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“NO EXISTIRA LA PENA DE MUERTE”: DOES THE UNITED STATES VIOLATE REGIONAL CUSTOMARY LAW BY IMPOSING THE DEATH PENALTY ON CITIZENS OF PUERTO RICO?

INTRODUCTION

On July 31, 2003, after three days of deliberations, a San Juan jury composed of seven men and five women ended the federal trial that set off a clash between the United States and the Commonwealth of Puerto Rico.¹ The defendants, Hector Oscar Acosta-Martinez (a.k.a. “Gordo”) and Joel Rivera-Alejandro were acquitted of the charges of abduction and murder of Jorge Hernandez-Diaz, a grocery-store owner.² The two men faced a penalty of death in the first capital trial in Puerto Rico in more than seventy-five years.³

Puerto Rico effectively abolished the death penalty in 1929⁴ and later incorporated the prohibition in its constitution, which was ratified by the U.S. Congress in 1952⁵ and states: “The Death Penalty shall not exist.”⁶ Despite this prohibition, the Department of Justice continues to seek the death penalty in cases arising under the jurisdiction conferred to it by the Federal Death Penalty Act of 1994 and the “Memorandum of Understanding” between the local authorities and the local United States Attorney’s office.⁷

1. John-Thor Dahlburg, *Acquittals Quash a US Bid for Death Penalties in Puerto Rico*, L.A. TIMES, Aug. 2, 2003, at A24; Leonard Post, *A Clash of Cultures*, THE NAT’L LAW J., July 23, 2003.

2. Dahlburg, *supra* note 1.

3. The last time the death penalty was applied in Puerto Rico was in 1927 when a man was hanged for the murder of his boss. Ivan Roman, *Not-guilty Verdict Thwarts Death Penalty Battle: The Case had Sparked a Fight about whether Federal Law on Capital Punishment Trumps Puerto Rico’s Ban on it*, ORLANDO SENTINEL, Aug. 1, 2003, at A3.

4. 34 P.R. LAWS ANN. § 995 (1929).

5. Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 33 (2000).

6. P.R. CONST. art. II, § 7 (“No existirá la pena de muerte.”).

7. *United States v. Acosta Martinez*, 106 F. Supp. 2d 311, 312 n.1 (D. P.R. 2000) [hereinafter *Acosta Martinez I*] (citing Rory K. Little, *The Federal Death*

To place the present controversy in context, Part I of this note consists of a discussion of the evolution of the political relationship between the United States and Puerto Rico, as well as Puerto Rico's ban on capital punishment. Part II discusses the Federal Death Penalty Act of 1994. Part III examines in detail the recent challenges to the applicability of the death penalty to Puerto Rico by defendants Acosta-Martinez and Rivera-Alejandro. Part IV of this note will show that the abolition of the death penalty has become a norm of regional customary law in the Latin American region and will argue that the U.S. Attorney's office violates these regional norms by imposing its views of capital punishment on a Latin population which has expressly and unequivocally rejected the ultimate punishment.

I. PUERTO RICO'S RELATIONSHIP WITH THE UNITED STATES AND THE APPLICABILITY OF FEDERAL LEGISLATION TO PUERTO RICO⁸

On December 10, 1898, the United States and Spain signed the Treaty of Paris which officially ended the Spanish-American War.⁹ As a result of this treaty, the island of Puerto Rico became a territory of the United States.¹⁰ In 1900, the Foraker Act¹¹ introduced a civilian government on the island appointed by the U.S. President.¹² The citizens of the island were not granted U.S. citizenship until the Jones Act of 1917¹³ which also

Penalty: History and Some Thoughts about the Department of Justice's Role, 26 FORDHAM URB. L.J. 347, 357 n.36 (1999) ("Because violent crime is unfortunately prevalent in Puerto Rico, the local authorities have entered into a 'Memorandum of Understanding' with the local US Attorney's office, agreeing that the federal authorities will prosecute much of the 'local' violent crime, such as car-jackings, in Puerto Rico.").

8. See generally Malavet, *supra* note 5.

9. Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, 1 P.R. LAWS ANN. 16 (1999).

10. *Id.* at art. 2 ("Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.").

11. Foraker Act, ch. 191, 131 Stat. 77 (1900), 1 P.R. LAWS ANN. 24-48 (1999).

12. Malavet, *supra* note 5, at 24. The members of the local cabinet were also appointed by the President, as well as the Chief Justice and Associate Justices of the Supreme Court of Puerto Rico. *Id.*

13. Jones Act of 1917, ch. 145, 39 Stat. 951, 953 (1917).

changed the local government rule and gave the governor of the island the right to appoint his cabinet, with the advice and consent of the local senate.¹⁴ The new citizens, however, were not afforded the same constitutional protections as U.S. citizens residing on the mainland.¹⁵

Thirty-three years after the Jones Act, on July 3, 1950, the U.S. Congress passed Public Law 600.¹⁶ The act was “adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.”¹⁷ It purported to “fully” recognize “the principle of government by consent.”¹⁸ Public Law 600 was submitted to the people of Puerto Rico and accepted by them in a referendum held on June 4, 1951.¹⁹ Pursuant to Public Law 600, a constitutional convention convened in Puerto Rico and adopted a constitution which was approved by Congress on July 3, 1952.²⁰

In March 1953, the United States sent a memorandum to the Secretary General of the United Nations regarding Puerto Rico’s new status.²¹ The memorandum stated that “at the request of the people of Puerto Rico and with the approval of the Government of the United States, Puerto Rico has voluntarily entered into the relationship with the United States that it has chosen to describe as a ‘commonwealth’ relationship.”²² The memorandum stated that because of Puerto Rico’s new status and based on the principles of self-determination and government by consent, the United States was no longer required to

14. Malavet, *supra* note 5, at 27.

15. *Id.* For example, in *Balzac v. People of Porto Rico*, the Supreme Court of the United States held that the right to trial by jury did not apply to U.S. citizens residing in Puerto Rico. *Balzac v. People of Porto Rico*, 258 U.S. 298, 309 (1922).

16. Act of July 3, 1950, ch. 446, 64 Stat. 319.

17. *Id.*

18. *Id.*

19. *Acosta Martinez I*, 106 F. Supp. 2d at 313.

20. Public Law 447, July 3, 1952, ch. 567, 66 Stat. 327, reprinted in 1 P.R. LAWS ANN. 138–39 (1999).

21. Memorandum by the government of the United States of America Concerning the Cessation of Transmission of Information under Article 73(e) of the Charter with Regard to the Commonwealth of Puerto Rico, Apr. 20, 1953, Department of State Bulletin, Apr. 1953, at 584–85 [hereinafter Memorandum Concerning Transmission of Information]. See also Malavet, *supra* note 5, at 35.

22. Memorandum Concerning Transmission of Information, *supra* note 21.

report information concerning Puerto Rico to the United Nations, in compliance with Article 73(e) of the United Nations Charter.²³ The General Assembly of the United Nations subsequently passed a resolution accepting the new U.S. position regarding its reporting requirements under the Charter.²⁴

Before Puerto Rico officially became a commonwealth of the United States, it passed a law in 1929 abolishing capital punishment.²⁵ Puerto Rico thereafter enshrined the prohibition in its highest document, its Constitution, in 1952.²⁶ Although Congress had amended the Constitution of Puerto Rico before approving it and returning it for ratification by the citizens of Puerto Rico, it allowed the phrase "The death penalty shall not exist" to remain in the text of the Constitution.²⁷

23. *See id.*; the United Nations Charter art. 73 states:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government, recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: ... (e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

U.N. CHARTER art. 73.

24. Cessation of the transmission of information under Article 73(e) of the Charter in respect of Puerto Rico, G.A. Res. 748, U.N. GAOR, 8th Sess., Supp. No. 17, at 25–26, U.N. Doc. A/2630 (1953).

25. 34 P.R. LAWS ANN. § 995 (1929).

26. P.R. CONST. art. II, § 7.

27. Malavet, *supra* note 5, at 33. According to Malavet:

The amendments provided: (1) that students in private schools were exempt from the compulsory public education requirement of Article II, section 5, of the Puerto Rico constitution; (2) that Article II, section 20, of the proposed Puerto Rico constitution – a declaration of Human Rights – should be eliminated; and (3) that Article VII, section 3, should have added to it language that essentially would require Congressional approval of amendments to the Puerto Rico constitution.

Id.

The applicability of Federal legislation to Puerto Rico is governed by the Puerto Rico Federal Relations Act (PRFRA).²⁸ As provided in Public Law 600, many provisions of the Jones Act of 1917 were repealed.²⁹ The remaining provisions remained in force as the PRFRA pursuant to the compact between Puerto Rico and the United States Congress.³⁰ Section 9 of the PRFRA states in pertinent part that “the statutory laws of the United States *not locally inapplicable*, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States.”³¹

Section 9 has engendered a vast amount of litigation with seemingly inconsistent results.³² In *United States v. Quiñones*,³³ the first case in a line of challenges to the applicability of Title III of the Omnibus Crime Control and Safe Streets Act³⁴ (Omnibus Act) to the citizens of Puerto Rico, the First Circuit Court of Appeals upheld the applicability of the Omnibus Act to Puerto Rico.³⁵ In *Quiñones*, the defendant challenged on appeal the applicability of the Omnibus Act’s provision authorizing “a person acting under color of law to intercept a wire, oral or electronic communication”³⁶ between a government informant and a

28. Puerto Rico Federal Relations Act, 64 Stat. 319 (1954) (codified in scattered sections of 48 U.S.C.).

29. *Acosta Martinez I*, 106 F. Supp. 2d at 315.

30. *Id.*

31. Puerto Rico Federal Relations Act § 9, 48 U.S.C. § 734 (2000) (emphasis added).

32. *See, e.g.*, *United States v. Rivera Torres*, 826 F.2d 151 (1st Cir. 1987) (Clean Water Act applicable); *United States v. Quiñones*, 758 F. 2d 40 (1st Cir. 1985) (Omnibus Crime Control and Safe Streets Act applicable even in light of Puerto Rico’s constitutional ban on wiretapping); *United States v. Tursi*, 655 F.2d 26 (1st Cir. 1981) (Youth Corrections Act applicable); *Liquilux Gas Services of Ponce v. Tropical Gas Co.*, 303 F. Supp. 414 (D. Puerto Rico 1969) (Robinson-Patman Act not applicable); *Trigo Bros. Packing Corp. v. Davis*, 159 F. Supp. 841 (D. Puerto Rico 1958) (Federal Alcohol Administration Act not applicable); *United States v. Figueroa-Rios*, 140 F. Supp. 376 (D. Puerto Rico 1956) (Federal Firearms Act not applicable).

33. *Quiñones*, 758 F.2d at 43 (defendant appealed his conviction of aiding and abetting in the possession of cocaine with intent to distribute. The court held that “[t]he Omnibus Crime Control Act is the controlling law for federal prosecutions in Puerto Rico” and that “[t]he evidence of the recorded telephone conversation was properly admitted.”).

34. 18 U.S.C. §§ 2510 et seq. (2000).

35. *Quiñones*, 758 F.2d at 43.

36. 18 U.S.C. § 2511(2)(c) (2000).

criminal suspect.³⁷ The court rejected Quiñones' argument that the Constitution of Puerto Rico should be viewed as a federal statute and that its prohibition against wiretapping should control "because it has the force of federal law."³⁸ The court concluded, instead, that the "intent behind the approval of the Puerto Rico Constitution was that the Constitution would operate to organize a local government and its adoption would in no way alter the applicability of United States laws and federal jurisdiction to Puerto Rico."³⁹

The same issue of the applicability of Title III of the Omnibus Act to the citizens of Puerto Rico was revisited in subsequent cases.⁴⁰ In *United States v. Gerena*,⁴¹ the court once again ruled that Title III of the Omnibus Act was not locally inapplicable to Puerto Rico. In the process, however, the court acknowledged that all federal law does not automatically apply to Puerto Rico.⁴² The court concluded that federal laws would be locally inapplicable to Puerto Rico in matters concerning purely local issues.⁴³

Finally, in 1989, the First Circuit revisited the issue, this time in a civil context. In *Camacho v. Autoridad de Telefonos de Puerto Rico*, the plaintiffs, some of the criminal defendants in the *Gerena* case, sued two corporations that had assisted federal authorities in wiretapping the plaintiffs' telephone calls.⁴⁴ In its decision, once again upholding the applicability of Title III of the Omnibus Act to Puerto Rico, the court nonetheless noted that the "prohibition of wiretapping is an integral and indispensable part of the definition of Puerto Ricans as a people and a cornerstone of cultural values."⁴⁵ The court then stated

37. *Quiñones*, 758 F.2d at 40.

38. *Id.* at 41.

39. *Id.* at 43.

40. *See generally* *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989) (civil case in which the court once again upheld the validity of the application of Title III to Puerto Rico); *United States v. Gerena*, 649 F. Supp. 1183 (D. Conn. 1986).

41. *Gerena*, 649 F. Supp. at 1183.

42. *Id.* at 1186–87.

43. *Id.* at 1187.

44. *Camacho*, 868 F.2d at 484.

45. *Id.* at 486. *See also* Sean M. Morton, *Death isn't Welcome Here: Evaluating the Federal Death Penalty in the Context of a State Constitutional Objection to Capital Punishment*, 64 ALB. L. REV. 1435, 1452 (2001).

that Puerto Rico's Constitution should be viewed as the equivalent of a state statute and that in matters in which federal and state law conflict, federal law must govern.⁴⁶

In part, as a result of these court decisions construing Section 9 to allow for the application to Puerto Rico of federal statutes that conflict with the Commonwealth's Constitution, federal prosecutors in Puerto Rico continue to seek the death penalty in cases arising mostly under the jurisdiction conferred to the federal courts by the Federal Death Penalty Act of 1994.⁴⁷

II. THE FEDERAL DEATH PENALTY ACT OF 1994

The Federal Death Penalty Act of 1994 (FDPA) was passed as part of the Violent Crime Control and Law Enforcement Act of 1993.⁴⁸ For the first time since the Supreme Court's decision in *Furman v. Georgia*,⁴⁹ the national government created a new set of procedural rules for implementing the federal death penalty.⁵⁰ Along with the new procedural guidelines, the FDPA also created new substantive crimes.⁵¹ It also attached the death penalty to crimes which previously did not include death as a possible penalty.⁵²

A. *The New Procedural Guidelines of the FDPA*

1. Notice of Intention to Seek the Death Penalty

The FDPA leaves the decision of whether to seek the death penalty to the federal prosecutor's discretion, based on the par-

46. *Camacho*, 868 F.2d at 488.

47. *Acosta Martinez I*, 106 F. Supp. 2d at 312, n.1 (citing Little, *supra* note 7, at 357 n.36 ("Because violent crime is unfortunately prevalent in Puerto Rico, the local authorities have entered into a 'Memorandum of Agreement' with the local US Attorney's office, agreeing that the federal authorities will prosecute much of the 'local' violent crime, such as car-jackings, in Puerto Rico.")).

48. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

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

50. Federal Death Penalty Act of 1994, 108 Stat. 1959-68 (1994) (codified at 18 U.S.C. §§ 3591 et seq. and in scattered sections of 18 U.S.C.).

51. *Id.* See also Morton, *supra* note 45, at 1440.

52. *Id.*

ticular circumstances of each case.⁵³ Once the determination that the death penalty is the appropriate punishment for a defendant is made, the government must provide the court and the defendant with notice that it intends to seek the death penalty.⁵⁴ Such notice must be provided within a “reasonable” time before the beginning of the trial or before the court accepts a guilty plea.⁵⁵ It must also include the aggravating factors that the prosecution will seek to prove in order to justify a death sentence.⁵⁶ The District Court of Puerto Rico held in *United States v. Colon-Miranda*⁵⁷ that the prosecution did not file its notice of intent to seek the death penalty within a reasonable time, where such notice was filed less than a week before the trial was set to begin and the government had no justification for its delay.⁵⁸ Furthermore, the court took into account the fact that the defendants would be prejudiced because they would be unable to prepare an effective defense.⁵⁹

2. The Sentencing Hearing

Once the government has filed its notice of intent to seek the death penalty and the defendant has been found guilty at trial of the capital crime(s) charged, the FDPA mandates a sentencing hearing.⁶⁰ The sentencing hearing is to be conducted before the same jury that determined the defendant’s guilt or, under special circumstances, before a new jury.⁶¹ Ultimate discretion as to the convicted defendant’s sentence rests with the jury.⁶² At the sentencing hearing, the jury must make a threshold find-

53. See 18 U.S.C. § 3593(a) (2000). See also *Nichols v. Reno*, 931 F. Supp. 748, 752 (D.Colo. 1996) (“The death penalty statute gives prosecutorial discretion to the United States Attorney.”).

54. See 18 U.S.C. § 3593(a).

55. *Id.*

56. 18 U.S.C. § 3593(a)(2).

57. *United States v. Colon-Miranda*, 985 F. Supp. 36 (D.P.R. 1997).

58. *Id.* at 39.

59. *Id.*

60. See 18 U.S.C. § 3593(b).

61. *Id.*

62. See 18 U.S.C. § 3594 (2000). See also *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (the Supreme Court held that the Sixth Amendment right to trial by jury precludes a sentencing judge, sitting without a jury, from finding an aggravating circumstance necessary for the imposition of the death penalty).

ing of at least one aggravating factor out of a list of four statutorily-defined factors.⁶³ The jury must find that the defendant:

- (A) intentionally killed the victim; or
- (B) intentionally inflicted serious bodily injury that resulted in the death of the victim; or
- (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a result of the act; or
- (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a result of the act.⁶⁴

In addition to one of these four aggravating factors, the jury must also find at least one additional aggravating factor from among the lists of factors defined in section 3592 of the FDPA.⁶⁵ The prosecution may only present evidence as to the aggravating factors for which it has given notice to the defendant.⁶⁶ The government must select its aggravating factors from one of three lists, depending on the type of crime that was committed.⁶⁷ The aggravating factors for the homicide offenses include sixteen factors, three for espionage or treason and eight for the drug-related offenses.⁶⁸

63. See 18 U.S.C. § 3591(a)(2) (2000).

64. 18 U.S.C. § 3591(a)(2).

65. 18 U.S.C. § 3592 (2000).

66. 18 U.S.C. § 3593(c) (“[T]he government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a).”).

67. 18 U.S.C. § 3592.

68. *Id.* Some of the factors for the homicide offenses are: when death occurs during the commission of another crime, 18 U.S.C. § 3592(c)(1); grave risk of death to additional persons, 18 U.S.C. § 3592(c)(5); heinous, cruel, or depraved manner of committing offense, 18 U.S.C. § 3592(c)(6); and continuing criminal enterprise involving drug sales to minors, 18 U.S.C. § 3592(c)(13). Some of the factors for the drug-related offenses are: a previous serious drug felony conviction, 18 U.S.C. § 3592(d)(3); use of a firearm, 18 U.S.C. § 3592(d)(4); and distribution to persons under 21, 18 U.S.C. § 3592(d)(5). The three aggravating factors for espionage or treason are: (1) prior espionage or

In addition to these statutorily-defined aggravating factors, the jury may also consider the existence of any other non-statutorily defined factors for which the government has given notice.⁶⁹ At the hearing, the government has the burden of proving these aggravating factors beyond a reasonable doubt, to every juror.⁷⁰ On the other hand, the burden of establishing the existence of any mitigating factors rests on the defense.⁷¹ Furthermore, such factors must be proved only by a preponderance of the evidence, rather than beyond a reasonable doubt.⁷²

Section 3593 of the FDPA also provides the procedural guidelines to be followed at the sentencing hearing. As during the trial, "the government shall open the argument [,] the defendant shall be permitted to reply [and] the government shall then be permitted to reply in rebuttal."⁷³ The rules applicable to the admissibility of evidence during trial do not apply to the sentencing hearing.⁷⁴ The FDPA specifies that parties may pre-

treason offense; or (2) grave risk to national security; or (3) grave risk of death, 18 U.S.C. § 3592(b)(1)-(3). *Id.*

69. 18 U.S.C. § 3592. Several courts have considered the constitutionality of non-statutory aggravating factors. In *United States v. Llera Plaza*, the District Court for the Eastern District of Pennsylvania found that the "non-statutory aggravating factors [of the Federal Death Penalty Act] do not unconstitutionally limit and guide [the] discretion of the jury [so as to permit] wholly arbitrary and capricious death sentences in violation of the Eight and Fourteenth Amendments." 179 F. Supp. 2d 444, 453 (E.D. Pa. 2001).

70. 18 U.S.C. § 3593(c).

71. *Id.* Carter and Kreitzberg define mitigation evidence as follows:

Offered in the penalty phase, evidence of mitigation provides reasons why the defendant should not be sentenced to death. Mitigating evidence comes in many varieties. For example, the defense might emphasize that the defendant played a minor role in the crime, the defendant had no prior criminal record, the defendant has lasting effects from an abusive childhood, the defendant has an underlying mental disorder, the youth of the defendant, the defendant is remorseful for the crime, or that the defendant can live peaceably in prison. As an element of the selection decision, mitigation allows for the individualized consideration of the defendant. The life and circumstances of each defendant are considered in deciding whether death or life is the appropriate sentence for a particular individual.

LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 137 (2004).

72. 18 U.S.C. § 3593(c).

73. *Id.*

74. *Id.*

sent any evidence that is relevant to the sentence, and that both parties will be given a fair opportunity to develop their arguments pertaining to any mitigating or aggravating factors.⁷⁵ The guidelines also specify the exclusion of evidence if “its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.”⁷⁶

At the close of the sentencing hearing, the jury is required to weigh the aggravating and the mitigating factors.⁷⁷ The jurors may impose a sentence of death, life imprisonment without parole, or another lesser sentence. If the jury opts for some other sentence, the FDPA authorizes the judge to sentence the defendant to some lesser sentence⁷⁸ according to federal sentencing guidelines.⁷⁹ The FDPA also requires that the death sentence determination be by unanimous vote of the jurors.⁸⁰

75. *Id.*

76. *Id.*

77. 18 U.S.C. § 3593(e). This section states:

[T]he jury, or if there is no jury, the court, shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death.

Id. In this respect, the FDPA is a weighing statute, which, instead of preventing the imposition of the death penalty in the presence of a mitigating factor, allows the jurors to weigh the aggravating factors against the mitigating factors when deciding whether to impose a sentence of death. Charles C. Boettcher, Note, *Testing the Federal Death Penalty Act of 1994, 18 USC §§ 3591-3598 (1994): United States v. Jones*, 132 F.3d 232 (5th Cir. 1998), 29 TEX. TECH L. REV. 1043, 1072 (1998).

78. 18 U.S.C. § 3594.

79. *Id.* 18 U.S.C. § 3595 sets out the guidelines for appeal by a defendant sentenced to death. 18 U.S.C. § 3595 (2000). For a discussion of the process of appellate review, as well as a discussion of a fairly recent challenge to the FDPA, see generally Boettcher, *supra* note 77.

80. 18 U.S.C. § 3593(e) (“[T]he jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.”).

B. Crimes Subject to the Federal Death Penalty

The Federal Death Penalty Act is applicable to three categories of crimes.⁸¹ First, the FDPA creates entirely new federal offenses, such as murder by a federal prisoner and use of weapons of mass destruction.⁸² Second, the FDPA authorizes the death penalty for pre-existing federal offenses which were not previously punishable by death.⁸³ Finally, the FDPA applies its

81. Boettcher, *supra* note 77, at 1058 (“It has been said that the FDPA created over sixty new death eligible crimes. However, the FDPA did not create sixty death eligible crimes, but actually created only around twenty new death eligible crimes.”). Boettcher clarifies that while the FDPA did create a few federal crimes, its major effect was to make its procedural provisions applicable to existing federal offenses, making them eligible for a penalty of death. *Id.*

82. Little, *supra* note 7, at 391 n.237. Other newly-created federal offenses include:

[D]rive-by shooting, § 60008 (codified at 18 U.S.C. § 36 (1994)); foreign murder of U.S. nationals, § 60009, 108 Stat. 1972 (codified at 18 U.S.C. § 1119 (1994)); murder by escaped [life] prisoners, § 60012, 108 Stat. 1973 (codified at 18 U.S.C. § 1120 (1994)); killing persons assisting federal investigations, § 60015, 108 Stat. 1974 (codified at 18 U.S.C. § 1121 (1994)); retaliatory killings of witnesses, victims, and informants, § 60017, 108 Stat. 1975 (codified at 18 U.S.C. § 1513(a) (1994)); violence against maritime navigation and fixed platforms, § 60019, 108 Stat. 1975–79 (codified at 18 U.S.C. § 2280, 2281 (1994)); violence at international airports, § 60021, 108 Stat. 1979–80 (codified at 18 U.S.C. § 37 (1994)).

Id.

83. *Id.* Some of these pre-existing offenses include:

Civil rights offenses and conspiracies, § 60006, 108 Stat. 1970–71, 18 U.S.C. §§ 241, 242, 245(b), 247(c) (1994) (focused on religious persecution); murder of a federal law enforcement official, § 60007, 108 Stat. 1971, 18 U.S.C. § 1114 (1994); sexual abuse and child molestation, § 60010, 108 Stat. 1972–1973, 18 U.S.C. § 2245 (1994) (penalty); sexual exploitation of children, § 60011, 108 Stat. 1973, 18 U.S.C. § 2251(d) (1994); gun murders during crimes of violence or drug trafficking, § 60013, 108 Stat. 1973, 18 U.S.C. § 924(c)(1) (1994) (penalty); possession of dangerous weapons in, or attack upon, a federal facility, § 60014, 108 Stat. 1973, 18 U.S.C. § 930 (1994); obstruction of justice (“protection of court officers and jurors”), § 60016, 108 Stat. 1974, 18 U.S.C. § 1503 (1994); murder of federal witnesses, § 60018, 108 Stat. 1975, 18 U.S.C. § 1512(a)(2)(A) (1994); terrorist death penalty act, § 60022, 108 Stat. 1980, 18 U.S.C. § 2232(a)(1) (1994); and, alien smuggling, § 60024, 108 Stat. 1981–82, 18 U.S.C. § 1324(a) (1994).

Id. at 391 n.238.

procedural guidelines to crimes which were previously eligible for the death penalty but whose death penalty provisions had been invalidated by the decision in *Furman*.⁸⁴ These death penalty provisions had never been removed from the Code nor amended. The FDPA effectively brought them back to life.⁸⁵

III. A CHALLENGE TO THE APPLICATION OF THE FDPA TO PUERTO RICO: THE *ACOSTA-MARTINEZ* CASES

The applicability of the FDPA to the citizens of Puerto Rico was challenged by two federal defendants charged with capital murder under the FDPA.⁸⁶ The District Court of Puerto Rico granted the defendants' motion to strike the death penalty certification based on the fact that, *inter alia*, Congress did not make the FDPA explicitly applicable to Puerto Rico.⁸⁷ The First Circuit, however, reversed the District Court's decision, and found that the statutes defining the substantive crimes the defendants were charged with explicitly applied to Puerto Rico.⁸⁸

While Judge Casellas of the District Court acknowledged in a footnote that "a germane issue would be whether customary international law forbids the application of capital punishment in Puerto Rico,"⁸⁹ neither the District Court nor the Circuit Court considered whether the application of the federal death penalty to citizens of Puerto Rico violates any norm of regional customary law.

84. Boettcher, *supra* note 77, at 1058–59. Boettcher states:

Approximately seventeen of these referenced crimes were already eligible for imposition of the death penalty prior to the enactment of the FDPA. The statutes which make these crimes eligible for death, appropriately referred to as "zombie statutes" because of their dormant nature after *Furman*, were effectively revived from their "Never-Never Land" by the FDPA...Although the FDPA did make some new crimes death eligible, its most impacting effect on federal death penalty jurisprudence is its codification of procedures for the imposition of the death penalty which comport with the constitutional requirements outlined by the Supreme Court.

Id.

85. *Id.*

86. See generally *Acosta Martinez I*, 106 F. Supp. 2d 311.

87. *Id.* at 318.

88. *United States v. Acosta Martinez*, 252 F.3d 13, 19 (1st Cir. 2001) [hereinafter *Acosta Martinez II*].

89. *Acosta Martinez I*, 106 F. Supp. 2d at 313 n.6.

A. Background of the Acosta-Martinez Cases

On June 2, 1999 defendants Hector Oscar Acosta-Martinez and Joel Rivera- Alejandro were charged with firearm murder in relation to a crime of violence⁹⁰ and killing a person in retaliation for providing law enforcement officials with information relating to the possible commission of a federal offense,⁹¹ both punishable by death under the FDPA.⁹² Subsequent to the U.S. Attorney General's authorization on January 24, 2000, the United States Attorney for the District of Puerto Rico filed the notice that the office intended to seek the death penalty in the event of a conviction.⁹³

On May 17, 2000 the defendants filed a motion to declare the federal death penalty inapplicable in Puerto Rico. The defendants argued, among other things, that the federal death penalty is "locally inapplicable" to Puerto Rico under Section 9 of the PRFRA due to the Puerto Rico Constitution's explicit ban on capital punishment.⁹⁴ The defendants also argued that applying the federal death penalty to citizens of Puerto Rico would be unfair due to their lack of representation in enacting federal law and thus, their lack of consent to this law in particular.⁹⁵

B. The District Court of Puerto Rico Decision in Acosta-Martinez

On July 17, 2000 District Court Judge Casellas granted Acosta-Martinez and Rivera-Alejandro's motion to strike the death penalty certification.⁹⁶ The district court based its deci-

90. In violation of 18 U.S.C. § 924(j) (2000). *Acosta Martinez I*, 106 F. Supp. 2d at 312.

91. In violation of 18 U.S.C. § 1513(a)(1)(B) (2000). *Acosta Martinez I*, 106 F. Supp. 2d at 312.

92. *Id.*

93. *Id.*

94. *Id.* at 312. The defendants' other arguments included an argument that even if Puerto Rico's Constitution were to be considered a federal statute, it could not be unilaterally altered by Congress. The court rejected this argument by stating that the theory had been previously rejected by the court and by citing *United States v. Quiñones*, discussed *supra*. The court, ruling for defendants based on their first and third arguments did not reach defendants' fourth argument that applying the federal death penalty to Puerto Rico violated Article X of the Treaty of Paris, which guaranteed the inhabitants of Puerto Rico the freedom to exercise their religion. *Id.* at 312-13.

95. *Id.*

96. *Id.* at 327.

sion on two grounds. First, the court cited the First Circuit Court of Appeals' decision in *United States v. Quiñones*.⁹⁷ However, the district court distinguished that case based on "two important elements."⁹⁸ The first element was "the fundamental principle that death is different."⁹⁹ The court, quoting from the Supreme Court's decision in *Furman v. Georgia*,¹⁰⁰ emphasized the uniqueness of the death penalty in its "irrevocability," its "rejection of rehabilitation of the convict as a basic purpose of criminal justice," and its "absolute renunciation of all that is embodied in our concept of humanity."¹⁰¹ The court distinguished the case before it from *Quiñones* on the ground that death is fundamentally and qualitatively different from any other type of punishment.¹⁰² As such, the court held that the administration of the death penalty requires a higher degree of fairness, consistency, and reliability.¹⁰³

Second, the court considered the language of the Federal Death Penalty Act and Congressional intent with regard to its applicability to Puerto Rico.¹⁰⁴ It stated that, while the Omnibus Act at issue in *Quiñones* specifically extends to Puerto Rico,¹⁰⁵ the FDPA does not.¹⁰⁶ The court noted that while the Omnibus Act expressly mentions the Commonwealth of Puerto Rico in its definition of "state" for purposes of that act, the FDPA merely mentions Puerto Rico to include it "in a geographical sense" in the definition of "United States" for certain maritime offenses only.¹⁰⁷ The court reasoned:

However, on a matter as unique and extreme as the death penalty, the mention of Puerto Rico exclusively in the context

97. See discussion *supra* Part I.

98. *Acosta Martinez I*, 106 F. Supp. 2d at 317.

99. *Id.*

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

101. *Acosta Martinez I*, 106 F. Supp. 2d at 318 (citing *Furman*, 408 U.S. at 306 (Stewart, J., concurring)).

102. *Id.*

103. *Id.*

104. *Id.*

105. Omnibus Act, 18 U.S.C. § 2510(2) (2000) ("[A]s used in this chapter 'state' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.").

106. *Acosta Martinez I*, 106 F. Supp. 2d at 318.

107. *Id.* at 319.

of these maritime offenses, *cannot reasonably be taken as Congress's manifest intention that the FDPA not fall within the "not locally inapplicable" provision set forth in section 9*, particularly in view of the Commonwealth Constitution's prohibition against capital punishment. The extraordinary nature of capital punishment requires a higher degree of clarity and precision. Reason and common sense dictate that had Congress intended to apply the death penalty in the Commonwealth, it would have done so by the plain declaration, and would not have left it to mere inference.¹⁰⁸

The court then went on to discuss the context in which the Commonwealth drafted and the U.S. Congress approved the Puerto Rican Constitution.¹⁰⁹ The court noted that the Framers, in enshrining Puerto Rico's prohibition of the death penalty in its highest document, were acting on the Puerto Rican people's "firm cultural, moral and religious convictions."¹¹⁰ Judge Casellas also noted that Congress conditioned its approval of the constitution on several amendments, and that Congress had not required the elimination of Puerto Rico's ban on the death penalty embodied in Article 2, Section 7.¹¹¹ Therefore, Puerto Rican citizens' expectations that the death penalty would not exist under the Puerto Rico-United States compact were reasonable.¹¹²

The court summarized its finding that the FDPA is inapplicable to Puerto Rico in five short points: (1) Commonwealth status was established in Puerto Rico in order to promote and develop self-government and enhance Puerto Rico's autonomy; (2) by accepting Public Law 600, the people of Puerto Rico ac-

108. *Id.*

109. *Id.* at 319–20.

110. *Id.* at 320.

111. *Id.* at 320–21; Malavet, *supra* note 5, at 33. Malavet states:

The amendments provided: (1) that students in private schools were exempt from the compulsory public education requirement of Article II, section 5, of the Puerto Rico constitution; (2) that Article II, section 20, of the proposed Puerto Rico constitution – a declaration of Human Rights – should be eliminated; and (3) that Article VII, section 3, should have added to it language that essentially would require Congressional approval of amendments to the Puerto Rico constitution.

Id.

112. *Acosta Martinez I*, 106 F. Supp. 2d at 321.

cepted Section 9 of the PRFRA which makes clear that federal law that is not locally inapplicable, applies to Puerto Rico; (3) the Commonwealth's Constitution explicitly prohibits the death penalty in Puerto Rico; (4) the culture, values and traditions of the Puerto Rican people all reject the death penalty; and (5) Congress did not explicitly extend the FDPA to Puerto Rico.¹¹³

The district court went on to state that even if Congress explicitly declared its intent to make the FDPA applicable to Puerto Rico, such application "would not comport with the exigencies of substantive due process."¹¹⁴ The court then discussed in detail the history of the adoption of the Commonwealth Constitution as embodying the principle of government by consent.¹¹⁵ The court explained that, for the first time, through the compact and through Section 9 of the PRFRA, the Puerto Rican people agreed to be governed by federal laws that were not locally inapplicable even though they did not have any participation in their enactment.¹¹⁶

In the case of Puerto Rican federal relations, the court said that the principle of government by consent is eroding because of the "widening sphere of federal authority, which has ex-

113. *Id.*

114. *Id.* at 321–22.

115. *Id.* at 322. The court also remarked that the FDPA expressly acknowledges the principle of government by consent by establishing special provisions for Indian Country:

No person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country...and which has occurred within the boundaries of Indian country, *unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction.*

Id. at 325 (citing 18 U.S.C. § 3598 (2000) (emphasis in original)).

116. *Id.* at 322. The Court pointed out that:

Puerto Ricans residing in Puerto Rico do not vote for the President of the United States, nor do they elect senators or representatives to the United States Congress, except for a non-voting Resident Commissioner for Puerto Rico who sits in the House of Representatives. The Resident Commissioner can vote in the Congressional committees to which he is assigned, *see* Rules of the House of Representatives, Rule XII, but he cannot cast a final vote on legislation proposed in the House.

Id. at 322 n.37.

panded without local participation, and the concomitant reduction in the sphere of commonwealth authority.”¹¹⁷ The court then differentiated between applying, on the basis of the “generic consent” given in Section 9 of the PRFRA, federal laws aimed at furthering the common good¹¹⁸ and a federal law which allows for the “deprivation of life.”¹¹⁹ The court held that the latter application is unreasonable, unfair, directly cuts against the principle of government by consent, violates the substantive due process rights of the American citizens of Puerto Rico,¹²⁰ and “constitutes a violation of the fundamental rights to liberty and life of the American citizens of Puerto Rico.”¹²¹ The court ultimately granted the defendants’ motion to strike the death penalty certification and the prosecution appealed that decision to the Court of Appeals for the First Circuit.

C. The First Circuit’s Decision in *Acosta-Martinez*

After holding that it had appellate jurisdiction to hear the case before it,¹²² the First Circuit Court of Appeals considered the issue of whether Congress intended the federal death penalty to apply to Puerto Rico.¹²³ The Court of Appeals found that the district court erred in focusing on the language of the FDPA rather than on the language of the substantive statutes which define the crimes with which the defendants were charged.¹²⁴

117. *Id.* at 324.

118. *Acosta Martinez I*, 106 F. Supp. 2d at 326 n.47. *See, e.g.*, United States v. Rivera Torres, 826 F.2d 1515 (1st Cir. 1987) (Clean Water Act); Caribtow v. Occupational Safety and Health Review Com’n, 493 F.2d 1064 (1st Cir. 1974) (Occupational Safety and Health Act).

119. *Acosta Martinez I*, 106 F. Supp. 2d at 326.

120. *Id.* at 325.

121. *Id.* at 326 (emphasis in original).

122. *Acosta Martinez II*, 252 F.3d at 16–17. The court held that it had jurisdiction to review the district court’s order under the Criminal Appeals Act, 18 U.S.C. § 3731. *Id.* According to the court of appeals, the district court had, by striking a statutorily authorized penalty, “effectively dismissed a significant portion of the counts against the defendants.” *Id.* at 17. The court also noted that the district court’s order affected more than merely the sentence; it materially affected the conduct of trial. *Id.* The court also concluded that the case before it also fell under its mandamus jurisdiction. *Id.*

123. *Id.* at 15.

124. *Id.* at 19. The court stated that while it accepted “the strength of Puerto Rico’s interest and its moral and cultural sentiment against the death

The FDPA, the court said, does not provide for the death penalty in and of itself.¹²⁵ Instead, it merely provides a set of procedural rules to be followed before capital punishment is imposed.¹²⁶ As the source of the penalty, the court instead looked to the substantive statutes which define the crimes and their punishments.¹²⁷

The court first looked at the language of 18 U.S.C. §924(j) under which the defendants were charged with firearm murder in relation to a crime of violence, then at 18 U.S.C. §1515(a)(1)(B), the basis for the defendant's retaliatory killing charge.¹²⁸ The court noted that both provisions punish those crimes with penalties that include the death penalty and that both crimes "and the consequent penalties are explicitly made applicable to Puerto Rico."¹²⁹ The court cited 18 U.S.C. §921¹³⁰ as evidence that the firearms murder offense is explicitly applicable to Puerto Rico and cited 18 U.S.C. §1513(d)¹³¹ to show that "the retaliatory killing offense applies not only within the United States, but also explicitly has "extraterritorial reach."¹³² Additionally, the court stated that the federal criminal code itself is explicitly made applicable to Puerto Rico because the territorial

penalty; the legal issue for the court is still one of what Congress intended." *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Acosta Martinez II*, 252 F.3d at 19.

130. *Id.* 18 U.S.C. § 921(a)(2) states:

The term "interstate or foreign commerce" includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term "state" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

18 U.S.C. § 921(a)(2) (2000).

131. *Acosta Martinez II*, 252 F.3d at 19. 18 U.S.C. § 1513(d) states that "there is extraterritorial Federal jurisdiction over an offense under this section." 18 U.S.C. § 1513(d) (2000).

132. *Acosta Martinez II*, 252 F.3d at 19.

definition of United States, for the purposes of the criminal codes, expressly includes Puerto Rico.¹³³

The court further stated that the fact that Congress included Puerto Rico in its definition of state in the new maritime offenses it enacted along with the FDPA is also indicative of Congressional "intent to apply the death penalty in the statutes which define the crime and penalty and not in a procedural statute."¹³⁴ As the constitutions of the fifty states only govern proceedings in state courts, so, too, the Constitution of Puerto Rico only governs matters in the Commonwealth courts. Accordingly, the court concluded that Congress intended that the federal death penalty apply to federal criminal prosecutions in Puerto Rico.¹³⁵

The court then turned to the district court's constitutional determination that the application of the federal death penalty to U.S. citizens who reside in Puerto Rico violated defendants' substantive due process rights.¹³⁶ The court claimed that the "shocking to the conscience test"¹³⁷ used to test executive action was not met in this case.¹³⁸ The court cited a string of cases which held federal law applicable to Puerto Rico and then stated that "it cannot shock the conscience of the court to apply to Puerto Rico, as intended by Congress, a federal penalty for a federal crime which Congress has applied to the fifty states."¹³⁹ The court went on to say that with the power to apply federal criminal laws to Puerto Rico comes the power to attach penal-

133. *Id.*

134. *Id.* at 20.

135. *Id.*

136. *Id.*

137. *Id.* at 21. The Court in *Furman* explained that:

In judging whether or not a given penalty is morally acceptable, most courts have said that the punishment is valid unless it shocks the conscience and sense of justice of the people... [W]hether or not a punishment is cruel and unusual depends, not on whether its mere mention shocks the conscience and sense of justice of the people, but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.

Furman, 408 U.S. at 360–61.

138. *Acosta Martinez II*, 252 F.3d at 21.

139. *Id.*

ties to them.¹⁴⁰ The court also found that it would be anomalous to grant U.S. citizenship to the people of Puerto Rico without affording them the protection of the federal criminal laws.¹⁴¹

IV. THE APPLICATION OF THE FDPA TO PUERTO RICO AS A VIOLATION OF REGIONAL CUSTOMARY LAW

While there are differing views as to whether abolition of the death penalty has become a norm of customary international law,¹⁴² there is ample evidence to suggest that it has at the least become a norm of regional customary law in the Latin American region.¹⁴³ Latin American countries have been at the forefront of the movement towards universal abolition of the death penalty,¹⁴⁴ and the evidence strongly suggests that these countries have engaged in the practice of abolition with the *opinio juris*¹⁴⁵ necessary for the development of a norm of regional customary law.¹⁴⁶ On this basis, the application of the Federal Death Penalty to citizens of Puerto Rico clearly violates regional customary law.

A. Customary International Law in Brief¹⁴⁷

The Restatement Third of Foreign Relations Law § 102 defines a rule of international law as one “that has been accepted as such by the international community of states (a) in the form of customary international law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world.”¹⁴⁸ The Restatement further ex-

140. *Id.* at 20.

141. *Id.* at 21.

142. See generally WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (Cambridge University Press, 3rd ed. 2002) (1993); Michelle McKee, *Tinkering with the Machinery of Death: Understanding why the State's Use of the Death Penalty Violates Customary International Law*, 6 BUFF. HUM. RTS. L. REV. 153 (2000).

143. See discussion *infra* Part IV.A.

144. SCHABAS, *supra* note 142, at 311.

145. See definition of *opinio juris* *infra* Part IV.A.

146. See discussion *infra* Part IV.B.

147. See generally CLIVE PARRY, THE SOURCES AND EVIDENCE OF INTERNATIONAL LAW (1965).

148. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1) (1987). See also Article 38(1) of the Statute of the International Court of Justice which provides:

plains that a binding rule of customary international law results from the consistent general practice of states,¹⁴⁹ followed out of a sense of legal obligation.¹⁵⁰

The comments to Section 102 of the Restatement note that state practice may take numerous forms, and that there is no requisite duration for such practice as long as it is “general and consistent.”¹⁵¹ Different forms of state practice include “diplomatic contacts and correspondence; public statements of government officials; legislative and executive acts; military manuals and actions by military commanders; treaties and executive agreements; decisions of international and national courts and tribunals; and decisions, declarations, and resolutions of international organizations, among many others.”¹⁵²

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031.

149. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987). The word “state” in the context of international law has been defined as follows:

As stated in the 1933 Convention on the Rights and Duties of States (the Montevideo Convention), concluded among 16 states in the Western hemisphere, “[t]he state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; d) capacity to enter into relations with other states.

INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 109 (Jeffrey L. Dunoff et al. eds. 2002).

150. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

151. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. b (1987). See also INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, *supra* note 149, at 74.

152. INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, *supra* note 149, at 74 (“State practice also includes inaction, at least in circumstances in which a state’s failure to object to actions by another state may imply acquiescence in those actions.”).

State practice alone does not constitute customary international law.¹⁵³ In order for a state practice to become a rule of customary international law, states that engage in the practice must do so out of a sense of legal obligation which is referred to as *opinio juris sive necessitatis* or simply *opinio juris*.¹⁵⁴ Since states usually do not refer to international law when acting, it is necessary to infer the *opinio juris* from the circumstances and the nature of the state practice itself.¹⁵⁵

Finally, there are circumstances, such as those which exist with relation to the death penalty in the Latin American region, in which the practice of states within a regional or other special grouping can result in the existence of “special,” “regional” or “particular customary law” for those states.¹⁵⁶

*B. The Abolition of the Death Penalty as a Norm of Regional Customary Law in the Latin American Region*¹⁵⁷

The abolition of the death penalty has become a general and consistent practice among Latin American states.¹⁵⁸ Some Latin

153. *Id.* at 75.

154. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. c (1987); INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, *supra* note 149, at 75.

155. INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, *supra* note 149, at 75. “It is often difficult to determine when the transformation into law has taken place. Explicit evidence of a sense of legal obligation (e.g., by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. c (1987).

156. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. e (1987).

157. There are differing views as to whether the abolition of the death penalty has become a norm of customary international law. For an overview of the current status of abolition in international law and for the view that the abolition of the death penalty has yet to reach the level of customary international law, see generally SCHABAS, *supra* note 142. See also Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. 1115, 1147 (2002). Bishop states:

While 111 countries have abolished capital punishment de jure or de facto, it is still too soon to claim that the use of the death penalty in general is prohibited by customary international law. There are still large regions of the world where the death penalty is widely used even for the most minor offenses.

Id. For the argument that abolition of the death penalty is a norm of customary law and that the United States’ use of the death penalty violates that law, see Michelle McKee, *supra* note 142.

American states abolished the death penalty as early as the nineteenth century and early twentieth century.¹⁵⁹ In fact, Latin American states such as Uruguay and Venezuela have played a crucial role within the United Nations by advocating for the abolition of the death penalty.¹⁶⁰ Many Latin American countries' constitutions either limit the scope of the death penalty or abolish it completely.¹⁶¹ According to a study by Roger Hood, "the hundred year tradition of abolition in South America now holds sway over almost all of the region."¹⁶²

1. The American Convention on Human Rights¹⁶³

Drawing on the United Nations' Universal Declaration of Human Rights¹⁶⁴ and the European Convention on Human Rights,¹⁶⁵ the Organization of American States adopted the

158. See Parts IV.B.1 and IV.B.2 *infra* for a discussion of relevant state actions which amount to general practice under customary international law.

159. SCHABAS, *supra* note 142, at 311. Venezuela abolished the death penalty in 1863, Costa Rica in 1877, Brazil in 1882, Panama in 1903, Ecuador in 1906, Uruguay in 1907 and Colombia in 1910. *Id.*

160. *Id.*

161. *Id.* The language of some of these countries' constitutions is as follows:

Colombia (1886), art. 29: "The legislature may not impose capital punishment in any case;" Costa Rica (1871), art. 45: "Human life is inviolable in Costa Rica;" Ecuador (1946), art. 187: "The state shall guarantee to the inhabitants of Ecuador: (1) the sanctity of human life: there shall be no death penalty;" Panama (1946), art. 30: "There is no penalty of death, expatriation, or confiscation of property;" Uruguay (1934), art. 25: "The penalty of death shall not be inflicted on any person."

Id. at n.3.

162. ROGER HOOD, THE DEATH PENALTY, A WORLD-WIDE PERSPECTIVE 43-44 (2nd ed. 1996) *cited in* SCHABAS, *supra* note 142, at 311.

163. For a discussion of some of the decisions of the Inter American Court and commissions regarding the death penalty and for a general discussion of the Inter American Human Rights System, see generally SCHABAS, *supra* note 142, and Richard J. Wilson, *The United States' Position on the Death Penalty in the Inter-American Human Rights System*, 42 SANTA CLARA L. REV. 1159 (2002).

164. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., pt. 1, Resolutions at 71, UN Doc. A/810 (1948).

165. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

American Declaration of the Rights and Duties of Man¹⁶⁶ in 1948, followed by the American Convention on Human Rights¹⁶⁷ in the late 1960's.¹⁶⁸ In all, through Article 4 of the American Convention, international law prohibits sixteen Central and South American states from imposing the death penalty.¹⁶⁹ Inspired by the above-mentioned documents, Article 4 states:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.¹⁷⁰
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be

166. American Declaration of the Rights and Duties of Man, Mar. 30-May 2, 1948, OAS Doc. OEA/Ser.L/V/I.4 (1965).

167. American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123, O.A.S.T.S. 36 (1979).

168. SCHABAS, *supra* note 142, at 312.

169. *Id.* at 353.

170. For the argument that the United States is in breach of international law, see Rachel J. Avery, "Killing Kids Who Kill" – *An International Perspective on the Juvenile Death Penalty*, 7 UCLA J. INT'L L. & FOREIGN AFF. 303 (2002-2003). The Supreme Court recently held that the execution of juveniles is unconstitutional. *See generally* Roper v. Simmons, 125 S. Ct. 1183 (2005) (holding execution of juveniles unconstitutional).

imposed while such a petition is pending decision by the competent authority.¹⁷¹

Although inspired by previously adopted international instruments,¹⁷² the American Declaration's standards on the death penalty are much more radical than those of its predecessors.¹⁷³ In fact, the drafters of the Convention were the first to promote the idea of implementing an additional protocol that would altogether abolish the death penalty in the region.¹⁷⁴

2. The Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty

In 1990, the Inter-American human rights system of the Organization of American States adopted and later gave effect to the Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty.¹⁷⁵ The Protocol states in part:

The State Parties to this Protocol

Considering:

That Article 4 of the American Convention on Human Rights recognizes the right to life and restricts the application of the death penalty;

That everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason;

171. American Convention on Human Rights, *supra* note 167, at art. 4.

172. The Universal Declaration of Human Rights merely states: "Everyone has the right to life, liberty and the security of person." Universal Declaration of Human Rights, *supra* note 164, at art. 3. Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 165.

173. SCHABAS, *supra* note 142, at 350 ("By the inclusion of Article 4 § 3, the Convention is in fact abolitionist for those State parties – and they are the majority in the Organization of American States – that have abolished the death penalty in their internal legislation.").

174. *Id.*

175. Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Aug. 28, 1991, 29 I.L.M. 1447, O.A.S.T.S. 73.

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That the tendency among the American States is to be in favour of abolition of the death penalty;

...

That an international agreement must be arrived at that will entail a progressive development of the American Convention on Human Rights; and

That States Parties to the American Convention on Human Rights have expressed their intention to adopt an international agreement with a view to consolidating the practice of not applying the death penalty in the Americas.

...

Article 1

The State parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.¹⁷⁶

The Protocol does not allow for reservations,¹⁷⁷ except to reserve the right to apply the death penalty in wartime.¹⁷⁸ The six countries that signed the protocol at adoption are Costa Rica, Ecuador, Nicaragua, Panama, Uruguay and Venezuela.¹⁷⁹ To date, nine states have ratified the Protocol; the United States clearly not one of them.¹⁸⁰

176. *Id.*

177. In the case where one or more states refuses to accept all of a treaty's provisions while still wishing to become a party to a multilateral treaty, the state "may seek to enter a reservation to the treaty to limit or exclude the application of one or more of the treaty's terms to the reserving state, provided that the treaty does not expressly prohibit the reservation at issue." INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, *supra* note 149, at 65.

178. Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *supra* note 175, at art. 2(1).

179. Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. 1115, 1145 n.223 (2002).

180. Organization of American States, Signatories and Ratifications of the Inter American Treaties, at <http://www.oas.org/juridico/english/Sigs/a-53.html> (last visited Feb. 19, 2005).

3. The Requisite *Opinio Juris*

While the international agreements discussed above are dispositive evidence of a general and consistent practice of abolition of the death penalty among Latin American states, their widespread acceptance by Latin American countries is also evidence that these states have acted with the requisite *opinio juris* necessary for the creation of a norm of customary law. The mere fact that there remains only one Latin American country, Guatemala, which continues to employ the death penalty,¹⁸¹ is strong evidence that those states that have abolished the death penalty have done so out of a sense of legal obligation.

The *opinio juris* for the abolition of the death penalty in Latin America can also be inferred from some of the language used in reservations to the treaties and in the language of the treaties themselves.¹⁸² In its reservation to the American Convention on Human Rights, the Dominican Republic stated that “[t]he Dominican Republic, upon signing the American Convention on Human Rights, aspires that the principle pertaining to the abolition of the death penalty shall become purely and simply that, with general application throughout the states of the American Region.”¹⁸³ It can be inferred from this language that the Dominican Republic, in signing onto the Convention, did so out of a sense of legal obligation and that it expected other countries in the American Region to subscribe to the principle now codified in the Convention that the death penalty ought to be abolished.

Furthermore, the language in the preamble of the Additional Protocol is also evidence of the necessary *opinio juris*. It can be inferred from the statement that the “State Parties to the American Convention on Human Rights have expressed their intention to adopt an international agreement with a view to *consolidating the practice of not applying the death penalty in the Americas*”¹⁸⁴ that the signatories were acting out of a sense

181. See McKee, *supra* note 142, at 159 (“It is also important to realize that among North America, South America, Central America and Western Europe; the United States, Guyana, Guatemala and Belize are the only non-conformist nations.”).

182. INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, *supra* note 149, at 75.

183. SCHABAS, *supra* note 142, at 436–37.

184. Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *supra* note 175 (emphasis added).

of legal obligation and with the goal of codifying a practice that was already in existence among them.

4. The United States Violates Regional Customary Law by Imposing the Death Penalty on the Citizens of Puerto Rico

In 1953, in response to the United States Memorandum to the United Nations concerning the Cessation of Transmission of Information regarding Puerto Rico,¹⁸⁵ the United Nations' General Assembly passed Resolution 748. The resolution stated, in pertinent part, "that the agreement reached by the United States of America and the Commonwealth of Puerto Rico, in forming a political association which respects the individuality and the cultural characteristics of Puerto Rico, maintains the spiritual bonds between Puerto Rico and Latin America and constitutes a link in continental solidarity."¹⁸⁶

This resolution evidences the importance that the international community places on the development of regional systems and on the incorporation into those systems of countries with similar cultures and beliefs. The almost unanimous abolition of the death penalty in the Latin American region is a result of those countries' moral, cultural, and religious respect for human life.¹⁸⁷ As discussed *supra*, in incorporating the abolition of the death penalty into the Commonwealth's Constitution, the Framers "were acting upon the people of Puerto Rico's firm cultural, moral and religious conviction against the death penalty."¹⁸⁸

By imposing the federal death penalty on the citizens of Puerto Rico, the United States has acted and continues to act in opposition to General Assembly Resolution 748.¹⁸⁹ The United States continues to disregard the "individuality and cultural characteristics"¹⁹⁰ that led Puerto Rico to definitively abolish the death penalty in its Constitution. Furthermore, and most im-

185. See Memorandum Concerning Transmission of Information, *supra* note 21. See also Malavet, *supra* note 5.

186. Cessation of the transmission of information under Article 73(e) of the Charter in respect of Puerto Rico, *supra* note 24.

187. SCHABAS, *supra* note 142, at 350.

188. *Acosta Martinez I*, 106 F. Supp. 2d at 311.

189. Cessation of the transmission of information under Article 73 (e) of the Charter in respect of Puerto Rico, *supra* note 24.

190. *Id.*

portantly for the purposes of the present discussion, the United States is ignoring the “spiritual bond”¹⁹¹ or “link in continental solidarity”¹⁹² which exists between Puerto Rico and the rest of the Latin American region. By continuously seeking the death penalty against citizens of Puerto Rico, the United States is violating the norm of regional customary law that has developed in the Latin American region, which upholds respect for the right to life and prohibits imposition of the death penalty.¹⁹³

CONCLUSION

The Constitution of the Commonwealth of Puerto Rico states: “[s]e reconoce como derecho fundamental del ser humano el derecho a la vida, a la libertad, y al disfrute de la propiedad. *No existirá la pena de muerte.* Ninguna persona será privada de su libertad, o propiedad, sin el debido proceso de ley, ni se negará a persona alguna en Puerto Rico la igual protección de las leyes.”¹⁹⁴

The Constitution of the Commonwealth of Puerto Rico, like so many of the constitutions of other Latin American countries,¹⁹⁵ clearly and explicitly prohibits the imposition of the death penalty on its citizens. In fact, as recently as 1991, the people of Puerto Rico once again expressed their abhorrence for the death penalty when they voted against a proposed constitutional amendment that would have changed § 7 of the Puerto Rico Constitution to allow for the death penalty in cases of repeat first degree murder and multiple murders committed during the same act.¹⁹⁶ The rejection of the constitutional amendment by the people of Puerto Rico shows that Puerto Rico’s long-

191. *Id.*

192. *Id.*

193. *See* discussion *supra* Parts IV.B.1 and IV.B.2.

194. P.R. CONST. art. II, § 7 (“Recognizing the fundamental rights to life, liberty and property. *The death penalty shall not exist.* No person shall be deprived of liberty or property without due process of law, nor shall any person in Puerto Rico be denied equal protection of the laws.”) (emphasis added).

195. *See* discussion *supra* Part IV.B.

196. Juan Alberto Soto Gonzalez & Juan Carlos Rivera Rodríguez, *La Pena de Muerte, Una Batalla entre una Ley Federal y la Constitución de Puerto Rico*, 41 REV. DER. P.R. 253, 257–58 (2002) (Title translates as “The Death Penalty, A Battle between a Federal Law and the Constitution of Puerto Rico”).

standing sentiments against capital punishment remain very strong even in modern times.

While the new procedural and sentencing guidelines introduced by the Federal Death Penalty Act of 1994¹⁹⁷ effectively cure many of the constitutional problems denounced by the Supreme Court in *Furman v. Georgia*, they continue to defy and violate the will of the people of Puerto Rico as well as the norm of customary law developed in the Latin American Region.¹⁹⁸ The Supreme Court of the United States has yet to address the issue of the applicability of the FDPA to citizens of Puerto Rico,¹⁹⁹ but will have to eventually, as the Department of Justice continues to seek the death penalty in a large number of federal prosecutions in Puerto Rico.²⁰⁰

The Supreme Court, like the District Court of Puerto Rico and the First Circuit Court of Appeals,²⁰¹ is likely to focus on domestic issues of applicability of federal legislation to Puerto Rico. However, in order to comply with regional customary law, either Congress or the Court itself will have to address the issue and declare the Federal Death Penalty Act inapplicable to Puerto Rico as a violation of regional customary law.

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197. See discussion *supra* Part II.

198. See discussion *supra* Part IV.

199. The Supreme Court denied *certiorari* in the case of Acosta Martinez. *Acosta-Martinez v. United States*, 533 U.S. 906 (2002).

200. Little, *supra* note 7, at 357 n.36 (“The Puerto Rico U.S. Attorney’s office has submitted the largest number of potential death penalty cases (59) of any of the 94 federal districts since the Capital Case Review protocol was issued in 1995.”).

201. See discussion of Acosta Martinez cases *supra* Part III.

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