Singapore Journal of Legal Studies
[2005] 218–233

THE CONSTITUTION AND THE RECEPTION OF CUSTOMARY INTERNATIONAL LAW: *NGUYEN TUONG VAN V. PUBLIC PROSECUTOR*

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I. INTRODUCTION

The Court of Appeal decision in *Nguyen Tuong Van v. Public Prosecutor* is the most significant decision to date on the interaction between customary international law and Singapore law.[1] Two key questions arose in *Nguyen*. First, whether the punishment of death by hanging violates international law.[2] Secondly, whether customary international law could prevail over Singapore law. A subsidiary question was whether death by hanging constitutes cruel and inhuman treatment or punishment by the standards of customary international law.

The appellant was found with two packets of heroin while in transit through Singapore's Changi Airport. He had given an oral statement and a cautioned statement. At trial, he was convicted by Kan Ting Chiu J. under section 7 of Singapore's *Misuse of Drugs Act*[3] and sentenced to death by hanging.[4] The defence had raised the argument that the cautioned statement, which was provided before the accused had exercised his right to consular access,[5] was inadmissible. This, according to the defence, was because the statement was taken in violation of Article 36(1) of the

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* Of the Faculty of Law, National University of Singapore. I have endeavoured to state the law as it appeared to me on 25 January, 2005. On that day, the *Diplomatic and Consular Relations Bill* was read a second time, and Singapore has expressed an intention to accede to the *Vienna Convention on Consular Relations of 1963*. I am grateful to my assistant, Ms. Jolene Lin, for purging the manuscript of unnecessary clutter. All errors remain my own.

1 [2005] 1 Sing.L.R. 103 (C.A.) (Chao Hick Tin J.A., Lai Kew Chai J., Yong Pung How C.J.) [*Nguyen*].

2 Michael Hor, "The Death Penalty in Singapore and International Law"(2004) 8 S.Y.B.I.L. 105.

3 Cap. 185, 2001 Rev. Ed. Sing.

4 [2004] 2 Sing.L.R. 328; Thio Li-ann, "The Death Penalty as Cruel and Inhuman Punishment Before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *PP v. Nguyen Tuong Van* (2004)" 4 Oxford University Commonwealth Law Journal 1. The significance of the High Court decision in respect of the application of customary law by the Singapore courts is discussed in C.L. Lim, "Public International Law before the Singapore and Malaysian Courts" (2004) 8 S.Y.B.I.L. 243 at 244-255.

5 It is debatable whether the accused, as opposed to Australia, had that right (see discussion of the *LaGrand* case, below). But the issue, it appears, was not raised before either the High Court or the Court of Appeal.

Vienna Convention on Consular Relations ("the VCCR").[6] Singapore is not a party to the Convention, but Kan J. in the court below accepted that Singapore is bound by the rule in Article 36(1) as a rule of customary international law.

II. Proving the Applicability of a Customary Rule

The learned judge had observed that Singapore practice conforms to the practice required by customary international law, and that the prosecution had not objected to the application of that customary rule to Singapore. Notably, the Court of Appeal accepted this conclusion in the appeal, even if this was put in somewhat more ambiguous terms. Lai Kew Chai J. who delivered the Court of Appeal's judgment considered that[7]:

> The VCCR is a key instrument in the regulation and conduct of consular activities. There is an established practice for a State which has arrested a national of another State to notify the consular officers of the State of the accused person. Although Singapore is not a party to the Convention, Singapore does conform with the prevailing norms of the conduct between States such as those set out under Art 36(1)…

On the face of it, the question of whether a binding customary rule exists does not arise because Singapore already "conform[s] with the prevailing norms of the conduct between States such as those set out under Article 36(1)". In other words, Article 36(1) already reflects a Singapore practice or usage. However, it may be observed that if this were the case (i.e., that what is involved is not an internationally binding rule but a mere practice or usage), the Court of Appeal's ensuing discussion of the content of Article 36(1) would have been otiose. Instead, as will be seen below, the Court of Appeal inquired, in a substantive fashion, into the consequences of a breach of the rule in Article 36(1), with the full knowledge that Singapore was not a party to the *Convention*. Why should the proper construction of the rule in Article 36(1) matter to a Singapore court if it was not at the same time considered a customary *rule* applying to Singapore as opposed to a reflection of what was merely a pre-existing usage or practice on Singapore's part? The better view then, it seems, would be that the Court of Appeal agreed with the view expressed by Kan J., that the rule in Article 36(1) bound Singapore in the guise of a customary international law rule.

Singapore has since expressed the intention to accede to the VCCR, and has already sought to implement certain provisions of the VCCR by means of an Act of Parliament. This note was completed as the *Diplomatic and Consular Relations Bill* was read for a second time in Parliament. Clause 4 of the *Bill*, curiously, does not seek to implement Article 36 of the VCCR.[8]

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6 *Vienna Convention on Consular Relations*, 24 April 1963, 596 U.N.T.S. 261.

7 *Supra* note 1 at para. 24.

8 Bill No. 65/2004; Ministry of Foreign Affairs, Singapore, Press Release, 25 January 2005 (second reading speech of Minister of State for Foreign Affairs, Mr. Zainul Abidin Rasheed).

III. (NO) BREACH OF A CUSTOMARY RULE

As a first step, the Court of Appeal discussed at some length the recent decision of the International Court of Justice ("ICJ") in the jurisdiction phase of the *Avena* case,[9] and which contains significant clarifications of questions earlier raised by the *LaGrand* case.[10] In the *Avena* case, the ICJ considered Mexico's complaint that between 1979 and 2003, 52 Mexican nationals had been arrested, detained, tried, convicted, sentenced and executed in the United States for various offences without consular access. Mexico argued that it should have been informed without delay of these detentions under the Article 36(1) rule. According to Mexico, the "without delay" rule meant that Mexico should have been informed before the interrogation phase.[11]

The ICJ, while holding (against the United States) that it possesses the requisite jurisdiction to deal with the case, rejected Mexico's argument about the content of the Article 36(1) "without delay" rule. Firstly, as the Singapore Court of Appeal put it[12]:

> …material to this case was [the] ICJ's rejection of Mexico's contention that Art 36(1) provided for consular access *before* interrogation or any action potentially detrimental to the foreigner's rights was carried out…This was not the object or purpose of Art 36, nor was this reflected anywhere in Art 36…This was also not in the *travaux preparatoires* or pre-Convention discussions…

Secondly[13]:

> The ICJ also held that "without delay" did not necessarily mean "immediately upon arrest". It concluded that the arresting authorities had a duty to give that information to the consular post of the country of which an arrested person was a national as soon as they realised that the person was a foreign national or once there were grounds to think that the person was probably a foreign national.

Thirdly[14]:

> The ICJ also rejected the contention that there must be consular access before any statements were recorded.

Accordingly, there was no breach of the Article 36(1) rule. As the court put it, "the appellant's submission that the statements in question are inadmissible is without basis".[15]

A decision of the ICJ, like any international court or tribunal decision, may be evidence of a general rule of customary international law, but this is not always so. The ICJ's pronouncement in the *Avena* case may simply be viewed as an interpretation of Article 36(1) of the VCCR. However, the Court of Appeal appears to treat it as

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9 *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)*, [2004] I.C.J. General List No. 128, online: ICJ website <http://www.icj-cij.org/>

10 *LaGrand Case (Germany v United States of America)*, [2001] I.C.J. General List No. 104, online: ICJ website <http://www.icj-cij.org/>.

11 *Supra* note 1 at para. 28.

12 *Ibid*. at para. 31.

13 *Ibid*. at para. 32.

14 *Ibid*. at para. 33.

15 *Ibid*.

evidence of a customary rule mirroring the content of the Article 36(1) rule, and which therefore also applies to (some) non-parties to the VCCR (*i.e.*, Singapore).[16] This falls neatly in line with how international lawyers view such matters — a State may use a treaty provision in a treaty to which it is not a party as a guide to its own conduct, thereby evincing an intent to be bound by that rule *qua* customary international law.[17] If this was how the Court of Appeal saw it (and it normally makes great sense to do so as a matter of accepted international law doctrine), it may be taken that in Singapore, the rule in Article 36(1) amounts to a customary law rule that has been accepted into the common-law. As will be seen in the ensuing discussion, this is not however an unproblematic view to hold.

IV. Differences Over an Aside

In *Avena*, the ICJ had also said that the question of what consequences would follow a breach of the rule in Article 36(1) is one for domestic courts, acting in accordance with domestic law. Kan J. in the High Court had said[18]:

> Assuming that there was a breach, it does not necessarily follow that the [appellant's] statements are inadmissible in evidence. There must be some resultant prejudice that renders it wrong for the statements to be used, for example, that if he had timely consular advice, he would not have made the statements at all, or in the form or at the times he did.

However, the Court of Appeal took the view that: "… the extension explicit in this *obiter dicta* is in principle and on authority unsustainable".[19] The Prosecution had (rightly) pointed out that Article 36(2) subjects this question of admissibility to the laws of the receiving State.[20] Article 36(2) states: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State." Therefore, according to the Court of Appeal, whether a breach of the rule in Article 36(1) would result in the inadmissibility of the statement was patently a question for Singapore law. With respect, this does not appear to differ, in substance, from the view taken by Kan J. in the learned judge's *obiter dicta*.

According to Kan J., "[t]here must be some resultant prejudice that renders it wrong for the statements to be used". The "resultant prejudice" rule is patently a Singapore rule and therefore, the larger principle on which the *obiter dicta* of the learned High Court judge rests must be that Singapore law prevails over international law. Kan J. did not quite put it like that, but it seems this is what the learned judge meant. The principal difference then, between the two views, is that the Court of Appeal based its conclusion on the true meaning of Article 36 (i.e., that Article 36 says that domestic law would prevail in such matters) while Kan J. had based

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16 Upon the *Diplomatic and Consular Relations Bill* becoming law, the rule in Article 36(1) will become a treaty rule to which Singapore is party, but it will nonetheless not enjoy the status of a statutory rule as the Bill omits Article 36 from the list of provisions which are to be incorporated into Singapore law; Bill No. 65/2004.

17 *North Sea Continental Shelf Cases (F.R.G. v. Denmark/F.R.G. v The Netherlands)*, [1969] I.C.J. Rep. 3 at para. 71.

18 *Supra* note 4 at para. 41.

19 *Supra* note 1 at para. 26 *et seq*.

20 *Ibid*. at para. 34.

his view on common-law principle instead; to wit, that in the case of a conflict between international law and domestic law, domestic law would prevail as a matter of common-law principle.[21]

Kan J.'s view does not sit uncomfortably with Singapore's aim to be a good global citizen. Questions regarding the application of international law rules that impinge on the operation and demands of domestic law typically arise in the course of proceedings dealing with the issues at hand for the first time. In these cases, the Singapore courts will have to discover the rule that applies to Singapore. At the same time, the view which they ultimately adopt will tend to become the primary, and sometimes the only, evidence of Singapore's position on the matter. Often, the Singapore courts are likely to have relatively little to go on. Kan J., while saying in rather more express terms than the Court of Appeal that the Article 36(1) rule bound Singapore under customary international law, had simply chosen to determine the content of that rule not by reference to the "true meaning" of Article 36 in the treaty. Instead, Kan J. looked towards Singapore's actual practice in informing the foreign state that a consular issue had arisen in these sorts of cases.[22] In any case, Singapore law, not international law, would determine the admissibility of the cautioned statement. The Court of Appeal's view, on the other hand, appears to require the further view that the real meaning of Article 36(1) also reflects the true content of the customary law rule which would apply to non-parties to the treaty, including Singapore at that time. But, with respect, the Court of Appeal does not say why this should necessarily be so.

The Court of Appeal did not enter into the question of what evidence there was to support the view that the Article 36(1) rule applied not only to VCCR parties under the law of treaties but also to non-parties under customary international law. Under the *pacta tertiis* rule, a non-treaty party is not bound by a rule contained in the treaty. If it is to be bound by a similar or identical rule, that ought to be because (a) the similar or identical rule pre-existed the treaty rule (i.e. that the treaty rule was merely a codification of a pre-existing customary rule), or (b) that the parties to the treaty negotiations widely considered what became the treaty rule to be a customary rule in the course of the negotiations, or (c) that the non-treaty party subsequently used the treaty rule as a *legally binding* guide to its own conduct.[23]

It is entirely possible, therefore, that various non-parties to the VCCR, including the Singapore Government at the time of the Court of Appeal decision, may actually take different views of a customary rule equivalent to the treaty rule in Article 36(1). Kan J. addresses this problem whereas the Court of Appeal, with the greatest respect, does not (even if the conclusion reached was ultimately the same).

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[21] By this, the court of Appeal took Kan J. to mean that a domestic statute prevails over customary international law (received into the common law); *supra* note 1 at para. 94. As has been mentioned, *supra* note 16, Article 36 will still not enjoy the status of a statutory rule when the *Diplomatic and Consular Relations Bill* becomes law as the *Bill* omits Article 36 from the list of provisions which are to be incorporated by statute.

[22] Saying "Singapore holds herself out as a responsible member of the international community and conforms with the prevailing norms of the conduct between states" and that Singapore's conduct "suggests the acceptance of the obligations set out in Article 36(1)." The learned High Court judge had also observed that the Prosecution did not argue with this: *supra* note 4 at paras. 36-37.

[23] *Supra* note 17.

Singapore's subsequent intention to accede to the VCCR without reservations may indicate an acceptance of the ICJ's ruling in *Avena*. However, the better view is that where Singapore's treaty relations are called into question, "the court should seek guidance from the executive whose views must be taken as conclusive evidence; the views of the executive on treaty relations may be volunteered to the court and where the Attorney General appears and states those views, such a statement is equally conclusive evidence".[24]

V. The (Ir)Relevance of the *LaGrand* Point

At this juncture, some consideration should also be given to the ICJ's earlier *LaGrand* decision. There, the ICJ had to address a complaint brought by Germany which was essentially similar to the Mexican complaint in the subsequent *Avena* case. As Kan J. pointed out, the United States accepted that it had breached its duty to Germany in the *LaGrand* case. Thus, the question concerning the phrase "without delay" in Article 36(1) did not arise for consideration. This, according to Kan J., rendered *LaGrand* distinguishable from the facts in *Nguyen*, and therefore irrelevant.[25]

It is difficult to see why *LaGrand* must be irrelevant on this ground. It could be said, equally perhaps, that no direct question arose in *Nguyen* concerning Singapore's duties towards Australia, at least not in the way that a duty by the United States to Germany arose in the *LaGrand* case. *LaGrand* was an international dispute, whereas *Nguyen* concerned a domestic criminal trial. Arguably, whether or not the United States was liable was just as irrelevant to the facts in *Nguyen*. *LaGrand* was therefore "irrelevant" only to the narrower issue concerning the phrase "without delay" in Article 36(1). Be that so, it may be argued that there were other aspects of *LaGrand* that are relevant.

At issue in *Nguyen* was the right, if any, of the accused to have consular access within a stipulated period. The court was called to consider the Singapore authorities' purported duty to Nguyen to allow him consular access before making his cautioned statement. According to defence counsel, the breach of this duty renders the evidence in question inadmissible. Likewise in *LaGrand*, the majority of the ICJ had held that the United States also owed the LaGrand brothers themselves a legal duty (in addition to its legal duty to Germany). To complicate matters, this was in itself a problematic conclusion concerning the true import of Article 36(1). In a powerful separate opinion, Vice-President Shi Jiuyong (with whom Judge Shigeru Oda agreed in his dissent) pointed to the negotiating history of Article 36(1), which states of the person arrested or detained that:

> if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular

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[24] *Halsbury's Laws of Singapore,* (Singapore: Butterworths, 1999), Vol. 1 at 12-13.

[25] *Supra* note 4 at para. 40: "This is a decision by the International Court of Justice where two accused persons were not informed of the right to consular access for almost 17 years after their arrest. This decision does not offer any assistance to the accused. The acceptable time was not considered by the Court as the United States accepted that there was a breach of Art 36(1)" (*per* Kan J.).

post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

The negotiating history behind Article 36(1), while a little complicated, is not without interest. During the negotiations, some delegates at the conference argued that the accused should have an automatic right of access to his/her consular State. Other delegates disagreed. As an initial compromise, Tunisia, together with a number of other delegations, proposed that there should be an automatic right *unless* the accused expressly opposes it since in some cases the accused may not wish his/her national state to know of the situation. The phrase suggested by the Tunisian proposal was "unless he", meaning where the accused "expressly opposes it". Egypt, in turn, suggested that the accused should have automatic access "if he so requests". This, it was argued, would lessen the burden placed upon the receiving State. The Egyptian proposal was accepted in what is Article 36(1) today, together with the additional last sentence above: "The said authorities shall inform the person concerned without delay of his rights under this subparagraph".[26]

Clearly, such a compromise is a little unsatisfactory in light of the fundamental difference in viewpoints that the VCCR States held as to what Article 36(1) should require. The present formulation is an awkward compromise between those who would place the burden on the receiving State (albeit with safeguards protecting the privacy of the accused) and those who would not wish to place such a burden on the receiving State. The question of privacy further complicates the issue.

In *LaGrand*, Japan's Judge Oda and Vice-President Shi of the People's Republic of China (now President of the court) considered that, in these circumstances, the duty to inform the accused was owed to the national State of the accused but not to the accused themselves. The majority of the ICJ judges disagreed with this view and considered instead that the United States owed, and therefore violated, a duty to the LaGrand brothers.[27] The majority's view in *LaGrand* has now been confirmed by the court in *Avena*,[28] with the exception of the President of the court. President Shi felt compelled to enter a separate declaration, saying "I should like to make it clear that I still maintain my views as expressed in my separate opinion annexed to the *LaGrand* Judgment …"[29]

In these circumstances, it would be difficult to discover which of the two positions Singapore agrees with. In Singapore's view, is the duty owed to the accused or simply

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[26] *Supra* note 10, separate opinion of Judge Shi (especially paras. 9-16) and the dissenting opinion of Judge Oda (paras. 23 *et seq*.). Of particular note is the view which Judge Oda took in his dissent (para. 24) that Article 36(1)(c) of the VCCR "was included in the Convention simply to provide for the situation in which an arrested foreign national waives consular notification in order to prevent his criminal conduct or even his presence in a foreign country from becoming known in his home country". In other words, Article 36(1)(c) only reflects the consideration given by some delegations during the negotiations to the requirement of privacy, but does not stand for an intent on the part of the Framers to endow an actionable legal right on foreign individuals against the receiving State in their own right. As will be seen, the court in *Avena* seems to have, however, rejected this view. For a detailed account of the negotiations leading to Article 36, see Luke T. Lee, *Consular Law and Practice*, 2nd ed. (Oxford: Clarendon, 1991) at 138-144.

[27] *Ibid*., at paras. 76-77, 89.

[28] *Supra* note 9; see also the dissenting opinion of Judge *Ad Hoc* Sepúlveda, para. 23 on this point.

[29] *Ibid*., declaration of President Shi.

to Australia? If it is the latter, it would be difficult to see how the defence could succeed in its argument. The entire matter would exist on the international plane, for even if the customary rule were received into the common law (that Singapore owes Australia a duty), and becomes cognisable by the Singapore courts, a Singapore statute would nonetheless prevail over the common law.

In truth, it is more likely that "Singapore" had never considered its position on the issue. In these circumstances, the clearest evidence of Singapore's position would have been the requirement which the Court of Appeal applied[30]:

> In our criminal justice system, the fundamental procedural principle is that the nature of any violation and possible prejudice must be considered under and in the light of our rules governing admissibility to be found in s 122(5) of the CPC or s 24 of the Evidence Act. These rules ensure the voluntariness with which statements are made and the reliability of confessions and admissions.

In other words, in the eyes of a Singapore court, domestic law prevails over international law in the event of a direct conflict. This, it appears, was the position which Kan J. took. Whichever approach is adopted, the result is the same. Arguably, if this is correct, the *Avena* point that Article 36(1) should not be construed to interfere with the domestic jurisdiction of States only arises when a national State seeks to press its rights against a receiving State on the international plane.[31] The view which the Court of Appeal appears to have taken, that *Avena* reflects a true construction not only of Article 36(1) but also its customary equivalent, does not seem to be based on evidence of Singapore practice (although the Court of Appeal's decision may now be taken to be evidence of such practice). Should the Court of Appeal risk binding Singapore's international position in this manner?[32]

In sum, a distinction may be drawn between cases where an international court or tribunal seeks to determine a mere treaty rule (where the forum State is not party to the treaty) and cases where the court or tribunal seeks to determine the content of a general customary rule (which applies to the forum state). It is only in the latter situation that the decision of the international court or tribunal may be taken to be evidence of "international law" for the purposes of the courts of the non-treaty party State.[33]

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30 *Supra* note 1 at para. 35.

31 Which in practice depends on the national State having the means to compel the receiving State to appear before an international tribunal. Where such recourse to an international tribunal is unavailable, the national State can only assert its rights through diplomatic channels.

32 A matter to which we will return in the penultimate part of this note.

33 The author's earlier remark on this issue involving *LaGrand* (Lim, *supra* note 4 at 247-248) should have read "There seems no reason, however, to think that had the case been relevant, it would *not* have been taken into consideration in determining both the customary rule reflecting Article 36(1) and the question of its breach. In any event, it would not be unusual should judicial decisions such as those of the International Court of Justice which pronounce upon the meaning of a treaty rule be relied upon to prove the content of a (parallel) customary rule." The word "not", which is underlined and italicised above, is missing. Nonetheless, did the ICJ in *Avena* (and the Singapore Court of Appeal in *Nguyen*) set out to determine the existence of a (parallel) customary rule or merely a treaty rule applying strictly to those party to the VCCR? It appears that only Kan J. was directly concerned with proving the content of the customary rule.

VI. Would a Mandatory (Death) Penalty Violate International Law?

The defence, inspired by the Privy Council decision in *Reyes v. The Queen*,[34] and more recently the doubt cast on the previous case of *Ong Ah Chuan v. Public Prosecutor* by *Watson v. The Queen*,[35] had argued that a mandatory sanction of death violates the equality clause in the Singapore Constitution (Article 12).[36] But there is a further related aspect; namely, the defence's argument that a mandatory penalty also constitutes cruel or inhuman treatment since a mandatory penalty would violate the requirement that the crime should fit the punishment (the proportionality requirement). The manner in which this argument was raised is both striking and novel.

According to defence counsel, the proportionality requirement is built into the import of Article 9 of the Singapore Constitution (the right to life). Article 9 states that: "No person shall be deprived of his life or personal liberty save in accordance with law". The phrase "in accordance with law" has been well litigated. The position here is that it requires conformity with the fundamental rules of natural justice, for example. In *Nguyen*, the defence argued that this principle also includes such rules of international law that may apply. This argument would entail that similar language in the Singapore Constitution carry the same meaning. This would have significant impact on our received understanding of the relationship between the Constitution and international law. In short, the Constitution would be taken to incorporate international law, making the Singapore Constitution a closer cousin of the American and German Constitutions than that of the United Kingdom. That this would fly in the face of our normal practice and understanding of the relationship between international law and Singapore law is without doubt. Furthermore, if by "international law" (in this argument) we also mean to include treaty laws, an unbearable tension would be created with Article 38, which vests the legislative power of Singapore in the "Legislature which shall consist of the President and Parliament". The retort here may simply be that this in fact creates no greater tension than that which necessarily exists between, say, Article 38 and Article 93 (the judicial power of Singapore), and which has never been viewed to be especially problematic in practice.[37]

Ultimately, the Court of Appeal chose to rest its decision on the view that proportionality would not be sacrificed by the existence of a mandatory penalty.[38] As for the argument that the Singapore Constitution incorporates references to international law, the Court of Appeal did not deal with this issue, saying only that: "Any customary international law rule must be clearly and firmly established before its adoption by the courts".[39]

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34 [2002] A.C. 235 (*per* Lord Bingham).

35 *Ong Ah Chuan v. Public Prosecutor* [1981] A.C. 648, 674 (*per* Lord Diplock); *Lambert Watson v. The Queen* [2004] UKPC 34 at paras. 29-30 (*per* Lord Hope).

36 References to the "Singapore Constitution" in this article are to the *Constitution of the Republic of Singapore* (1999 Revised Edition, as amended subsequently). The equality argument was directed at the "15 grams or more" differentiating measure under the *Misuse of Drugs Act* (Cap. 185, 2001 Rev. Ed. Sing.), challenging the distinction drawn between persons trafficking in 15grams or more and in relation to whom the *Act* requires the imposition of the death penalty, and persons trafficking in less than 15 grams on whom the imposition of a lesser penalty is prescribed; *supra* note 1 at paras. 61-77.

37 See, for example, *ibid*. at paras. 95-98.

38 *Ibid*. at paras. 83-87.

39 *Ibid*. at para. 88.

VII. Cruel or Inhuman Treatment?

The Court of Appeal did, however, go on to address the argument that hanging constitutes cruel or inhuman treatment under customary international law. It said[40]:

> To succeed on this ground of appeal, the appellant must first show that the prohibition against cruel and inhuman treatment or punishment amounts to a customary international rule. Next, the appellant must show that a specific prohibition against hanging as a mode of execution is part of the content of that rule in customary international law.

The first step, according to the court, was unproblematic. As for the second step, reliance was placed instead on the view that[41]:

> Capital punishment, imposed pursuant to conviction in accordance with due process of law, has not been recognised as a violation of the customary law of human rights. It may, however, constitute cruel and inhuman punishment … if grossly disproportionate to the crime. …

Reviewing state practice in this area, Singapore's Court of Appeal concluded that[42]:

> The appellant was unable to show a specific customary international law prohibition against hanging as a mode of execution. Indeed, the passage quoted above shows that there is not enough evidence at this time to show a customary international law prohibition against the death penalty generally.

In any event, according to the court, statute would prevail in the event of a conflict between statute and international customary law.[43] This must be true, but only if certain rules of customary international law are not imported into the words of the Constitution, such as the phrase "save in accordance with law" in Article 9 of the Singapore Constitution. In such a case, the constitutional provision would prevail over an inconsistent statutory provision.

It seems that the court has left at least two possibilities open. First, should a rule of customary international law against death by hanging become established in the future, the Singapore courts would accept the existence of such a rule as one of international law. Secondly, such a rule could be incorporated by way of the Singapore Constitution itself.

VIII. Constitutional Issues

At the heart of the present case is a series of overlapping and interlocking arguments which counsel advanced for the appellant. In particular, the argument that the Constitution includes references to customary international law (hereafter, the "monist theory") overlaps with the argument that the phrase "save in accordance with law" in Article 9 (the right to life) goes beyond statute, that Article 9 therefore includes a

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40 *Ibid*. at para. 90.

41 *Ibid*. at para. 91 (citing Professor David Harris).

42 *Ibid*. at para. 92.

43 *Ibid*. at para. 94; approving Kan J. who cited *Chung Chi Cheung v. The King* [1939] A.C. 160; and *Collco Dealings Ltd v. Inland Revenue Commissioners* [1962] A.C. 1.

requirement of proportionality, that Article 12 (equality) is violated where the proportionality requirement is not satisfied, and that the death penalty could constitute inhuman or degrading treatment or punishment. One noticeable feature of the Court of Appeal's decision in *Nguyen* is that the court did not expressly reject (or confirm) the overlap between this "monist theory" and the first and last of these arguments.

It may be said that the court did not need to reject the connection between the underlying "monist theory" and the argument that reference to "law" in Article 9 includes a reference to international law because the application of a mandatory penalty by the Singapore courts could still be sufficiently discriminating. Likewise, it may be argued that the court did not need to address the connection between the last argument (that the death penalty could constitute cruel or inhuman treatment) and the "monist theory" because the court had considered that in the event of a direct conflict between a customary rule and statute, the latter would prevail.[44]

Such a view does not solve the problem entirely. Firstly, with respect to the overlap with the first argument, this still leaves the monist contention open. Secondly, and with respect to the overlap with the last argument, the fact that statute prevails over the common-law would not preclude the Constitution prevailing over Parliamentary statute (Article 4 of the Constitution).[45] Therefore, if the monist theory advanced by the defence were correct, the court has left open the future possibility that the Constitution may trump such statutory prescriptions as those found in the *Misuse of Drugs Act*.

The monist theory requires an argument which a defence strategy that has kept a firm eye on the past practice of the Singapore courts and its received understandings of the relationship between international law and Singapore law would not have raised so readily. But this having been done, the Court of Appeal in *Nguyen* did not address it head-on. The question may be put in its simplest form: Does the Singapore Constitution include references to international law? The remainder of this note seeks to outline some of the issues which bear on the question. While the Court of Appeal is probably right not to deal with this issue in the present case, the question is nonetheless likely to arise again in future and may require fuller consideration at that juncture.[46]

So far as the Singapore Constitution is concerned, commentators are at least agreed on one thing[47]:

> The Singapore Constitution contains no express provision regulating the reception of international law or establishing the hierarchical ordering of international and domestic law. It generally follows UK practice on the domestic reception of international law. With respect to treaty law, or inter-state agreements, a dualist approach applies…

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44 In itself an unassailable view.

45 Something which the Court of Appeal has reiterated in the present case.

46 Not least because of some suggestion given by the Privy Council to this effect in *Lambert Watson v. The Queen*, *supra* note 35, especially paras. 61-62 (*per* Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Steyn and Lord Walker of Gestingthorpe); *contra* Lord Hope of Craighead at para. 54.

47 Thio, *supra* note 4 at 10-11.

Put differently[48]:

> The constitutional context of Singapore is not well disposed towards internationalization. Unlike its German or American counterparts, the Singaporean Constitution is silent on whether or not international law forms part of the law of the land.

Strictly speaking, however, the Constitution is not silent on the matter of treaty law — Article 38 vests the law-making power of Singapore in the Legislature, not the Executive. Instead, the problem lies with customary international law. This is compounded by the fact that the Constitution fails to specify the location of the power to conduct foreign affairs on behalf of the Republic of Singapore, which would include the power to determine Singapore's position under (or consent to) customary international law. No-one argues against the view that the power to conduct foreign affairs is vested in the Executive. Could the Constitution be taken to imply this? If so, then it may be thought that such a power includes the power to determine Singapore's attitude towards particular rules of customary international law. Judges then may, at best, only go so far as to discover customary international law as part of the common-law in Singapore. The courts should not decide Singapore's position under customary international law without reference to the Executive (i.e. on their own accord), say that the Constitution imports a particular customary rule, and strike down Parliamentary legislation for contradicting that rule (and therefore the Constitution).

There lies one answer. It is not a full-proof answer, but is arguably more complete than that suggested by the defence in *Nguyen* (that, simply put, international legal standards inhering in the Constitution could trump Singapore legislation), or in an oft-heard criticism of constitutional adjudication in Singapore. According to the latter, constitutional cases touching upon the protection of fundamental liberties are unduly "formalistic", lack "progressiveness", are unduly "deferential" to executive and legislative determinations on how best to balance fundamental liberties against public goods, and employ foreign law comparisons to "buttress the *status quo*".[49] Such sentiments are sometimes presented in terms of a certain lack of receptiveness on the part of the Singapore courts to international legal standards. In other words, these criticisms are extended to questions concerning the interaction between international law and Singapore law.[50] It may or may not be true that the Singapore courts, generally speaking, are not receptive to the application of international legal standards. Either way, a doctrinally rigorous view of the convergence of constitutional reasoning and theories about the reception of international law into Singapore law is required.

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48 Simon S.C. Tay, "The Singapore Legal System and International Law: Influence or Interference?" in Kevin Y.L. Tan, ed., *The Singapore Legal System*, 2nd ed. (Singapore: Singapore University Press, 1998) 467 at 472.

49 See, for example, Thio, *supra* note 4 at 13-14 for the latest statement of this view. See also Thio Li-ann, "*Lex Rex* or *Rex Lex*? Competing Conceptions of the Rule of Law in Singapore" (2004) 20 U.C.L.A. Pac. Basin L.J. 1 at 70 for the latest criticism of the "four walls" approach to constitutional adjudication; Thio Li-ann, "An 'I' for an 'I': Singapore's Communitarian Model of Constitutional Adjudication" (1997) 27(2) Hong Kong L.J. 152 at 164 *et seq*. Another version of this criticism is that the Singapore courts have been selective in drawing from the comparative constitutional jurisprudence of foreign courts; Victor V. Ramraj, "Comparative Constitutional Law in Singapore", (2002) 6(1) S.J.I.C.L. 302.

50 Thio, *supra* note 4 at 14. Another example perhaps is Tay, *supra* note 48.

IX. Proof of Custom and Executive Conduct

A sound argument could be made that while custom may be a part of the common-law (with all the characteristics and limitations of the common law in the hierarchy of domestic legal sources), and statute laws should be interpreted in light of international treaty obligations where possible,[51] it is nonetheless not for the courts to import customary international law standards *into the Constitution* against Parliamentary legislation without a high degree of deference to the views of the Executive.

The courts may scrutinise legislation for conformity with the Constitution where the meaning given to constitutional provisions may be derived by a variety of means of legal reasoning, but not where such scrutiny is had *purely* by reference to what the courts alone consider to be an existing international legal standard. The courts must be wary of a hidden usurpation of the legitimate exercise (or non-exercise) of the foreign affairs powers of the Republic of Singapore,[52] which surely includes the foreign affairs power to define and determine Singapore's attitude towards regulation by a particular international customary rule. The courts cannot go there because this power belongs to the Executive.[53] Put simply, the application of such international standards may affect the proper separation of the executive power in foreign affairs and the judicial power in Singapore.

It might be objected, firstly, that it is for the courts to declare the meaning of the Constitution. If so, the argument goes, it is not for the Executive to say what customary international law (as a part of the Singapore Constitution) looks like. However, this argument misses the point. The final word on what the law is lies certainly with the courts, but the courts, in choosing to interpret the Constitution one way or another, would nonetheless not do so arbitrarily. Judicial decisions must, after all, rest on legal reasoning and legal principle. What is the true legal principle to be applied in such cases then? Simply put, the courts and the Executive should speak with "one voice".[54] By this, we mean that the courts should look to what the Executive considers to be Singapore's attitude towards the rule of customary law that is sought to be applied (regardless of how widely that rule may be applicable to other States). It is not without interest that in the classic cases where the English courts have had to consider the application of customary international law in the domestic context, they have tended to look not towards what other countries might have accepted to be the applicable customary rule, but what the United Kingdom itself considers to be the customary rule.[55]

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51 Lim, *supra* note 4 at 252-255, 260-266.

52 This is a complex area in which the United States courts have tended to uphold the foreign affairs powers of the United States over liberties enshrined in the Bill of Rights, with limited exception only; Louis Henkin, *Foreign Affairs and the U.S. Constitution* (Oxford: Clarendon, 1996) at 283 *et seq*.

53 In effect, this must mean that, in practice, Parliamentary legislation cannot be challenged on the basis of international standards alone unless Singapore, through executive determination, clearly subscribes to a contrary international position. Put simply, both the executive and judicial branches would have to agree before the judiciary may successfully overturn legislation for violation of the Constitution on the basis of international legal standards.

54 Lim, *supra* note 4 at 272.

55 The classic illustration here is *West Rand Central Gold Mining Co. v. R.* [1905] 2 K.B. 391 (*per* Lord Alverstone C.J.). See also *R v. Keyn* (1876) 2 Ex. D. 63, where the same point is upheld. The point is discussed further in the penultimate part of this note.

It might still be objected that the present line of argument makes a mockery of the fundamental liberties enshrined in the Constitution. After all, it seems to make little sense to say that the Constitution is supreme,[56] while saying at the same time that the courts should defer to the Executive where the Constitution requires (*ex hypothesi*) the application of international law in ensuring respect for the fundamental liberties enshrined in the Constitution. The simple answer here is that the fundamental liberties may still be given breadth and meaning by other means (e.g., the application of rules of natural justice) that would achieve the same result. The argument here is only that such meaning which may become the basis for scrutinising and over-turning Parliamentary legislation cannot be arrived at by saying that the court is applying a rule under customary international law unless it is (at least) shown that the Executive considers that Singapore has adopted that rule of customary international law.

Arguably, there is only one exception to this; namely, where the customary international law rule is a non-derogable one (i.e. a *jus cogens* rule).[57] In such cases, it can properly be said that what the Executive thinks is the (international customary) rule applicable to Singapore does not matter. On the facts of the present case, there is no evidence that the death penalty is prohibited under customary international law, let alone under a *jus cogens* rule of customary international law.

It might also be objected that proof of custom is about what States *generally* accept as the customary rule in the instant case. On this view, proof of the Executive's views would be unnecessary (for the purposes of the Singapore courts) if a particular rule is widely known to be the general customary rule that applies to all, or at least most, States. The answer to this objection is that proof of a customary rule that applies generally to all States at best constitutes presumptive evidence of the view of Singapore that it accepts the general rule to also apply to Singapore.[58] There may be cases where, in the absence of evidence of the attitude of the Singapore Government, "whatever has received the common consent of civilized nations must have received

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[56] And that the court's duty is to "declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution, or which contravenes any prohibition which the Constitution provides": *Chan Hiang Leng Colin v. Public Prosecutor* [1994] 3 Sing.L.R. 662, 681 (*per* Yong Pung How C.J.). See also *supra* note 1 at para. 58.

[57] According to the *jus cogens* doctrine, some customary international law rules are "non-derogable", by which is meant that States cannot "contract out of these rules" by way of treaty, or otherwise seek to have a different customary rule applied to them. See Article 53 of the *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 U.N.T.S. 331. Needless to say, such a rule will require proof.

[58] The way in which the matter arises in everyday international law practice, involving the exchange of contesting claims by States about the content of a specific customary rule, is interesting and may be instructive, put simply: "… it is more convincing to 'objectify' a rule, and thereby attempt to shift a burden of proving otherwise into the opposing party". That is why reference is usually made to what the general rule is, instead of proceeding more directly to show what your opponent has consented to as the applicable rule in the particular situation (such proof is often hard to come by, or your opponent's position remains unclear). Thus, "States will always try to find as much support for their position as possible, and where better than in the practice of other States? The less peculiar and individual that position is, the more acceptable it is likely to be. It is [simply] better to say 'everybody else agrees that *x* is the case', than it is to say 'I think *x*, so there' "; O.A. Elias & C.L. Lim, *The Paradox of Consensualism in International Law* (The Hague/London/Boston: Kluwer, 1998) at 27-28, also citing M.H. Mendelson, "Practice, Propaganda and Principle in International Law", (1989) Curr. Legal Probs. 1 at 8-9: "…if you can present your demand as an existing right, it is the other government who would ostensibly be disturbing the *status quo* by denying it, and not you by making the demand".

the assent of our country".[59] But all that is meant by this is that, in the absence of proof of the Singapore Government's position, proof of the *general* customary rule *may* be sufficient to prove the Government's position. It does not detract from the fact that there is no better evidence of Singapore's attitude towards a customary rule of international law than the views expressed by the Government.

In the present sort of case, considering that what is involved is not an international rule of the sort usually determined by judicial practice,[60] the courts should look for evidence of actual Government conduct for proof of the applicability of a customary rule.[61] That is why Lord Alverstone C.J. took the view in *West Rand Central Gold Mining v. R.* that[62]:

> The international law sought to be applied must…be proved by satisfactory evidence, which must show *either* that the particular proposition put forward has been recognized and acted upon *by our own country*, *or* that it is of such a nature, and has been so widely and generally accepted, that it *can hardly be supposed that any civilized state would repudiate it*…

A view which was also earlier stated in *R. v. Keyn*[63]:

> To be binding, the law must have received the assent of the nations *who are to be bound by it*.

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59 *West Rand Central Gold Mining Co. v. R.* [1905] 2 K.B. 391 (King's Bench) (*per* Lord Alverstone C.J.).

60 "The corporate behaviour of a state may be readily identified if the state applies all its resources to some great effort, such as fighting a war, but much more commonly, acts attributable to states will be myriad actions over smaller events of greatly differing character…In the conduct of international affairs. Relevant acts and conduct may involve diplomatic activity, ranging from informal discussions to diplomatic correspondence of all kinds. They may include entering treaties and participating in international organizations. Equally, however, acts and conduct for present purposes may include internal acts, such as enactment of legislation or decisions of national courts, amounting, in either case, to the manifestation of a course of conduct by the state in relation to a matter that has international significance": Richard K. Gardiner, *International Law* (London: Pearson/Longman, 2003) at 103.

61 In some cases the existence of a customary rule depends upon a survey of national judicial conduct, and not those of the policy executing or implementing branches of government. An example would be the rule under the restrictive immunity doctrine. In such cases, the applicable international law rule is " 'proved' by taking judicial notice of 'international treaties and conventions, authoritative textbooks, practice and judicial decisions' of other courts in other countries which show that they have 'attained the position of general acceptance by civilized nations' "; *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529 (Court of Appeal, England) (*per* Stephenson L.J., quoting from Lord Macmillan). But the present case does not fall into that sort of category. Indeed, there was some uncertainty prior to the VCCR about the customary status of the rule in Article 36(1); see Lee, *supra* note 26 at 136 *et seq*., 138 (the example of Japanese practice). Even accepting that the rule is a customary rule, does Singapore accept everything which the ICJ has said about what the rule entails in the *Avena* case? Namely, that an Article 36(1) right is a right enjoyed not only by the national State but also the individual. Clearly the United States in *LaGrand* did not accept this view and were it not bound by the VCCR (which, unlike Singapore, it is), would not (and may not still) consider that to be the case under customary international law. It simply goes too far to suggest that Singapore would accept the view given by the ICJ in *Avena* as a true and complete representation of the position under customary international law. See also *supra* note 26.

62 [1905] 2 K.B. 391 (*per* Lord Alverstone C.J.) (my emphasis).

63 (1876) 2 Ex. D. 63 (Crown Cases Reserved) (*per* Lord Cockburn C.J.) (my emphasis). See further Lim, *supra* note 4 at 245-257.

X. Conclusion

Should the courts be faced with a similar argument in the future, that the Constitution incorporates rules of customary international law, and *assuming* that references to the word "law" in the Constitution may refer to international law, a further criterion should nonetheless be required to be fulfilled. Namely, that it is only where the Executive and the courts "agree" that a specific customary rule (which conflicts with Parliamentary legislation) applies, that such a customary rule may be said to have been incorporated into the Constitution. If the Executive suggests Singapore's true position through its conduct or foreign affairs statements, the courts should normally defer to that view. If executive conduct does not, however, provide evidence of Singapore's attitude towards a customary international law rule, the courts should be slow to attribute a position under that rule to Singapore. The only true exception to all this is where a non-derogable rule of customary international law is involved where, as a matter of law, it would be unimaginable that Singapore would object to it. A prohibition of the penalty of death unfortunately does not fall into this category, and is not likely to do so in the foreseeable future.