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Domestic and International Developments Relating to the Death Penalty: Introduction and Remarks

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DOMESTIC AND INTERNATIONAL DEVELOPMENTS RELATING TO THE DEATH PENALTY

INTRODUCTION AND REMARKS BY SANDRA L. BABCOCK*

In recent years, international law has played an increasingly prominent role in the development of death penalty jurisprudence in both domestic and international tribunals. In the United States, the citation of foreign jurisprudence by the Supreme Court in *Roper v. Simmons*[1] and *Atkins v. Virginia*[2] has generated an intense debate within the Court, Congress, and the media. In the Caribbean, decisions of the Judicial Committee of the Privy Council and the Inter-American Court on Human Rights have resulted in commutations of numerous death sentences. While abolitionists have celebrated these developments, the death penalty remains a popular sanction, and human rights advocates in the Caribbean have been particularly frustrated by antiquated laws that have effectively impeded important death penalty reforms. These developments are discussed below and in accompanying papers.

In litigation challenging the application of the death penalty in the United States, assiduous defense attorneys have been citing international human rights norms for decades. Foreign governments have also played a prominent role in promoting the acceptance of international norms that support restrictions on the application of the death penalty. These efforts led directly to landmark decisions regarding the execution of juvenile offenders and the execution of foreign nationals whose consular rights had been violated.

THE EXECUTION OF JUVENILE OFFENDERS

In Roper v. Simmons, the United States Supreme Court held, for the first time, that the execution of juvenile offenders was prohibited by the Eighth Amendment to the U.S. Constitution.[3] Justice Kennedy's majority opinion emphatically reaffirmed the role of international law as "instructive" and "significant" in interpreting the contours of the Eighth Amendment.[4] The Court cited state practice, noting that only seven countries in the world had executed juvenile offenders in recent history, as well as international instruments such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, in concluding that the "overwhelming weight of international opinion" was opposed to the juvenile death penalty.[5] The Court concluded its analysis by observing that:

> [o]ver time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the

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[1] 125 S.Ct. 1183 (2005).

[2] 536 U.S. 304 (2002).

[3] *Roper*, 125 S.Ct. at 1183.

[4] *Id.* at 1198, 1200.

[5] *Id.* at 1200.

> Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.[6]

The Court's opinion prompted a scathing dissent by Justice Scalia, who has long opposed any citation to foreign law in constitutional analysis. After noting that the Court's abortion jurisprudence was hardly consistent with the more restrictive practices of most states, Scalia concluded:

> The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.[7]

Consular Rights Violations and the Death Penalty

In 1969, the United States ratified the Vienna Convention on Consular Relations (VCCR).[8] Article 36(1)(b) of the Vienna Convention requires that when foreign nationals are detained, the country detaining them must give them immediate notice of their right to see and communicate with their consular representative. Article 36(1)(c) grants consular officers the right to visit, converse, and correspond with nationals who are in detention and to arrange for their legal representation. Finally, Article 36(2) provides that the laws and regulations of the receiving state must enable full effect to be given to these rights.

In the United States, violations of the Vienna Convention have been widespread since its ratification. Over the last decade, the executions of several foreign nationals who were deprived of their VCCR rights have drawn international condemnation and extensive intervention by foreign nations. Beginning in the late 1990s, nations such as Paraguay, Germany, and Mexico sought remedies for Vienna Convention violations from domestic courts and international tribunals alike. None of these efforts succeeded in changing the practice of the United States. The legal landscape changed significantly, however, after Mexico obtained a judgment from the International Court of Justice (ICJ) regarding fifty-two Mexican nationals condemned to death in the United States.

The ICJ issued its final judgment in the *Avena* case on March 31, 2004. The Court found that, for fifty-one Mexican nationals, the United States had failed to inform the detainees of their right to consular notification without delay, in violation of Article 36(1)(b) of the VCCR. In forty-nine cases, the Court also found that the United States had violated its corresponding obligation to notify the Mexican consulate of its nationals' detention without delay, as well as Mexico's right to communicate and have access to its nationals. In thirty-four of the cases, the United States was also found to have deprived Mexico of its right to arrange for legal representation of those nationals in a timely manner, in breach of Article 36, paragraph 1(c).

The *Avena* Court found that in all fifty-one cases, the United States was obligated to provide judicial review and reconsideration of the convictions and sentences in light of the violations of Article 36. The Court held that clemency review alone would not fulfill this obligation, although the clemency procedures could *supplement* judicial review in the cases

[6] *Id.* (citations omitted).

[7] *Id.* at 1228 (Scalia, J., dissenting).

[8] Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 8638.

of three Mexican nationals who had already exhausted their appeals. The Court held that judicial review must be effective, and must give "full weight" to the violation of the rights set forth in the Vienna Convention, "whatever may be the actual outcome of such review and reconsideration."[9] The Court declined to adopt Mexico's position that the convictions and sentences of all fifty-two nationals must be vacated, while leaving open the possibility that such remedies could be provided by the United States courts.

The ICJ emphatically affirmed its earlier ruling in the *LaGrand Case*[10] that procedural default rules may not be invoked to prevent meaningful review and reconsideration of cases in which violations of Article 36 have occurred. The United States had argued that the application of procedural bars was harmless in these cases, since each Mexican national was entitled to challenge the fairness of his trial under the United States Constitution. The Court rejected these arguments, emphasizing that the review and reconsideration process must "guarantee that the [VCCR] violation and the possible prejudice caused by that violation will be *fully examined* and taken into account in the review and reconsideration process."[11]

The ICJ's judgment in *Avena* has already affected judicial proceedings involving Mexican nationals in the United States. The first case to arise after the March judgment was that of Osbaldo Torres, a Mexican national in Oklahoma whose execution had been scheduled for May 18, 2004.

The Case of Osbaldo Torres

Following the ICJ's judgment in *Avena,* attorneys representing Mr. Torres and the government of Mexico filed a clemency petition with the Oklahoma Pardon and Parole Board and a postconviction application with the Oklahoma Court of Criminal Appeals. Both documents relied extensively on the *Avena* Judgment. Following a hearing on May 7, 2004, the Pardon and Parole Board voted to recommend commutation of Mr. Torres's death sentences. Then, on May 13, the Oklahoma Court of Criminal Appeals (OCCA) issued an indefinite stay of execution and remanded the case for an evidentiary hearing to determine, *inter alia*, whether Torres was prejudiced by the state's violation of his Vienna Convention rights.[12]

Hours after the Court issued its order, Governor Brad Henry announced that he was commuting Torres's death sentence to life imprisonment without parole. Noting the OCCA order, the governor said, "Despite that stay, I felt it was important to announce the decision that I had made upon a careful and thorough review of the entire case." Significantly, the governor's statement also pointed out that "under agreements entered into by the United States, the ruling of the ICJ is binding on U.S. courts."

While the OCCA order is somewhat terse, the concurring opinion of Judge Chapel provides some insight into the court's reasoning. By remanding the decision to the trial court for a hearing on the VCCR claim, the majority (at least implicitly) recognized that the ICJ judgment was binding. Judge Chapel's special concurrence says so explicitly:

> There is no question that this Court is bound by the Vienna Convention and Optional Protocol ... At its simplest, this is a matter of contract. A treaty is a contract between

[9] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ Rep. 128, at ¶ 139 (Mar. 31, 2004) [hereinafter Avena Judgment].

[10] LaGrand Case (F.R.G. v. U.S.), 2001 ICJ Rep. 466 (June 27, 2001).

[11] Avena Judgment, 2004 ICJ Rep. at ¶ 138 (emphasis added).

[12] Torres v. State, Case No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (granting stay of execution and remanding case for evidentiary hearing).

> sovereigns. The notion that contracts must be enforceable against those who enter into them is fundamental to the Rule of Law ... *Avena* is the product of the process set forth in the Optional Protocol, under which Mexico brought a suit against the United States for alleged treaty violations. This process is promulgated by the treaty itself and exists between states as a result of international law—well within the State Department's definition of an appropriate remedy for violations of the Vienna Convention.[13]

Judge Chapel also noted that the OCCA could not apply its ordinary procedural bars to the Vienna Convention claim. He observed that the ICJ had directed the United States not to apply rules of procedural default in such cases, and stated that the courts were obliged to comply with this mandate:

> In order to give full effect to *Avena*, we are bound by its holding to review Torres's conviction and sentence in light of the Vienna Convention violation, without recourse to procedural bar. Common sense and fairness also suggest this result ... I believe that we cannot fulfill the goal of a just and fair review of Torres's case if we refuse to look at his Vienna Convention claims on the merits.[14]

In November 2004, an Oklahoma trial court convened a hearing pursuant to the OCCA's order. In March 2005, the court concluded that Mr. Torres had been prejudiced by the violation of Article 36. If the OCCA affirms the lower court's findings, Mr. Torres could receive a new trial.

The Case of Jose Medellin Rojas

On December 10, 2004, the United States Supreme Court granted certiorari in *Medellin v. Dretke*.[15] The questions presented were:

1. In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?
2. In a case brought by a foreign national of a state party to the Vienna Convention, should a court in the United States give effect to the *LaGrand* and *Avena* Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

On February 29, 2005, in direct response to the Supreme Court's action in *Medellin,* President Bush issued an executive determination regarding the *Avena* Judgment. The executive determination was included as an appendix to an amicus brief filed by the U.S. Solicitor General, and took the form of a legal memorandum addressed to the U.S. Attorney General. In it, the president declared:

> I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 I.C.J. 128 (Mar. 31), by having State courts give effect to the

[13] *Id.* at 7 (Chapel, J., specially concurring).

[14] *Id.* at 8.

[15] 125 S.Ct. 686 (Dec. 10, 2004) (No. 04-5928), *granting cert. to* 371 F.3d 270 (5th Cir. 2004).

decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[16]

One week after the presidential determination was submitted to the Supreme Court, the United States informed the UN Secretary-General that it was withdrawing its ratification of the VCCR Optional Protocol Concerning the Compulsory Settlement of Disputes (the treaty instrument that provided the ICJ with binding jurisdiction in the *LaGrand* and *Avena* cases).

In the wake of the presidential determination, many have speculated that the Supreme Court would dismiss Medellin's petition as improvidently granted. Arguments in the case were held on March 28, 2005, and the parties are currently awaiting a decision.

Conclusion

International law has been invoked by human rights attorneys, foreign governments, the U.S. executive branch, and domestic and international tribunals considering the legal claims of death row inmates. The death penalty provides fertile ground for litigation that draws upon international norms, and there is a rich jurisprudence developing in foreign courts, international tribunals, and UN treaty bodies. After the Supreme Court's decision in *Roper*, it is unclear where litigants will set their sights. One potential international challenge to the administration of the death penalty involves the extended incarceration of individuals on death row awaiting execution. This issue is discussed in the paper presented by Philip Sapsford.

The Death Penalty: Can Delay Render Execution Unlawful?

by Philip Sapsford

Delay *can* render execution unlawful, if the delay be inordinate and not attributable to the conduct of the condemned; execution in such circumstances constitutes a cruel and unusual punishment in violation of the Eighth Amendment of the Constitution. Historically, the United Kingdom tradition has been that sentence of death be followed as soon as possible by execution. Time was to be allowed only for appeal and consideration by the Crown of reprieve.

In *Riley v. Attorney General of Jamaica*[1] the majority of the Judicial Committee of the Privy Council held that whatever the reasons for, or the length of, the delay in executing a sentence of death lawfully imposed, and even assuming the delay could be described as inhuman or degrading, the delay could not render the execution unlawful. This is the current jurisprudence of the United States.

The minority perceived the law in a completely different light. The test was not whether it was reasonable in the circumstances to delay execution but whether that inordinate delay, not attributable to the conduct of the convicted, was cruel and inhuman. While a period of anguish and suffering was an inevitable consequence of sentence of death, a prolongation of it beyond the time necessary for appeal and consideration of reprieve could amount to the imposition of cruel and unusual punishment on the condemned man. The test was not the reasonableness of the decision to delay execution, but the effect of the delay in all of

[16] Brief for the United States as Amicus Curiae Supporting Respondent, Medellin v. Dretke, 125 S.Ct. 686 (2004) (No. 04-5928), 2005 WL 504490.

[1] 1 A.C. 719 (P.C. 1983).