

International Law, American Sovereignty, and the Death Penalty

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*The Federalist Society
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I. Introduction

The use of the death penalty in the United States has lately become a subject of diplomacy, litigation, and activism in international forums. The European Union routinely protests executions and presented the U.S. government with a demarche on the subject in 2000.¹ International non-governmental organizations (NGOs) and U.S.-based activists have prioritized the issue, including the convening of a World Congress to Abolish the Death Penalty in 2002 and the proclamation of October 10, 2003 as World Day Against the Death Penalty.² Paraguay, Germany, and Mexico have sued the United States in the International Court of Justice (ICJ, or World Court) to prevent execution of their citizens on death rows in U.S. states.³ Meanwhile, opponents of the death penalty within the United States have made appeals to international law and international public opinion to claim that the United States is both morally and legally obligated to “abolish”⁴ the practice.⁵

Basing themselves on flawed theories of the formation of international law and of the relationship between international and municipal law, these anti-death penalty forces are trying to establish international law as superior to American law. If successful, they would subject the democratic political choices of American citizens to foreign veto. These attempts follow three lines of argument. First, death penalty opponents claim that capital punishment is illegal in international law and must therefore be ended in the United States. Second, they claim that the

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¹ See generally, European Union, EU Policy and Action on the Death Penalty, <http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm>. See also, Council of Europe, Death Penalty, <http://www.coe.int/T/E/Communication%5Fand%5FResearch/Press/Theme%5FFiles/Death%5Fpenalty/>.

² See generally, World Coalition Against the Death Penalty, <http://worldcoalition.org>; Amnesty International, Campaign Against the Death Penalty, <http://web.amnesty.org/pages/deathpenalty-index-eng>, and Campaign to Abolish the Death Penalty, <http://www.amnestyusa.org/abolish>; Human Rights Watch, Campaign to Stop the Death Penalty in the United States, <http://hrw.org/campaigns/deathpenalty>.

³ Vienna Convention on Consular Relations (Paraguay v. United States of America) (1998), available at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm>; LaGrande Case (Germany v. United States of America) (1999-2001), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>; Application Instituting Proceedings, Avena and other Mexican Nationals (Mexico v. United States of America) (2003), available at http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_application_20030109.PDF.

⁴ Death penalty opponents refer to “abolition” of the death penalty and to themselves and states that do not practice capital punishment as “abolitionists,” perhaps to link themselves to the Eighteenth and Nineteenth Century movement to abolish slavery. This article will refer to them as “opponents” of the death penalty and “anti-death penalty activists.”

⁵ See e.g., Death Penalty Information Center, The Death Penalty: An International Perspective, <http://www.deathpenaltyinfo.org/article.php?did=127&scid=30>; American Civil Liberties Union, The Case Against the Death Penalty: Internationally, Capital Punishment Is Widely Viewed As Inhumane And Anachronistic (1997) available at <http://www.aclu.org/DeathPenalty/DeathPenalty.cfm?ID=9082&c=17#internationally>.

way the death penalty is practiced in the United States violates international law. Specifically, activists claim that capital punishment is unfairly imposed in such a systematic way as to render it totally banned because of racial disparities in sentencing and because of the “death row phenomenon” (i.e., the wait on death row prior to execution while appeals progress). Opponents also claim that the execution of juveniles and of the mentally handicapped are illegal in international law. Finally, death penalty opponents have invoked the 1963 Vienna Convention on Consular Relations⁶ in attempts to block the execution of foreign nationals on death rows in U.S. states, claiming that the failure to inform arrested non-citizens that they may contact a consul from their country is grounds for vacating their convictions and/or death sentences.

This paper examines each line of argument in turn, highlighting in particular the way in which death penalty opponents exaggerate the binding nature of the international instruments they invoke and misrepresent the effect of international law in U.S. courts. Furthermore, the paper demonstrates that the anti-death penalty activists seek to foist upon the American public the values, standards, and legal claims of the international human rights movement, dominated as it is by an elite of scholars and activists not accountable to democratic processes.

II. The Status of the Death Penalty in International Law

A. Introduction

Certain international human rights instruments specifically commit signatories to end the use of the death penalty: the Sixth Protocol⁷ of the European Convention on Human Rights⁸ (“European Convention”), the Protocol⁹ to the American Convention on Human Rights¹⁰ (“American Convention”), and the Second Optional Protocol¹¹ to the International Covenant on Civil and Political Rights¹² (ICCPR). Though the United States is a party to the ICCPR (with reservations) it is not a party to any of these protocols, nor, indeed, to the European and American Conventions at all. As a matter of treaty law, then, the death penalty is not banned in the United States. Nevertheless, opponents of the death penalty cite other treaties to which the United States is a party to claim that the death penalty is in fact illegal—even when those treaties explicitly permit the death penalty, such as the ICCPR. Opponents also claim that the death

⁶ Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820 (1963) [hereinafter, Vienna Convention].

⁷ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, as Amended by Protocol 11, E.T.S. 114 (1983).

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 005 (1950) [hereinafter, European Convention].

⁹ Protocol to the American Convention on Human Rights to Abolish the Death Penalty, O.A.S. Treaty Series No. 73 (1990).

¹⁰ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (1978) [hereinafter, American Convention].

¹¹ Second Optional Protocol to the International Covenant on Civil and Political Rights, UN General Assembly Resolution 44/128 (1989)

¹² International Covenant on Civil and Political Rights, 99 U.N.T.S. 171 (1966) [hereinafter, ICCPR].

penalty is illegal under customary international law (CIL),¹³ usually citing as evidence for this proposition treaties that the United States has affirmatively chosen not to ratify.

The following sub-sections examine these instruments and the arguments of death penalty opponents on the subject. As will be demonstrated, death penalty opponents cite non-binding instruments as law, try to impose on the United States alleged international norms that do not exist or to which the United States has demonstrated its non-consent, and, as a general matter, exaggerate their claims. The leading international opponent of the death penalty, Professor William Schabas, for example, claims that the imposition of death penalty is on its way to becoming a *jus cogens* violation of international law,¹⁴ thus equating lawful executions in the United States to genocide, slavery, and torture.

B. International Human Rights Instruments

Death penalty opponents commonly first cite the Universal Declaration of Human Rights¹⁵ (“Universal Declaration”) as establishing a basic norm against capital punishment.¹⁶ Amnesty International (“Amnesty”), for example, claims, “[The death penalty] violates the right to life as proclaimed in the Universal Declaration of Human Rights.”¹⁷ Article 3 of the declaration states, “Everyone has the right to life, liberty, and security of person,” but neither that article nor any other article of the declaration refers to the death penalty specifically. In fact, the death penalty arose at the drafting sessions of the document, and a resolution to prohibit capital punishment was defeated, as Professor Schabas admits.¹⁸

Furthermore, the Universal Declaration is not a binding legal document. Rather, it is an aspirational instrument, whose terms are intentionally vague and therefore cannot be used as rules of decision. The “right to life,” for example, may mean many things. Opponents of the death penalty cannot simply read into “the right to life” the meaning they chose and then claim that their meaning is controlling, especially without considering other possible interpretations of the phrase. The “right to life” could apply to fetuses, and in fact, abortion was a significant subject of discussion during the drafting of the declaration. In many cases, the same countries speaking against the death penalty, in particular Latin American nations, were also those speaking against abortion.

The Universal Declaration, therefore, cannot be said to prohibit the death penalty as a matter of treaty law. The text is silent, the drafting history reveals that an attempt to cover the death

¹³ A rule of CIL is established through actual state practice with *opinio juris*, that is, a sense of legal obligation, generally exhibited over time. See, Peter Malanczuk, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 39-48 (7th ed., 1997).

¹⁴ William Schabas, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 20 (2d ed., 1997). A *jus cogens* rule is one that applies at all times and to all states and from which no derogation is permissible. At the moment, the only widely agreed upon *jus cogens* norms are those against genocide, slavery, and torture.

¹⁵ Universal Declaration of Human Rights, UN General Assembly Resolution 217A (III) (1948).

¹⁶ See, e.g., Amnesty International, *International Standards on the Death Penalty*, Sec. 2.1 (Dec. 1998) available at <http://web.amnesty.org/library/Index/ENGACTION500101998?open&of=ENG-392>

¹⁷ Amnesty International, *Death Penalty Q & A*, available at http://www.amnestyusa.org/abolish/dp_qa.html#whyoppose (no date).

¹⁸ Schabas, *supra* note 14, at 35-40. Ironically, it was the Soviet Union that proposed an amendment to the basic text to prohibit capital punishment, at a time when millions were dying in the Gulag.

penalty in Article 3 was rejected, the document is aspirational and non-binding, and no authoritative, neutral interpretation of the term “right to life” exists. Furthermore, the Universal Declaration is not CIL¹⁹ and anti-death penalty activists’ tendentious interpretations of it cannot establish its meaning.

Despite these facts, Schabas maintains that the declaration is “pertinent[.]” to “the evolution of more comprehensive abolitionist norms over subsequent decades.”²⁰ He argues that the very fact that the death penalty was discussed during the drafting of the declaration, with numerous countries arguing for banning it, means that the declaration “was aimed at eventual abolition of the death penalty.”²¹ In other words, Schabas finds that a document intentionally silent on a subject supports his position. Based on this unique approach to treaty interpretation, the declaration might also be said to be “aimed at eventual abolition” of abortion as a result of the discussion of abortion at the drafting sessions,²² yet international human rights advocates do not normally make this connection.

Indeed, the major international human rights treaty, the International Covenant on Civil and Political Rights, explicitly permits the death penalty. Like the Universal Declaration, the ICCPR contains an article protecting the right to life. Article 6(1) states, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”²³ Unlike the Universal Declaration, however, the ICCPR does reference the death penalty. Subsections (2) through (5)²⁴ address protections for those sentenced to death “[i]n countries which have not abolished the death penalty,” and article 6(6) notes that although the covenant permits the death penalty, “[n]othing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to this Covenant.”²⁵

In text and structure, then, Article 6 acknowledges that states are within their rights to impose the death penalty, seeking only to ensure that those facing capital punishment are provided a fair trial.²⁶ In fact, an effort to add a ban on the death penalty was rejected in the drafting process; Uruguay and Colombia unsuccessfully offered a text of Article 6 that read, “Every human being has the inherent right to life. The death penalty shall not be imposed on any person.”²⁷

¹⁹ See, Hurst Hannum, *The Status and Future of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int’l & Comp. L. 287 (a comprehensive review of citations to the Universal Declaration in domestic constitutions, law, and cases, concluding that the declaration is not cited as a rule of decision and that its status as CIL is debatable at best).

²⁰ Schabas, *supra* note 14, at 45.

²¹ *Id.* at 44.

²² *Id.* at 34; *see also*, Mary Ann Glendon, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 92 (1st ed., 2001) (“The [Drafting] Commission decided to retain the general statement, ‘Everyone has the right to life, to liberty, and to security of person,’ rather than try to reach agreement on specific issues such as euthanasia, abortion, or the death penalty. This was a defeat for the representatives of Chile and Lebanon, who had pushed for express protection of the lives of the unborn, and for the Soviet-bloc delegates who had argued for a ban on capital punishment.”) (footnote omitted).

²³ ICCPR, *supra* note 12 at art. 6(1).

²⁴ *Id.* at art. 6(2)-(5).

²⁵ *Id.* at art. 6(6).

²⁶ Since the ICCPR is intended to be the instrument incorporating the Universal Declaration’s principles as legally binding, and it does not outlaw the death penalty, it should be clear that the Universal Declaration must not have, either.

²⁷ Schabas, *supra* note 14, at 67-73.

Nevertheless, opponents of the death penalty find in the ICCPR a “trend” toward abolition. The Human Rights Committee²⁸ declared that “the article also refers generally to abolition in terms which strongly suggest (paras. 2[2] and [6]) that abolition is desirable.”²⁹ For his part, Schabas lays significant emphasis on the mere fact the word “abolition” is mentioned in the article.³⁰ These arguments appear, again, as attempts to recast a treaty to say the opposite of what it actually states. Indeed, the very fact that states opposed to capital punishment felt the need to draft the Second Optional Protocol to the ICCPR specifically aimed at the elimination of the death penalty is proof that the ICCPR itself does not ban the death penalty.³¹

C. Regional Human Rights Instruments

Regional human rights instruments cited by death penalty opponents are even less probative of the claim that the death penalty is illegal in international law. Opponents generally cite the American Declaration on the Rights and Duties of Man³² (“American Declaration”), the American Convention on Human Rights, and the European Convention on Human Rights for the proposition that the death penalty is banned either as treaty law or by CIL, with these instruments as evidence of CIL.

As a matter of treaty law, the American Declaration, to which the United States is a party, is non-binding, aspirational, and cannot create judicially cognizable rights. For example, Juan Raul Garza, the first person executed by the federal government in recent decades, cited a report of the Inter-American Commission on Human Rights (IACHR) in an attempt to delay his execution. He claimed his sentence should be set aside following the IACHR’s finding that he had been deprived of his human rights because evidence of four previous murders he had committed in Mexico were introduced at his sentencing hearing, depriving him of the right to a fair trial. Garza admitted that the American Declaration, which the IACHR is authorized to interpret, was not binding, but said that the issuance of the IACHR’s report based on the American Declaration did create a binding obligation under the Charter of the Organization of American States (OAS), which created the commission.³³ The Seventh Circuit rejected this argument, saying that the

²⁸ A body (not to be confused with the UN Human Rights Commission) set up by the ICCPR to receive reports on state practice regarding the covenant and to “comment” on it. It is not, however, an authoritative interpreter of the covenant and its comments are not legally binding on signatories.

²⁹ Human Rights Committee, General Comment 6(16), adopted July 27, 1982.

³⁰ Schabas, *supra* note 14, at 94.

³¹ Schabas nevertheless still spins the documents his way: “[The protocol] is important first by its very existence, even though the number of States parties is still relatively modest... The Protocol begins the completion of a process that began in 1948, with article 3 of the [Universal Declaration], and that advanced in 1957, with article 6 of the [ICCPR].”

³² American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter, American Declaration]

³³ The quality of argument in these cases may be surmised based on the writing of one prominent anti-death penalty activist. Professor Richard J. Wilson of American University’s Washington College of Law has belittled arguments of the U.S. government regarding the binding nature of the American Declaration in U.S. domestic law, referring to these arguments as “hackneyed” and as the U.S. government attorneys who presented them as “minions” of the Department of Justice. Richard J. Wilson, *The United States’ Position on the Death Penalty in the Inter-American Human Rights System*, 42 Santa Clara L. Rev. 1159.

American Declaration was aspirational and that the OAS charter created no judicially enforceable rights.³⁴ The Supreme Court denied certiorari,³⁵ and Garza was executed on June 19, 2001.

Furthermore, even if the American Declaration were binding and created individual rights, its protection of the “right to life” has no more validity regarding the death penalty than that of the Universal Declaration. Like Article 3 of the Universal Declaration, the American Declaration’s Article 1 protects the right to life with no other explanation of the content of that right. Again, death penalty opponents cannot simply invest the declaration’s right to life with the meaning they chose and then declare it law. Furthermore, one does not commonly see human rights activists relying on the *duties* proclaimed in the American Declaration, such as the “duty of children to honor their parents,” the “duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be,” the “duty of every able-bodied person to render whatever civil and military service his country may require for its defense and preservation,” or the “the duty of every person to work, as far as his capacity and possibilities permit, in order to obtain the means of livelihood or to benefit his community.”³⁶

Next, as a matter of treaty law, neither the American Convention on Human Rights nor the European Convention on Human Rights outlaw capital punishment. In fact, they permit it. The American Convention states, “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.”³⁷ Likewise, the European Convention states, “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.”³⁸ Equally important, they cannot bind the United States simply because it is not a party to either one (it signed but did not ratify the American Convention).

Furthermore, even if the right to life in these various instruments were interpreted to outlaw capital punishment, they cannot be probative of the status of capital punishment in CIL because other international instruments allow for the death penalty and might equally be cited as evidence that CIL supports capital punishment. The Arab Charter of Human Rights, for example, acknowledges that members impose the death penalty and provides for fair imposition, and the African Charter on Human and Peoples’ Rights makes no mention of the death penalty in any way, positive or negative. Most importantly, the American Convention cannot be cited as applicable to the United States since it affirmatively chose not to ratify it. It would be perverse to claim that the convention applies as CIL when the United States rejected the treaty; such a claim would essentially eliminate the requirement for consent to be bound by international law.

³⁴ *Garza v. Lappin*, 253 F.3d 918, 924 (7 Cir.2001).

³⁵ 121 S.Ct. 2543, 533 U.S. 914, 150 L.Ed.2d 709 (2001).

³⁶ American Declaration, *supra* note 32, at arts. 30, 33, 34, 37.

³⁷ American Convention, *supra* note 10, at art. 4(2).

³⁸ European Convention, *supra* note 8, at art. 2(a)

Significantly, the contrast with the treatment of abortion and the death penalty by human rights advocates is perhaps most blatant with regard to the American Convention. The convention indeed has a “right to life” protection in article 4(1). The full text of the article states, “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.” (emphasis added.) This phrase is a significant addition; other than that, the article is similar to the ICCPR. This is not surprising, since the Latin American nations were those who were initially insistent that the Universal Declaration ban abortion through inclusion of such a phrase. One may reasonably, therefore, ask whether a convention that protects life from the moment of conception may be cited by opponents of the death penalty without also establishing the principle that CIL is opposed to abortion. Yet, perhaps not surprisingly given the political leanings of those involved, one does not see activism or scholarship in the international human rights community arguing this point.

Finally, in each of these cases, the regional human rights instruments have had later instruments added in order specifically to eliminate capital punishment. As noted above, as a matter of treaty law, the European Convention’s Sixth Optional Protocol outlaws the death penalty in signatory states, as does the Second Optional Protocol to the American Convention. Indeed, the argument that the primary instruments represent CIL banning the death penalty is an attempt through legal sophistry to enforce the terms of the protocols on states that chose not to sign them.

In sum, all that can be said considering these various human rights instruments is that certain states have signed treaties committing them to eliminate the death penalty. Other states still practice the death penalty, including American, Asian, African, and Middle Eastern states, both developed and developing countries, and states representing significant populations such as India, Japan, China, and Indonesia.³⁹ Invoking only European and Latin American practice as evidence of customary international law is a tautology. To define the scope of the states relevant to formulation of the rule so as to ensure that the rule’s existence will be proved is to nullify any serious conception of “international” law.

D. Trend toward Non-Use

The final plank in the claim that international law bans the death penalty is the purported trend in domestic legislation toward elimination of the death penalty that creates a customary international law norm against it.⁴⁰ The underlying theory of this argument is unclear. It may be that death penalty opponents believe that this alleged trend against capital punishment is a result of classic CIL formation—state practice with *opinio juris*. Alternatively, it may be that death penalty opponents cite this alleged trend as evidence of “the general principles of law recognized by civilized nations,” referenced by Article 38 of the Statute of the International Court of Justice (the commonly accepted delineation of the sources of international law). In neither case, however, is the theory persuasive.

³⁹ Nor does it avail the opponents as a legal matter to claim, as they often do, that the United States is the only “major Western industrialized” state (i.e., to exclude South Korea, Japan, India, and Caribbean states, all of which are democracies that employ the death penalty) to execute criminals.

⁴⁰ See, e.g., Amnesty International, *Abolitionist and Retentionist Countries*, available at <http://web.amnesty.org/pages/deathpenalty-countries-eng>.

With regard to the first theory, states that have eliminated capital punishment may have done so out of moral, ethical, even religious concerns rather than out of *opinio juris*. Without comprehensive analysis and proof as to the reason for elimination of capital punishment, the fact that states, either *de jure* or, certainly, *de facto*, have stopped executions cannot serve as *ipso facto* evidence of CIL. For example, moves toward eliminating the death penalty in Turkey and former Soviet states such as Russia, Ukraine, and Armenia are most likely motivated not out of *opinio juris* but rather, in exchange for the benefits of membership in the economically and politically advantageous clubs of the EU and Council of Europe—and practically under duress and defiance of the opinion of their publics. Furthermore, it is a common observation that the death penalty remains popular among the European public, with between half and two-thirds of the populations in Italy, France, Germany, and Britain in favor of it.⁴¹ In fact, the ban on capital punishment in Europe appears more likely to be the result of the democratic deficit that plagues Europe, in which governments, especially the supranational European Union (EU), are unresponsive to their citizens.⁴² Finally, almost all of the English-speaking states in the Caribbean have reinstated the death penalty, including revising their constitutions to eliminate the role of the British Privy Council as their court of final appeal because it had been used by London-based human rights attorneys to block executions.⁴³ Incredibly, Amnesty International responded to these events by claiming that it was the death penalty itself—not the reversal of death sentences by foreign courts—that was “colonialist.”⁴⁴ Likewise, the Philippines has recently announced that it is ending its moratorium on executions.⁴⁵

The second theory—that is, that the numbers of states with or without the death penalty establishes *prima facie* the legality or illegality of the practice—is factually and theoretically tenuous. Amnesty International trumpets that there are “112 countries which are abolitionist in law or practice and 83 countries which retain and use the death penalty.”⁴⁶ First, on purely factual basis, 57 percent is a weak basis for existence of a rule of CIL. CIL is not formed on the basis of a majority vote. Second, as a theoretical matter, it is difficult to find a rule of recognition that would lead to this method being an effective way to adduce CIL. At what point does a practice become illegal according to this theory? When 57 percent of countries give it up? Or 60 percent? Finally, this is a theory that would not avail human rights activists in other contexts. What weight would the human rights movement place on a similar accounting, for example, of nations in which abortion and homosexual relations are illegal versus those where they are legal?

E. Other Arguments

⁴¹ Joshua Micah Marshall, “Death in Venice: Europe’s Death-penalty Elitism,” *The New Republic* (July 31, 2000).

⁴² *Id.*

⁴³ Owen Bowcott, “Caribbean severs link to privy council,” *The Guardian*, Feb. 15, 2001, available at <http://www.guardian.co.uk/Archive/Article/0,4273,4136716,00.html>.

⁴⁴ Amnesty International, *State killing in the English speaking Caribbean: a legacy of colonial times*, (April 23, 2002) available at <http://web.amnesty.org/library/Index/engAMR050032002>.

⁴⁵ “Philippines Executions to Resume,” BBC News, Dec. 5, 2003, available at <http://news.bbc.co.uk/2/hi/asia-pacific/3293119.stm>.

⁴⁶ Amnesty International, *The Death Penalty*, available at <http://web.amnesty.org/pages/deathpenalty-index-eng>.

In addition to these major arguments, opponents of the death penalty typically invoke numerous other “authorities” for the proposition that CIL prohibits the death penalty. They cite non-binding, political resolutions of the General Assembly, reports of the UN Human Rights Commission, and reports of UN special rapporteurs, who are generally appointed by the Human Rights Commission and have as much independence, legal authority, and credibility as might therefore be expected.⁴⁷ Often, they appeal to the non-binding interpretations of these bodies as controlling on the meaning of the instruments discussed above. None of those interpretations or political resolutions holds any legal consequence.

Only one subsidiary argument has some legitimacy. Death penalty opponents have recently begun to cite approvingly the lack of a death penalty at the International Criminal Tribunals for Yugoslavia and Rwanda (ICTY and ICTR, respectively) and the newly formed International Criminal Court (ICC). They are correct to note that the death penalty was rejected as a punishment for those courts, and there is some logic to the argument that since the death penalty was deemed inappropriate for genocide, war crimes, and crimes against humanity, it should *a fortiori* not apply to criminal murder.

This argument leaves out much of the calculus of the creation and operation of these tribunals, however, as both political and legal matters. First, it is important to note that both the Yugoslavia and Rwanda tribunals were created out of an *ex post* sense of guilt on the part of European nations and the United States for their failure to intervene in the crises in the Balkans and Rwanda that spawned the atrocities at issue. In fact, Rwanda itself was coincidentally a member of the UN Security Council during the drawing up the ICTR and voted against the creation of the ICTR because it felt that an international tribunal had no legitimacy to judge acts against its citizens by the former, genocidal regime. Second, it is indeed true that persons convicted at the ICTY and ICTR do not face the death penalty. Perhaps, however, they should. Many of the sentences at the tribunals leave much to be desired and are viewed as illegitimate by the victims. In fact, one of the complaints of Rwanda in opposing the ICTR was its lack of the death penalty, and Rwanda’s own courts have sentenced hundreds of perpetrators to death.⁴⁸ Thus, while it might fairly be said that recent innovations in international criminal law have excluded the death penalty, those actions must be considered in light of serious political and moral failures and should not be allowed to stand as an argument for the illegality of the U.S. death penalty under international law. Finally, the latest tribunal created to judge war crimes, crimes against humanity, and genocide—the Iraqi Special Tribunal—does not exclude the death penalty, and public statements by members of the Iraqi Governing Council indicate that Saddam Hussein will be executed.

⁴⁷ See, e.g., Eric Prokosch, *Human Rights versus the Death Penalty* (Dec. 1998), available at <http://web.amnesty.org/library/Index/ENGACTION500131998?open&of=ENG-392>.

⁴⁸ Helen Vesperini, “Rwanda genocide death sentences,” British Broadcasting Corporation, Oct. 14, 2001, available at <http://news.bbc.co.uk/1/hi/world/africa/1598940.stm>. In 2002, the Rwandan government, faced with tens of thousands of people still in prison awaiting trial, set up an alternative justice system based on pre-colonial traditional law (without legal advocates for defendants and with judges who have no formal legal training) as a means to resolve lingering social dislocation. The system is intended to encourage reconciliation and therefore allows lenient sentences for those who confess their crimes and does not include the death penalty. British Broadcasting Corporation, “Rwanda tests genocide courts,” June 19, 2002, available at <http://news.bbc.co.uk/2/hi/africa/2053508.stm>.

F. Death Penalty and International Law in U.S. Courts

The claim that the U.S. death penalty violates international law has been convincingly rejected in the U.S. legal system. The Sixth Circuit, for example, recently ruled that the death penalty is illegal neither by treaty law nor by CIL.⁴⁹ Richard Buell was convicted and sentenced to death in Ohio for sexually assaulting and killing 11-year-old Kristen Lee Harrison. In a habeas appeal to the Sixth Circuit, he argued, *inter alia*, that the Ohio death penalty was illegal under the American Declaration, the ICCPR, and CIL, in particular as a *jus cogens* norm. The court stated, “Buell’s argument is wholly meritless.”⁵⁰ First, it pointed out (as argued above) that both the American Declaration and the ICCPR do not outlaw capital punishment,⁵¹ that the United States made reservations to them that foreclose any reliance on them to the extent that they deviate from Supreme Court interpretations of the Constitution,⁵² and that, in any event, both are non-self-executing and therefore “neither is binding on federal courts.”⁵³ Second, the court held that CIL does not ban capital punishment, stating that “[t]he prohibition of the death penalty [in domestic law] is not so extensive and virtually uniform among the nations of the world that it is a customary international norm”⁵⁴ and that “[t]here is no indication that the countries that have abolished the death penalty have done so out of a sense of legal obligation, rather than for moral, political, or other reasons.”⁵⁵ The court added that since capital punishment is not banned by CIL, it cannot be a violation of a *jus cogens* norm.⁵⁶

Third, the court stated that even if CIL banned capital punishment, it would not strike down the Ohio death penalty. Courts have rejected claims of private civil rights of action against state officials by U.S. citizens based on CIL, and Buell “is attempting to interpose customary international law as a defense against ‘acts committed by government officials against a citizen of the United States.’”⁵⁷ The court stated, therefore, “If anything, the standards for implying a civil private right of action under international law should be less than those for using international law as a defense against otherwise lawful government action under the Constitution.” Perhaps most importantly, the court appropriately delineated its role in evaluating claims based on international law in the U.S. legal system. The court stated,

We hold that the determination of whether customary international law prevents a state from carrying out the death penalty, when the state is otherwise acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it is their constitutional role

⁴⁹ Buell v. Mitchell, 274 F.3d 337 (6th Cir.2001). This appears to be the only case in which a circuit court addressed the issues directly and thoroughly.

⁵⁰ Id. at 370.

⁵¹ Id. at 371.

⁵² Id.

⁵³ Id. at 372. A self-executing treaty is one that has direct effect in a domestic court, while a non-self-executing treaty does not. Self-executing treaties may be relied upon by courts as any law, while a non-self-executing treaty requires implementing legislation by Congress.

⁵⁴ Id. at 373.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id., citing Hawkins v. Comparet-Cassani, 33 Fed. Supp. 2d. 1244, 1255 (C.D.Cal.1999) *rev’d on other grounds*, 251 F3d 1230 (9thCir.2001).

to determine the extent of this country's international obligations and how best to carry them out.⁵⁸

The Sixth Circuit could have gone even further than it did in rejecting the alleged applicability of international law on a death penalty case. The court began its discussion of international law by citing the Supreme Court's 1900 decision in *The Paquete Habana*.⁵⁹ This case has become an icon for international activists and internationalist scholars because they cite it, as the Sixth Circuit did, for the proposition, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdictions as often as questions of right depending upon it are duly presented for their determination."⁶⁰ Those citing *The Paquete Habana* generally end at this sentence and go on to assert far-ranging claims for application of international law in U.S. law, e.g., that CIL trumps inconsistent domestic law. The Sixth Circuit, in contrast, went on to draw a definitive and appropriate line between international law and U.S. law when it examined the specific international law at issue.

The Sixth Circuit should, however, simply have cited the qualification of the Supreme Court in the next sentence of *The Paquete Habana*. The Court stated that international law applied in U.S. courts only "where there is no treaty and no controlling executive or legislative act or judicial decision..."⁶¹ In other words, international law may fill a gap when a court has to make a decision but cannot find any domestic rule of decision.⁶² In *The Paquete Habana*, the Court had to decide whether two Cuban fishing vessels could be seized during the Spanish-American War, an issue that had never come before the courts, been addressed by the Congress, or definitively commented on in policy or practice by the Executive Branch. The Court decided to look to international law, and, as evidence of it, to the writings of prominent scholars. It was a far different situation than the death penalty case before the Sixth Circuit, in which the Supreme Court, Congress and various state legislatures, and the President and various state executives have provided ample controlling authority in favor of capital punishment.

⁵⁸ Id. at 375-376.

⁵⁹ 175 U.S. 667 (1900).

⁶⁰ Id. at 700.

⁶¹ Id. The Court goes on to say that the works of commentators can be consulted regarding international law "not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." Id. (citation omitted) Then, quoting the nineteenth century writer Henry Wheaton, the Court stated that such works were trustworthy because commentators were "generally impartial in their judgment." A quick look at the secondary sources cited in this paper will disabuse any fair-minded reader of the idea that contemporary international law commentators are impartial analysts of what the law is rather than advocates for what, in their minds, it ought to be.

⁶² In fact, *The Paquete Habana* is bad law anyway. As Professors Bradley and Goldsmith have shown, *The Paquete Habana* was no longer relevant after the Court decided in *Erie v. Tompkins*, 304 US 64 (1938), that federal courts had no authority to create "general common law." Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997). *But see*, Harold H. Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998). This has become a highly contested debate in international legal academia. The debate has only recently seeped into the general consciousness of Constitutional scholars, but at least one leading expert has taken Bradley & Goldsmith's position. *See*, Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 Va. J. Int'l L. 513, 518 ("[T]he fact that a rule has been recognized as CIL, by itself, is not an adequate basis for viewing that rule as part of federal common law.")

In any event, the Sixth Circuit set out a well-reasoned and convincing case for the protection of U.S. sovereignty against faulty conceptions of the formation, content, and role in U.S. courts of international law. It remains to be seen whether anti-death penalty activists take note of the court's lessons and whether other circuits follow their sister court's lead in re-asserting the primacy of the Constitution and U.S. law over activists' interpretations of international law.

G. The United States as Persistent Objector

Even if all the preceding argument were wrong—that is, even if international law did ban capital punishment and even if international law were directly applicable in U.S. courts—the United States would still not be bound to end capital punishment because it would be regarded as a persistent objector. The rule of the persistent objector, enunciated first by the International Court of Justice in a case regarding Norway's claim of a four-mile territorial sea limit,⁶³ is well-established in international law.⁶⁴ Relying on the principle that international law can only be made by consent of sovereign states, the rule states that a state that has persistently objected to the formation of a norm on a particular subject is exempt from that norm. The United States's consistent practice of the death penalty and defense of that practice in international forums qualifies the United States for this exemption.

III. Aspects of Death Penalty Administration in International Law

Opponents of the death penalty, in addition to arguing that CIL bans capital punishment in its entirety, also appeal to international human rights treaties and CIL to claim both that the administration of the death penalty is sufficiently unfair that it is entirely illegal and that, at the least, specific aspects of death penalty administration are illegal.

A. Unfair Administration that Renders the Death Penalty Illegal

1. Racial Bias

Opponents of the death penalty argue that racial bias so infects the administration of capital punishment in the United States that it is a violation of international human rights law. Essentially, they claim that the International Convention on Elimination of All Forms of Racial Discrimination (CERD),⁶⁵ which the United States ratified in 1994, with their favored interpretation of it, trump Constitutional jurisprudence.

These claims have, for the most part, been rejected in the United States, including, most importantly, in the Supreme Court's decision in *McCleskey v. Kemp*.⁶⁶ In *McCleskey*, a black man convicted of killing a white police officer presented statistical evidence purporting to show

⁶³ Fisheries Case (U.K. v. Norway), Judgment of December 18, 1951, *available at* <http://www.icj-cij.org/icjwww/icasess/iukn/iuknframe.htm>.

⁶⁴ *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (1987) §102 at Comment d and Reporter's Note 2.

⁶⁵ International Convention on Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (1969).

⁶⁶ *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756 (1987).

that blacks who killed whites were more likely to be sentenced to death than whites who killed blacks, blacks who killed blacks, or whites who killed whites. The Court rejected his argument that this evidence⁶⁷ demonstrated that the application of the death penalty was in violation of the Equal Protection Clause and the Eighth Amendment, saying that the statistics could not prove that in *McCleskey*'s individual case jurors acted with discriminatory intent and that the statistics presented only a correlation with race and did not prove an unacceptable risk of racial bias. At the time, the case was considered to have ended Constitutional challenges to the reinstatement of the death penalty, and subsequent efforts regarding race and the death penalty, as suggested by the Court, have focused on political remedies.

The *McCleskey* case remains alive, however, among the legal arguments of death penalty activists in their attempt to establish international law as superior to U.S. law. Their attitude toward the case—and U.S. law in general—may be summed up by the title of one section of a recent Amnesty International report on race and capital punishment: “The *McCleskey* Obstacle.”⁶⁸ And Amnesty notes approvingly that in 1998 a UN Special Rapporteur concluded that the *McCleskey* decision was incompatible with the United States obligations under the CERD. The conflict is clear. Amnesty believes that the CERD and the interpretation of it favored by a UN envoy should trump the U.S. Constitution and the Equal Protection Clause jurisprudence of the Supreme Court.

In fact, though, Amnesty's position on race and the death penalty and their link to international law consists of little more than highly debatable points that are more appropriately made in the context of domestic law. For example, the statistics cited in *McCleskey* point not to discrimination against minority defendants, but, rather, against minority victims. That is, the problem is the failure of prosecutors to charge with capital murder those of either race who kill blacks and the reluctance of juries to sentence them to death if convicted. This may well be a result of racism, but one that values the life of a black victim less than that of a white victim, not eagerness to execute a black murderer more than a white murderer. Such a problem, however, is only part of a larger societal problem of racism, not one of the criminal justice system alone, nor one that the criminal justice system itself can solve. The remedy is certainly not to eliminate a punishment that is intrinsically just.

In any event, this is a debate best conducted in the courts, legislatures, and public opinion of the United States. In fact, it has been conducted, and American public maintains its support for the death penalty. That fact points to the real challenge to American sovereignty that the anti-death penalty activists represent. They seek to appeal to authority outside the democratic political

⁶⁷ The Court assumed the veracity of the statistical evidence because the 11th Circuit below had done so, and therefore the facts were not before the Court. The Court nevertheless stated that the record showed mainly failings of the statistical study, such as incomplete data on aggravating and mitigating circumstances presented at sentencing hearings, lack of information on race of all victims in multiple victim cases, and numerous methodological problems, including the inability of the statistical model to predict the results of cases. The Court noted that the district court “concluded that *McCleskey* had failed to establish by a preponderance of the evidence that the data were trustworthy.” *Id.* at 288.

⁶⁸ Amnesty International, *United States: Death by Discrimination—The Continuing Role of Race In Capital Cases* (April 2003), available at http://www.amnestyusa.org/abolish/reports/dp_discrimination.html. See also, Richard Dieter, Death Penalty Information Center, *International Perspectives on the Death Penalty* (Oct. 1999), available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=536>

system and legal process of the United States. It is an appeal that is based on flawed evidence, flawed logic, and a flawed legal theory, and it should be vigorously resisted.

2. “Death-Row Phenomenon”

The second major basis for the claims that administration of the death penalty in the United States is so flawed as to make capital punishment illegal is the “death row phenomenon,” that is, the often extended period of time a prisoner sentenced to death awaits actual execution. The “death row phenomenon” allegedly violates the UN Convention Against Torture and other Cruel and Degrading Punishment (Torture Convention),⁶⁹ to which the United States is a party and whose provisions have been incorporated directly into U.S. law.⁷⁰

This argument finds some support in the ruling of the European Court of Justice (ECJ) in the often-cited case of *Soering v. United Kingdom*. In that case, Jens Soering, a German national, contested his extradition from the United Kingdom to face charges of murdering his girlfriend’s parents in Virginia. The ECJ ruled that, despite the “democratic character of the Virginia legal system in general and the positive features of Virginia trial” which are “neither arbitrary nor unreasonable, but, rather, respect[] the rule of law and afford[] not inconsiderable procedural safeguards to the defendant in a capital trial,” Soering should not be extradited because of the “the ever present and mounting anguish of awaiting execution.”⁷¹ The U.K. Privy Council made a similar decision in *Pratt and Morgan*,⁷² ruling that more than five years spent on death row constituted torture, a decision that overturned the death sentences of dozens of inmates on death rows in Caribbean states and that galvanized the move to eliminate the role of the Privy Council as the Caribbean court of last resort described above.

Several problems arise with these cases as a support for the claim that the “death row phenomenon” is torture under CIL or treaty. First, as a legal matter, the cases are national and regional human rights determinations and do not apply to the Torture Convention nor are they sufficient evidence of CIL to bind the United States. Equally important, on an intellectual basis, the decisions are deeply flawed. The plain fact is that, as the ECJ itself admitted,⁷³ the delays in

⁶⁹ Activists sometimes claim that the death penalty itself is banned by the Torture Convention and Article 7 of the ICCPR on torture and cruel punishment etc. Amnesty states, “[The death penalty] is the ultimate cruel, inhuman and degrading punishment. . . Like torture, an execution constitutes an extreme physical and mental assault on an individual.” Amnesty International, *Death Penalty Q&A*, http://www.amnestyusa.org/abolish/dp_qa.html#whyoppose. This is another example of activists simply investing an undefined term with the meaning they prefer.

⁷⁰ The ICCPR also has bans torture and cruel, inhuman or degrading treatment or punishment, but, as noted above, the ICCPR is non-self-executing. The conflict between U.S. and international law is clearer, therefore, regarding the Torture Convention.

⁷¹ *Soering v. United Kingdom*, 11 EHRR 439 (1989), at ¶111. Significantly, the ECJ ruled that the European Convention did not prohibit capital punishment per se, along the lines of the same logic in Section II, *supra*, regarding the ICCPR. The ECJ ruled that the protection of the “right to life” in the convention could not have banned capital punishment if another article of the same treaty assumed its permissibility and if a subsequent protocol was necessary specifically to eliminate it. *Id.* at ¶103.

⁷² PC Appeal No. 10 of 1993, judgment delivered on 2 November 1993.

⁷³ *Soering v. United Kingdom*, *supra* note 71 at ¶106 (“*However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.*”) (emphasis added)

execution are typically a result of the prisoner's own legal maneuvering in the post-conviction appeals process. It is perverse to argue that the post-conviction appeals by a prisoner himself that extend the time until execution should be used to free him under the guise of state torture. Indeed, prosecutors, victims' survivors, and the general public most likely would favor shorter stays on death row for convicted murders. In fact, the restrictions on post-conviction federal habeas corpus review instituted in the Anti-Terrorism and Effective Death Penalty Act of 1996, intended to shorten the time between conviction and execution, were widely condemned by the very activists who would argue, in another context, that the length of time between conviction and execution constitutes torture. Finally, it should be beyond contention that such post-conviction appeals processes are, indeed, often appropriately used to ensure that convictions are valid. How, it is fair to ask, can the justice system's legitimate post-conviction review process, necessarily extensive and time-consuming, be deemed to be torture?

Most importantly, however, these arguments would not avail death penalty opponents as a matter of U.S. law. First, the Supreme Court has rejected the notion that the "death row phenomenon" renders the death penalty cruel and unusual punishment under the Eighth Amendment to the Constitution. Twice the Court has refused to review cases in which the issue was raised (although Justices Stevens and Breyer wrote dissents from denial of certiorari, with Breyer arguing that the international aspect of the case rendered it necessary to address).⁷⁴ Similar to the case of alleged racial discrimination, this is a significant stumbling block for death penalty opponents and is one reason they have appealed to international law. As with race, it is a clear conflict between American sovereignty and claims of these activists. Arguing that the "death row phenomenon" is illegal in international law, they seek to overturn the Supreme Court's interpretation of the U.S. Constitution.

They are forced into such a dramatic position because the Senate added specific reservations, understandings, and declarations (RUDs) to its ratification of the Torture Convention, stating that,

The United States considers itself bound by the obligation under Article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States...[and] [t]he United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, *including any constitutional period of confinement prior to the imposition of the death penalty.*"⁷⁵ (emphasis added)

⁷⁴ Lackey v. Texas, No. 94-8262 (U.S. Mar. 27, 1995). (Stevens, J, mem. respecting denial of cert.); Ellege v. Florida, 1998 WL 440516 (U.S. Fla) (Breyer, J., mem. respecting denial of cert.) Note that in each of these cases, the time on death row was far more extensive, 17 years and 23 years, respectively, than the ranges found unacceptable by the ECJ, 6 to 8 years, and the Privy Council, 5 years.

⁷⁵ U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990), *available at* University of

The United States Senate, therefore, made clear its intent in ratifying the treaty that it cannot apply to the so-called “death row phenomenon” (or other interpretations of the treaty besides those of the Supreme Court). Hence, the need of death penalty opponents to state that beyond the treaty’s terms lies the ECJ’s understanding of torture in the *Soering* case and their own interpretation of the terms “cruel and degrading.” As a matter of law, however, neither as CIL nor as directly applicable law in the form of the Torture Convention, can the “death row phenomenon” invalidate the death penalty’s administration in the United States.

B. Application of the Death Penalty to Certain Categories of Offenders as Illegal Under International Law

1. Mentally Retarded

In the 2002 *Atkins* case,⁷⁶ the Supreme Court declared that the execution of mentally retarded persons is a violation of the Eighth Amendment. The case represented a victory for international anti-death penalty activists, who have hailed the decision as a first step in entrenching their view of human rights in the U.S. court system. The Court specifically noted international opinion on the death penalty, saying, in a footnote, that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”⁷⁷ The dissenting justices pointed out, however, that the Court’s jurisprudence is based on *national* consensus and that the Court rejected the idea of using international law and opinion as a source for evidence of consensus in *Stanford v. Kentucky*, a 1989 case involving the death penalty for juveniles (discussed in more detail below). Chief Justice Rehnquist wrote, “While it is true that some of our prior opinions have looked to ‘the climate of international opinion,’ we have since explicitly rejected the idea that the sentencing practices of other countries could ‘serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people.’”⁷⁸ (citation to *Stanford* omitted).

The majority’s somewhat muted reference to international opinion downplays the significant forces that had brought before the Court their claims of the applicability of international human rights standards to the case. In fact, the legal maneuvering of the anti-death penalty activists represents a cautionary tale to those concerned with the protection of U.S. sovereignty. Anti-death penalty activists had for years argued that executing mentally retarded murders was a violation of international law. Human Rights Watch, for example, cited the ICCPR and various UN bodies’ interpretations of it to support this claim.⁷⁹ The nature of these claims is similar to those discussed in other sections of this paper and need not be exhaustively addressed again. Suffice it to note that, as with the claims about the death penalty and international law in general and race and the “death row phenomenon” in particular, the activists’ interpretations of treaty

Minnesota Human Rights Library, <http://www1.umn.edu/humanrts/usdocs/tortres.html>. The United States added a similar reservation to its ratification of the ICCPR.

⁷⁶ *Atkins v. Virginia*, 536 U.S. 304 (2002)

⁷⁷ *Id.* at n.21.

⁷⁸ *Id.* (Rehnquist, CJ, dissenting).

⁷⁹ Human Rights Watch, *Beyond Reason: The Death Penalty and Offenders with Mental Retardation*, Sec. III: Legal Standards (March 2001), available at <http://www.hrw.org/reports/2001/ustat>.

language are self-serving and their claims to the existence of a rule against executing the mentally retarded in CIL are exaggerated.

More significant is the way these activists and their associates pressed their case in *Atkins*. Led by Professor Harold Hongju Koh, they sought to “bring international law home” in a well-thought-out scheme.⁸⁰ This plan is consciously modeled on the public law litigation of the 1960s and 1970s in which activists sought political reform through the courts and relied on sympathetic judges to enact their programs, generally as a means to outmaneuver the democratic political process. Koh lauds this approach and now seeks to emulate it to entrench in U.S. law certain international human rights standards. Indeed, he sees himself as leading a principled campaign to subvert the domestic democratic process through the manipulation of the courts, with the assistance of activist judges. He notes that such a campaign should focus on “first, provoking interactions [of international and domestic law]; second, provoking norm interpretations; and third, provoking norm-internalizations.”⁸¹ The campaign should also “expand the participation of intergovernmental organizations, NGOs, private business entities, and transnational norm entrepreneurs as process-activators.”⁸² Transparent democratic processes—say, elections—are apparently not part of the campaign.

Unfortunately, with the *Atkins* decision, Koh and his allies were successful. On behalf of nine retired U.S. diplomats, he filed an amicus brief that laid out their claims that an international consensus exists against executing the mentally retarded, that U.S. diplomacy suffered because of the practice, and that the Court should take international opinion into account in evaluating the “evolving standards of decency” of guiding Eighth Amendment jurisprudence.⁸³ The EU also filed an amicus brief, making similar points, that served as the direct citation for the Court in

⁸⁰ See, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L. J. 2327 (advocating litigation that “encourag[es] dialogue between domestic and international law-declaring institutions” that “brings us closer to a unitary, ‘monist’ legal system in which domestic and international law are integrated”); Harold Hongju Koh, *1998 Frankel Lecture: Bringing International Law Home*, 35 Houston L. Rev. 623 (arguing that “those who favor application of international norms to state behavior cannot afford to be passive observers...[T]hey must seek self-consciously to participate in, influence, and ultimately enforce transnational legal process, by promoting the interaction, interpretation, and internalization of international norms into domestic law.”); Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. Davis L. Rev. 1085 (calling *Atkins*, “an invitation” to the Supreme Court to begin the process of declaring the death penalty in violation of the Eighth Amendment by “internalizing the global norm against execution of persons with mental retardation through a judicial process of constitutional adjudication [that]...would give new energy to ‘vertical’ efforts to internalize international law norms into domestic constitutional law.”) The quote in the title is from the Declaration of Independence’s comment about paying “a decent respect to the opinions of mankind.” One wonders if Koh would support similar reliance on the Declaration’s reference to “the Laws of Nature and of Nature’s God” and its invocation of a “Creator” for the purposes of judicial decision-making in, say, Establishment Clause cases.

⁸¹ Koh, *1998 Frankel Lecture: Bringing International Law Home*, *supra* 80 at 676.

⁸² *Id.*

⁸³ Brief of Amici Curiae, Diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstadt, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G. Wisner in Support of Petitioner, *McCarver v. North Carolina*, Case No. 00-8727, in the Supreme Court of the United States, October Term, 2000, available at <http://www.deathpenaltyinfo.org/article.php?scid=28&did=538>. The Supreme Court dismissed cert. in this case when North Carolina enacted a law forbidding execution of the mentally retarded and accepted all amici curiae briefs for *Atkins*.

referring to world consensus.⁸⁴ Koh's strategy and his arguments have scored a victory and, unless vigorously opposed, are likely to advance in other areas as well.⁸⁵

2. Juveniles

With the Supreme Court's banning of the execution of the mentally retarded, the practice in several U.S. states of the execution of persons who committed crimes while less than 18 years of age represents the next looming battle between anti-death penalty activists and defenders of American sovereignty.

Anti-death penalty activists argue that the execution of juveniles⁸⁶ is illegal under treaty and CIL and that a *jus cogens* norm against it has formed.⁸⁷ The evidence for this claim, according to Amnesty, consists, first, of four treaties that explicitly prohibit execution of juveniles—the ICCPR, the American Convention, the UN Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child. According to Amnesty, virtually all countries in the world—194—are parties to at least one of these treaties, and only the United States has entered a reservation to any of the treaties (discussed in detail below). Second, argues Amnesty, the UN General Assembly, UN Economic and Social Council, and the UN Human Rights Commission have adopted resolutions prohibiting execution of juveniles. Furthermore, claims Amnesty, almost no states *de jure* or *de facto* execute juveniles. The legal merits of these arguments notwithstanding,⁸⁸ it may well be fair to concede that there is a strong bias in the international community against the execution of juveniles.

This bias cannot not, however, require the United States end the practice. For, through both U.S. treaty action and Supreme Court decision, the execution of juveniles remains a matter of domestic law alone, and within domestic law it is Constitutional. Based on the 1989 Supreme Court case of *Stanford v. Kentucky*⁸⁹ that permitted execution of convicted murders who were as young as 16 at the time of their crime, the United States Senate added a reservation to U.S. ratification of the ICCPR that states,

⁸⁴ Brief of Amicus Curiae the European Union in Support of the Petitioner on Writ of Certiorari in the Supreme Court of the United States, No. 00-8727 *McCarver v. North Carolina*, (Richard J. Wilson, Professor of Law Washington College of Law, American University, Counsel of Record).

⁸⁵ The Court in the 2002-2003 term also cited foreign law in *Lawrence v. Texas*, 02-102 (2003) regarding sodomy. Note that the theories on which these citations rely are inconsistent. In *Atkins*, the Court relied on foreign sources of law as evidence of an international consensus on the issue of execution of the mentally retarded. In *Lawrence*, the Court selectively cited decisions that supported its already-decided position. Similar arguments should be expected regarding gay rights, including homosexual marriage and service by openly gay members of the military. As with *Lawrence*, citations to foreign sources will mostly likely consist entirely of decisions from Western European courts.

⁸⁶ Activists consistently refer to these murderers as “children” in order to obfuscate the nature of their crimes and their responsibility for them.

⁸⁷ Amnesty International, *The Exclusion of Child Offenders from the Death Penalty Under General International Law* (July 2003) available at <http://www.amnestyusa.org/abolish/reports.html>.

⁸⁸ For an extensive discussion of this issue, see Curtis Bradley, *The Juvenile Death Penalty and International Law*, 52 *Duke L. J.* 485 (2002). Professor Bradley examines in detail and dismisses the claim that the juvenile death penalty is illegal under the ICCPR and under CIL, points out that even if they were, the United States has persistently objected to the norm and is therefore not bound, and establishes that neither a treaty nor CIL norm against the juvenile death penalty would be enforceable in a U.S. court. He also examines in somewhat greater detail than I do below the question of the U.S. reservation to the ICCPR.

⁸⁹ 492 U.S. 361 (1989).

(2) [t]hat the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.⁹⁰

The reservation became controversial immediately, with 11 (of the 144) other state-parties to the treaty objecting on the basis that the reservation frustrated the object and purpose of the treaty. The Human Rights Committee added its condemnation in 1995. The U.S. Congress in response added a rider to a bill later that year that prevented the State Department from spending any funds for reporting to the HRC. Schabas labels this funding provision “a bizarre legislative proposal,”⁹¹ apparently not aware that Congress often expresses its policy preferences through exercise of its power of the purse and that such riders are often used, especially in foreign affairs matters, to ensure that the Executive Branch adheres to Congressional policy direction.

The situation may have lain there—the United States maintaining that its reservation was valid and continuing to permit the execution of juveniles, while activists, the HRC, and foreign countries seethed and declare the reservation invalid—but for further activism by the transnational litigation elite. In *Domingues v. Nevada*, a murderer convicted of killing a woman and her four-year-old son when was 16 years of age appealed his sentence on the basis of the ICCPR and customary international law.⁹² Domingues claimed that the U.S. reservation to the ICCPR was illegal under U.S. law and under the international law of treaties, that the U.S. declaration that the ICCPR was non-self executing was invalid, that the execution of juveniles was illegal under CIL, and that execution of juveniles violates a *jus cogens* norm.⁹³ In deciding on certiorari, the Supreme Court invited the Clinton Administration to respond to these arguments. The Solicitor-General advised that certiorari should be denied because, first, Domingues’ claims regarding the validity of the reservation and the non-self executing provision were flawed; second, Domingues was asking the Court to overturn Executive and Congressional branch determinations of foreign affairs; third, if a CIL norm against execution of juveniles existed, the United States in any event was a persistent objector to it; and, fourth, the record did not contain sufficient evidence on the issues of international law raised in the certiorari petition for the Court to evaluate the claims.⁹⁴ The Court subsequently denied certiorari.⁹⁵

⁹⁰ U.S. Reservation to the ICCPR, *available at* http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm.

⁹¹ Schabas, *supra* note 14, at 84.

⁹² Petition for Writ of Certiorari to the Nevada Supreme Court, Michael Domingues v. the State of Nevada, in the Supreme Court of the United States, Mark S. Blaskey, counsel of record (Feb. 1999), *available at* http://www.mhb.com/profiles/ford/cases/ford_death.htm. Like other arguments on the death penalty and international law, this petition relies heavily for authority on non-binding political declarations, such as those of the UN Human Rights Commission, the Inter-American Commission on Human Rights, the UN General Assembly, and academic commentaries.

⁹³ *Id.*

⁹⁴ Brief for the United States as the Amicus Curiae, Domingues, Petitioner, v. State of Nevada, in the Supreme Court of the United States, No. 98-8327 (Seth Waxman, counsel of record), *available at* <http://www.usdoj.gov/osg/briefs/1999/2pet/6invt/98-8327.pet.ami.inv.html>.

⁹⁵ *Domingues v. Nevada*, cert. denied 528 U.S. 963 (1999). The activism continued, however, with Domingues petitioning the IACHR for a decision that the U.S. had violated international law. Refining its 1987 decision in *Roach and Pinkerton*, Case 9647, Res. 3/87 (Sept. 22, 1987), which declared the existence of a *jus cogens* norm

As a matter of U.S. law, then, the United States is neither obligated by its ratification of the ICCPR nor by the Constitution to prohibit execution of juveniles. Neither IACHR opinions nor HRC comments, as noted *supra*, are binding on the United States, and there is no indication that the United States believes itself to be legally or politically obligated to respond or otherwise take these opinions into account.

On this subject, as opposed to the execution of the mentally handicapped, U.S. sovereignty is, for the moment at least, intact. There is no doubt, however, that the transnational litigation elite has prioritized this issue. With the success of their strategy in regard to the mentally handicapped, the likelihood is that they will find another test case to bring the issue to the Supreme Court and argue, as they did in *Atkins*, that the United States must adhere to alleged international human rights norms. Since the denial of cert in *Domingues* was not a decision on the merits, and since the lack of a record on the international law aspects of the case was a major factor in the Clinton Administration's argument, it should be expected that these issues are now being raised in a pending juvenile death sentence case with a view toward litigating them for the purpose, as Koh strategized, of provoking courts to take positions on them. The situation bears careful attention by those concerned about protecting U.S. sovereignty.

C. Other Arguments

Death penalty opponents raise a series of other arguments regarding administration of the death penalty, including: differentials in the outcomes of cases due to plea bargaining; alleged errors in sentencing as reflected in post-conviction remands; ineffective assistance of counsel; geographic disparities; cases of actual innocence as proved by DNA testing; the use of peremptory challenges; and the requirement in U.S. law of having a "death-qualified" jury, that is, one that excludes any juror who states categorically that she would not impose a death sentence no matter what evidence were presented in the sentencing hearing.⁹⁶ They also claim that as a practical matter the death penalty does not deter crime.⁹⁷

against juvenile executions but no consensus on a minimum age, the IACHR declared that in the years since that decision, the *jus cogens* norm had developed and now prohibited execution of any person under eighteen years of age, *Domingues v. United States*, Case 12.205, Report No. 62/02 (Oct. 22, 2002). Again an international body, prompted by anti-death penalty activists, has asserted its primacy over U.S. law.

⁹⁶ All of these arguments are reflected in the Amnesty report on racial discrimination, *supra* note 68, on the basis that minorities suffer most from the alleged harms, but they also stand on their own as arguments against the death penalty. Indeed, their inclusion in the Amnesty reports seems at times to be a stretch and as though Amnesty was trying to stuff every conceivable anti-death penalty argument into one document. Amnesty also engages (as do other anti-death penalty activists) in sophistry, such as condemning both "all-white" and "nearly all-white" juries. One may wonder at what point a "nearly all-white jury" has sufficient minority representation to satisfy Amnesty—when three members are non-white? Or four? One may also wonder if Amnesty requires multicultural juries when the defendant is not black. For example, Amnesty condemns an all-white jury that sentenced a Hispanic to death, though Amnesty does not mention the race of the convicted Hispanic (which is a cultural, rather than racial, category that may include both whites and blacks) nor whether any Hispanics were on the jury. Does a black Hispanic defendant require black Hispanic jurors, or would black non-Hispanic jurors be adequate? What about an Asian defendant accused of killing a white Hispanic? What about a Hispanic of Asian decent, e.g. a Japanese-Brazilian?

⁹⁷ Amnesty International, *Death Penalty Facts: Deterrence*, <http://www.amnestyusa.org/abolish/deterrence.html>.

A full discussion of the merits of these claims one-by-one is beyond the scope of this paper, but it is significant that much of the evidence cited by death penalty opponents is highly contestable. For example, Amnesty cites a study that alleges a 68 percent “error rate” in capital cases. The study is deeply flawed.⁹⁸ Writing in *The Wall Street Journal*, Professor Paul Cassell pointed out that the study found no cases in which an actually innocent person was sentenced to death, that it includes cases in which the death penalty was subsequently re-imposed, includes hundreds of cases from the 1970s whose “errors” were a result of a confusing scheme of jurisprudence, and relies on secondary sources for dubious factual assertions.⁹⁹ Arguments against the deterrent effect of capital punishment are equally flawed. Amnesty states categorically, “The death penalty is not a deterrent.”¹⁰⁰ They seem to be unaware of recent studies that demonstrate that each execution results in as many as five¹⁰¹ or even eighteen¹⁰² fewer murders than would otherwise occur and that a hiatus in executions in Texas resulted in between 90 and 150 extra murders.¹⁰³

There are reasons anti-death penalty arguments have made little headway in U.S. courts and legislatures and among the American public.¹⁰⁴ In the end, as with the other subjects discussed in this section, such issues are properly debated and resolved among the American political community—those people who are affected by the debates and the resolution of it and have to live with the consequences of the results. By appealing to international law and opinion—and especially by marshalling that opinion with distorted facts—domestic and international anti-death penalty activists insult the American electorate, the U.S. judicial system, and the democratic political process.

IV. The Consular Notification Cases

The third line of argument employed by death penalty opponents to stop U.S. executions is in one sense more limited than the previous two, because it applies only to foreign citizens on death rows in U.S. states, but is nevertheless equally as broad an attack on American sovereignty. Invoking the 1963 Vienna Convention on Consular Relations, foreign countries and domestic and international death penalty opponents claim that the convictions and/or sentences of foreign

⁹⁸ James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995* (no date), available at <http://www2.law.columbia.edu/instructionalservices/liebman>.

⁹⁹ Paul G. Cassell, “We’re Not Executing the Innocent,” *The Wall Street Journal*, June 16, 2000.

¹⁰⁰ Amnesty International, *supra* note 97.

¹⁰¹ H. Naci Mocan & R. Kaj Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, (revised version of Pardons, Executions and Homicide, NBER WP8639) forthcoming in the *Journal of Law and Economics*, available at <http://econ.cudenver.edu/mocan/papers.htm>.

¹⁰² Hashem Dezhbakhsh, Paul Rubin & Johanna Mehlhop Shepherd, “Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data,” available at http://userwww.service.emory.edu/~cozden/dezhbakhsh_01_01_cover.html

¹⁰³ Roberto Marchesini & Dale O. Clonginger, Execution and Deterrence: A Quasi-Controlled Group Experiment, 33 *Applied Economics* 569 (April 2001), available at <http://ideas.repec.org/a/taf/applec/v33y2001i5p569-76.html>. The deterrent effect of capital punishment was hotly debated in academic studies in the 1970s and 1980s, and until these recent works, the anti-deterrent claims were seen as the more persuasive.

¹⁰⁴ In contrast, most information on the U.S. death penalty that is presented to the international community comes from death penalty opponents themselves, leading to a highly distorted view of the facts among foreign activists, governments, and citizens.

citizens should be set aside in cases where law enforcement officers failed to inform the consulate of their state of nationality that those persons had been arrested.¹⁰⁵ Death penalty opponents are essentially trying to make the ICJ a court of last resort—superior even to the U.S. Supreme Court—with the power to overturn legally imposed punishments of the U.S. criminal justice system. Worse, however, is the fact that they have found sympathy for their arguments from prominent American lawyers and on the Supreme Court itself. This section first describes the major cases in this line of argument, then addresses the sovereignty issues they raise.

A. The *Breard* Case

The origins of the consular cases litigation lie in the 1992 murder of Ruth Dikie of Arlington, Virginia. Her murderer, Angel Breard, a citizen of Paraguay, was caught, tried, found guilty, and sentenced to death.¹⁰⁶ Against the advice of his attorneys and his mother, who came from Paraguay to attend the trial, he testified at his trial on his own behalf and admitted that he had attempted to rape and then killed Dikie because of a Satanic curse laid upon him by his father-in-law. In a subsequent federal habeas corpus petition, Breard claimed that his conviction and sentence should be overturned because of the alleged failure of the Virginia law enforcement officials to inform him that he could contact the Paraguayan consulate, as provided for in Article 36 of the Vienna Convention. His petition was rejected by the district and circuit courts as barred by procedural default, because he had failed to raise the issue in state court. At the same time, Paraguay itself, through its ambassador and consul-general, filed suit for violation of its rights under the Vienna Convention. Their suit was rejected for lack of subject-matter jurisdiction, since they had failed to allege the continuing violation of federal law required to overcome a state's Eleventh Amendment sovereign immunity to suit in federal court.

¹⁰⁵ Article 36 of the Vienna Convention states

Communication and Contact with Nationals of the Sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
 - a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
 - b) 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 post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
 - c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

¹⁰⁶ The following discussion and analysis is based on the per curiam opinion in *Breard v. Green*, 523 U.S. 371 (1998) and Jonathan I. Charney and W. Michael Reisman, *The Facts, in Agora: Breard*, 92 Am. J. Int'l L 666 (1998).

Both Breard and Paraguay appealed to the U.S. Supreme Court, and Paraguay also brought suit against the United States in the ICJ. Unable to address the merits of the case until several months hence, the ICJ issued a “request for the indication of provisional measures”—roughly analogous to an injunction—“that the United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order.”¹⁰⁷

The Supreme Court, however, subsequently ruled against both Breard and Paraguay. The Court found that, although the convention “arguably confers on an individual the right to consular assistance following arrest,”¹⁰⁸ the doctrine of procedural default barred Breard from bringing a claim. The Court stated, first, that international law recognizes that “the procedural rules of the forum state govern the implementation of the treaty in that state” and that the Vienna Convention itself confirms this principle.¹⁰⁹ Second, the Court stated that, although the convention, as a treaty, is “supreme law of the land” under the Constitution, it is, like any treaty, subject to nullification by subsequent Congressional action.¹¹⁰ In this case, the Court held that the 1996 Anti-Terrorism and Effective Death Penalty Act prevented a hearing on the Vienna Convention claim. The Court also ruled that, in any event, it was “extremely doubtful” that Breard’s “speculative” claim of prejudice as a result of the Vienna Convention violation would result in the overturning of his conviction.¹¹¹ Finally, the Court upheld the lower courts’ rulings that Virginia was immune to suit by Paraguay under the Eleventh Amendment.¹¹²

The Court did note in conclusion that a case was pending before the ICJ and that diplomatic contacts were afoot among the U.S. Executive Branch, Paraguay, and the governor of Virginia. Nevertheless, it stated that “this Court must decide questions presented to it on the basis of law... Last night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard’s execution. If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.”¹¹³

The Court was influenced by the amici briefs of the United States filed by the State and Justice Departments at the Court’s request, in which the Executive Branch argued, *inter alia*, that the provisional measures request of the ICJ was non-binding and that, even if it were, the Court had no power under the federal nature of the Constitution to order Virginia to heed the ICJ.¹¹⁴ Rather, they argued, the ICJ order was directed to the United States government, as represented in foreign affairs by the Executive Branch, and the Secretary of State had taken “all measures at

¹⁰⁷ Request for the Indication of Provisional Measures, Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), April 9, 1998, ¶41(1)

¹⁰⁸ Breard, *supra* note 106 at 376.

¹⁰⁹ *Id.* at 375.

¹¹⁰ *Id.* at 376

¹¹¹ *Id.* at 377.

¹¹² *Id.*

¹¹³ *Id.* at 378. The court also reject a claim by the Paraguayan consul-general himself, since, it said, he was acting only in his official capacity. *Id.*

¹¹⁴ Charney & Reisman, *supra* note 106.

[her] disposal” to prevent the execution—that is, the letter referenced by the Court.¹¹⁵ The letter requested a stay “in light of the [ICJ]’s request, the unique and difficult foreign policy issues, and other problems created by the [ICJ]’s provisional measures.”¹¹⁶ The Secretary added that she was concerned for U.S. citizens abroad who might be harmed and denied consular assistance if the United States were seen to be in violation of the Vienna Convention.¹¹⁷

Governor James Gilmore responded to the ICJ and Secretary Albright by saying, “As Governor of Virginia my first duty is to ensure that those who reside within our borders...may conduct their lives free from fear of crime...Indeed, the safety of those residing within the Commonwealth of Virginia is not the responsibility of the International Court of Justice. It is my responsibility and the responsibility of law enforcement and judicial officers throughout the Commonwealth. I cannot cede such responsibility to the International Court of Justice.”¹¹⁸ Gilmore signed the death warrant and Breard was executed on April 14, 1998. At Paraguay’s request, the ICJ dismissed the pending proceeding before it as moot.

The *Breard* case raised a number of issues of international law and its effect in U.S. courts. First, was the ICJ request for provisional measures mandatory? As noted, the United States Executive Branch believed they were only precatory and so advised the Supreme Court. The Court did not address this issue in its opinion, however. Second, did the Vienna Convention provide for an individual right that could be remedied in a U.S. court? The Court, in dicta, stated that it was at least “arguable” that it did. Third, if the order were mandatory, would the Supreme Court (as opposed to the Executive Branch) be obliged to give effect to it? Again, the Court for the most part declined to address this question, though its dicta implied that it did not see itself as having that power. Fourth, did not the United States Executive Branch have more power to prevent Breard’s execution other than a letter from the Secretary of State to the Governor of Virginia (e.g., a Presidential executive order)? Commentary on these issues has been, as might be expected, overwhelmingly unfavorable to the United States, the Supreme Court, and Virginia, with most analysts of the case answering “Yes” to all these questions.¹¹⁹

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ See, e.g., Louis Henken, *Provisional Measures, U.S. Treaty Obligations, and the States*, in *Agora: Breard*, *supra* note 106, at 679 (arguing that the ICJ order was binding on all parties in the United States—the Executive Branch, the Supreme Court, and the governor of Virginia); Carlos Manuel Vázquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, in *Id.* at 683 (arguing that the federal government had the duty to intervene and the President should have issued an executive order preventing Breard’s execution); Jordan Paust, *Breard and Treaty-Based Rights under the Consular Convention*, in *Id.* at 691 (arguing, *contra* the Supreme Court, the Vienna Convention does grant individual rights, rights to the consular officials, and rights to states in domestic courts); Lori Fisler Damrosch, *The Justiciability of Paraguay’s Claim of Treaty Violation*, in *Id.* at 697 (arguing that states should be able to sue for redress of treaty violations in U.S. courts, that the Eleventh Amendment is not a bar to such suits, and the Supreme Court should have given effect to the ICJ’s provisional measures order in order to preserve the “important federal interest” of upholding the ICJ’s authority in international disputes); Frederic L. Kirgis, *Zschernig v. Miller and the Breard Matter*, in *Id.* at 704 (arguing that under *Zschernig v. Miller* states are not allowed to intrude on foreign affairs interests of the federal government, such as those involved in this case); Anne-Marie Slaughter, *Court to Court*, in *Id.* at 708 (arguing that the Supreme Court should have stayed Breard’s execution as a matter of “judicial comity.”) Slaughter also signed an amicus brief by international law academics arguing for a stay. *But see*, Curtis Bradley & Jack Goldsmith, *The Abiding Relevance of*

The matters of international law awaited a later case for their resolution—the *LaGrande* case described in the next section of this paper. The matters of domestic law—that is, the effects of the Vienna Convention in U.S. courts—remain to be addressed by the Supreme Court, as described in the section after next.

B. The *LaGrande* Case

Since the ICJ was unable to address the merits of Breard’s case before his execution, the resolution of the key questions of international law awaited the case of Walter and Karl LaGrande. The two brothers were on death row in Arizona for the 1982 murder of bank manager Kenneth Hartsock, whom Karl killed during a bank robbery by cutting Hartsock’s throat and stabbing him 23 times with a letter opener from his desk. Although born in Germany in 1962 and 1963 respectively, the brothers moved to the United States with their mother in 1967.¹²⁰ Except for one six-month visit in 1974, they had no other connection to the country.¹²¹ They did not speak German and appeared to all intents and purposes to be American.¹²² They may even have been unaware of their true citizenship, with Walter reportedly even telling a law enforcement officer that he was in fact a U.S. citizen.¹²³ They were convicted and sentenced to death in 1984. Law enforcement officials did become aware of their foreign citizenship sometime after their arrest but were evidently unaware of the import of that fact.¹²⁴ The brothers did not raise the consular issue until 1992.¹²⁵

As in *Breard*, the ICJ *LaGrande* case came too late for the convicted men, Karl and Walter LaGrande, who were executed in February and March of 1999, respectively, with Walter’s execution in the face of an ICJ request for provisional measures to halt the procedure. The Supreme Court declined to issue a stay of the execution filed by Germany and based on the ICJ’s request, with the majority relying on its decision in *Breard* that a foreign country could not make a claim against a state in federal court for a Vienna Convention violation, and with concurring justices relying on the Solicitor-General’s opinion that the order was not binding and that the Vienna Convention did not provide for the relief sought.¹²⁶ Justices Breyer and Stevens, however, dissented, saying, at they did in *Breard*, that a stay and full briefing were necessary, in no small part because Germany and the ICJ requested.¹²⁷ The Secretary of State did forward to the Governor of Arizona the ICJ’s order, albeit with comment that it was non-binding.¹²⁸

Federalism to U.S. Foreign Relations, in *Id.* at 675 (arguing that the political branches of the federal government should take state interests into account when determining the federal government’s position on foreign relations).

¹²⁰ *LaGrande Case (Germany v. United States of America)*, Judgment of June 27, 2001, ¶13, available at <http://www.icj-cij.org/icjwww/idocket/igusframe.htm>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at ¶16.

¹²⁴ *Id.*

¹²⁵ *Id.* at ¶22.

¹²⁶ *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (per curiam opinion) and *Id.* at 112 (Souter and Ginsburg, JJ, concurring) (1999).

¹²⁷ *Id.* at 112 (Breyer and Stevens, JJ, dissenting).

¹²⁸ *LaGrande Case (Germany v. United States of America)*, Judgment of June 27, 2001, *supra* note 120 at ¶111

Despite the execution of the LaGrande brothers, the ICJ subsequently ruled on the merits of Germany's case against the United States, finding against the United States on every point in contention (which included a number of procedural issues). The ICJ held that the United States had breached both Germany's and the LaGrandes' rights under the Vienna Convention in the first place by not informing the LaGrandes of their right to consular assistance, in the second place by not reviewing their convictions and sentences in light of the violation of the convention, and in the third place by not taking sufficient steps to prevent their execution.¹²⁹ Specifically, the ICJ ruled that 1) the convention did provide for an individual right to consular assistance;¹³⁰ 2) that its own requests for provisional measures were mandatory;¹³¹ 3) that states were obligated to give full effect to the rights in the treaty, whether or not domestic judicial principles such as procedural fault would bar them;¹³² 4) that the United States was obligated to review and reconsider the convictions and sentences of any other German citizens who had been denied their right to consular assistance;¹³³ and 5) that the United States should have done more to prevent their execution, no matter what internal law problems it created.¹³⁴

The decision is a model of judicial overreach. First, the ICJ strained to find an individual right under the convention, relying entirely on the reference to "his" rights in Article 36 regarding the detained non-citizen.¹³⁵ In doing so, however, it ignored the statement in the chapeau of the article that its purpose is "facilitating the *exercise of consular functions* relating to nationals of the sending state,"¹³⁶ (emphasis added) rather than protecting individual rights. Furthermore, the court ignored the preamble of the treaty itself, which could not be clearer: "The States-Parties to the present Convention...Realizing that the purpose of such privileges and immunities [in consular relations] is not to benefit individuals but to ensure the efficient performance of functions of consular posts on behalf of their respective states...Have agreed as follows..."¹³⁷ Indeed, Article 36 is the only article in the entire treaty that has any application to an individual other than consular officials or their staff. Only one rationale can explain such judicial inventiveness: The court found a right for foreign citizens in the convention simply because it wanted to rule against the United States in a death penalty case.

Second, the court strained to find justification for its claim that its own indications of provisional measures are binding. It found, to begin with, an ambiguity in the two authentic language versions of its statute. The French version states that the court has "le pouvoir d'indiquer" measures that "doivent etre prises" and refers to the court's action as "l'indication," while the English text states the court has the "power to indicate" measures that "ought" to be taken and refers to the court's "suggested" measures. The court stated that "doivent etre prises" and "ought" can be read as implying mandatory power, in contrast with the other, precatory terms.¹³⁸

¹²⁹ Id. at ¶128.

¹³⁰ Id. at ¶77.

¹³¹ Id. at ¶102.

¹³² Id. at ¶90.

¹³³ Id. at ¶125. A separate statement by the president of the court indicated that such was the appropriate remedy for citizens of other countries, even though the case specifically applied only to Germans.

¹³⁴ Id. at ¶115.

¹³⁵ Id. at ¶77.

¹³⁶ Vienna Convention, *supra* note 6 at art. 36.

¹³⁷ Id. at Preamble.

¹³⁸ LaGrande Case (Germany v. United States of America), Judgment of June 27, 2001, *supra* note 120 at ¶100

The court then chose to resolve this alleged ambiguity by finding that its statute as a whole was geared toward judicial settlement of disputes and that such settlement required the binding ability to prevent changes in the status quo pending a decision on the merits.¹³⁹

Although by standard treaty interpretation measures, the investigation into the meaning of Article 41 would end at this point, the court nevertheless went on to examine the preparatory work of the statute and to interpret it oddly. As the court admitted, the original text of Article 41 included more strongly worded French and English terms—“ordenner” and “order” provisional measures—that were replaced with “indiquer” and “indicate,” along with similar changes with the other terms noted above.¹⁴⁰ Nevertheless, the court stated that “the preparatory work of the Statute does not preclude the conclusion that orders under Article 41 have binding force.”¹⁴¹ The court stated that the non-binding language was chosen because the drafters recognized that the court had no enforcement power. To the court, “the lack of means of execution and the lack of binding force are two different matters,”¹⁴² and, thus, the court’s understanding of the object and purpose of the treaty trumped the intent of the drafters. This distinction without a difference is a weak reed upon which to dismiss the evident intent of the drafters. If the drafters of the statute had the opportunity to use language implying binding force but chose not to do so, a disinterested analyst would assume that the language actually used is not binding. The court simply found for itself the alleged power to stop executions in the United States because it wanted to stop them, not because the text or history of its statute gave it such authority.

Regarding the third point, the court tried to avoid intruding into U.S. sovereignty, but nevertheless overstepped its authority. The court stated that the procedural default rule, under which the U.S. federal courts had refused to grant habeas corpus review for Vienna Convention violations, had been applied in this case in such a manner as to prevent the LaGrandes and Germany from effectively enjoying their rights under the convention, as required by paragraph 2 of Article 36.¹⁴³ The court was careful to say that it was not ruling that the procedural default rule per se was invalid, but only that its application in this case violated the Vienna Convention.¹⁴⁴ Clearly, the ICJ was aware of the political impact of the appearance that it had invalidated a standard feature of domestic U.S. jurisprudence. In fact, the court was emphatic in denying that it was acting as a criminal appeals court. It stated, rather, that it was “do[ing] no more than apply[ing] the relevant rules of international law to the issues in dispute between the Parties to this case.”¹⁴⁵ Again, this is a distinction without a difference. It matters not that the ICJ limited its decision to the application of the rule in the specific circumstances of the *LaGrande* case. Those circumstances were already considered by the U.S. Supreme Court in its refusal to stay the LaGrandes’ executions and in its *Breard* decision. In effect, the ICJ purported to supplant a rule of domestic law with a long history and well-deserved status within the U.S. legal system on the basis of its interpretation of a treaty and in the face of a U.S. Supreme Court ruling on the matter.

¹³⁹ Id. at ¶102-103

¹⁴⁰ Id. at ¶106

¹⁴¹ Id. at ¶104.

¹⁴² Id. at ¶107.

¹⁴³ Id. at ¶90.

¹⁴⁴ Id.

¹⁴⁵ Id. at ¶52.

On the fourth point of the decision, the court did not just overreach, but went entirely against the standard understanding of remedies in international law. International law provides for four types of remedies for an illegal act: restitution, that is, restoration of the situation prior to the illegal act; compensation, that is, payment of economic damages; satisfaction, that is, some kind of verbal acknowledgement of responsibility, such as an apology; and assurances and guarantees of non-repetition. In the aftermath of *Breard*, the United States apologized to Paraguay and began a campaign to educate federal, state, and local law enforcement officials about the Vienna Convention, including training, a booklet and a pocket-sized information card on the convention, and an office in the State Department to ensure compliance.¹⁴⁶ When the *LaGrande* case arose, the United States apologized to Germany and gave assurances that it was doing everything it could to ensure non-repetition (neither economic damages nor restitution being feasible at that point).¹⁴⁷

Germany was not satisfied and told the ICJ that it wanted “an effective remedy [that] requires certain changes in U.S. law and practice.”¹⁴⁸ While the ICJ noted U.S. efforts to ensure compliance with the Vienna Convention and admitted that those efforts satisfied a general requirement for assurance of non-repetition, it went further—in fact, far beyond any previous understanding of this type of remedy. Agreeing with Germany, the court stated that if another violation of the Vienna Convention were to occur despite the U.S. efforts at compliance, “it would be incumbent on the United States to allow the review and reconsideration of the conviction and sentence [of the affected German citizen] by taking account of the violations of the rights set forth in the Convention.”¹⁴⁹

Although the court added that “[t]he choice of means must be left to the United States,”¹⁵⁰ at the most basic level the court here required the United States to change its criminal justice system as a way to guarantee non-repetition. It provided no authority in law or state practice for this step, and it would have had a difficult time doing so. As one commentator who is generally favorable to the *LaGrande* decision stated, “[T]o date, guarantees and assurances of non-repetition had at best played a marginal role in the international law of state responsibility.”¹⁵¹ Indeed, in its commentary on non-repetition in its model articles on state responsibility (written after the *LaGrande* decision), the International Law Commission (ILC), could refer only to *LaGrande* and to cases and incidents between 60 and 120 years old to find examples of such action.¹⁵² Furthermore, the ILC emphasized the language of its model article is designed “to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by states in the past.”¹⁵³ Surely a change in the domestic jurisprudence of a state is the

¹⁴⁶ Id. at ¶121.

¹⁴⁷ Id. at ¶119.

¹⁴⁸ Id. at ¶122.

¹⁴⁹ Id. at ¶125.

¹⁵⁰ Id.

¹⁵¹ Christian J. Tams, *Consular Assistance: Rights, Remedies, and Responsibilities*, 13 *European J. of Int'l Law* 1257 (2002), at text accompanying footnote 79, available at <http://www.ejil.org/journal/Vol13/No5/sr1.html#TopOfPage>

¹⁵² International Law Commission, *Commentaries to the Draft Articles on Responsibility of States for Intentionally Unlawful Act* (2001), available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm. Text accompanying footnotes 470 to 476.

¹⁵³ Id. at text accompanying footnote 476.

kind of excessive claim the ILC means—especially when, as the ILC noted in discussing *LaGrande*, “[The ICJ] did not...discuss the legal basis for assurances of non-repetition.”¹⁵⁴

Finally, the court found that the United States had not done as much as possible to prevent the execution of the LaGrandes. The court stated that the State Department could have asked the governor of Arizona for a stay of execution, rather than just transmitting the order with a note that it was non-binding, that the United States Supreme Court could have issued a stay, and that the governor of Arizona could have stayed the execution in the face of the ICJ’s order, particularly since the Arizona Clemency Board had suggested a stay.¹⁵⁵ The criticism is highly fact-specific, and the court stated that it was not declaring that the United States should have guaranteed a particular result. Rather, the court stated that the United States did not “take all measures at its disposal” to ensure that Walter LaGrande was not executed, as the order on provisional measures stated.¹⁵⁶

The court decision on this point was more than meets the eye. On one level, it is rather restrained because the court recognized that it could not force the United States “to exercise powers it did not have”¹⁵⁷ and criticized the United States only for not doing as much as it could even within its powers. In a larger sense, though, the decision highlights the problem for ICJ and death penalty opponents—and as a matter of international law theory in all cases—of the dualist conception of the relationship between international law and domestic law. The dualist conception views domestic law and international law as two distinct spheres, with actions in one having to be translated—so to speak—into the other through separate rules unique to that sphere. This is the concept lying behind, for example, the need for domestic implementing legislation for treaties, rather than having treaties self-executing and directly applicable in U.S. courts. This approach stands in sharp contrast to the monist conception of international law that views an international law rule as having direct application in domestic law, overriding any domestic rules. In other words, the dualist conception views international law as binding *on* a state, the monist, as binding *in* a state.¹⁵⁸

Europeans and international human rights law advocates are monists, but the United States is and always has been dualist. Thus, the United States may well incur state responsibility for a breach without being able to prevent it because of the domestic federal structure of the state. If the actions of Virginia officials cause a breach of an international law obligation of the United States, the only choice is for the U.S. government to accept responsibility and provide a remedy at the international law level. As the U.S. Supreme Court stated in *Breard*, U.S. law provided no means for it to order Virginia to stay the execution, and any resolution of the conflict between the ICJ, Virginia, and the federal government was in a different forum. No matter what the ICJ held regarding the United States’ responsibility to prevent the execution of the LaGrandes,

¹⁵⁴ Id. at text accompanying footnote 468.

¹⁵⁵ *LaGrande Case (Germany v. United States of America)*, Judgment of June 27, 2001, *supra* note 120 at ¶¶111-114.

¹⁵⁶ Id. at ¶115.

¹⁵⁷ Id.

¹⁵⁸ For more on monism and dualism, see Curtis Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 *Stan. L. Rev.* 529 (noting, *inter alia*, that international law academics believe in monism, while U.S. courts, including the Supreme Court in *Breard*, are firmly dualist).

therefore, if U.S. law did not provide some authority for stopping Arizona's execution procedures, it simply could not be done.¹⁵⁹

In sum, on the critical questions of the case, the court created the results it wanted in order to claim the United States had violated international law in applying the death penalty. On the individual rights issue, the court read one word in Article 36 of the Vienna Convention without considering the stated object and purpose of the article or the treaty as a whole. On the provisional measures issue, the court ignored the plain meaning of the terms and focused on its own understanding of the object purpose of the treaty, in apparent defiance of the intention of the treaty's drafters. On the question of breach, the court, while denying that it was serving as a criminal appeals court, acted just so—invalidating a principle of U.S. domestic criminal jurisprudence as applied in the case. On the remedies issue, the court—on no authority—practically invented a new remedy for violation of international law. Finally, on the question of how the United States should have reacted, the ICJ came up against a basic and insoluble conflict between the dualist and monist conceptions of international law.

C. Next Steps in the Consular Notification Litigation

Breard and *LaGrande* were part of a growing trend of litigation by foreign countries and anti-death penalty activists. The Inter-American Court of Human Rights¹⁶⁰ in 1999 issued an advisory opinion claiming that not providing consular notification in a capital case constituted an arbitrary deprivation of life under the ICCPR and American Convention,¹⁶¹ while the Inter-American Commission, had been issuing provisional measures to stop U.S. executions and declaring that the United States had violated the Vienna Convention in specific cases.¹⁶² *Breard* and *LaGrande* energized this movement. Amnesty International, for example, produced a report on the Vienna Convention that cited the ICJ's *LaGrande* opinion and called for, among other things, the commutation by executive authorities of death sentences of those who had not been given notice under the convention.¹⁶³

¹⁵⁹ Some commentators argue that the president should have invoked his authority under the Constitution to see that the laws (i.e., the Vienna Convention) were faithfully executed and likened the case to previous exercises of presidential authority, such as those at issue in *Dames & Moore v. Regan*, in which President Reagan ordered the suspension of lawsuits against Iran in order to ensure conclusion of an agreement with Iran on the creation of the U.S.-Iran Claims Tribunal. See, e.g., Vazquez, *supra* note 119.

¹⁶⁰ The court should not be confused with the Inter-American Human Rights Commission. The court is organized under the American Convention, to which, as noted above, the United States is not a party, while the commission is organized under the American Declaration, to which the United States is a party but which is not legally binding.

¹⁶¹ The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, October 1, 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999).

¹⁶² See, e.g., Report No. 52/02, Ramon Martinez Villareal v. United States, Case 11.753 (Merits) (October 10, 2002) (detailing history of case going back to 1997, including issuance of provisional measures order).

¹⁶³ Amnesty International, *United States of America: A Time for Action—Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty* (August 2001), available at <http://web.amnesty.org/library/Index/engAMR511062001?OpenDocument&of=COUNTRIES\USA?OpenDocument&of=COUNTRIES\USA>.

Most importantly, Mexico instituted suit in 2003 at the ICJ to halt execution of 54 of its citizens on death row,¹⁶⁴ and the ICJ issued provisional measures to halt executions in three of those cases.¹⁶⁵ Mexico's claims in the *Avena* case go far beyond those of Germany in *LaGrande* and if accepted by the court would amount to an unwarranted and unprecedented interference in U.S. domestic affairs. Mexico petitioned the court to order the United States to vacate its citizens' convictions and sentences, provide them new trials, suppress any statements made prior to consular notification, and prohibit operation of any municipal legal doctrine to prevent these remedies, such as procedural default and the requirement to show prejudice.¹⁶⁶ Furthermore, Mexico petitioned the court to order the United States "to take all legislative, executive, and judicial steps necessary" (such as prohibiting the application of procedural default) in order to ensure no further violations of the convention.¹⁶⁷

Mexico's claims have no basis in either fact or law, even under the flawed *LaGrande* decision. First, as the United States pointed out, Mexico provided only tendentious, conclusory, and selective summaries of the facts of the 54 individual cases. Indeed, in some of these cases, it is still not even clear that the individuals are actually Mexican citizens. At least one is a dual citizen of the United States, to whom the U.S. owes no duty under the convention;¹⁶⁸ in seven cases, the defendants claimed to be U.S. citizens when arrested,¹⁶⁹ and in 20 cases, there was no apparent reason to suspect non-U.S. citizenship.¹⁷⁰ Mexico did not even establish before the court that there was a single case in which law enforcement officials knew of non-U.S. citizenship and failed to provide consular notification,¹⁷¹ and in 22 cases, as Mexico conceded, notification was provided soon enough to allow Mexican consular officials to assist in pre-trial and trial proceedings.¹⁷²

Second, *LaGrande* required only that the United States provide for "review and reconsideration" of cases in which defendants had been deprived of their right to consular notification. Although Mexico in its argument to the court impugned the fairness of the U.S. criminal justice system, the United States maintained that both the judicial system and executive clemency provide that review.¹⁷³ Most importantly in this regard, the court in *LaGrande* specifically stated, as noted above, that the United States should provide that review "by means of its own choosing" and that the U.S. domestic rule of procedural default was not illegitimate per se, only its application in the case of the *LaGrandes*.

¹⁶⁴ Application Instituting Proceedings, *Avena and other Mexican Nationals (Mexico v. United States of America)* (2003) *supra* note 3.

¹⁶⁵ Order, Request for Indication of Provisional Measures, *Avena and other Mexican Nationals (Mexico v. United States of America)* (2003), available at http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iorder_20030205.PDF.

¹⁶⁶ Memorial of Mexico, Case Concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*, at ¶407 (June 20, 2003) available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>.

¹⁶⁷ *Id.* at ¶408.

¹⁶⁸ Counter-Memorial of the United States, Case Concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*, at ¶7.8 (Nov. 3, 2003), available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>.

¹⁶⁹ *Id.* at ¶7.10.

¹⁷⁰ *Id.* at ¶7.11.

¹⁷¹ *Id.* at ¶7.12.

¹⁷² *Id.* at ¶7.15.

¹⁷³ *Id.* at ¶6.63.

Third, as the United States pointed out, Mexico seeks to apply to the United States rules that neither it itself nor any other party to the convention follows. For example, Mexico claimed that the United States was obliged to notify a consular official of the arrest of a citizen immediately and prior to any interrogation, but the United States pointed out that Mexico does not do so and only a handful of parties to the convention do so.¹⁷⁴ Likewise, “there is not a single recorded case in Mexico that has resulted in the exclusion of evidence—much less the vacation of a conviction or remittal of sentence—where the requirement of Article 36 was not met.”¹⁷⁵ The United States noted, “Not a single criminal justice system in the world—not one among the more than 160 Parties to the [Vienna Convention] operates in accordance with the rules Mexico would have this Court adopt and impose on the United States.”¹⁷⁶

Finally, Mexico’s claim that the right to consular notification has the status of a human right is overreaching. Mexico, in essence, seeks to convert a treaty on consular privileges and immunities into a human rights instrument, claiming that the mere provision of a consul is fundamental to ensuring due process that its nationals would otherwise not be afforded. This claim is off the mark on three points. As a basic matter, Mexico misreads Article 36. The only individual right at stake is that of *notification* of the consul. The detained individual has no right to consular *assistance*; indeed, a consul can refuse to assist the individual.¹⁷⁷ It cannot be the case, therefore, that notification of a consul, no matter what other results might flow from it, is a human right *per se*, fundamental to due process on the level of the privilege against self-incrimination or right to counsel. Further, the U.S. criminal justice system provides a range of due process rights for the accused that apply to all defendants, regardless of nationality, in accordance with the requirements of the U.S. Constitution. Mexico tries to obscure this fact and have a consul assume the role that an attorney performs in the U.S. system regarding legal advice, assistance during interrogation, etc., a role that was never intended by Vienna Convention and is not even hinted at in its text. Mexico proffered no evidence that any state practice treats consular notification and assistance as fundamental rights of due process or grants the remedies Mexico demands.¹⁷⁸

In the end, Mexico’s far-reaching claims attempt to put important elements of the U.S. criminal justice system itself on trial before the ICJ. Its purpose is to maneuver the ICJ into a determination that the U.S. judicial and executive clemency systems do not provide adequate protections for criminal defendants on their own and must be forced by the court through the vehicle of the Vienna Convention to meet standards that Mexico believes are sufficient—even though its own judicial system and those of other parties to the convention do not meet those standards. How the court will deal with Mexico’s challenge is unclear at the time of this writing, as is the timing of a decision.

No matter how the ICJ rules, however, the real impact of the consular notification cases will occur in U.S. courts. So far, all of the federal appeals courts to have dealt with habeas claims based on the convention have found either that the convention does not protect individual

¹⁷⁴ Id. at ¶¶6.32-6.43.

¹⁷⁵ Id. at ¶4.15.

¹⁷⁶ Id. at ¶1.20.

¹⁷⁷ See Id. at ¶1.12.

¹⁷⁸ Id. at ¶6.86.

rights¹⁷⁹ or have found, without deciding that issue, that the convention does not provide for a judicially cognizable remedy.¹⁸⁰ Furthermore, in most of the latter cases, the courts' dicta indicate that they were highly skeptical of the claim for an individual right in the convention based on the convention's text and the consistent position of the Executive Branch to the negative.¹⁸¹ The Sixth Circuit, the only appeals court to have definitely addressed whether the convention provides an individual right,¹⁸² added two other important considerations. The court noted that the Supreme Court had denied Paraguay and Germany a right of action for a violation of the convention and stated that "[i]f a foreign sovereign to whose benefit the Vienna Convention inures cannot seek a judicial remedy, we cannot fathom how an individual foreign national can do so in the absence of express language in the treaty."¹⁸³ Perhaps more significantly, the court stated it would not create a right for foreign nationals under the Vienna Convention because to do so "risks aggrandizing the power of the judiciary and interfering in the nation's foreign affairs, the conduct of which the Constitution reserves for the political branches."¹⁸⁴

Nevertheless, in the face of these decisions, one district court in Illinois took upon itself to use the ICJ's opinion in *LaGrande* to find an individual right and a judicial remedy in the Vienna Convention. In *Madej v. Schomig*,¹⁸⁵ the court, which had previously declared a habeas claim based on a Vienna Convention violation to be procedurally barred,¹⁸⁶ declared that the ICJ's decision in *LaGrande*,

conclusively determines that Article 36 of the Vienna Convention creates individually enforceable rights, resolving the question most American courts (including the Seventh Circuit) have left open. It also suggests that courts cannot

¹⁷⁹ *United States v. Emuegbunam*, 268 F.3d 377 (6th Cir. 2001); *United States v. Jimenez-Nava*, No. 99-11300 (5th Cir. 2001).

¹⁸⁰ *United States v. Nai Fook Li*, No. 97-2034 (1st Cir. 2000) (suppression of evidence and dismissal of indictment not remedies for Vienna Convention violation); *United States v. De La Pava*, 268 F.3d 157 (2nd Cir. 2001) (dismissal of indictment not a remedy for Vienna Convention violation); *United States v. Page*, 2000 FED App. 0388P 6th Cir (suppression of evidence and dismissal of indictment not remedies for Vienna Convention violation); *United States v. Chaparro-Alcantara and Romero Bautista*, Nos. 99-2721 & 99-2874 (7th Cir. 2000) (suppression of evidence not a remedy for Vienna Convention violation); *United States v. Ortiz*, 315 F.3d 873 (8th Cir. 2002) (suppression of evidence and preclusion of death penalty not remedies for Vienna Convention violation); *United States v. Lombera-Camorlinga*, No. 98-50347 (9th Cir. 2000) (en banc) (suppression of evidence not a remedy for Vienna Convention violation); *United States v. Cordoba-Mosquera*, 212 F.3d 1194 (11th Cir. 2000) (exclusion of evidence, dismissal of indictment, vacation of sentence not remedies for Vienna Convention violation); *United States v. Duarte-Acero*, 296 F.3d 1277 (11th Cir. 2002) (dismissal of indictment not a remedy for Vienna Convention violation).

¹⁸¹ *See, e.g., Li*, No. 97-2034 ("[I]t is far from clear that the Vienna Convention confers any rights upon criminal defendants.") (The Vienna Convention "contain[s] no explicit language conferring on private citizens rights enforceable in court, and there is nothing in the character of the subject matter that compels (or even suggests) an inference in favor of private rights.") (Selya and Boudin, JJ, concurring); *De La Pava*, 268 F.3d at 164 (Although the Supreme Court in *Breard* left it open, "[a]s a general matter, however, there is a strong presumption against inferring individual rights from international treaties."); *Duarte-Acero*, 296 F.3d at 1281 ("[T]he Vienna Convention itself disclaims any intent to create individual rights...").

¹⁸² A panel of the Ninth Circuit did find an individual right under Article 36 in *Lombera-Camorlinga*, but the decision was reversed by an en banc panel that then decided the case without addressing that issue.

¹⁸³ *United States v. Emuegbunam*, 268 F.3d at 394 (6th Cir. 2001).

¹⁸⁴ *Id.*

¹⁸⁵ 223 F.Supp 3d 968 (N.D.Ill, 2002).

¹⁸⁶ *Madej v. Gilmore*, 2002 WL 370222 (N.D.Ill)

rely upon procedural default rules to circumvent a review of Vienna Convention claims on the merits.¹⁸⁷

The court went on to read the Supreme Court's decision in *Breard* narrowly in conjunction with the ICJ's *LaGrande* decision. It stated that the ICJ's decision that the procedural default rule prevented full effect of the rights in the convention "undermin[ed] a major premise of the [*Breard*] holding."¹⁸⁸ Furthermore, the court held that *Breard* was bad precedent, because it was argued and decided in haste, was a per curiam decision, and did not address the United States' Vienna Convention obligations directly.¹⁸⁹ Regarding a remedy, the court found that Madej would likely not have been prejudiced at trial since the evidence of his guilt was substantial, but that a consul's assistance may have helped at sentencing. In the end, however, the court declared the issue moot because it had already vacated the death sentence on the basis of a claim of ineffective assistance of counsel.¹⁹⁰ The court rejected a motion for reconsideration, explaining,

This interpretation of the Convention [granting an individual right] is binding upon the United States and this Court as a matter of federal law due to the [U.S.] ratification of the [Vienna Convention's] Optional Protocol [regarding the ICJ's authority to interpret the convention].¹⁹¹

In any event, the Illinois governor, noting the Vienna Convention violation, commuted Madej's sentence, along with the sentences of all the prisoners on death row in his state in February 2003. Nevertheless, the district court's *Madej* decision should be deeply troubling to those concerned with both American sovereignty and the orderly functioning of the federal courts. To be clear: The *Madej* court declared that a decision of a foreign court superceded the decision of the U.S. Supreme Court in a domestic criminal law case. The court simply did not understand the difference between a dualist and monist conception of international law. The court believed that since the United States had entered into a treaty that gave the ICJ the authority to interpret it, the ICJ's interpretation was then binding *in* domestic law. This is a serious error. The ICJ's flawed opinion may well have created an obligation *on* the United States, but that obligation is to be discharged by the political branches of the nation, not by the judicial branch *within* the court system. The interpretation of the Vienna Convention and its impact within the U.S. domestic legal system is the province only of the U.S. judiciary acting under its authority to interpret the laws and treaties of the United States in accord with the Constitution. The district court cannot abdicated its authority to interpret a treaty of the United States to a foreign court, nor can it decided to ignore a decision of the U.S. Supreme Court and the persuasive authority of circuit courts in favor of the International Court of Justice.

¹⁸⁷ Id. (internal citation omitted)

¹⁸⁸ Id. (internal citation omitted)

¹⁸⁹ The district court's argument finds some support in the Restatement of Foreign Relations Law (Third), which states that courts interpreting international law should give "particular attention" to the decisions of international tribunals. RESTATEMENT OF FOREIGN RELATIONS LAW (THIRD) (1987) §112(1). Nevertheless, the Restatement affirms that decisions of the Supreme Court on international law are "conclusive." Id. at §112(2). This is probably why the court chose to read *Breard* narrowly. Furthermore, as the Restatement points out, the interpretation of international law by the Executive Branch must be given weight, as the courts in other cases on the Vienna Convention, including the Supreme Court, have also noted. Id. at Comment C.

¹⁹⁰ Madej's counsel had failed to put on evidence of childhood abuse at the sentencing hearing.

¹⁹¹ 2002 WL 31386480 (N.D.Ill.)

Cases on the conflict between international and U.S. law almost reached the Court in 2002 and 2003, and at least two justices on the Court appeared to accept the authority of the ICJ as superior to their own. In 2002, the Court denied certiorari in the case of Javier Suarez Medina, who had petitioned for review of his conviction and sentence specifically on the basis of the Vienna Convention and the CIJ's *LaGrande* decision¹⁹² In 2003, Osbaldo Torres petitioned for habeas review of his conviction and death sentence in Oklahoma, asserting that *LaGrande* prohibited the application of procedural default and lack of prejudice to deny his Vienna Convention claim. Justice Stevens wrote straightforwardly that the *LaGrande* decision was the “authoritative interpretation” of the convention, binding on federal and state courts as a treaty of the United States.¹⁹³ Justice Breyer was more cautious, but stated that he would defer a decision on certiorari until after a decision in *Avena*, in order to examine the question of whether the ICJ's opinion is in fact binding on U.S. courts.¹⁹⁴

Only when a case like *Madej*, *Medina*, and *Torres* is decided by the Court will this conflict between domestic and international law be settled. How will the Court rule in the face of the ICJ *LaGrande* opinion and a potentially equally overreaching *Avena* opinion and the decisions of the federal appeals courts and its own *Breard* decision?

Two considerations are likely to influence the court. First, the Court may invoke the *Charming Betsy* canon, although it is not exactly apposite. The canon states that U.S. statutes should be interpreted so as not to conflict with international law,¹⁹⁵ and generally courts use the canon to find plausible interpretations of U.S. statutes under the presumption that Congress did not intend to violate international law, thought its applicability both in logic and in law has come under attack in recent years.¹⁹⁶ In the Vienna Convention cases, the direct question is the meaning of

¹⁹² See, Petition for Writ of Certiorari to the Texas Court of Criminal Appeals, *Javier Suarez Medina v. the State of Texas*, in the Supreme Court of the United States (Linda M. Valenti Brandt, counsel of record) (Aug. 2002), available at <http://www.internationaljusticeproject.org/briefs.cfm#briefs>. Suarez was executed on August 14, 2002. Mexican President Vicente Fox cancelled a trip to visit President Bush in protest. Mexico had filed an amicus brief asking the court to review the case as well, which was signed by 13 other countries (Argentina, Brazil, Chile, Colombia, El Salvador, Guatemala, Honduras, Panama, Paraguay, Poland, Spain, Uruguay, and Venezuela). Mary Robinson, then-UN Commissioner for Human Rights, called for commutation of the sentence, as did the UN Sub-Commission on the Promotion and Protection of Human Rights. Interestingly, the Sub-Commission asked for mercy partly because Suarez was “only 19” at the time of his crime. This shows the intellectual dishonesty of the anti-death penalty activists, since the “abolitionist” movement argues so strongly for a ban on execution of juveniles—i.e., those under 18 years of age. Here, however, they argue that he was “only” 19, trying to blur the very bright line that in other contexts they insist on so strongly. A similar argument can be expected in cases involving allegedly mentally retarded defendants in the aftermath of *Atkins*. No doubt, defense attorneys will soon begin to claim that their clients are “borderline” retarded and should not be executed.

¹⁹³ *Osbaldo Torres v. Mike Mullin*, 540 U.S. ___ (2003) (Stevens, J., dissent from denial of cert.).

¹⁹⁴ *Id.* (Breyer, J., dissent from denial of cert.)

¹⁹⁵ *Murray v. Charming Betsy*, 6 US (2 Cranch) 64, 118 (1804) (stating that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”)

¹⁹⁶ See, Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L. J. 479 (arguing that the canon's justifications are outdated as policy and irrelevant as law after *Erie*); See also, Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is Charming Betsy Sinking?*, 24 Fordham Int'l L.J. 1533, 1546 (2001) (“[G]iving overriding weight to [a] WTO decision, based upon the Charming Betsy doctrine, may be likened to the court operating under the pre-*Erie*, now rejected, notions of *Swift v. Tyson*.”)

the treaty itself, and there is ample evidence that the intent of the Executive Branch in signing the convention was that it did not provide for an individual right and judicial remedy. Nevertheless, the canon has become an article of faith for international law activists and monist scholars.¹⁹⁷ One contrarian scholar has therefore called the canon a “phantom” way of incorporating international law into U.S. domestic law.¹⁹⁸ At the least, the Court could refer to the canon as justifying a decision that the U.S. interpretation of its obligations under the convention should not contradict the ICJ’s.

Second, some justices are already open to the idea that foreign and international law should influence its decisions, as seen in the *Lawrence* and *Atkins* decisions, in Justice Breyer’s comments in *Breard*, and in Justice Breyer’s and Justice Stevens’ dissents from denial of certiorari in *Torres*. Even if the Court does not adopt Justice Stevens’s monist conception of the relationship between the Supreme Court and the ICJ, the idea of “judicial comity” could be an important factor in the Court’s approach to the subject.¹⁹⁹ The justices might choose to interpret the convention as a treaty of the United States under its Constitutional authority but refer to the ICJ (and the Inter-American Court) decisions as evidence of the meaning of the convention. The Court would thus preserve its nominal independence, but would in fact have foresaken its duty to the Constitution and the American public. Ironically, there may be some hope in that the ICJ’s *LaGrande* opinion is so weak, and an *Avena* opinion might be weaker, both as matters of treaty interpretation and international law, that the Court could not in good conscience rely on them.

Alternatively, the Court could find that although the convention does create an individual right, the appropriate remedy is for federal courts to allow for extraordinary hearings to consider habeas appeals based on that right. At those hearings, the courts could still apply the cause and prejudice standards to determine whether the failure to raise the Vienna Convention violation in a state court was excusable or could have had any prejudicial effect on the trial. Given Mexico’s extreme position regarding remedies in *Avena*, however, there could well be further litigation at the ICJ regarding the requirement to give “full effect” to the right to notify a consul. The opportunities for mischief—by turning routine determinations by U.S. courts into international cases—are endless.

¹⁹⁷ See, e.g., Jordan Paust, *Breard and Treaty-Based Rights under the Consular Convention*, *supra* note 106. Paust has also argued that the Violence Against Women Act and affirmative action should be upheld by the Supreme Court on the basis of international law and that CIL and human rights treaties apply directly in U.S. courts. See, Paust, *Human Rights Purposes of the Violence Against Women Act and International Law's Enhancement of Congressional Power*, 22 *Hous. J. Int'l L.* 209 (2000); Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 *Mich. J. Int'l L.* 301 (1999); Paust, *Race-Based Affirmative Action and International Law*, 18 *Mich. J. Int'l L.* 659 (1997). Professor Paust is also quite fond of citing his own articles as authority for sweeping propositions of law.

¹⁹⁸ Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, *supra* note 196 at 483.

¹⁹⁹ For a sympathetic description of how judges interact, see Anne-Marie Slaughter, *Judicial Globalization*, 40 *Va. J. Int'l L.* 1103, 1124 (Judicial globalization requires “recognition of participation in a common judicial enterprise, independent of the content and constraints of specific national and international legal systems. It requires that judges see one another not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders. This recognition is the core of judicial globalization, and judges, like the litigants and lawyers before them, are coming to understand that they inhabit a wider world.”)

V. Conclusion

Despite the arguments of anti-death penalty activists, the American public strongly supports capital punishment, with 74 percent of the public in favor, according to a recent Gallup Poll.²⁰⁰ Having lost the debate on the subject within the United States domestic democratic polity, activists now appeal to international law to claim that—despite the policy preferences of the American public—the United States is legally obligated to forgo the death penalty in the administration of its criminal justice system. To support this position, they cite international human rights instruments, customary international law, and the opinions of foreign tribunals.

As demonstrated in this paper, none of the arguments against the death penalty based on appeals to international law survives scrutiny. First, the instruments invoked by anti-death penalty activists are non-binding as matters of international law, do not apply internally as a matter of U.S. law, and/or do not say what the activists claim they say. Second, contrary to the claims of these activists, CIL does not contain a norm against the death penalty, nor would it be applicable directly in U.S. courts if it did. Furthermore, if such a norm did exist, the United States, as a persistent objector, would not be bound by it. Third, attempts to prevent the execution of foreign nationals in the United States based on the Vienna Convention on Consular Relations rely on a forced interpretation of the treaty and an unprecedented understanding of the appropriate remedies for violations of international law. In addition, by making such arguments, foreign governments and anti-death penalty activists seek to submit the operation of the U.S. criminal justice system—and the Supreme Court itself—to the dictates of foreign judges.

In asserting their claims, activists and allied international law academics selectively cite international law and state practice and fail to apply their reasoning on subjects in which their methodology would yield results contrary to their policy preferences. In many European countries, criminals are tried before judges or mixed judge-lay person juries, and there is no presumption of innocence. Similarly, in many civil law jurisdictions prosecutors can appeal acquittals and lenient sentences. Few countries around the world have protections equivalent to the exclusionary rule.²⁰¹ In Britain, the government recently allowed adverse inferences to be taken from a defendant's refusal to testify. In Germany, victims are permitted to join a criminal case as "co-plaintiffs" of the government, with rights to cross-examine witness and present their own evidence. In the United States, suspects may be held without charges for no more than 24 hours, while in France, they may be held for as long as four days. The protections of the U.S. criminal justice system are examples of American exceptionalism, based primarily on an ingrained suspicion of government power, with little or no analogue in foreign legal systems or political culture. Yet, human rights activists would never consent to the Supreme Court eliminating these protections because other countries do not practice them.

The death penalty thus provides an illuminating case study of the importance of maintaining American sovereignty in the face of organized campaigns by the human rights movement to

²⁰⁰ Gallup Organization, Poll Analysis: Support for the Death Penalty Remains High at 74% (May 19, 2003), available at http://www.gallup.com/subscription/?m=f&c_id=13474.

²⁰¹ Some countries do have a form of exclusionary rule, but it generally applies only where the manner of retrieving the evidence casts substantial doubt on its accuracy or inclusion of the evidence would result in a denial of justice, higher standards than those that apply to the U.S. exclusionary rule.

“impose foreign moods, fads, or fashions on Americans.”²⁰² If these campaigns are successful, other elements of American criminal law will also come under international scrutiny. Few countries around the world, for example, have life in prison without parole as a punishment, which would likely become the next target of human rights advocates. Mexico, for example, has recently begun refusing to extradite accused criminals to the United States if they may be subject to life without parole.²⁰³ The EU, in discussing alternatives for the death penalty as punishment, specifically disclaims life imprisonment without parole, stating that “the present criminal policy in the EU Member States...is moving towards keeping imprisonment to an absolute minimum.”²⁰⁴ In other words, EU and Mexican policy is that murderers should not be executed, nor should they be imprisoned for very long. Some countries and international human rights activists, one suspects, do not really believe in punishment at all.

Unfortunately, these campaigns to override U.S. law on the basis of foreign practices are gaining credibility among U.S. elites in politics and law and among the Supreme Court justices themselves. This trend must be vigorously resisted by all those concerned about preserving America’s unique values, as formed by our history, established in our traditions, and enshrined in our Constitution.

²⁰² *Lawrence v. Texas*, *supra* note 85, (Scalia, J, dissenting, quoting *Foster v. Florida*, [537 U. S. 990](#), n. (2002) (Thomas, J, concurring in denial of certiorari)).

²⁰³ Kathleen Flynn, “Feinstein Decries Mexico’s Extradition Policy,” Copley News Service, Dec. 8, 2003.

²⁰⁴ European Union, EU Memorandum on the Death Penalty, *available at* <http://www.eurunion.org/legislat/deathpenalty/eumemorandum.htm>