102, 119 (1933); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

legal obligation.” Restatement § 102(2). In a case involving customary international law, this Court stated:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.

The Paquete Habana, 175 U.S. 677, 700 (1900).

In *The Paquete Habana*, the Court was articulating a rule of decision in a subject area—the adjudication of prizes—in which federal courts traditionally devised rules of decision in a common law manner. The Court had no occasion to determine the circumstances in which customary international law alone might, in an area within the usual purview of the States (here, criminal punishment), preempt a state statute that is not otherwise subject to attack as conflicting with the responsibilities of the National Government or a source of federal law (such as a federal statute or constitutional provision, or a rule of federal common law emanating from the constitutional structure of the Nation). Nor has the Court had occasion to consider that question since *The Paquete Habana* was decided.⁶ Such a

⁶ Although petitioner argues that this Court has decided that customary international law is federal law that preempts contrary state law, see Pet. 11 n.6, 12, the decisions on which he relies do not reach that far. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-426 (1964), the Court held that the scope of the act of state

claim raises numerous issues of considerable difficulty and complexity, with potentially far-reaching significance.⁷

This case does not present an appropriate vehicle for the Court to address those issues, for several reasons. First, the record compiled in the lower courts contains no probative materials concerning the development of customary international law in this area. Cf. Restate-

doctrine must be determined as a matter of federal law in light of the Constitution's entrustment of foreign relations to the national government, but the Court also observed that the act of state doctrine is not compelled by international law, see *id.* at 427. In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court held invalid a state statute regulating the disposition of intestate property to foreign nations on the ground that its application would interfere with the national government's exclusive conduct of foreign relations; see also *Clark v. Allen*, 331 U.S. 503, 516-517 (1947) (rejecting similar claim of preemption on facts of that case). *Missouri v. Holland*, 252 U.S. 416 (1920), upheld a treaty against a Tenth Amendment challenge, and *Kansas v. Colorado*, 206 U.S. 46, 95-98 (1907), recognized the applicability of a form of federal common law, borrowing principles of international law where appropriate, to resolve water disputes between States of the Union.

⁷ For example, to determine whether the application of Nevada's death penalty statute to a 16-year-old offender is preempted by customary international law, the Court would likely have to decide whether the legal principle relied on by petitioner has developed with sufficient clarity and obtained sufficient consensus internationally to become a rule of customary international law; whether customary international law, when invoked in domestic courts, is properly understood as federal common law that preempts state law through the Supremacy Clause, U.S. Const. Art. VI, Cl. 2; and whether domestic courts should apply a principle of customary international law to preempt state law when the President and the Senate have entered a reservation to a treaty provision that addresses the same subject, or whether that reservation constitutes a "controlling act" under *The Paquete Habana*, *supra*, preventing the application in domestic courts of the rule of customary international law invoked by petitioner.

ment § 113 cmt. c & rep. note 1 (noting that courts have adopted practice of receiving evidence on questions of international law). Thus, there is no record to which this Court might refer to determine whether state practice (at least outside the United States) has reached a consensus that capital punishment should not be imposed on 16-year-old offenders, and (perhaps more important) whether such a consensus, if it exists, reflects a sense of legal obligation (*opinio juris*) on the part of states that international law prohibits capital punishment for 16-year-old offenders, rather than a mere convergence of state practice on the subject. “It is often difficult to determine when that transformation [from mere customary state practice to legal obligation] has taken place.” Restatement § 102 cmt. c. In view of the significance of reaching a conclusion that customary international law preempts application of a state statute, this Court should not reach such a conclusion without a record that fully supports the proposition relied on by a party that seeks to establish that customary international law preempts state law.

Second, perhaps reflecting the fact that the record has not been developed on this point, the Nevada Supreme Court did not discuss customary international law at all in the opinion below. Nor has any other state supreme court or federal court of appeals addressed the precise issues presented by the petition. On issues of such potentially far-reaching significance, this Court would benefit from the reasoned decisions of lower courts, and should not address those questions in the first instance.

b. In addition, in light of actions taken by the political Branches of the United States Government objecting to the asserted rule of customary international law relied on by petitioner, petitioner’s claim does not warrant this Court’s review. Given that the Executive

Branch has primary responsibility for conducting the foreign relations of the United States, the 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 in its relations with other Nations, just as they give great weight to the Executive Branch's interpretation of a treaty. Cf. *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 119 S. Ct. 662, 671 (1999); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982).

The United States has in the past taken the position in international fora that customary international law does not prohibit the execution of 16-year-old offenders.⁸ The United States has also persistently objected to the development and application of such a principle. The latter point is dispositive here of petitioner's claim based on customary international law, for "[c]ustomary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm, * * * just as a state that is not party to an international agreement is not bound by the terms of that agreement." *Siderman de Blake v. Argentina*, 965 F.2d 699, 715 (9th Cir.

⁸ When the United States Government was called upon by the Inter-American Commission on Human Rights to defend the legality of capital punishment for offenders under 18 years old, it argued that no norm of customary international law had developed barring the execution of offenders under 18 years old. See Memorandum of the United States to the Inter-Am. Comm'n on Human Rights in Case 9647 (James Terry Roach and Jay Pinkerton) 14-17 (July 15, 1986); *In re Roach*, Case 9647, ¶ 38(g)-(h) (Inter.-Am. C.H.R. 1987) (summarizing position of United States). We have lodged with the Clerk copies of the United States' submissions in the *Roach and Pinkerton* case as well as the decision of the Inter-American Commission on Human Rights in that case.

1992), cert. denied, 507 U.S. 1017 (1993); accord Re-statement § 102 cmt. d (“[I]n principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.”).

In 1986 the United States Government stated in a case before the Inter-American Commission on Human Rights that it objected to the application of any rule of customary international law that would proscribe the application of capital punishment to persons who were under 18 at the time of their offenses.⁹ In addition, as discussed above, the United States formally entered a reservation to Article 6(5) of the ICCPR on that precise question, and that reservation remains in force. Nor (with one narrow exception not applicable here) has the United States heretofore accepted other obligations under international instruments that would preclude the imposition of capital punishment on 16-year-old of-

⁹ See Memorandum of the United States to the Inter-Am. Comm’n on Human Rights in Case 9647, *supra*, at 17-19. The Inter-American Commission on Human Rights agreed with the United States in that case that a “customary rule * * * does not bind States which protest the norm,” *In re Roach, supra*, ¶ 52, and stated that, “[s]ince the United States has protested the norm, it would not be applicable to the United States should it be held to exist,” *id.* ¶ 54. The Commission also agreed with the United States that there did not at that time exist a norm of customary international law establishing 18 to be the minimum age for the death penalty, although it suggested that such a norm was “emerging,” *id.* ¶ 60. The Commission stated that a binding *jus cogens* principle of international law had developed prohibiting the execution of *children*, but it noted that the existence of such a principle did not resolve the case before it, because of the absence of uniform practice concerning the appropriate age of majority. See *id.* ¶¶ 55-60.

fenders.¹⁰ The United States' persistent objections to the asserted norm of customary international law relied

¹⁰ The American Convention on Human Rights proscribes (among other things) the death penalty for 16- and 17-year-old offenders. See American Convention on Human Rights, Nov. 22, 1969, art. 4(5), 1144 U.N.T.S. 123, 125, 9 I.L.M. 673, 676. The United States has not, however, become a party to the American Convention. Furthermore, at the final drafting conference of the American Convention, the United States urged the deletion of the prohibition on execution of those under 18 years old. See *United States: Report of the Delegation to the Inter-American Specialized Conference on Human Rights*, 9 I.L.M. 710 (Apr. 22, 1970). In 1978, President Carter proposed that the Senate consider a reservation to American Convention's provisions regarding capital punishment in the event of an eventual ratification. S. Exec. Docs., *supra*, at XVII, XVIII.

The Convention on the Rights of the Child also contains a prohibition against the death penalty for persons who were under 18 at the time of their offenses. See Convention on the Rights of the Child, Nov. 20, 1989, art. 37(a), G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49 at 167, U.N. Doc. A/44/49, 28 I.L.M. 1448, 1470. The United States has not at this point ratified the Convention on the Rights of the Child. Further, in the course of the negotiation of that Convention, the United States stated that it would agree to the adoption by consensus of the provision against capital punishment for juvenile offenders only on the condition that the United States retained the right to enter a reservation to the provision, should it decide to ratify the Convention. See Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child*, 45th Sess., 2 Mar. 1989, at 101, U.N. Doc. E/CN.4/1989/48.

The United States has ratified the Fourth Geneva Convention, which prohibits imposition of the death penalty against a national of another country held during time of war who was under 18 when he committed the offense. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, 3560, 75 U.N.T.S. 286, 330. That exception to the United States' policy of opposing treaty provisions and the application of a rule of customary international law barring capital punishment for offenders under 18 years of age does not vitiate the

on by petitioner refutes his contention that that norm now operates within the United States to prevent the State of Nevada from applying its capital punishment statute to petitioner.

3. Finally, petitioner contends (Pet. 18-20) that his execution is prohibited by a *jus cogens* norm of international law. A *jus cogens* norm, also known as a “peremptory norm,” has been described as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.” Vienna Convention, art. 53; see also Restatement § 102 rep. note 6. The precise nature and scope of the concept of *jus cogens* remains uncertain in international law.¹¹ For present purposes, however, the important point about *jus cogens* as that concept has been developed by some courts and commentators—which distinguishes it fundamentally from customary international law as discussed above (pp. 14-18, *supra*)—is that the binding nature of a *jus cogens* norm does not depend on the consent of a state. See *Siderman*, 965 F.2d at 715.

In order to hold that there is a *jus cogens* principle that preempts the application of Nevada’s death penalty statute to petitioner, the Court would have to de-

United States’ status as a persistent objector. The Fourth Geneva Convention addresses only the specific case of foreign nationals held during time of war, and does not address the imposition of capital punishment by a country on one of its own citizens, such as petitioner.

¹¹ The very few decisions in United States courts that have addressed the concept of *jus cogens* norms have described them as “universal and fundamental rights” that include “principles and rules concerning the basic rights of the human person.” See, *e.g.*, *Siderman*, 965 F.2d at 715. It has been suggested that *jus cogens* norms include prohibitions against slavery and genocide. See *id.* at 716-717; Restatement § 702 rep. note 11.

cide that the asserted legal prohibition against capital punishment for 16-year-old offenders has similar force under international law to the prohibitions that are commonly cited as *jus cogens*, such as those against slavery and genocide; that this Court should recognize such a *jus cogens* norm that is binding on the United States in the international community, despite the United States' persistent objection to the asserted legal obligation up to this point in international fora; and that domestic courts must give effect to that norm to preempt the application of a state criminal statute, notwithstanding the contrary intentions of the political Branches (including the reservation to a treaty to which the United States is a party).

Such contentions, if accepted by this Court, would obviously have profound significance. For the reasons we have given above in discussing petitioner's claim based on customary international law, we submit this case does not present an appropriate vehicle for addressing those far-reaching contentions. Neither the record nor the decision below illuminates in any way the question whether a *jus cogens* norm against capital punishment for 16-year-old offenders has developed. Nor is there any conflict among lower courts on the question; indeed, we are not aware of any lower court decision that has addressed the question. In addition, there is no other source of decisional law (such as decisions of the International Court of Justice) that this Court might find helpful in resolving the question whether the execution of a 16-year-old offender violates a *jus cogens* norm. Given the considerable uncertainty as to how it might be ascertained whether a principle of international law has attained the status of *jus cogens*, see Restatement § 102 rep. note 6; *id.* § 702 rep. note 11, we submit that this case does not present an appropri-

ate occasion for the Court to make such a determination in the first instance.

Moreover, the suggestion that the courts, by declaring that the asserted *jus cogens* norm exists and applies here, should in effect override the judgment of the political Branches that the United States should not be bound by an international legal prohibition against the execution of 16-year-old offenders plainly raises serious separation of powers concerns. In other contexts touching on foreign relations and international law, the courts have declined to substitute their judgment for that of the political Branches; for example, the courts have not applied the provisions of a treaty that have been abrogated by an Act of Congress (see *The Head Money Cases*, *supra*) or rules of customary international law that have been rejected by the controlling acts of the political Branches (see Restatement § 115 rep. note 3). Similarly, we submit, there is no occasion for this Court to consider recognizing and giving preemptive force to the purported *jus cogens* norm relied on by petitioner, in light of the absence of decisional authority regarding the existence of such a peremptory norm and the persistent objection by the United States, through the political Branches, to a prohibition against the execution of 16-year-old offenders including in a formal treaty reservation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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