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## INTERNATIONAL LAW ISSUES IN DEATH PENALTY DEFENSE

*Richard J. Wilson\**

The American Bar Association adopted revised *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* in February 2003.<sup>1</sup> For the first time in any set of standards regarding the role of defense counsel in a criminal case, the new guidelines make reference to an obligation to raise issues involving the application of international law in our domestic courts. Guideline 10.6, entitled “Additional Obligations of Counsel Representing a Foreign National,” requires defense counsel to raise relevant issues under the Vienna Convention on Consular Relations (“Vienna Convention”).<sup>2</sup> As the treaty and title of the section imply, these obligations arise only when the client is a foreign national.

This short article will explore some additional issues regarding the relationship between international law and the death penalty. First, it will discuss some additional aspects of the representation of foreign nationals in capital cases. Second, it will discuss additional instances in which defense counsel can make international law arguments, regardless of the client’s nationality. Third, because international law issues are new to most lawyers in the United States, even those who are seasoned in capital litigation, it will suggest some alternative ways in which international law arguments can be made. The conclusion will put the United States experience with the death penalty into the broader context of world practice on the death penalty.

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1. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003) [hereinafter GUIDELINES].

2. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

## I. SOME OTHER ASPECTS OF THE VIENNA CONVENTION

The Commentary to Guideline 10.6 notes that there is “considerable evidence that American local authorities routinely fail to comply with their obligations under the Vienna Convention.”<sup>3</sup> Other commentators have noted that most domestic courts have thus far failed to provide an effective remedy for violation of the Vienna Convention.<sup>4</sup> However, there are several good reasons why defense lawyers should continue to raise the issue in future cases, in addition to the imprimatur of the Guidelines themselves. First, there are positive signs from more recent decisions that the environment is shifting in favor of protection of the defendant when serious violations occur. Second, if the issue is lost, it may be as much from untimely or unpersuasive advocacy as from judicial hostility. Third, and closely related to the previous reason, the cutting edge of the battle for incorporation of international law into the domestic regime is being fought in the realm of the death penalty, but that fight must be seen as a long-term struggle to change the legal culture of the courts of the United States. Enforcing international treaties that protect individual human rights is not something that many courts in the U.S. are accustomed to doing, and the role of the defense bar is as much educational as it is persuasive.

The Commentary to the Guideline notes the favorable decision of the Oklahoma Court of Criminal Appeals in *Valdez v. State*.<sup>5</sup> Another positive outcome in a capital case was achieved in *United States ex rel. Madej v. Schomig*,<sup>6</sup> decided on a petition for habeas corpus relief by a federal district court sitting in review by writ of habeas corpus of a death sentence in Illinois. Although the court had granted relief on ineffective counsel grounds, it granted a motion to reconsider the Vienna Convention claim in light of a decision on the merits in the *LaGrand*

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3. GUIDELINES, *supra* note 1, at Guideline 10.6, commentary.

4. See, e.g., Anthony N. Bishop, *The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the LaGrand Case?*, 25 HOUS. J. INT'L L. 1, 97 (2002) (“[U.S.] courts have essentially created unenforceable rights to consular notification and access.”); Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT'L L. 427, 427 (2002) (“The Judgment of the International Court of Justice (ICJ) in the *LaGrand* case has not to date resulted in a discernible improvement in United States compliance with the Vienna Convention on Consular Relations.”) (citation omitted); John Quigley, *Consular Rights and the Death Penalty After LaGrand*, 96 AM. SOC'Y INT'L L. PROC. 309, 316 (2002) (“Many U.S. courts in rejecting an Article 36 claim deprecate the importance of consular assistance.”). Article 36 of the Vienna Convention contains the operative language regarding the rights under discussion in Guideline 10.6. See Vienna Convention, *supra* note 2, at art. 36.

5. GUIDELINES, *supra* note 1, at Guideline 10.6, commentary n.194.

6. 223 F. Supp. 2d 968 (N.D. Ill. 2002).

*Case*<sup>7</sup> by the International Court of Justice (“ICJ”), which had been decided since the time of the petitioner’s original filing.

The *Madej* court noted at the beginning of its discussion that “[t]he ruling of the International Court of Justice in *LaGrand* is certainly among the most important developments defining the treaty obligations of signatories to the Vienna Convention.”<sup>8</sup> The court went on to find that “the ICJ ruling conclusively determines that Article 36 of the Vienna Convention creates individually enforceable rights, resolving the question most American courts (including the Seventh Circuit) have left open.”<sup>9</sup> Finally, the court stated that the ICJ’s decision suggests that “courts cannot rely upon procedural default rules to circumvent a review of Vienna Convention claims on the merits.”<sup>10</sup> Although the government asked the court to again reconsider its decision, it declined to do so, noting that consular assistance could have played a significant role in the capital sentencing hearing.<sup>11</sup>

A second aspect of the Vienna Convention issues has to do with when and how the issue is raised by counsel. Guideline 10.6 implicitly suggests that the issue should be raised at the earliest possible time, in pre-trial proceedings if possible. The Guideline refers to “every stage of the case” in Section A, and, in Section B, urges counsel to act “immediately” if possible.<sup>12</sup> These admonitions are consistent with the treaty provisions themselves, which call for detaining authorities to inform the detainee of consular rights, and to contact consular officials,

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7. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (last visited July 31, 2003). Another important international decision dealing with interpretation of the Vienna Convention is from the Inter-American Court of Human Rights in its Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 16 Inter-Am. Ct. H.R. (Ser. A) (1999), which can be found on the web at <http://www1.umn.edu/humanrts/iachr/A/OC-16ingles-sinfirmas.html> (last visited Aug. 3, 2003). An excellent analysis of that decision is provided in William J. Aceves, *International Decision: The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Advisory Opinion OC-16/99*, 94 AM. J. INT’L L. 555 (2000).

8. United States *ex rel. Madej*, 223 F. Supp. 2d at 978.

9. *Id.* at 979.

10. *Id.*

11. See United States *ex rel. Madej v. Schomig*, No. 98 C 1866, 2002 WL 31386480, at \*2 (N.D. Ill. Oct. 22, 2002). A thoughtful analysis of the decisions in *Madej* and *Valdez* is provided by William J. Aceves, *The Vienna Convention on Consular Relations: Recent Developments*, in ACLU INTERNATIONAL CIVIL LIBERTIES REPORT, 2002 EDITION, at 44, available on the web at <http://www.aclu.org/International/International.cfm?ID=11742&c=36> (last visited July 31, 2003).

12. GUIDELINES, *supra* note 1, at Guideline 10.6.

both “without delay.”<sup>13</sup> Although there have been a number of daunting decisions by domestic courts on the Vienna Convention issue, a good deal of the analysis by the courts is simply an erroneous reading of either domestic treaty obligations, the nature of international obligations, or both. Some of this comes about because the courts are unwilling to confront the issue, but much of the bad analysis arises from defense counsel’s failure to raise the issue in a proper and timely manner. Lawyers without significant international experience should consult helpful literature on raising Vienna Convention challenges,<sup>14</sup> or at the least, with their client’s permission, contact consular officials, who can frequently provide helpful legal advice.<sup>15</sup>

Finally, effective protection under the Vienna Convention is particularly difficult to gain from domestic courts because recognition of the validity of international norms requires that the courts provide an effective remedy for their violation. Moreover, recognition of international norms could further undermine the already shaky validity of the death penalty itself in domestic law, since the overwhelming trend in international law and practice is toward abolition. The leading decisions of international tribunals, however, suggest that the reversal of the death sentence is required when there is a violation of the Vienna Convention, and that the defendant need not prove that there would have been a different outcome if the violation had not occurred.

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13. Vienna Convention, *supra* note 2, at art. 36(1)(b). The U.S. State Department has drafted a helpful and thorough document on government obligations under the Vienna Convention which can be found on the web at [http://travel.state.gov/consul\\_notify.html](http://travel.state.gov/consul_notify.html) (last visited June 28, 2003).

14. In addition to the articles critical of the U.S. courts’ treatment of this issue, *supra* note 4, there are other helpful analyses of the Vienna Convention. *See, e.g.*, William J. Aceves, *International Decision: LaGrand (Germany v. United States)*, 96 AM. J. INT’L L. 210 (2002); John Quigley, *LaGrand: A Challenge to the U.S. Judiciary*, 27 YALE J. INT’L L. 435 (2002); William A. Schabas, *The ICJ Ruling Against the United States: Is it Really About the Death Penalty?*, 27 YALE J. INT’L L. 445 (2002). In his article, Professor Schabas suggests that the most important aspect of the *LaGrand* decision may be its conclusion that its own provisional-measures decisions are binding on the parties. *See* Schabas, *supra*, at 452. Obtaining interim measures, as suggested in the *Avena* litigation now pending at the ICJ, may be a way to use the Vienna Convention to clients’ benefit. *See* Case Concerning *Avena and Other Mexican Nationals (Mexico v. United States)*, at Guidelines commentary, *supra* note 1, at Guideline 10.1, n.193. A thoughtful student note suggests the possibility of civil rights actions under 42 U.S.C. § 1983. *See* Cara Drinan, Note, *Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts After LaGrand*, 54 STAN. L. REV. 1303, 1316 (2002).

15. This is particularly true with Mexican nationals who make up nearly a half of all known foreign nationals on death rows in the United States, and are now the subject of collective litigation before the ICJ in the *Avena* case, *supra* note 14. *See* Death Penalty Information Center, *Foreign Nationals and the Death Penalty in the United States*, at <http://www.deathpenaltyinfo.org/article.php?did=198&scid=31#Reported-DROW> (last visited July 31, 2003) (indicating that fifty-two out of 118 foreign nationals on death row were of Mexican nationality as of June 13, 2003).

First, the Inter-American Court of Human Rights, in its advisory opinion on application of the Vienna Convention in the Americas, held that:

[N]onobservance of a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, *imposition of the death penalty is a violation of the right not to be 'arbitrarily' deprived of one's life*, in the terms of the relevant provisions of the human rights treaties . . . .<sup>16</sup>

Similarly, in the *LaGrand* decision, the ICJ concluded that, for the purposes of a violation of Article 36 notification requiring a remedy, it would not matter "whether a different verdict would have been rendered,"<sup>17</sup> and that rules of procedural default that normally apply in both state and federal capital litigation "prevent[] [the U.S. courts] from attaching any legal significance" to violations of the Vienna Convention and therefore also give rise to Article 36 violations requiring an effective remedy.<sup>18</sup>

The death penalty decisions of the United States Supreme Court have traditionally considered international human rights norms and practice, until the 1989 decision in *Stanford v. Kentucky*,<sup>19</sup> where, in a footnote, the majority opinion suggested that sentencing practices of other countries are irrelevant to interpretation of the Eighth Amendment because "it is *American* conceptions of decency that are dispositive . . . ."<sup>20</sup> In its 2002 decision abolishing the death penalty for mentally retarded persons, however, the court returned to its well-established tradition of consideration of international law and practice in the determination of whether a punishment is "unusual" in violation of the Eighth Amendment's prohibition on cruel and unusual punishments.<sup>21</sup> Two decisions at the end of the U.S. Supreme Court's

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16. Advisory Opinion OC-16/99, *supra* note 7, ¶ 137 (emphasis added). One of the relevant human rights treaties to which the court referred is the International Covenant on Civil and Political Rights, to which the U.S. is a party. *Id.*

17. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), ¶ 74, available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.

18. *Id.* ¶ 91.

19. 492 U.S. 361 (1989).

20. *Id.* at 369 n.1. For a discussion of the relevant history, see Richard J. Wilson, *The Influence of International Law and Practice on the Death Penalty in the United States*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* (James R. Aker et al. eds., 2d ed. forthcoming 2003).

21. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). The tradition of considering international law and practice in deciding capital cases is covered in Harold Hongju Koh, *Paying*

2002 term provide further evidence that the Court will look to international human rights norms and jurisprudence in its future decisions. First, in *Lawrence v. Texas*,<sup>22</sup> the Court struck down a Texas statute criminalizing sexual intimacy by same-sex couples as violative of Fourteenth Amendment substantive due process. Justice Anthony M. Kennedy, writing for a five-member majority of the Court, made multiple references to decisions of the European Court of Human Rights (“European Court”) regarding the rights of homosexuals. Among the several useful references for defense counsel is the recognition by a majority of the court that the jurisprudence of the European Court expresses relevant views of “Western civilization”<sup>23</sup> and “values we share with a wider civilization.”<sup>24</sup> Relying on a series of European Court decisions, the majority concluded that “the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”<sup>25</sup> In the second landmark case, *Grutter v. Bollinger*,<sup>26</sup> the Court upheld the use of affirmative action admission policies at the University of Michigan Law School. In her concurrence with the majority opinion, Justice Ruth Bader Ginsburg, joined by Justice Stephen G. Breyer, relied on two international human rights treaties, one to which the United States is a party and one to which it is not, as sources for “the international understanding of the office of affirmative action.”<sup>27</sup> The court’s renewed interest in international practice opens the door to other potential challenges to the death penalty through international law.

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“Decent Respect” to World Opinion on the Death Penalty, 35 U.C. DAVIS L. REV. 1085, 1095-1102 (2002).

22. 123 S. Ct. 2472 (2003).

23. *Id.* at 2481.

24. *Id.* at 2483.

25. *Id.* It is also noteworthy that neither Justice Antonin Scalia nor Justice Clarence Thomas, who wrote lengthy dissents in *Lawrence*, challenged the majority’s use of international human rights law as a source of law or supportive authority, unlike the lengthy and vitriolic dissents of Justice Scalia and Chief Justice William H. Rehnquist in the *Atkins* decision, *supra* note 21, written in the death penalty context.

26. 123 S. Ct. 2325 (2003).

27. *Id.* at 2347 (Ginsburg, J., concurring). The two treaties are the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the U.S. in 1994, and the Convention on the Elimination of All Forms of Discrimination Against Women, signed by the United States but not yet ratified. *See id.* Also noteworthy in both *Grutter* and *Lawrence*, however, was the conspicuous failure of Justice Sandra Day O’Connor to use, endorse or even acknowledge the use of international law as a source, given her position as a crucial swing vote in many capital cases.

## II. OTHER INTERNATIONAL LAW CHALLENGES

### A. Extradition and the Death Penalty

Along with foreign nationals on death row, special consideration must be given to those individuals who might face the death penalty after extradition to the United States. Although the United States Supreme Court has approved the practice of so-called “irregular rendition”—the forcible removal of persons to U.S. territorial jurisdiction without formal judicial process<sup>28</sup>—that procedure normally should yield to a formal process of extradition under one of the more than one hundred bilateral extradition treaties between the United States and other countries.<sup>29</sup> Increasingly, as in the new extradition treaties between the United States and both Paraguay and South Africa, completed in 2001, abolitionist countries can refuse extradition to the United States without assurances against the death penalty.<sup>30</sup>

Countries with close ties to the United States are tightening their extradition rules as a means of expressing their displeasure with our government’s aggressive use of the death penalty. Because of its disagreements with the United States over application of the Vienna Convention, for example, Mexico not only refuses persons facing the death penalty extradition to the U.S., but also any accused facing a potential life sentence.<sup>31</sup> The strongest demonstration of this trend occurred when European Union members indicated that they would not

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28. See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

29. See Amnesty International, *United States of America: No Return to Execution - The US Death Penalty as a Barrier to Extradition* 5, (2001), available at [http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/AMR511712001ENGLISH/\\$File/AMR5117101.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR511712001ENGLISH/$File/AMR5117101.pdf) (last visited July 31, 2003). The United States is a party to both a multilateral treaty – the Vienna Convention on Consular Relations – as well as bilateral consular treaties with individual countries, as noted in the commentary to the ABA Guidelines, *supra* note 1, at Guideline 10.6, note 193. In all cases in which defense counsel has a death-eligible client facing extradition into the United States, counsel should fully explore potential defenses against the death penalty that might be extracted from the provisions of bilateral treaties on consular relations, extradition, mutual legal assistance, or even prisoner transfer. See, e.g., Alan Clarke, *Justice in a Changed World: Terrorism, Extradition, and the Death Penalty*, 29 WM. MITCHELL L. REV. 783 (2003) (discussing discernable movement toward a per se rule barring extradition absent assurances that the death penalty will not be imposed); Robert Gregg, *The European Tendency Toward Non-Extradition to the United States in Capital Cases: Trends, Assurances and Breaches of Duty*, 10 U. MIAMI INT’L & COMP. L. REV. 113 (2002); Kyle M. Medley, *The Widening of the Atlantic: Extradition Practices Between the United States and Europe*, 68 BROOK. L. REV. 1213 (2003).

30. See Amnesty International, *supra* note 29, at 6.

31. See Ginger Thompson, *Mexico: Extradition to U.S. Blocked*, N.Y. TIMES, May 23, 2002, at A6.

extradite suspected terrorists to the United States after September 11, 2001 without assurances against the death penalty.<sup>32</sup>

In at least two instances, foreign courts have reached out to bar possible capital punishment in stinging rebuke to the death penalty regime in this country. In *United States v. Burns*,<sup>33</sup> the Canadian Supreme Court held that Canada's Justice Minister had violated the Canadian Charter of Rights and Freedoms in his failure to seek assurances against the death penalty for Glen Sabastian Burns and Atif Ahmad Rafay, eighteen-year-olds charged with capital murder in Washington State. The young men were extradited only after those assurances were provided. And in South Africa, the Constitutional Court ruled, after the fact, that government officials had violated constitutional and statutory obligations by refusing to seek assurances against the death penalty before turning over Khalfan Khamis Mohamed to U.S. authorities for trial in the U.S., where he faced the death penalty for his alleged role in the U.S. embassy bombing in Tanzania.<sup>34</sup> Although Mohamed was already at trial at the time of its judgment, the federal judge here permitted an instruction to the jury about the South African decision, and the New York City jury deadlocked on the issue of the death penalty, resulting in a sentence of life imprisonment without possibility of parole.<sup>35</sup>

*B. Certain Categories: Mentally Retarded and Mentally Ill Persons, Juveniles, and Persons Tried by Military Commission*<sup>36</sup>

As noted above, the United States Supreme Court has now banned the execution of mentally retarded persons in its 2002 decision in *Atkins v. Virginia*.<sup>37</sup> However, the court has yet to bar capital punishment for the related categories of mentally ill persons and juvenile defendants, whose mental and emotional maturity is also significantly less than that of fully competent adults.

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32. See *U.S. Capital Punishment Stops Extradition of EU Terror Suspects*, AGENCE FRANCE PRESSE, Oct. 7, 2001.

33. [2001] 1 S.C.R. 283.

34. *Mohamed & Another v. President of the Republic of South Africa & Others*, [2001] (7) BCLR 685 (CC).

35. Amnesty International, *supra* note 29, at 14.

36. See Susan M. Boland, *Walking the Edge of Death: An Annotated Bibliography on Juveniles, the Mentally Ill, the Mentally Retarded and the Death Penalty*, 21 N. ILL. U. L. REV. 131 (2001), for a comprehensive annotated bibliography on the first three categories. Although it predates some of the important new cases in this area, the article provides a comprehensive overview of both domestic and international sources.

37. See *supra* text accompanying note 21.

The issues with regard to juveniles are ripe for resolution, and every capital lawyer with a juvenile client should raise and preserve a challenge to the validity of the juvenile death penalty in the United States under international law and practice. The issue came very close to review on two occasions during the 2002 term of the Supreme Court, and on one occasion, the dissenters from denial of certiorari made explicit mention of the “apparent consensus . . . in the international community” on the issue.<sup>38</sup> There are excellent recent materials that provide helpful information for practitioners on raising this issue.<sup>39</sup>

A recent international decision broadly attacks the validity of the juvenile death penalty in the United States. In October of 2002, the Inter-American Commission on Human Rights (“Commission”) decided the case of *Domingues v. United States*.<sup>40</sup> This is the same case that divided the Nevada Supreme Court over the question of the application of the International Covenant on Civil and Political Rights (“ICCPR”), a treaty to which the United States is a party, and which explicitly prohibits the execution of persons under the age of eighteen at the time of their alleged crimes. Treaties have the same status as federal law under the explicit language of the supremacy clause of the U.S. Constitution, and are thus part of “the supreme Law of the Land.”<sup>41</sup> The Nevada court

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38. *Patterson v. Texas*, 536 U.S. 984 (2002) (Stevens, Ginsberg and Breyer, JJ., dissenting from denial of certiorari) (arguing that it would be appropriate for the court to revisit the issue of offenders below the age of eighteen in light of the “apparent consensus that exists among the States and in the international community” as to the impropriety of the death penalty for juveniles); see also *In re Stanford*, 123 S. Ct. 472 (2002) (Stevens, Souter, Ginsberg and Breyer, JJ., dissenting from denial of certiorari in juvenile death penalty case).

39. See Christian A. Levesque, Comment, *The International Covenant on Civil and Political Rights: A Primer for Raising a Defense Against the Juvenile Death Penalty in Federal Courts*, 50 AM. U. L. REV. 755 (2001); Connie de la Vega, *Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Case*, 42 SANTA CLARA L. REV. 1041 (2002); Edmund P. Power, *Too Young to Die: The Juvenile Death Penalty After Atkins v. Virginia*, 15 CAP. DEF. J. 93 (2002); Amnesty International, *The Exclusion of Child Offenders from the Death Penalty Under General International Law* (2003); Amnesty International, *United States of America: Indecent and Internationally Illegal: The Death Penalty Against Child Offenders* (2002) available at <http://web.amnesty.org/library/Index/ENGAMR511432002?open&of=ENG-USA> (last visited Aug. 2, 2003).

40. Case 12.285, Inter-Am. C.H.R. 62, OEA/sr.L/V/II.117 (Oct. 22, 2002), available at <http://www.iachr.org/annualrep/2002eng/USA.12285.htm> (last visited Aug. 2, 2003).

41. Article VI, Clause 2 of the U.S. Constitution provides:

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 or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2 (emphasis added). The last clause is particularly important for the enforcement of treaties because most death sentences are imposed under the state law of the thirty-

narrowly upheld the juvenile death penalty based on an exception taken by the United States Senate to that provision in the treaty at the time of ratification, called a “reservation” in international law, and the U.S. Supreme Court denied review after inviting a submission on the issues by the Solicitor General’s office.<sup>42</sup>

The Commission directly challenged any ongoing validity for the juvenile death penalty in its *Domingues* decision. Its conclusion was that “by persisting in the practice of executing offenders under age [eighteen], the U.S. stands alone amongst the traditional developed world nations and those of the inter-American system, and has also become increasingly isolated within the entire global community.”<sup>43</sup> From this evidence, the Commission found that “a norm of international customary law has emerged prohibiting the execution of offenders under the age of [eighteen] years at the time of their crime.”<sup>44</sup> Moreover, the Commission found that the rule against execution of juveniles “has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*.”<sup>45</sup> Finally, it explicitly rejected the government’s claims that, as a persistent objector to the rule against juvenile executions, it is not bound by the customary norm.<sup>46</sup>

Many domestic practitioners may not be familiar with the international law terms used by the Commission in the *Domingues* decision, so a short explanation is in order. First, customary international law is simply “a general practice accepted as law,” according to the Statute of the International Court of Justice.<sup>47</sup> Another recognized definition for customary international law is “the general usage and practice of nations,” judicial decisions recognizing and enforcing that law, and the “works of jurists.”<sup>48</sup> In a landmark decision on the issue of the applicability of customary law in the United States, the U.S. Supreme Court held, “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 . . . .”<sup>49</sup> That decision also states

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eight retentionist states. For arguments about the binding nature of international human rights norms on the states in a federal system, see Peter J. Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567 (1997).

42. *Domingues v. State*, 961 P.2d 1279 (Nev. 1998).

43. *Domingues v. United States*, Case 12.285, *supra* note 40, ¶ 84.

44. *Id.*

45. *Id.* ¶ 85; *see also id.* ¶¶ 107-10.

46. *Id.* ¶ 85.

47. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060, 3 *Bevans* 1153, 1187.

48. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

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

that international law, including customary international law, “is part of our law, and must be ascertained and administered by the courts of justice.”<sup>50</sup> The leading treatise on the foreign relations law of the United States recognizes this as well, when it notes as follows: “Matters arising under customary international law also arise under ‘the laws of the United States,’ since international law is ‘part of our law’ . . . and is federal law.”<sup>51</sup>

A *jus cogens* norm is, as the Commission asserts, an “indelible” version of customary international law. It is a peremptory 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.”<sup>52</sup> The persistent objector doctrine allows the objecting nation to assert its refusal to be bound by a customary norm, although there is a complex set of rules with regard to the invocation of persistent objector status, and obviously there can be no valid objection to a *jus cogens* norm.<sup>53</sup>

The last category of cases in which international law is especially relevant is conviction by the newly created military commission tribunals for alleged terrorists, followed by sentence of death. Military commissions have been used in the past, but the creation of such commissions at this time in the United States is a specific response to the September 11, 2001 terrorist attacks. No such trials have taken place at the time of this writing, but the authority to undertake them lies in the president’s Military Order of November 13, 2001.<sup>54</sup> Recent press

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50. *Id.*

51. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, reporter’s note 4 (1987).

52. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 53, 1155 U.N.T.S. 331, 352, 8 I.L.M. 679, 699. Although not ratified by the United States, it has recognized the treaty’s norms as an expression of customary international law.

53. See Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT’L L. & POL’Y 147, 150-54 (1996); 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, 758-59 (1998).

54. Military Order of November 13, 2001, 66 Fed. Reg. 57,833, *available at* 2001 WL 1435652 (Pres.). The Order itself provides, in Section 4(a), for the possibility of the death penalty, and further provides, in Section 4(c)(7), that sentences require only a two-thirds majority of the commission members, rather than the traditional unanimous verdict in a criminal case. See Military Order of November 13, 2001, 66 Fed. Reg. at 57,834-35. Section 7(b)(2) bars any review or further remedy in domestic or international tribunals from the commission’s decision. See Military Order of November 13, 2001, 66 Fed. Reg. at 57,835-36. A later, more specific set of procedures were adopted and published by the U.S. Department of Defense on March 21, 2002, as Military Commission Order No. 1, *available at* <http://www.defenselink.mil/news/Mar2002/>

announcements indicate that the final groundwork is being completed to begin trials by commissions at Guantanamo Bay, Cuba.<sup>55</sup> The creation and scope of these tribunals themselves, as well as their imposition of the death penalty, will present complex issues at the intersection of domestic and international law, as well as humanitarian law and human rights. The commissions create a new “global death penalty jurisdiction”<sup>56</sup> that many scholars and practitioners find deeply disturbing.<sup>57</sup>

### C. General Arguments Using International Human Rights Law

Many capital defense lawyers see international law as relevant only to their foreign clients, or in extraditions from abroad or particular categories of cases in which the penalty itself can be challenged.<sup>58</sup> However, international human rights law now provides a rich body of decisions on due process and fair trial. Lawyers have applied those norms to issues in prisoner transfers<sup>59</sup> and prison conditions,<sup>60</sup> among other possible arenas in criminal law and process.

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d20020321ord.pdf (last visited June 28, 2003). The amended procedures responded to a number of criticisms of the earlier presidential order, the most relevant for our purposes being a requirement, in Section 6(G), that the commission reach unanimity on the death penalty. The amended order also permits review within the military. See U.S. DEP'T OF DEF., MILITARY COMM'N ORDER NO. 1 § 6(G) (2002). The Defense Department changes may require amendment of the presidential order, an issue that has not been settled as of this writing.

55. See Vanessa Blum, *Defense Dept. Readies Team for Terror Trials*, THE RECORDER (San Francisco), Apr. 18, 2003.

56. David Bruck, *Capital Punishment in the Age of Terrorism*, 41 CATH. LAW. 187, 193 (2001).

57. Most legal scholars have been highly critical of the commissions as proposed by the administration and Defense Department. See, e.g., Eric M. Freedman, *The Bush Military Tribunals: Where Have We Been? Where Are We Going?*, 17 CRIM. JUST. 14 (2002); Daryl A. Mundis, *Agora: Military Commissions: The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320 (2002); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001). But see Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002).

58. One challenge that I have not developed here, among possible arguments that can only be imagined, is an argument that the death penalty is “inhuman” under the language of Article 6 of the International Covenant on Civil and Political Rights. See Manfred Nowak, *Is the Death Penalty an Inhuman Punishment?*, in THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETIVE APPROACH 27 (Theodore S. Orin et al. eds. 2000). Although the U.S. reserved the right to impose capital punishment on any person other than pregnant women, including persons below eighteen years of age, there is no explicit reservation to Article 6 provisions. See 138 CONG. REC. 4781 (1992), cited in LOUIS HENKIN ET AL., HUMAN RIGHTS 75 (Supp. 2001).

59. See, e.g., Ralph Ruebner & Lisa Carroll, *The Finality of Judgment and Sentence Prerequisite in the United States-Peru Bilateral Prisoner Transfer Treaty: Calling Congress and the President to Reform and Justifying Jurisdiction of the Inter-American Human Rights Commission and Court*, 15 AM. U. INT'L L. REV. 1071 (2000).

The United States is a party to a number of important international human rights treaties. The relevant treaties, one of which has already been mentioned, the date of their entry into force in the United States, and the number of countries that have ratified the treaty as of this writing, are:

- The International Covenant on Civil and Political Rights, June 8, 1992, 149 countries;
- The International Convention on the Elimination of All Forms of Racial Discrimination, Oct. 21, 1994, 168 countries;
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Oct. 21, 1994, 133 countries.<sup>61</sup>

These treaties are still relatively new to the United States, and advocates are only now beginning to read them closely and use their provisions, in combination with the many international decisions interpreting them, in ways to protect the rights of the accused in all criminal proceedings, not just those ending with a capital sentence.<sup>62</sup>

Finally, as noted above, treaties are not the sole source of international law. One of the most fertile interpretive sources of international human rights law as applied to the death penalty in the United States has been the American Declaration of the Rights and Duties of Man (“American Declaration”), an international instrument that embodies binding norms of customary international law.<sup>63</sup> The Inter-American Commission on Human Rights, which sits in Washington, D.C., is one of the principal human rights bodies of the Organization of American States. Its seven members are independent experts in the field of human rights who can hear complaints by

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60. See, e.g., Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions*, 67 BROOK. L. REV. 719 (2002).

61. All information on the number of treaty ratifications is current, from the UN Treaty Collection, *Status of Multilateral Treaties Deposited with the Secretary-General*, at <http://untreaty.un.org> (last updated on May 8, 2003).

62. Space does not permit the development of examples of these arguments and sources for them. Interested readers can consult the now-extensive literature on the issue, including my own writings. See Richard J. Wilson, *Defending a Criminal Case with International Human Rights Law*, THE CHAMPION, May 2000, at 28; see also John Quigley, *Human Rights Defenses in U.S. Courts*, 20 HUM. RTS. Q. 555 (1998).

63. Sources for this conclusion can be found in Richard J. Wilson, *The United States' Position on the Death Penalty in the Inter-American Human Rights System*, 42 SANTA CLARA L. REV. 1159, 1159, 1167 (2002).

individuals against any government in the Americas for violations of the American Declaration.<sup>64</sup> The Commission has issued a number of favorable rulings in cases from the United States challenging the imposition of the death penalty.<sup>65</sup>

### III. APPROACHES TO INTERNATIONAL LAW ARGUMENTS IN DEATH PENALTY CASES

The structure of international law presents the three principal approaches to raising international law arguments against the death penalty. This section will more fully articulate those approaches.

#### A. *International Law and Practice Should Inform or Interpret Domestic Law*

This is the “softest” way to argue international law, and has proven to be one of the most persuasive ways to introduce international law and practice into the domestic courts. It avoids the harder arguments asserting the binding force of international human rights law, as the other two approaches require. It is essentially the approach taken by the U.S. Supreme Court in *Atkins v. Virginia*, in which the court concluded that the views of the international community are a relevant factor—not a binding source—for the interpretation of the U.S. Constitution.<sup>66</sup>

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64. The Commission and its companion body, the Inter-American Court of Human Rights, have treaty powers as well, but the United States has not ratified any of these treaties. See ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OAS/ser.L/V/II.4 rev. 9 (Jan. 31, 2003), available at <http://www.iachr.org/basic.eng.htm> (last visited Aug. 3, 2003).

65. These cases are reviewed in detail in Wilson, *supra* note 62. The most comprehensive treatment of the death penalty by human rights tribunals, including the Inter-American system, is William A. Schabas, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 311-54 (3d ed. 2002) [hereinafter Schabas, ABOLITION OF THE DEATH PENALTY]; see also generally William A. Schabas, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE (1996).

66. See *supra* discussion at text accompanying note 21. This was also the approach taken in the influential brief of the European Union as *amicus curiae* in the *Atkins* case. That brief and other helpful pleadings can be found in the brief bank of the International Justice Project, which works to challenge the death penalty in the United States through the use of international law. The Project's website is <http://www.internationaljusticeproject.org> (last visited on Aug. 3, 2003). Another source of helpful information and assistance on international law issues in capital litigation is the British organization Amicus. They maintain a web site and publish a periodical providing assistance to lawyers in the U.S., at <http://www.amicus-alj.org> (last visited on Aug. 3, 2003).

*B. Treaties are Expressions of International Law Which, as Federal Law, Trump Contrary State Law*

This is a second way of making an international law argument. It is the position formally expressed in the supremacy clause of the U.S. Constitution.<sup>67</sup> The dissenters in *Domingues v. State*, the Nevada case upholding the death penalty for juveniles in the face of a treaty challenge, followed this approach.<sup>68</sup> It also came into play in all of the domestic cases interpreting the obligations of the Vienna Convention on Consular Relations, a self-executing treaty to which the United States is a party, and the subject of Guideline 10.6.<sup>69</sup>

*C. Customary and Jus Cogens Norms of International Human Rights Law are Binding in the Domestic Courts of the United States*

The third approach to international law arguments avoids the difficulty of treaty reservations. It is the approach taken by the Inter-American Commission on Human Rights in its decision in *Domingues v. United States*, where the Commission found that U.S. application of the death penalty to persons under eighteen years of age at the time of their offense constitutes a *jus cogens* violation.<sup>70</sup> Customary law has taken on increased importance in the U.S. in the context of the significant body of cases decided under the Alien Tort Claims Act,<sup>71</sup> a federal statute that has been used extensively by foreign victims adjudicating customary international law and treaty claims of human rights violations in the U.S. federal courts.<sup>72</sup>

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67. See *supra* discussion at note 41 and accompanying text.

68. See *supra* text accompanying note 44. There are several sample briefs making treaty-based arguments in juvenile death penalty cases on the website of the International Justice Project, *supra* note 66.

69. Self-executing treaties are those that do not require the adoption of implementing legislation in order to take full domestic effect. See Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 50-51 (5th ed. 1998). The United States Senate has attached a declaration to each of the three human rights treaties discussed in the text asserting that the treaties are non-self-executing. The judicial effect of these declarations is subject to ongoing dispute. For a collection of arguments against non-self-execution, see Wilson, *supra* note 62, at 57-58.

70. See *supra* discussion at note 40 and accompanying text.

71. 28 U.S.C. § 1350 (2000).

72. The Alien Tort Claims Act provides that federal courts have jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The "law of nations" is customary international law. Two extremely helpful texts on the Act are BETH STEPHENS & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* (1996) and *THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY* (Ralph G. Steinhardt & Anthony D'Amato eds., 1999); see also, Joan

## IV. CONCLUSION

Recent reports from the United Nations show that about two-thirds of the countries of the world have abolished capital punishment,<sup>73</sup> and the trend in the last decade has been strongly toward abolition, not expansion or re-adoption.<sup>74</sup> As Professor William Schabas concludes in his comprehensive treatment of the death penalty under international law, systematic review of international norms “shows an inexorable progress towards abolition.”<sup>75</sup> In 2002, for example, only thirty-one of the world’s nearly two hundred countries carried out executions, and three countries—China, Iran and the United States—accounted for eighty-one percent of all known executions.<sup>76</sup> Figures for the juvenile death penalty are even more startling. While the United States has carried out twenty-two executions of juvenile offenders since 1976, only six other countries in the world report having carried out juvenile executions since 1990—the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia and Yemen.<sup>77</sup> As of this year, all of those countries have changed their laws to abolish the death penalty for juveniles, or have denied that juvenile executions took place, leaving the United States as the only country in the world to continue the practice.<sup>78</sup> Moreover, the U.N.’s Convention on the Rights of the Child,<sup>79</sup> a treaty that explicitly bars the execution of minors, has been ratified by every country of the world except the United States and Somalia, a country that is only now emerging from almost complete anarchy.<sup>80</sup>

All of the recently established international criminal tribunals created within the U.N. system have barred the use of capital punishment for the world’s worst crimes—genocide, war crimes and crimes against humanity. These include the temporary international criminal tribunals for the former Yugoslavia and for Rwanda, sitting in

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Fitzpatrick, *The Relevance of Customary International Norms to the Death Penalty in the United States*, 25 GA. J. INT’L & COMP. L. 165 (1996).

73. See Schabas, *supra* note 14, at 445.

74. See Amnesty International, *Facts and Figures on the Death Penalty*, available at [http://web.amnesty.org/pages/deathpenalty\\_facts\\_eng](http://web.amnesty.org/pages/deathpenalty_facts_eng) (last visited Aug. 3, 2003) (indicating that an average of three countries a year have abolished capital punishment over the last decade).

75. ABOLITION OF THE DEATH PENALTY, *supra* note 65, at 19.

76. See Amnesty International, *supra* note 74.

77. See International Justice Project, *Reported Worldwide Executions of Juveniles Since 1990*, at <http://www.internationaljusticeproject.org/juvWorld.cfm> (last visited Aug. 3, 2003).

78. See *id.*

79. G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736 (1989).

80. See U.N. Treaty Collection, *supra* note 61.

The Hague and Arusha, Tanzania, respectively, as well as the new International Criminal Court, which will also take up operations this year in The Hague. United States opposition to the new court by the current Bush administration is open and aggressive. It has not only attempted to “unsign” the treaty, which was signed in the closing days of the Clinton administration, but has also taken steps to obtain bilateral agreements with individual countries not to submit Americans to the Court’s jurisdiction if arrested in those countries.<sup>81</sup> It has gone so far as to adopt domestic legislation that critics have called the “Hague Invasion Act” because it permits the use of military force to “liberate” any American held by the Court for trial.<sup>82</sup>

Aside from pervasive problems in the domestic administration of the death penalty—problems that give rise to the need for the adoption of these Guidelines, among other measures—United States isolation in the world community for its use of the death penalty grows with each passing day. Yale Professor Harold Koh, a former Assistant Secretary of State for Democracy, Human Rights and Labor, has written that, “I can now testify that [actions of the U.S. government regarding the death penalty] are no longer minor diplomatic irritants.”<sup>83</sup> It is only a matter of time before Americans will conclude, as did Justice Harry A. Blackmun in 1994, that they are “morally and intellectually obligated simply to concede that the death penalty experiment has failed.”<sup>84</sup>

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81. See Press Release, Human Rights Watch, Opposition Mounting to U.S. Arm-Twisting on ICC (Aug. 13, 2002) at <http://www.hrw.org/press/2002/08/article98press.htm> (last visited Aug. 3, 2003).

82. See Press Release, Human Rights Watch, U.S.: ‘Hague Invasion Act’ Becomes Law (Aug. 3, 2002) at <http://www.hrw.org/press/2002/08/aspa080302.htm> (last visited Aug. 3, 2003).

83. Koh, *supra* note 21, at 1105.

84. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).