AMERICAN LEGAL INSTITUTIONS

HUMAN RIGHTS LITIGATION PROMOTING INTERNATIONAL LAW IN U.S. COURTS

YING-JEN LO

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List of Acronyms

ACLU	American Civil Liberties Union
AEDPA	Antiterrorism and Effective Death Penalty Act
AI	Amnesty International
APA	Administrative Procedure Act
ATCA	Alien Tort Claims Act
AU	African Union
CCR	Center for Constitutional Rights
CFR	Code of Federal Regulations
CIA	Central Intelligence Agency
DEA	Drug Enforcement Administration
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
EU	European Union
FBI	Federal Bureau of Investigation
FSIA	Foreign Sovereign Immunities Act

HRC	Haitian Refugee Center
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International War Crimes Tribunal for Rwanda
ICTY	International War Crimes Tribunal for the Former Yugoslavia
IGO	Intergovernmental Organization
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996
IMMACT	Immigration Act of 1990
INA	Immigration and Naturalization Act of 1952
INS	Immigration and Naturalization Service
MNC	Multinational Corporation
NAACP	National Association for the Advancement of Colored People
NGO	Non-governmental Organization
OAS	Organization of American States
OAU	Organization of African Unity
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organization
POW	Prisoner of War
RC	Rules of Civil Procedure (Ohio law)
ROC	Republic of China
RUDs	Reservations, Understandings, and Declarations
TVPA	Torture Victim Protection Act
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UNHCR	Office of the United Nations High Commissioner for Refugees
US	United States
USA	United States of America
USCIS	Bureau of U.S. Citizenship and Immigration Services
USC	United States Code
USSR	Union of Soviet Socialist Republics
ZANU-PF	Zimbabwe African National Union-Patriotic Front

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Foreword by Howard B. Tolley, Jr.

Justice is the ligament which holds civilized beings and civilized nations together.

Daniel Webster

In this important study, Ying-Jen Lo demonstrates how United States judges have failed to honor rule of law principles in their reluctance to accept international human rights standards. She documents the vigorous human rights advocacy by non-governmental activists that has only begun to influence America's nationalist judicial culture. Readers will find *Human Rights Litigation Promoting International Law in U.S. Courts* a well-reasoned critique of U.S. jurisprudence based on an exhaustive review of relevant case law by an international admirer.

Efforts to win the hearts and minds of U.S. judges are part of a culture war over domestic and foreign policy responses to a changing world. The 1950s civil rights movement invoked emerging international law norms, but U.S. courts relied exclusively on domestic constitutional provisions to promote justice. When the Supreme Court elevated an international treaty over states' rights in *Missouri v Holland*, Congress came close to approving a Constitutional amendment proposed by Senator Bricker who sought to reaffirm the supremacy of national law.

This work clearly reveals that a few judges, including several Supreme Court Justices, have shown a growing willingness to inform their judgments with favorable references to international law and practice. In 2003 and 2004 a Supreme Court majority looked beyond the U.S. Constitution in overruling prior decisions involving execution of the mentally retarded and the criminalization of sodomy. Now members of Congress have responded with draft legislation that would preclude federal judges from reaching decisions based on international practice.

In 2004, the Bush administration's brief and argument in *Sosa v Alvarez-Machain* urged the justices to defer to the executive in the creation of customary international law. In a characteristically vigorous dissenting opinion, Justice Scalia insisted that court judgments contributing to the formulation of binding international legal norms would violate democratic procedures. In accord with the conclusion of

this work, the court majority reasoned that justice would be served by judicial enforcement of the most fundamental international standards. In recent presentations at annual meetings of the American Society of International Law, Supreme Court Justices Breyer and O'Connor have acknowledged the growing importance of international law for U.S. judges.

As this foreword is being written in winter 2005, the Supreme Court is preparing to decide cases on juvenile executions and consular notice for Mexican nationals on death row. The international law arguments examined in this study will be considered in those cases and others to follow. This scholarship on fundamental issues confronting the court obviously cannot examine the most recent developments, but it should provide an essential foundation for understanding the effort to enlist American judges in the quest for universal human rights. The focus on death penalty and refugee cases in this project should also assist scholars, practicing attorneys, and other readers concerned about the related issues posed by litigation on behalf of U.S. detainees in the war on terrorism.

Americans owe a debt to international observers who after learning our language urge us to honor our highest ideals. It has been my great good fortune to serve as an adviser to Ying-Jen Lo during her extraordinary labor in translating the fruits of prodigious research into a work that should be a definitive reference on human rights issues in U.S. death penalty and refugee litigation. Her disappointment at U.S. judges' minimal support for global justice is matched by an appreciation of the U.S. system's history of reform and unrealized promise.

Howard Tolley, Jr.
Professor of Political Science
University of Cincinnati
February 2005

Foreword by Mark Warren

More than a decade ago, a small team of lawyers, human rights activists and consular officials joined forces to work on the case of Stanley Faulder, a Canadian citizen facing execution in Texas. The catalyst for this unlikely coalition was the violation of an international treaty that safeguards the human and legal rights of all detained foreign nationals. Despite knowing of his nationality from the time of his arrest and for the next 15 years of his death row incarceration, Texas authorities had never informed Mr. Faulder of his right to consular notification and access. One of several interwoven themes in this book is the story of how a global campaign grew out of our efforts to litigate a consular rights violation in a single death penalty case.

Like the author's parallel topics of refugee rights and juvenile death sentencing, non-compliance with international consular norms in capital cases has profound human rights implications. Access to timely consular support can remedy the vulnerability of detained foreigners in a multitude of ways. Consular representatives explain unfamiliar local laws and judicial procedures to jailed foreign nationals, facilitate their effective legal representation and ensure that they receive fair and humane treatment. For many foreign detainees, a prompt consular visit simply offers reassurance at a time of great confusion and distress; for others, however, the influence of the consulate is all that stands between them and arbitrary imprisonment, torture, or even death in custody. Never is that help more essential than when the life of the detainee is at jeopardy under the laws of the arresting State.

Of course, none of these indispensable services can be provided if the local authorities do not comply with their consular treaty obligations. The plight of foreign nationals facing the death penalty in the United States has become the defining illustration of this dilemma. More than one hundred foreign citizens are under sentence of death nationwide; in virtually every case, U.S. authorities violated treaty law by never informing the arrested person of the right to seek consular assistance. In consequence, most consulates did not learn of the fatal predicament facing their citizen until months or even years after a death sentence was imposed. There is compelling evidence in many of these cases that timely consular involvement would have rebalanced the judicial scales

from death to life, and sometimes even from conviction to acquittal. Confronted with these troubling facts, domestic courts have relied instead on arcane procedural barriers to deny any chance of redress. For those organizations and nations that already look on the death penalty with abhorrence, the prospect of foreign citizens undergoing execution in these circumstances is an injustice that must be remedied.

As Ying-Jen Lo notes in the conclusion to her insightful book, "The landscape of judicial dualism in the U.S. nonetheless is not necessarily enduring and unalterable." The worldwide campaign to vindicate consular rights provides solid support for that assertive statement. Rebuffed at every turn by U.S. judges, our litigation efforts eventually led us to the International Court of Justice, which recently ordered the United States to afford meaningful judicial remedies for its violations of the Vienna Convention on Consular Relations in death penalty cases. With the support of some sixty national governments and a broad array of concerned organizations and individuals, we returned to seek enforcement of that judgment in the domestic courts. Now, thirteen years after this legal odyssey began, the United States Supreme Court has agreed to address the burning question that illuminated our efforts from the outset: what is the remedy when foreigners are deprived of their consular treaty rights in the United States and are then sentenced to death? The Court's acceptance of that question for review is tacit recognition that the domestic practices of even the world's mightiest nation must ultimately be weighed against binding international obligations.

In a larger sense, the innovative human rights litigation discussed in the pages that follow exemplifies a truly revolutionary development in world affairs. Formerly the exclusive domain of statesmen and diplomats, the course of international law is now increasingly shaped by innovative alliances arising within civil society. From the establishment of the International Criminal Court to the incorporation of treaty standards in domestic jurisprudence, activist coalitions are invariably in the vanguard of transnational legal progress. At a time when the international community faces so many seemingly insurmountable problems, we should never lose sight of this emerging global populism as a force for positive change. So long as the ordinary citizens of the world are prepared to join in common cause for justice and human dignity, our collective future is not yet beyond redemption.

Mark Warren
Human Rights Research
Ottawa, Canada
December 10, 2004

Introduction

With the coming into being of the International Criminal Court (ICC), promoting globalization in the sphere of human rights has taken a significant step toward obtaining worldwide recognition as one indispensable way to foster international peace and security. In addition to effectuating a rule of universal jurisdiction, the effective enforcement of universally defined human rights standards in domestic domains is another central task facing human rights globalization. In today's nation-state system, sovereign authority remains a governing norm in world politics. It is natural that international tribunals would be limited to functioning as an auxiliary to national justice systems, as evidenced by the principle of complementarity codified in the recent Rome Statute.[1] In this context of sovereign supremacy, the role of domestic courts appears all the more crucial in advancing and materializing individual rights safeguards around the world.

The process of monism and supranationalism is already vigorously underway on the European continent, with national judges constantly prioritizing the application of regional treaties and court decisions in their adjudication of domestic rights issues.[2] In a series of recent developments, individual countries have unceasingly sought international justice against human rights abusers under the doctrine of universal jurisdiction.[3] Austrian and German authorities, for instance, instituted criminal proceedings to bring several Serbians to trial for their alleged commission of genocidal crimes in Bosnia. As a result of a Belgian statute based on the principle of universal jurisdiction, two Rwandan nuns were convicted and sentenced to prison terms in June 2001 for complicity in the mass killings of ethnic Tutsis. Pursuant to the 1988 Implementation Act to the U.N. Convention against Torture,[4] the conviction of a former Congolese military officer of human rights offenses also took place in the Netherlands.

Additionally, Spanish Judge Baltasar Garzon insisted on investigating the nefarious atrocities committed in Argentina and Chile during the 1970s and 1980s.[5] In those two countries, the military juntas then in power brutally undertook acts of mass murder, terrorism, and torture to suppress thousands of domestic left-leaning dissidents,

including some suspected Spaniards, in order to entrench their authoritarian control. Irrespective of amnesty privileges later granted separately by the governments of Argentina[6] and Chile to those military perpetrators, over a hundred Argentine army officers allegedly implicated in that notorious "dirty war" were formally indicted in Spain. Additionally, Judge Garzon asked Britain to surrender for trial former Chilean dictator Augusto Pinochet, who was then visiting London for medical treatment. Similar actions aimed at holding Pinochet criminally accountable were concurrently launched in Switzerland, France, and Belgium.

As will be presented in Chapter 2, shortly after World War II, human rights advocates litigated numerous civil rights cases in the United States premised on the U.N. Charter[7] as well as the Universal Declaration of Human Rights (UDHR).[8] These initiatives for the enforcement of international law in U.S. courts, however, soon suffered a major setback in *Sei Fujii v. State*[9] (1952), in which the California Supreme Court dismissed the concept that international human rights norms afforded a private right of action in U.S. courts. During the 1960s and 1970s, human rights defenders again mounted a series of international legal challenges against U.S. business dealings with racist Southern Rhodesia and South Africa and, at the same time, against U.S. military recruitment and intervention in Vietnam.[10] Invariably, judges reviewing those cases rejected invalidating the government policies at bar. In some instances involving overseas abduction, the death penalty, and Haitian refugees, human rights activists nonetheless successfully convinced adjudicators of the utility of universal legal standards in municipal law analysis. On the subject of prison conditions, several sitting judges, even on their own accord, invoked the 1955 U.N. Standard Minimum Rules for the Treatment of Prisoners (the U.N. Standard Minimum Rules)[11] as a tool to enrich constitutional interpretation. As *Filartiga v. Pena-Irala*[12] (1980), *Rodriguez-Fernandez v. Wilkinson*[13] (1981), *INS v. Cardoza-Fonseca*[14] (1987), and *Thompson v. Oklahoma*[15] (1988) proclaimed victories in U.S. courts, the number of international human rights actions from the 1980s to 2004 rose dramatically in response. Yet, human rights activists' litigation performance during this period turned out to be far less than positive.

Courts in the United States have a long history of proclaiming jurisdiction over misconduct carried out outside of U.S. territory. One example is the exercise of extraterritorial commercial jurisdiction by U.S. courts, which can be traced back to the mid-twentieth century. Cases falling into this category often addressed overseas rifts over property expropriations by foreign governments, alongside anticompetitive conduct engaged in by foreign or American companies to the general detriment of U.S. commercial interests.[16] In 1976, the Foreign Sovereign Immunities Act (FSIA)[17] divested foreign governments and their

agencies of the prerogative not to be sued in cases linked to their trade activities operating within or having a nexus with the United States. Moreover, U.S. judges have sometimes invoked international or statutory mandates pursuant to the concept of universal jurisdiction to criminally punish foreign offenders charged with piracy,[18] Nazi war crimes,[19] or terrorism.[20] As Chapter 2 shows, since the *Filartiga* case, a body of case law has similarly emerged in asserting universal civil jurisdiction over foreign violators of human rights.

Several events, however, have signaled the inclination of the U.S. government to unilaterally opt out of the global justice system whenever its sovereign concerns are at stake. On 6 May 2002, the George W. Bush Administration reversed President Bill Clinton's signing of the Rome Statute and declared the resolve of the United States to withdraw from the ICC. Two key considerations fully account for why the ICC has been so adamantly boycotted by the United States. One is that the power of the Court over war crimes, crimes against humanity, and, if elaborated later by an amendment process, crimes against aggression[21] may one day provide an outlet for rogue countries to launch politically motivated charges against U.S. military operations abroad. The other stimulus for intense objections from U.S. political leaders is the perceived requirement of a partial waiver of sovereign authority to the ICC even on the part of a non-signatory party like the USA. Two preconditions are required to fit this scenario. The wrongdoings allegedly committed by American nationals must take place in the territory of parties to the Rome Statute or in those countries later recognizing the competence of the Court on an ad hoc basis.[22] In addition, neither the USA nor any other State with potential jurisdiction subsequently undertakes to hold the suspects criminally liable.[23] Only under these circumstances could the ICC then exercise its jurisdiction over Americans despite the fact that the United States has nullified its signature to the Rome Statute.

To shield U.S. soldiers from such multilateral criminal oversight without advance approval from the United States or the U.N. Security Council, the political branches have waged some preventive measures explicitly undercutting the spirit and letter of Article 98(2) in the Rome Statute. On the understanding of many proponents of the ICC, the provision of Article 98(2) purports to cope with the existing, rather than prospective, Status of Forces Agreements that might give rise to jurisdictional conflict with the newly established Court, by requiring the original sending State's consent to a request for its national's surrender to the ICC.[24] Yet, from the outset, U.S. authorities have deliberately read that statutory mechanism in their own preferential terms.

More specifically, the executive department framed Procedural Rule 195(2) to Article 98(2) during the fifth meeting of the ICC Preparatory Commission. Its purpose was to enlarge the meaning of "international agreements" for conveniently licensing any special exemptions later

negotiated between the United States and its military partners. Domestically, members of Congress endorsed the American Service-members' Protection Act of 2 August 2002 (ASPA)[25] as a counter-measure to stunt the jurisdictional power administered by the ICC. The Act serves to pave the way for, among other things, coercing member parties to the Rome Statute into signing bilateral agreements with the United States that would forsake placing future American criminal offenders under the ICC's scrutiny. By threatening to cancel military assistance for U.S. allies based on the ASPA, Bush Administration officials have thus far satisfactorily pressed 90 countries to enter into separate impunity accords with the USA in conspicuous defiance of Article 98(2).[26] Moreover, this 2002 law does not preclude the future likelihood of applying military action against the ICC should U.S. citizens be taken into custody for trial in The Hague.[27]

Along with vehement demurs to the ICC's expansive competence as illustrated above, other U.S. deviations from international law are closely associated with the terrorist attacks of 11 September 2001. In the aftermath of the horrendous terror raids on the United States, several hundreds of unidentified non-U.S. citizens were arbitrarily swept into prison on the suspicion of linkage with al-Qaeda operatives. U.S. authorities denied them access to legal representation and other due process protections in spite of human rights activists' fierce efforts to fight for their legal rights through various grass-roots campaigns and litigation.

On top of allowing FBI agents to intrude upon Americans' privacy without a warrant or probable cause, the USA PATRIOT Act of 2001[28] empowers the Attorney General with yet another weapon for potential mistreatment of foreign nationals in the United States. Under that counter-terror statute, the Attorney General has a wide range of discretion to imprison any suspicious aliens without U.S. court certification. On the basis of security concerns, this incarceration may be extended indefinitely if U.S. law enforcement officers encounter practical difficulties in deporting detainees back to their home countries after the investigation is completed. On 13 November 2001, the Bush Administration further promulgated an executive order according to which suspected non-citizen al-Qaeda elements and other international terrorists (as well as those who knowingly shelter them) would face the fate of trial before specially-created military tribunals.

For nearly three years since the war against al-Qaeda and their fellow Taliban conspirators in Afghanistan, over 600 nationals from 42 countries seized by U.S. armed forces have been held incommunicado at Guantanamo Bay, Cuba. As of 28 January 2005, except for 208 men released to their homelands, most of the remainder at Guantanamo remained neither charged nor accorded counsel to defend their international legal rights. The outburst of a prisoner abuses scandal at

Iraq's Abu Ghraib Prison further drew serious international concern over the unlawful techniques resorted to by U.S. agencies for extracting intelligence from those internees consigned to U.S. custody following the 9/11 attacks.

Overall, the drastic methods espoused by executive officials to domestically neutralize terrorism activity have profoundly eroded the very field of individual liberties that Americans as a whole conventionally treasure and take pride in. Beyond paying that heavy cost, the U.S. government has substantially tarnished its long-earned image as a democratic vanguard of the liberal world in the course of combating violent terror machinations plotted by a small number of miscreant Islamic extremists. As a matter of international law, U.S. maltreatment of captured terrorism suspects has plainly breached its treaty obligations to prohibit torture and other cruel behavior, as well as due process prescriptions.[29] In view of its robust security capabilities, the circumstances of the United States subsequent to the terror attacks can hardly be said to satisfy the extraordinarily emergent national conditions that would permit derogation from treaty-based due process standards.[30] Further, the Bush Administration has openly spurned the laws of war[31] by withholding prisoner of war status determinations from Guantanamo detainees and by using coercive interrogation measures on captives housed in Afghanistan, Iraq, Cuba, and other undisclosed locations. Neither did U.S. authorities faithfully abide by or give due respect to the provisional decision delivered by the Inter-American Commission on Human Rights (IACHR), which called for the United States to assess the status of the Guantanamo inmates through appropriate judicial proceedings.[32]

As the sole superpower in the post-Cold War international system, it is essential for the United States to take an active part in moving the world toward a universal legal order. The absence of U.S. membership in the League of Nations chronically plagued the League's functions and ultimately led to its devastating breakdown, all of which were indeed responsible for the recurrence in human history of the ravages of world war.[33] Even today, the perceived ineffectiveness of the Inter-American Court of Human Rights may be partially attributable to a decades-long U.S. refusal to ratify the hemispheric human rights treaty and accept the competence of the Court.[34] How to successfully enlist the USA into the bourgeoning regime of universal justice therefore becomes an overriding task for human rights defenders to contemplate and pursue.

Recently, a Coalition for the International Criminal Court composed of over 2,000 transnational non-governmental organizations (NGOs) keenly embarked on a global ratification campaign to urge countries worldwide, including the United States, to join the permanent ICC.[35] With the support of thirty activist scholars and jurists, Princeton University also produced a body of standard principles designed to guide

national courts in practicing international criminal justice in their domestic jurisdictions.[36] Meanwhile, human rights crusaders have persistently lodged litigation in U.S. courts in hopes of raising judges' awareness of the growing global advocacy for international law application.

This transnational drive aimed at socializing the U.S. judiciary is founded on a number of rationales. The first incentive is that some international human rights precepts have protective ambits far broader than the corresponding provisions of U.S. law. Through strenuous litigation, U.S. domestic human rights practices may hopefully be driven into conformity with international standards. In addition, as a principal legal umpire, converting the U.S. bench would enable global human rights jurisprudence to be swiftly executed on U.S. soil. In particular, the enactment of the Alien Tort Claims Act (ATCA) and the Torture Victim Protection Act (TVPA) has transformed the U.S. judiciary into a transnational venue for U.S. citizens and foreign nationals alike to raise their overseas grievances based on internationally designated yardsticks. More importantly, in light of its long-standing role in leading the free democratic world, the United States' amenability to international legal governance is a necessity to generate an affirmative example for countries elsewhere to follow. To be sure, the effect would be a considerable acceleration in the pace of globalization in the protection of individual human rights and freedoms.

KEYNOTE OF THE RESEARCH SURVEY

As just delineated, in today's world, taking international law claims to U.S. courts comprises one of the dominant agendas for human rights activists to facilitate the crystallization of juridical globalization. It is precisely this phenomenon that accounts for why an anatomy of the factors affecting litigation results in U.S. courts is a matter of essentiality. The research in this book purports to enhance the understanding of judicial behavior by employing a legal model to ascertain whether neutral legal rules have any significant correlation with U.S. judges' voting choices in death penalty and refugee cases.

The legal model posits that judges on the U.S. bench adjudicate cases solely on the basis of objective legal criteria without involving political considerations or judges' own personal attitudes. The elements of objective legal criteria consist of: any language spelled out by the provisions of municipal and international laws; judicially erected principles; the original intent of legislative drafters; past precedents; and a balancing process exercised by judges to decide the comparative strength of rival legal arguments presented by individual and government

litigants.[37] These defining factors made the legal model markedly distinguishable from the political and attitudinal models that consider political forces (executive and legislative pressures and the activities of interest groups) and judges' attitudes (ideology and value preferences) to be the determinants of case outcomes in U.S. courts.[38] In general, academics employ the legal-centered paradigm to investigate the voting patterns in cases decided by justices from the U.S. Supreme Court.[39] Since judges' opinions are inextricably and extensively affiliated with the elements of the legal model, this book elects to use this model to explore how significantly domestic and international laws per se have affected judges' decision making in capital punishment and refugee cases.

Revolving around this subject matter are a number of core questions to be carefully examined in the chapters that follow. If a treaty ratified by the United States is clearly self-executing (and thus may provide grounds for a private cause of action), are courts more likely to follow the norms in that treaty than those in a non-self-executing treaty? Provided Congress has endorsed legislation to implement a treaty rule or incorporate a customary international principle, does that situation categorically guarantee that U.S. courts will unanimously hand down a decision in accordance with international law? Does a Senate reservation routinely act as a rule of law to bind the decision making of U.S. judges? Further, how smoothly do human rights activists invoke customary and peremptory norms in U.S. courts?

Another crucial theme in this book is the campaign strategies employed by human rights activists to counterbalance the United States' flouting of international law in the domains of capital punishment and refugees. In essence, the survey of these strategic approaches is intended to disclose their strengths and weaknesses. From that knowledge, human rights advocates may redesign their formulations for the next round of legal challenges mounted in the United States or elsewhere. Again, two questions form the core of this mode of investigation. By filing a series of complaints on domestic and international fronts to publicize U.S. wrongs in capital and refugee cases, will human rights defenders in the long run achieve the campaign goal of mobilizing U.S. judges in order to push the executive branch and Congress in support of a globalizing legal system? Are there any other factors intervening in the entire legal integration process advanced by human rights activists on behalf of death row inmates and refugees in flight from persecution?

This study incorporates for inquiry four categories of court cases brought between the 1980s and the 2000s against the U.S. government, individual states, or both: the juvenile death penalty, the execution of foreign nationals without consular notification, and acts of arbitrary and protracted internment and refoulement imposed on asylum migrants from Haiti and Cuba. Within these categories, a strong transnational civic

movement prominently figured in consular cases. It was characteristically transnational in that the germination of the human rights NGOs in consular cases was not confined to a single local geography. Rather, consular cases involved NGO campaigners from a diversity of countries. To effectively heighten and aggregate their campaign pressure on the U.S. government, these human rights groups made cross-border alliances with one another and fought for international justice for a group of foreign nationals sentenced to death under flawed U.S. court proceedings.

This book embraces Gabriel A. Almond's functional theory[40] as a research framework, although with some alterations, for methodically analyzing all pertinent efforts made by NGOs in the above four classes of litigated cases as well as their long-term impact in the U.S. domain. The use of functionalism is warranted because Almond's scheme in the form of system and process functions permits us to look into functional facets of the interactions between NGOs and other requisite protagonists on legal, political, and social levels. System functions refer to three operational procedures of socialization, recruitment, and communication. Process functions represent two revamped stages of interactive behavior: interest articulation/aggregation and policy making/implementation/ adjudication. As a rule, they arise between human rights activists and legal and political players serving in the capacity of government elites or individual experts at municipal and international apparatuses.

Specifically, the activity of socialization comes about as human rights NGOs make use of discrete educational tools to aggrandize the base of their movement supporters for the enforcement of international law in the United States. The modern communicative instruments utilized for campaign purposes may include, for instance, websites, the mass media, regular symposiums, publications, law school clinics, and legal actions. Turning to the phase of recruitment, what initially were passive receivers of human rights information may by degrees switch into becoming outspoken defenders ardently standing up for the position of condemned inmates and persecuted asylees.

The process of communication bridges diversified activities from one level to another throughout the entire functional system. Besides that, it distinctly denotes another mode of discourse routinely transpiring between representing attorneys and their clients as well as between concerned activists themselves. The objective of such iterative interactions is to trade and reciprocate one another's campaign messages and court experiences. In this way, communication is expected to reinforce the prospect of having U.S. capital and refugee policies rectified in concert with international law.

Amid system functions already underway, interest articulation/ aggregation by human rights upholders may be simultaneously unfolded through events such as lobbying, the entry of legal actions, amicus

submissions, and court argument. Shortly after articulation/aggregation, the functional system converts into the final level of policy making/implementation/adjudication. At this point, policy makers sitting on national and international mechanisms would begin their deliberations on a series of cases petitioned by human rights advocates for the benefit of death row inmates and asylum seekers. Take the example of litigation in U.S. courts. The resulting attitude of judges toward the domestic force of international law may literally mirror a continuum of monism, dualism, or somewhere in between. Monism means applying international law as a rule of decision on which to review the legality of claims put forth by litigating parties. Unlike the monist concept, positivist dualism rejects the relevance of international law standards during the course of case disposition. Another type of position stands between monism and dualism by reflecting judicial willingness to invoke international norms as an aid to inform domestic law construction. Judges grouped into this category are dubbed reconciling dualist judges, for at least moving toward a monist direction. Notably, it is at the stage of policy making/implementation/adjudication that the legalistic paradigm is additionally employed to calibrate the association of objective legal rules with judges' decisional votes in U.S. courts. Then, in a circular fashion, a dualist decision-making outcome repugnant to international law can possibly ignite a renewed succession of challenges by NGOs against U.S. mistreatment of capital offenders and Haitian and Cuban refugees. The repetition of this chain reaction would carry on until U.S. reform of the misdeeds under accusation is contentedly attained or until U.S. courts disclaim to accept further litigation of the claims.

Overall, this book is divided into six chapters along with an introduction and conclusion. Chapter 1 considers the theories of natural law monism and positivist dualism, with the relationship between international human rights law and municipal law in U.S. jurisdiction constituting another focal point. Chapter 2 furnishes a historical overview of international human rights litigation in U.S. courts. Chapters 3 and 5 describe the applicability of treaty and customary norms as well as international and regional mechanisms in remedying U.S. defaults in the matter of the death penalty and refugees. Relevant statutory provisions and treaty constraints set up by the U.S. government to obstruct treaty power come under review as well.

In Chapters 4 and 6, two sets of assumptions are crafted and subsequently tested by means of qualitative and quantitative techniques. One addresses legalistic postulates surrounding decisional determinants in U.S. courts. The other is predicated on a multitude of functional activities conducted by NGOs in the quest for capital and refugee justice. In addition, both chapters include a critique from an international law perspective of adverse court opinions rendered in capital punishment and refugee cases. The final chapter summarizes the research outcomes and

their accompanying ramifications that may facilitate our appreciation of the voting behavior of U.S. judges and contribute to the framing of human rights activists' litigation strategies in the future.

CHAPTER 1:

Monism, Dualism, and the Human Rights System

Regime theorists envisage an emerging human rights regime that redefines the interests of sovereign states in international politics.[1] Almond's theoretical paradigm explores much the same subject matter from a distinct angle by stressing the functional activities undertaken by a diverse range of legal/political/social actors in propelling such regime formation. Since World War II, the international community has translated the lesson of the Holocaust and pressure from transnational non-governmental organizations (NGOs) into a series of human rights instruments and monitoring institutions at both U.N. and regional levels. In the system of policy making/implementation/adjudication, sovereign members introduced the concept of individual human rights protection into the following areas:

- the U.N. Charter;
- the four Geneva Conventions[2] and two additional protocols;[3]
- the International Bill of Rights—i.e., the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and its two optional protocols,[4] and the International Covenant on Economic, Social and Cultural Rights;[5]
- U.N. conventions on genocide,[6] refugees,[7] consular relations,[8] race,[9] apartheid,[10] women,[11] torture,[12] and children;[13] and other regional human rights treaties.[14]

To bring the above normative rules into effective force, the international community further established deliberative or adjudicative bodies in the U.N. and regional systems such as:

- the U.N. Commission on Human Rights;
- the commissions and courts of human rights in the European/American/African regions;
- the International War Crimes Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR); and
- the permanent International Criminal Court (ICC).

Moreover, municipal courts, in reference to the ICC Statute and the Princeton Principles on Universal Jurisdiction, become one of the potential prime movers equipped with authoritative power to administer international norms against egregious human rights abusers anywhere. Their functional significance is increasingly on the rise in today's global movement toward the realization of international justice. This chapter focuses on the two major international legal theories of monism and dualism. The theories roughly convey the comparative depth to which national courts on the European continent and in the United States can and will integrate themselves into bolstering the growth of the human rights regime/system.

NATURAL LAW MONISM

Two theories—monism and dualism—dispute the relationship between international law and municipal law and offer squarely dichotomous answers to the outcome of global human rights governance. The monist camp visualizes one integrated legal order in the world system under which international law always assumes ascendancy over municipal law in the event of friction arising between them.[15] Within such a hierarchical structure, the most basic norm of international law constitutes the source and foundation of all international and municipal legal orders and jointly decides their validity and contents.[16] The supremacy of international law over municipal law was patently stated by the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ).

In the *Greco-Bulgarian Communities* case, the PCIJ rendered its advisory opinion on the controversy over the interpretation of some provisions of the Greco-Bulgarian Convention respecting Reciprocal Emigration by holding:

> If the proper application of the Convention should be in conflict with some local law, the latter would not prevail as against the Convention. The generally accepted principle of international law, according to which, in the relations between the Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty, would prevent adoption of any other view.[17]

Analogously, the ICJ upheld the primacy of international law in a dispute between the United States and the United Nations that centered on the closure of the observer mission of the Palestine Liberation Organization (PLO) at the U.N. The legal basis for the U.S. action was the Anti-Terrorism Act passed by the U.S. Congress in 1987 with the intent of shutting down all PLO offices across the USA, including this observer mission. Promulgating an advisory opinion bolstering the monist stance, however, the World Court advised that the United States was under an obligation to submit the difference to international

arbitration pursuant to its 1947 Headquarters Agreement with the United Nations.[18]

The monist supposition of international law as a superior legal order materially explains some of the fundamental concepts in international law. For example, a nation is permitted to:

- claim jurisdictional exercise within its territorial bounds;
- transfer a sovereign legal identity to a new regime after a revolution or a coup d'etat; and
- enjoy privileges of sovereign equality and independence.

Beyond nations, individuals are similarly the subject of international law in the monist legal arrangement. There are ample examples demonstrating the monist vindication of individual human rights protection in post-World War II international society, including (1) the trial of war criminals at the Nuremberg and Tokyo Military Tribunals; (2) the management and safeguard of individuals in times of war under the 1949 Geneva Conventions and its protocols; (3) the prosecution and punishment of terrorists and the guarding of diplomatic agents and international persons under several crucial conventions dealing with the taking of hostages, the hijacking of aircraft, and diplomatic relations;[19] (4) the provision of individual liability to criminal penalties under the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), the International Convention on the Suppression and Punishment of the Crime of Apartheid (the Apartheid Convention), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention) ; (5) the granting of petitioning status to human rights victims before the U.N. and regional mechanisms; (6) the creation of ad hoc tribunals to hold accountable perpetrators of war crimes in the brutal Yugoslav and Rwandan civil wars; (7) the decision of the 1998 Rome Conference to establish the permanent ICC to prosecute persons committing crimes against humanity, genocidal acts, war crimes, and the crime of aggression; (8) the passage of a line of U.N. and regional human rights treaties and resolutions aimed at securing refugees, death row inmates, prisoners, minorities, women, and children from undue treatment by national authorities; and (9) the recognition of universal criminal jurisdiction by municipal courts worldwide.

Finally, the school of monism contends that international treaty and customary rules directly enter into force and administer each nation's domestic affairs, without the need of internal legislative or incorporative proceedings. In the eyes of monists, the directly binding thesis uniformly explains the domestic power of judgments of international and regional organs such as the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights, the ICJ, and the ICC.[20] Based on this monist paradigm, it is therefore not

uncommon to see municipal courts regularly adjudge individual grievances in accordance with international jurisprudence.

The countries moving with the tide of monist implementation include Austria, Luxembourg, the Netherlands, Belgium, Switzerland, Spain, and France.[21] Furthermore, the supranational relationship between the ECJ/ECHR and their member States properly accounts for the manner in which international holdings extend their legal effect to domestic jurisdictions within the monist legal framework.

POSITIVIST DUALISM

Conversely, positivist dualists such as H. Triepel and Dionisio Anzilotti champion dual legal structures by stating that municipal legal orders operate separate from and independent of the international legal system.[22] International law and municipal law are ascribed to two different legal domains and regulate different subject matters. So too do their origins flow from utterly heterogeneous bodies of law. International law arises from custom evolved over time by national conduct and treaties concluded by multiple nations, while municipal law is a result of custom circumscribed within the boundaries of each individual nation and statutes enacted by its lawmakers.[23]

In fact, dualists argue, international law is a masterpiece of collective sovereign decisions, and municipal law stems solely from the will of a nation.[24] International law grounded on general national consent dominates mutual relations among sovereigns with regard to a vast spectrum of rights and duties: the right of equality; the right of territorial integrity and political independence; the right of self-defense; the right to enjoy a certain degree of sovereign immunity; the duty to renounce the use of force against other territorial States; and the duty to faithfully comply with treaty obligations. From a dualist standpoint, sovereign nations, rather than private individuals, are the single exclusive target of international regulations.[25] On the other hand, municipal law delimited by each nation covers domestic jurisdictions alone and supervises the behavior of individuals as well as the relations between that nation and its nationals.

Since both international and municipal laws are entirely autonomous and disparate legal systems and bind discrete subject matters, it is unlikely for them to conflict with each other. Yet, in reality, a nation may impose some obstacles in municipal law to avoid honoring its treaty obligations, leaving at odds the legal edicts in these two spheres. Under this scenario, dualist endorsers advance that the nation concerned has nothing more than an international responsibility for such breaches by being potentially subject to blanket sanctions and negative publicity in the international community. However, the municipal law causing such a treaty default remains legally effective and domestic courts possess no

authority of their own to recant the fact of violation by virtue of delivering dispositions pursuant to that treaty.[26]

The dualist schema favoring municipal over international law is evidenced by the last-in-time rule applied in U.S. courts. In *Diggs v. Shultz*[27] (1972), the controversy between the litigating parties was over the lawfulness of the Byrd Amendment to the Strategic and Critical Materials Stock Piling Act. The Amendment was passed by Congress with a view to empowering the importation of chrome from Southern Rhodesia. Backing the legislative decision, the U.S. Court of Appeals for the District of Columbia Circuit indicated that the subsequent Byrd Amendment preempted U.S. international responsibilities arising from Article 25 of the U.N. Charter to observe a Security Council resolution purporting to levy trade sanctions against Southern Rhodesia.[28]

Another illustrative case is *Nicaragua v. Reagan*[29] (1988). In that class-action lawsuit, U.S. citizens and several organizations fervently denounced U.S. foreign policy toward Central America. They alleged to have suffered physical, economic, and other sorts of harms caused by Contra military actions in Nicaragua and sought to compel the U.S. government to act in accordance with the 1986 ICJ judgment.[30] That judgment at the World Court expressly pointed out that the U.S. support of Contra activities against Nicaragua's leftist Sandinista government was strictly contrary to customary law as well as a bilateral friendship treaty between the two countries. As a matter of law, the United States was obliged to immediately cease any ongoing flow of assistance to the Contra rebels in Nicaragua. In spite of the ICJ's disposition, the District of Columbia Circuit squarely rejected the international law claims made by the injured parties on the ground of the last-in-time rationale. By that principle, the new legislation appropriating funds for the Contras should on all accounts supersede both Article 94 of the U.N. Charter and the rule of customary international law that required disputing U.N. members to adhere to decisions entered by the ICJ.[31] The conclusion reached by the D.C. Circuit underscored that the U.S. disregard of international law incurred no domestic legal consequences at all and that the Court lacked any competence to redress the appellants' situation.

Along with the last-in-time postulate, dualist proponents reject treaty power on yet another basis: the non-self-executing doctrine. Under this doctrine, treaty provisions confer no private rights of action unless the treaty in question is deemed to be self-executing or has otherwise obtained full domestic force through implementing legislation. For dualists, international human rights law lacks legally binding force on the domestic plane and invests neither rights nor duties in private persons. Individuals are the actual candidates to be addressed by municipal law, and the treatment of their human rights roundly belongs to an act of national exclusiveness. Where human rights infringements occurred, the abused parties must originate their legal cause squarely from municipal

law, and municipal judges predicate their rulings only on municipal legal derivations. International human rights norms are viable in national courts inasmuch as national lawmakers incorporate or implement those norms in their municipal law.[32] In other words, each nation wields its own unchallengeable sovereign power to distinctly determine the applicability of international human rights law and its rank in relation to municipal law on the domestic level.

Again, the *Nicaragua* case offers a pertinent paradigm to understand the dualist vision of international law. The D.C. Circuit declared Article 94 of the U.N. Charter non-self-executing and overruled the effort of the individual and organizational appellants to pursue the implementation of the ICJ judgment in sync with that clause.[33] In addition, the British treaty practice perfectly fits the dualist description of the relationship of international law to municipal law. In British courts, litigants had long been unable to assert the rights and freedoms underwritten by the European Convention for the Protection of Human Rights and Fundamental Freedoms until after Parliament's determination in 1998 to adopt the Human Rights Act.[34] The same holds true in Germany, Italy, Finland, Denmark, Iceland, Norway, and Sweden. There, a piece of legislation executing or infusing the European Convention is categorically a sine qua non for the entry of Convention benefits into domestic effectiveness.[35] Finally, as the *Nicaragua* case[36] demonstrates, the dualist legal conformation dictates that decisions from international mechanisms such as the ICJ are reachable merely to the contentions between and among sovereign states. They exert little regulatory force on national court rulings. Neither do they endow individual claimants with any private rights of action maintainable in municipal courts to attack their governments' wrongdoing.

U.S. IMPLEMENTATION OF INTERNATIONAL LAW

Treaties

In the United States, the U.S. Constitution and court rulings are the primary authority for deciding the legal position of human rights treaties relative to U.S. municipal law. Moreover, treaty power in U.S. jurisdiction is profoundly affected by the conditions laid down by the Senate in its resolutions consenting to treaty ratification.

Article VI(2) of the U.S. Constitution is the fundamental legal clause in U.S. jurisprudence that stipulates the connection of human rights treaties to U.S. law. On that mandate, akin to the Constitution and federal statutes, all treaties to which the United States is a party are "the supreme Law of the Land," and state judges are legally bound by the force of those treaties despite any contrary provisions in state constitutions and laws. In effect, Article VI(2) sets forth two guiding principles about

treaty standing in U.S. jurisdiction: (1) the direct employment and enforcement of international treaties without demanding congressional incorporation or implementation; and (2) the superiority of treaties over state laws.[37]

Article VI(2), however, says nothing about the link between international treaties and the U.S. Constitution or to federal statutes.[38] Nor does it make mention of the echelon of customary international law vis-à-vis treaties, the U.S. Constitution, federal statutes, and state laws. Moreover, it is constitutionally vague about whether federal judges have jurisdiction over cases arising under customary international law. Notwithstanding the Supremacy Clause in Article VI(2) and its buttressing of some facets of monism,[39] in many practical cases, a dualist policy in the United States precludes the tenability of human rights treaties thoroughly. More often than not, judges invoke, among other barriers, non-self-executing and last-in-time canons to justify their line of thinking and discard treaty claims made by human rights activists. Further, the insertion of treaty limitations by the Senate into the instruments of ratification represents another form of negative force standing in the way of treaty performance in U.S. territory. Beyond hampering treaty power, positivist dualism conditions the views of most judges to rebuff the utility of customary law in human rights litigation.

In U.S. courts, the enforceability of human rights treaties mainly centers on the question of whether or not the treaty is self-executing. The guidelines for that inquiry were first articulated by the Supreme Court in *Foster v. Neilson*[40] (1829) involving a contention over the nature of the 1819 treaty that legalized the Spanish transfer to the USA of land in the state of Louisiana. The *Foster* Court pronounced that the Supremacy Clause of Article VI(2) made the U.S. approach to international law uniquely different from the dualist procedure of other countries necessitating legislative translation of treaties into domestic law for implementation. At the same time, the Court nonetheless conceded an exception to the Article VI(2) Supremacy Clause.

With this in mind, the *Foster* Court identified two types of treaty status in the United States. A treaty provision might operate of itself without requiring congressional action. For cases in which a treaty clause implied a contractual meaning, however, the legislature would have to construct implementing legislation before that clause could be enforced by U.S. courts. By looking for the intent of the United States and Spain from the treaty text, the *Foster* Court found that the treaty provision at bar was by no means self-executing, although the Court later overturned this reading of the treaty in *United States v. Percheman*[41] (1833), when it instead construed the treaty's Spanish text. In the Court's interpretation, the treaty denoted a call for lawmakers to enact additional legislation to ratify and confirm the rights of those persons in possession of land in the ceded territory of Louisiana. Since then, the judiciary has constantly

accepted the *Foster* and *Percheman* precedents in distinguishing between self-executing and non-self-executing treaties.[42]

In *People of Saipan ex rel. Guerrero v. United States Department of Interior*[43] (1974), the U.S. Court of Appeals for the Ninth Circuit went a step further in exploring a number of elements to ascertain the character of a treaty. The Circuit Court examined:

> the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.[44]

Likewise, the Seventh Circuit Court of Appeals developed comparable construing canons in *Frolova v. U.S.S.R*[45] (1985) to determine if human rights articles in the U.N. Charter as well as the Helsinki Accords were self-executing and created judicially actionable rights for private persons. In general, U.S. courts are predisposed to consider a treaty provision as non-self-executing provided that the provision in question encompasses hortatory words (i.e., a non-mandatory phrase), expresses general treaty purposes and objectives, or carries positive terms (e.g., obligations to do).[46]

Additionally, in a situation where the separation of powers between the judiciary and the other two coordinate branches collides, a non-self-executing viewpoint against treaty power would almost certainly preponderate. Cases of this kind have touched broadly on the matter of tariffs, appropriations, the annexation or cessation of territories, armed forces, foreign affairs, and criminal penalties for international offenses (e.g., piracy, genocide, torture, and hijacking).[47] As described below, in the realm of human rights, judges embedded in a dualist environment have periodically dismissed human rights treaties based on the non-self-executing rule. Still another inimical factor comes from the Senate, as congressional members lodge non-self-executing declarations for the purpose of frustrating treaty relevance in U.S. courts.

As far as treaty authority in relation to the U.S. Constitution is concerned, further elucidation can be found in the line of cases of *Doe v. Braden*[48] (1853), *The Cherokee Tobacco*[49] (1870), *Geofroy v. Riggs*[50] (1890), and *Reid v. Covert*[51] (1957). In a consistent manner, the U.S. Supreme Court that heard those cases crafted a constitutional preemption over international treaties by proclaiming that a treaty to which the United States was a party should not in any way trespass on the domain of the U.S. Constitution. Such a judicial conviction of constitutional precedence was also firmly shared by members of the Senate. As a condition on their consent to ICCPR ratification, senators limited the treaty obligations by introducing several reservations, understandings, and declarations (RUDs) and a proviso to the Covenant. Take a glimpse

at the ICCPR's Articles 20 (free speech), 6 (barring juvenile capital punishment), and 7 (freedom from "cruel, inhuman or degrading treatment or punishment"). Owing to a set of legislatively added restraints, these Covenant mandates were consciously abridged to meet the United States' dualist preferences. Elsewhere, lawmakers in the Senate similarly imposed their version of terms to thwart other treaty administration on U.S. territory. A reservation was instituted on the Genocide Convention in order to ensure the primacy of the U.S. Constitution over treaty prescriptions. A number of qualifications appeared on the Torture Convention to, for example, narrow the language of "cruel, inhuman or degrading treatment or punishment" and sanction the infliction of the death row phenomenon on condemned prisoners. To uphold the paramount concern of the U.S. constitutional application to the exclusion of Convention-guaranteed measures against racism, the Senate set two reservations and a proviso to the International Convention on the Elimination of All Forms of Racial Discrimination (the Racial Convention).

In *Whitney v. Robertson*[52] (1888), the Supreme Court juxtaposed international treaties and federal statutes in terms of their correlated status. A self-executing treaty was ruled equivalent to a federal statute. Since a self-executing treaty and a federal statute both stand in the same hierarchy, "the one last in date will control the other."[53] In this way, a self-executing treaty surmounts earlier federal laws and, reciprocally, a subsequently structured federal statute overrides a prior self-executing treaty in the situation of discord between them. In practice, U.S. courts frequently make use of the rule of last in time to disregard treaty causes of action raised by human rights activists.

Despite an absence of constitutional reference to the conjunction between international treaties and the Constitution and federal statutes, Article VI(2) nevertheless explicitly specifies treaty preeminence over state laws. The Supreme Court echoed that constitutional provision in *Ware v. Hylton*[54] (1796), *Missouri v. Holland*[55] (1920), *Asakura v. Seattle*[56] (1924), and *Clark v. Allen*[57] (1947). In its light, an international treaty with a self-executing feature or with a statutory authorization for activation triumphed over conflicting state and local laws at all times.

Treaty rank in U.S. law and its resulting domestic effect have significantly influenced the willingness of the Senate to approve human rights treaties.[58] In 1948, Supreme Court Justices Hugo L. Black and Frank Murphy issued separate concurring opinions in *Oyama v. California*.[59] The concurrences signaled that the 1920 California alien land law inequitably withheld a right to lease or acquire farm lands from a class of aliens disqualified for U.S. citizenship pursuant to federal laws. Unmistakably, this statutory prejudice of aliens' interests in real property was at odds with U.S. duties to the U.N. Charter's Articles 55 and 56, which mandated member countries to show reverence for human rights

without making any distinctions.[60] More than two years later, the California appeals court in *Sei Fujii v. California* took an even bolder action by disaffirming the invidious California act outright on the premise of the Charter provisions on human rights.[61] When the *Sei Fujii* legal battle moved forward to the California Supreme Court, the appellate holding was sustained, however, solely on the Fourteenth Amendment's due process and equal protection requirements. Opposite to the appellate court's encouraging monist posture, the California high court declared human rights prescriptions of the U.N. Charter to be inoperative for want of legislative consent.[62]

Notwithstanding the hostile finalized judgment on the U.N. Charter in the *Sei Fujii* lawsuit, conservative legislators on Capitol Hill perceived the Charter's human rights provisions as a potential menace to racially driven state laws. Had the *Sei Fujii* statement enunciated by the California appellate court been solidly validated by the U.S. Supreme Court, federal and state discriminatory regimes would have been dismantled exhaustively by human rights treaties.[63] By extension, the *Sei Fujii* incident alerted right-wingers in Congress to some lurking disruptive dangers spawned by ratification of international treaties that might one day inexorably impinge on the United States' sovereignty to handle its internal affairs. In fact, from 1952 to 1957, Senator John W. Bricker of Ohio spearheaded a historically well-known movement to hedge off treaty dominance in the United States. Alongside the *Sei Fujii* overtone haunting the lawmakers of the times, several other key motivations also worked to catalyze the counteraction aggressively taken by Senator Bricker and other congressional members.[64]

First, the approval of international human rights treaties could probably subject biased domestic laws to the scrutiny of communist countries at the U.N. In that situation, socialist rights (e.g., Article 23 of the UDHR regarding "just and favorable" work conditions and pay as well as protection against unemployment) would unavoidably infiltrate the U.S. system as a result. Second, if ratified, human rights treaties predictably were about to replace and dwarf U.S. constitutional protection of individual rights. Third, the federal government could easily avail itself of its treaty-making power to routinely invade states' rights. With these intense fears in mind, Senator Bricker in 1952 proposed an amendment to the U.S. Constitution in hope of containing the President's treaty-making power on one hand and making all international treaties unworkable in the United States on the other.[65] In the finale to this Senate anti-treaty chapter in U.S. history, a mixture of outgrowths surfaced. Fortunately, the Bricker Amendment did not pass the requisite bar of the two-thirds vote as many hoped, because other congressional colleagues had soberly posed grave concerns about the likely erosion by the Amendment of presidential authority in the conduct of foreign affairs. In the meantime, there was also a disheartening

outcome. To assuage the formidable force of the Bricker Amendment's campaigners, the Dwight D. Eisenhower Administration proclaimed that it held no desire to sign any human rights treaties in the foreseeable future.

Not until the 1960s did President John F. Kennedy begin breaking that taboo of his predecessor. In 1963, the Kennedy government initiated the ratification of three human rights treaties[66] to probe whether the Bricker climate continued its strong hold on the Senate.[67] Essentially, the regulations in the three treaties largely squared with U.S. federal and state laws. Kennedy contemplated a plan to individually gauge treaty receptivity among members of the Senate by forwarding them for advice and consent in the first instance. If senators agreeably gave an imprimatur to these least contentious treaties, it might then be worth pursuing sequential ratification of still more treaties such as the Genocide Convention and the ICCPR. Yet, President Kennedy's endeavor to promote treaty authorization was unsuccessful. The Senate overhaul of the three treaties resulted only in the endorsement of the Supplementary Convention on the Abolition of Slavery and the Slave Trade[68] in 1967 and the Convention on the Political Rights of Women in 1975.

During the 1970s, President Jimmy Carter again looked for Senate consent to four major human rights treaties: the ICCPR; the International Covenant on Economic, Social, and Cultural Rights; the American Convention on Human Rights; and the Racial Convention. To eliminate the Senate's mistrust of potential treaty ascendancy in U.S. jurisdiction, a set of qualifications to block domestic employment of the above treaties was recommended. In particular, the Carter Administration promised the Senate that the submitted treaties would in no way take effect or convert the substance of U.S. law without prior congressional assent. By declining to sign the Optional Protocol to the ICCPR, President Carter further effectively foreclosed the prospective likelihood of the U.N. Human Rights Committee to address U.S. rights violations through its individual communication procedure.[69]

The blended function of the non-self-executing and "federal-state" clauses proffered by the Carter Administration purportedly eased Senate anxieties that: 1) some international canons might be used against the constitutional rights of U.S. citizens—for example, paring down constitutional freedom of speech via Article 20 of the ICCPR; (2) the acceptance of human rights treaties would federalize a wide array of state rights already reserved by the Tenth Amendment such as invoking Article 6(5) of the ICCPR to bar the state levying of capital punishment on juvenile offenders; and (3) giving force to the human rights provisions could greatly interfere with U.S. domestic affairs in an unbridled manner and without congressional supervision.[70] To this day, the Bricker legacy steadily unleashes its powerful clout in the Senate

treaty-making process by taking the form of RUDs and provisos to international human rights treaties.[71]

While taking a lead in originating the post-World War II human rights system, the USA continues to resist major multilateral human rights treaties on the U.N. and hemispheric planes, including the recent ICC Statute. As chronologically enumerated in Table 1-1, only a small fraction of important rights treaties have thus far procured a blessing, often a qualified one, from the Senate.

Table 1-1. Dates of treaties entering into force in the USA

Treaty	Effectiveness
The four Geneva Conventions	2 February 1956
The Vienna Consular Convention	24 December 1969
The Supplementary Slavery Convention	6 December 1967
The Refugee Protocol	1 November 1968
The Convention on the Political Rights of Women	7 July 1976
The Genocide Convention	23 February 1989
The International Covenant on Civil and Political Rights	8 September 1992
The Racial Convention	20 November 1994
The Torture Convention	20 November 1994
The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict	23 January 2003
The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography	23 January 2003

The Senate has exercised authority without a constitutional dictate[72] to restrain the domestic power of most human rights treaties approved by it.[73] The legal fallout of such Senate-enforced treaty barricades should not be ignored. The federal-state understandings affixed to the ICCPR and the Racial Convention enable the federal government to technically yield to states its jurisdiction over treaty-based matters pursuant to the constitutional Tenth Amendment. As a consequence, the United States is in a comfortable position to claim the legitimacy of sidestepping nationwide enforcement of certain rights stipulated in the two U.N. treaties. As for non-self-executing declarations, they are generally capitalized on as a weapon to forestall individuals in the U.S. legal system from bringing forward a range of entitlements guaranteed in treaties such as the ICCPR, the Torture Convention, and the Racial Convention.

Even if Congress later adopts an implementing enactment, it is always that law, rather than the human rights treaty, that governs the rule of decision in U.S. courts. For instance, the Senate put forth Article 5 of the Genocide Convention to be non-self-executing, which called for Congress to statutorily delimit an act of genocide as a federally punishable crime before the President formally deposited the ratification instruments with the U.N. Secretary General.[74] In doing so, the Senate wanted to ensure that U.S. courts would adjudge the criminal violations of pertinent Convention rights categorically based on that domestic implementing law. Another goal calculated by the Senate in this non-self-executing mechanism was to make human rights victims incapable of depending on the Convention as a source of civilly actionable causes to redress their complaints. In sum, the domestic legal power of international human rights treaties to which the United States is a party is often weakened by a package of qualifications that the Senate lodges to condition its passage of the resolutions of treaty ratification.

Customary Law

Article I(8) of the U.S. Constitution empowers Congress to delineate and punish offenses against the law of nations, implicitly conceding that the law of nations is not solely confined to international treaties.[75] Yet, nowhere does the Constitution further illuminate the position of customary law in relation to U.S. law. In *The Paquete Habana*[76] (1900), the Supreme Court stated that customary international law was "part of [U.S.] law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision," customary law would subsequently come into play in judges' decisional choices. The *Paquete Habana* Court, however, failed to elucidate the status of customary law in the U.S. legal system.[77] Since clear judicial guidelines are absent, international law scholars have been persistently divisive over the true import of "no controlling executive or legislative act" in the *Paquete Habana* maxim.[78]

Since the *Paquete Habana* case, the Supreme Court has repeatedly held that customary international law is the law of the United States.[79] In *Banco Nacional De Cuba v. Sabbatino*[80] (1964), the Supreme Court tacitly suggested that customary legal principles were determined by federal courts as if they were federal law and were superior to contradictory state laws.[81] In U.S. jurisprudence, however, a definite hierarchical structure has never been erected to unravel the enigmatic relationship between customary law, international treaties, the U.S. Constitution, and federal statutes. Despite the obscurity over customary normative power in U.S. law, a vast number of courts have leaned toward sticking with the canon that a conflicting federal statute takes

priority over customary provisions if a congressional indication to do so is demonstrably cognizable.[82]

As shown in the chapters below, U.S. judges have mapped out a variety of legal obstructions that included non-self-executing and last-in-time doctrines to exclude a spectrum of treaty standards absent support from the executive and legislative departments. Moreover, when a norm of customary international law clashes with a federal statute or an executive act, it is pervasive for courts to champion the supremacy of municipal law instead. Since judges are conservatively inclined to disclaim international human rights law, the U.S. government may retract its treaty commitments under any circumstances without necessarily inviting legal liabilities domestically. As a whole, monist human rights activists are commensurable to advocates of a multilateral U.S. foreign policy in a global system that functions as Almond explains. In contrast, dualist judges favor unilateral approaches rejecting participation in global political and legal orders.

CHAPTER 2:

U.S. Human Rights Litigation since World War II

INTRODUCTION

Human rights advocates in the United States seek judges in policy making that either incorporate international law directly or use international law to inform the interpretation of U.S. law. Liberal judges on the U.S. bench looked to the U.N. Charter and the UDHR to adjudicate discrimination cases in the 1940s and 1950s. As global jurisprudence broadened its scope to strengthen individual human rights protection, they also extended their consultation to a wide array of international sources such as the 1955 U.N. Standard Minimum Rules, the 1975 U.N. Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (the Torture Declaration), the Torture Convention, the ICCPR, and judgments of the International Criminal Tribunal for the Former Yugoslavia (ICTY).

A number of elements contribute to favorable judicial outcomes: (1) the presentation of international legal arguments by human rights activists; (2) the support of the administration in the form of a memorandum or a suggestion of interest; (3) statutory authorization to proceed against foreign human rights abusers in the Alien Tort Claims Act (ATCA) and the Torture Victim Protection Act (TVPA) and against foreign countries perpetrating or countenancing terrorist acts in the amended Foreign Sovereign Immunities Act (FSIA) (28 U.S.C. § 1605(a)(7)); and (4) judges' attitude in preference for international norms.

Conversely, conservative judges have bluntly rebutted international human rights claims by depending on various types of legal formulae: (1) the non-self-executing treaty rule; (2) the last-in-time principle; (3) a nonjusticiable political question; (4) a lack of standing; (5) *forum non conveniens*; (6) foreign sovereign immunity; (7) the act of state doctrine; and (8) head-of-state immunity. As described in this chapter, cases

arising out of the backdrop of terrorism have scored incredible wins in U.S. courts as a result of the congressional withholding of legal immunity prerogatives from some countries specified by the State Department as terrorism champions. Apart from those untypical occasions, judges were often apt to relieve non-terrorist sovereign offenders of the payment of civil damages to human rights victims on the theory of sovereign immunity. Three major underlying forces were principally responsible for such judicial behavior.

- Legislators on Capitol Hill were unable to incorporate a *jus cogens* violation[1] into the exception clauses in the FSIA at the time it codified a restrictive sovereign immunity doctrine in the Act (28 U.S.C. §§ 1330, 1602-1611).
- The U.S. Supreme Court decision in *Argentine Republic v. Amerada Hess Shipping Corp.*[2] (1989) has created an enormous impediment to suing alien abusers acting in the capacity or under the cloak of government office. The *Amerada Hess* ruling mandated the FSIA as the sole basis for obtaining jurisdiction over a foreign state in U.S. courts by precluding the employment of the ATCA as a legal recourse to provide an exception to the grant of sovereign immunity.[3] Moreover, it definitively limited the curtailment of sovereign immunity to certain cases falling within a few FSIA exception provisions (28 U.S.C. §§ 1604, 1605-1607).
- In several cases, an executive intervention predominantly prompted judges to absolve foreign abusers from human rights accusations in U.S. courts.[4] Likewise, in other foreign affairs matters closely associated with military hostility abroad and the head of a sovereign state, an executive decision to grant immunity could significantly sway the court not to award civil reparations on behalf of human rights complainants.[5]

Several major areas challenged by human rights activists in courtrooms pursuant to international law are presented as follows: racial and national origin discrimination, apartheid, prison conditions, the war in Vietnam, and tortious acts by aliens.

RACE AND NATIONAL ORIGIN DISCRIMINATION, 1946–1959

From 1946 to 1959, human rights NGOs such as the American Civil Liberties Union (ACLU), the National Lawyers Guild, and the National Association for the Advancement of Colored People (NAACP) inaugurated their quest for international law-based justice in U.S. courts. They sought the rescinding of biased state statutes on alien land ownership, commercial fishing licenses, housing covenants, transportation, and education as well as other civil rights infractions.[6]

More than a dozen cases were fought all the way up to the U.S. Supreme Court.[7] Despite nondiscrimination arguments premised on the U.N. Charter and the UDHR by human rights activists, the federal high court ruled on those cases strictly in accordance with constitutional equal protection or due process provisions or statutory rules. After *Asakura v. City of Seattle*[8] (1924), *Oyama v. California* (1948) represented an extraordinarily infrequent instance during the early post-war era in which four U.S. Supreme Court justices displayed monist thinking in their decision-making process.[9] In that litigation, the two camps of Justices Black/William O. Douglas and Murphy/Wiley B. Rutledge respectively concurred with the self-executing standing of U.N. Charter Articles 55 and 56 on human rights in favor of permitting Japanese ownership of purchased land in California.

Since the U.S. Supreme Court in the *Oyama* case did not address the constitutionality of the alien land law practiced in California,[10] human rights activists proceeded further to press allegations of civil rights breaches before state courts during this period.[11] In *Namba v. McCourt*[12] (1949), representing attorneys Verne Dusenbery and Allan Hart attacked the viability of Oregon's alien land law with great success. To clarify the meaning of the pertinent federal and state laws argued in *Namba*, the Oregon Supreme Court on its own initiative referred to the U.N. Charter as supplementary guidelines.[13] It continued by finding that the treatment of foreign citizens in the acquisition of agricultural land was verifiably built on elements of alienage and racism. As such, for the first time, the discrimination regime—which had been unshaken for years in U.S. states—was held constitutionally unacceptable as contrary to due process and equal protection rules.

Going beyond their *Oyama* counterparts' focus on constitutional arguments, counselors J. Marion Wright and Owen E. Kupfer in *Sei Fujii v. State* (1952) strategically constructed their claims in conjunction with international law. At the same time, the *Sei Fujii* battle to challenge a prejudicial alien land law in California was backed by amicus joiners A. L. Wirin, Fred Okrand, and Will Maslow. These human rights attorneys vindicated Sei Fujii's deed to the real estate he bought in 1948 by asking judges to take into account the applicability of the U.N. Charter provisions and Article 17 of the UDHR (the right to own property). As previously illustrated, the California appellate court regarded the quoted Charter rights as judicially enforceable and overturned California's long history of unjustly discriminating against non-naturalized aliens in the transaction of farm land.[14] Yet, the *Sei Fujii* international law argument succumbed in the next appeal stage as the California Supreme Court swiftly reversed the appellate court's sympathetic attitude by entering a pronouncement indicative of the non-self-executing trait of the Charter articles in question.[15]

Two factors motivated the California Supreme Court to issue the *Sei Fujii* decision in rejection of international human rights law. As the prelude to the Cold War unfolded, anti-Communism sentiments began filling the minds of congressional members (and even average Americans). Frequently, lawmakers in the United States viewed the institution of the U.N. and its countenanced treaties as a potentially effective weapon empowering communist members at the U.N. to undo inequitable legal practices in the American South. In addition, Congress believed that international treaties might be exploited by the federal government through its treaty-making power to cut back on states' prerogatives in the management of racial issues. Although the *Sei Fujii* case was not brought forward to the level of the U.S. Supreme Court, the non-self-executing outlook embraced by the California high court has thus far persistently haunted Charter-based litigation in the United States.[16]

APARTHEID, PRISONS, AND VIETNAM, 1960–1981

From the 1960s to the early 1980s, legal claims dependent upon international jurisprudence typically concentrated on assailing the regime of apartheid, prison conditions, or the U.S. military intervention in Vietnam. Beyond bringing up the U.N. Charter and the UDHR for court debate, human rights activists expanded the range of their legal premises to include other multilateral legal instruments. In *Diggs v. Schultz* (1972), the Center for Constitutional Rights (CCR), Professors Bert B. Lockwood and Thomas M. Franck as well as numerous other human rights activists[17] played an important role in calling the judges' attention to international law standards. The defenders legally pushed the U.S. government to fulfill its U.N. Charter duties and the Security Council resolutions setting a trade embargo against the racist policies of Southern Rhodesia. Yet, this litigation effort to oppose the U.S. doing business with Zimbabwe's predecessor proved in vain, as the District of Columbia Circuit overruled the international legal claims as raising a nonjusticiable political question.[18]

A dispute over the conduct of U.S. foreign affairs returned to the District of Columbia Circuit Court in *Diggs v. Richardson* (1976). The action was headed by human rights activists from the Southern Africa Project of the Lawyers Committee for Civil Rights, with amicus support by the International League for the Rights of Man and the International Youth and Student Movement for the U.N.[19] This time, human rights activists strove to proscribe the U.S. government from commercial interactions with South Africa, which practiced the infamous system of apartheid in Namibia in defiance of fervid international objections. Despite all attempts made by human rights litigators to bind the United States' behavior via Security Council resolutions, the D.C. Circuit

nonetheless relied on the political question doctrine and the non-self-executing principle to underline its dualist line of reasoning.[20]

As the USA became intensively engulfed in the Vietnam conflict after the mid-1960s, a stream of legal actions questioning the lawfulness of the U.S. intervention were simultaneously set in motion in U.S. courts, including *United States v. Sisson*[21] (1968), *United States v. Valentine*[22] (1968), *United States v. Berrigan*[23] (1968), *Cooper v. United States*[24] (1968), *Simmons v. United States*[25] (1969), and *United States v. Owens*[26] (1969). In all of those actions, the CCR, the National Lawyers Guild, and other activists[27] invoked international and humanitarian law on behalf of draft resisters.[28] Invariably, U.S. courts, however, rebuffed all legal contentions advanced by them on the ground of a lack of standing[29] and a nonjusticiable political question.[30]

During the 1970s and early 1980s, human rights attorneys additionally launched a string of legal actions from municipal and international law standpoints to rectify improper prison operation nationwide. In the form of amici, their campaign undertakings were concurrently supported by liberal NGOs such as the NAACP Legal Defense and Educational Fund, the ACLU National Prison Project, the National Lawyers Guild, and the Lawyers Committee for International Human Rights. In *Turner v. Ward*[31] (1977), an unfriendly judge on the Superior Court of Schenectady County, New York described international claims arising under the U.N. Standard Minimum Rules, the ICCPR, and the Torture Declaration as "junk and gobbledygook."[32]

On the other hand, *Avant v. Clifford*[33] (1975), *Detainees of Brooklyn House of Detention for Men v. Malcolm*[34] (1975), and *Jordan v. Arnold*[35] (1976) all registered signs of judicial activism in employing international norms in support of constitutional readings. The three cases severally queried the fairness of inmates' treatment in the disciplinary process and the confinement of pretrial detainees in cramped single-occupancy cells with substandard living conditions. Without human rights activists' referring to the Rules, the courts taking up these cases instinctively resorted to the U.N. Standard Minimum Rules to inform their decisions under constitutional provisions of equal protection, due process, and cruel and unusual punishment as well as statutory regulations.[36] In *Sterling v. Cupp*[37] (1981), male prisoners complained of undergoing routine supervision by female security guards during showers and toilets as well as pat-down searches. By relying on international law[38] on his own accord[39] as a source of reference, Justice Hans Linde on the Supreme Court of Oregon went on to demarcate the scope of "unnecessary rigor" that the Oregon Constitution banned inflicting on prisoners. Justice Linde concluded by acknowledging the legitimate right of those inmates to maintain their privacy in jail. Prison officials were promptly ordered to remove the female staffers from their assignment to the contested duties unless an emergency dictated otherwise.

The last litigation claiming victory in challenging prison administration was *Lareau v. Manson*[40] (1981). The basis for the dispute was the overcrowding of the prisoner population in the Hartford Community Correctional Center in Connecticut. The derivative harms characterized by the Center's inmates in that context ranged from poor health care and sanitation and deficient food to inadequate recreational facilities, coupled with the Center's inability to separate pretrial detainees from sentenced convicts. Akin to trial Judge Jose A. Cabranes,[41] Second Circuit Judges Amalya L. Kearse and Walter R. Mansfield consulted the U.N. Standard Minimum Rules for scrutinizing the inmates' allegations of harsh treatment that was unconstitutional under the Eighth and Fourteenth Amendments.[42] As a whole, the display of judicial responsiveness in *Lareau* was deemed by academics to be attributable to Connecticut's inclusion of the U.N. Rules into its prison regulations and the judges' hospitable attitude to international norms.[43]

Meanwhile, some landmark cases[44] prevailing in the 1980s have stimulated human rights activists and NGOs to continue the pursuit of international law justice for a vast host of individual victims in U.S. courts. Among them, the *Filartiga* decision strikingly heralded a new epoch of invoking the Alien Tort Claims Act (ATCA) mechanism by the human rights community, mostly, in an effort to negate and transform human rights violations in foreign lands.[45] In addition to achieving civil redress for the benefit of foreign and American parties in grievances, human rights advocates have generally viewed the launch of the ATCA litigation drive as a meaningful vehicle to promote and actualize their other agendas as well.[46]

An amicable U.S. court ruling pursuant to international law, once rendered, would amount to legally enunciating the culpability of the challenged criminals irrespective of the location of the violations or the nationalities of the litigants involved. For cases in which monetary damages are uncollectible for practical reasons, the judgment may serve as a bargaining chip by which to enhance an alternative political solution of the case in the future. Through media reports and other modern communications, the litigation process per se necessarily invites worldwide awareness of the exposed grim atrocities that were egregiously levied on the plaintiffs. In turn, heightened international concerns are likely to arouse the willingness of national cooperation in jointly denying sanctuary to party defendants. Removing their impunity would eventually make the perpetrators obliged to stand trial and be held accountable.

In combination, the integrated outcomes flowing from this transnational litigation backdrop can often function as a deterrent to recidivism. In some cases, the transnational drive for lodging cases with U.S. courts helpfully pressures targeted national governments into reorienting the direction of their foreign policies in concert with

international law. The final benefit of staging ATCA litigation is to increase U.S. judicial understanding of and receptivity to international human rights law in the long term. It enables human rights fighters to first acquaint judges with limited international norms and, as advantageous precedents aggregate, to make the litigation campaign spill over to other international issues in U.S. courts. In turn, the availability of addressing the rights abuses for alien claimants in the United States reciprocally repairs the deficiencies of other litigation conduits at the U.N. and the regional systems, in terms of their dragged-out proceedings and severe reliance on the political will of sovereign countries to condition case outcomes.

Considering the above virtues, human rights activists have persistently appealed to the U.S. judicial system as one of the preferable ways to repair and halt human rights violation situations emerging within and outside of the USA. Notably, as global concerns about the protection of human rights increase, so are individual transnational lawsuits proliferating in U.S. courts, the details of which are narrated in the next section.

ALIEN TORT CLAIMS, 1980–2004

In 1980, pioneer attorneys John Corwin, Jose Antonio Lugo, Peter Weiss, and Rhonda Copelon from the CCR took the initiative by innovatively using the long-forgotten Alien Tort Claims Act (28 U.S.C. § 1350)[47] as a jurisdictional foundation in *Filartiga v. Pena-Irala* (1980). They attacked a former Paraguayan police officer (Americo N. Pena-Irala) for having caused the wrongful death of a Paraguayan doctor's seventeen-year-old son in significant contravention of customary international law. On appeal, the Second Circuit Court, composed of Judges Irving Kaufman, Amalya L. Kearse, and Wilfred Feinberg, asked the Carter Administration for its views on the validity of applying this 1789-enacted Act in the *Filartiga* case. In a reply memorandum,[48] administration officials stated that freedom from torture as set forth by the *Filartiga* appellants constituted one of the central fundamental rights underwritten by customary law and an abundance of national statutes. Many countries, including Paraguay and the United States, had long consented to abide by that international precept without demur. Consequently, the officials concluded, the act of torture that occasioned the death of the Paraguayan youngster was tortious in essence and remediable under the ATCA. Beyond using the State Department's memorandum to guide its decision making, the Circuit Court tapped into a body of international and regional standards as well as expert testimonies from law school Professors Thomas M. Franck, Myres S. MacDougal, Richard A. Falk, and Richard B. Lillich.[49]

On the heels of these inquiries, Judge Kaufman, speaking for the Second Circuit panel, affirmatively upheld subject matter jurisdiction over the tort claims raised under the ATCA against the Paraguayan police abuser for his alleged commission of official torture. The originally adverse *Filartiga* ruling was then sent back for reconsideration.[50] In dicta, the Second Circuit, along with the District Court on remand, foiled the attempt by the Paraguayan tortfeaser to rely on other modes of excuse to sidestep his burden of liability. The act-of-state immunity articulated by Pena-Irala was an outright failure since it was far from legitimate as a matter of law to administer an act of torture under the pretense of government authority.[51] Given that the Filartiga family had fruitlessly sought legal recourse for mending their grievances back in Paraguay, Pena-Irala's assertion of *forum non conveniens* was further ruled null and void.[52]

The satisfactory outcome in the *Filartiga* case was ascribable to several functional elements. The congressional enactment of the ATCA licensed the Second Circuit to draw on customary human rights law as an underpinning for entering a decision on the question of jurisdiction.[53] Based on that legal authority, the *Filartiga* Court was able to elicit solid international proof to castigate the torturer, on a level with pirates and slave traders, as an enemy of all mankind. The second contributor facilitating the *Filartiga* success was the provision by amici NGOs[54] of the information on an international customary bar against official torturous misconduct.[55] Moreover, the executive intervention seemed to have carried some measure of weight in determining Judge Kaufman's mindset. In comparative terms, it was generally believed that the executive approval of the ATCA jurisdiction in the form of a memorandum had swayed the *Filartiga* litigation far more potently than the jurisdictional authorization by Congress through the passage of the Act.[56] Since the *Filartiga* case, the ATCA has immensely opened the floodgate of lawsuits in U.S. federal courts, allowing numerous alien victims suffering grievous tortious abuses without remedial avenues in their homelands to bring up their unresolved injustices abroad.

In 1992, the formulation of the Torture Victim Protection Act (28 U.S.C. § 1350 note)[57] extended the coverage of the ATCA protective system. The new law now entitles both alien nationals and U.S. citizens[58] to recover reparations against alien evildoers demonstrably embarking on an act of torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." In addition to writing the *Filartiga* decision into law, the TVPA purports to fundamentally eradicate the potential invocation of the act-of-state principle by foreign government officials to evade the imputation of their wrongdoing associated with torture and extrajudicial killing.[59]

From the 1980s up to 2002, several beneficial decisions were rendered by U.S. courts under the ATCA and the TVPA.[60] In this

decades-long quest of tort justice in the interests of alien and American victims alike, many individual activists and human rights NGOs had actively partaken either as a defense lawyer[61] or an amicus submitter.[62] By submitting a sequence of legal actions, human rights activists systematically confronted a class of perpetrators acting under color of law or in their private or official capacities. The named defendants included a quasi-state actor without recognized official status, a political party, party leaders, Chilean and Bosnian Serb soldiers, and senior government officials. Further, under international legal challenge came U.S. and French multinational corporations (MNCs) acting along with a suppressive junta regime in Burma for the purpose of financial gains. Predicated on the preceding two tort statutes, human rights activists triumphantly claimed in U.S. courts that a wide spectrum of gross unlawful acts were in violation of customary law: genocide, war crimes, crimes against humanity, torture, arbitrary detention, summary execution or extrajudicial killing, disappearance, rape and other types of violence against women, forced labor, and cruel, inhuman, or degrading treatment.

The first cluster of such actions focused on the injuries wreaked by human rights criminals under color of law, or in their roles as a private individual, as a self-styled head of state lacking internationally conceded legitimacy, or as a junior serviceman. *Kadic v. Karadzic*[63] (1995) was an example of the above three scenarios. The complained outrages were conducted by Radovan Karadzic in the arguable name of the President of a Bosnian-Serb Republic (Srpska), the establishment of which received little recognition around the world at that time. In the lawsuit instituted by human rights advocates, the Second Circuit viewed acts of genocide and war crimes through the lens of the law of nations as standing in juxtaposition with piracy and the slave trade for their joint behavioral blameworthiness.[64] So long as the contested behavior of the individual tortfeasers like Karadzic fell into this category, the Court pointed out that under no circumstances were they able to free themselves from the regulatory force of the ATCA. In other words, it became irrelevant in this context to consider whether genocidal or war criminal offenses per se were committed under the guise of national legal authority or solely out of other official or private incentives. A purely individual action alone, devoid of any governmental implications, was sufficient justification to generate the attachment of tort responsibility.

As for acts of torture and summary execution, after thoughtfully examining the *Filartiga* case, the Torture Declaration and Convention, and the TVPA, Judge Jon O. Newman, as an opinion author on behalf of the Circuit Court, further averred that:

> [T]orture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by

> international law only when committed by state officials or under color of law.[65]

By studying the appellants' preliminary allegations, Judge Newman, however, thought it fit to adjudicate in their favor. The torture and execution were part of the genocide and war crimes efforts designed by Karadzic to exterminate the entire population of Croatians and Muslims within Bosnia-Herzegovina. Thus, the need to incorporate a state action element for subjecting Karadzic to tort liability was swiftly lifted. Even assuming the torture and summary execution in question took place as individual isolated incidents, in Judge Newman's view, Karadzic still could not claim to be free from responsibility. Karadzic was no less than a state actor throughout the large-scale human rights persecution process. This was because the entity of Srpska he contrived was essentially a territorial state[66] according to the appellants' statement. Moreover, the appellants implied that Karadzic had "acted in concert with the former Yugoslavia" in pursuit of a "Great Serbia" schema. Judging from that account, it seemed verifiable that Karadzic's villainies were brought about under color of law for the purpose of jurisdiction under the ATCA.[67] For all of the grounds delineated and with the support of the State Department,[68] the Second Circuit remanded the case to the lower court to enter a decree consistent with its opinion.[69]

In subsequent years, the Second Circuit's decisional logic has continued to exercise considerable impact on some cases arising from analogous claims structured on the ATCA and the TVPA. In *Mushikiwabo v. Barayagwiza*[70] (1996), a Hutu party leader was held responsible for having tortured and slaughtered 38 relatives of two naturalized U.S. citizens during a hideous month-long bloodbath in Rwanda's internal warfare.[71] Legal challenges in the case of *Tachiona v. Mugabe*[72] (2001) achieved the same contented result. Presided over by Judge Victor Marrero, the U.S. District Court for the Southern District of New York viewed the torture and summary execution of political opponents by Zimbabwe's dominant party (ZANU-PF) as nothing other than conduct carried out "by state officials or under color of law."[73] The court was persuaded by the plaintiffs' arguments that the defendant party organization, virtually led and controlled by Zimbabwe's President, had effectively invoked public facilities and manpower to jockey for its unrivalled ascendancy in domestic power struggles. In addition to misusing the government transport system and communications, the governing party was overtly dependent on military and police forces as well as intelligence agents as a handy persecution instrument to terrorize dissenters into silence.

While the ATCA and the TVPA made no mention of whether organizational groups like the ZANU-PF could be legally pursued, Judge Marrero gave an affirmative answer in this regard. He treated entities as

being culpable parties identical to natural individual perpetrators.[74] The underlying theory was that organizational groups in many cases were capable of fashioning a chain of complicity with government leaders regarding human rights violations. In one way or another, however, the latter almost always easily acquired impunity through the shield of discrete immunities. To further confine tort lawsuits as applying exclusively against subordinate offenders under superior or organizational dictates would significantly cripple the intended mechanisms established by the ATCA and the TVPA: compensation, punishment, and deterrence. In reality, it was often the junior officers, not those in high command or institutional groups, who had the least resources to discharge the payment of the court judgment. With all these considerations in mind, Judge Marrero insisted that the ZANU-PF be held liable to the persecuted Zimbabweans.

Beyond the *Kadic* precedent, the ICCPR and international tribunal opinions were judicially quoted as critical benchmarks against which to chart the configurations of accountability in actions arising from tort breaches. Two cases are pertinent in this aspect: *Estate of Cabello v. Fernandez-Larios*[75] (2001) and *Mehinovic v. Vuckovic*[76] (2002). The former complained of the wrongful abuse and murder of Winston Cabello by a Chilean military officer, Armando Fernandez-Larios, as part of his effort to endorse former Chilean strongman Pinochet's call for political purges. The latter concerned a series of human rights infringements against four Muslim refugees committed by a Bosnian Serb soldier, Nikola Vuckovic. The misconduct was performed to facilitate the creation of a state-backed "Greater Serbia" through the so-called ethnic cleansing.

Sitting on separate courts of first instance, Judges Joan A. Lenard and Marvin H. Shoob extensively looked to a number of legal sources to remedy the plaintiffs' causes of action in litigation brought pursuant to the ATCA and 28 U.S.C. § 1331.[77] Repeated references were made to the import of "extrajudicial killing" and "torture" in the TVPA and derivations such as Articles 6 (the right to life) and 7 (the prohibition of cruel treatment) of the ICCPR, and the Torture Convention. Both courts concluded by pointing to the defendants' offenses in default of international customary law.[78] More conspicuously, among those materials adduced for corroborating customary law bans on "war crimes" and "crimes against humanity" were the constitutive statutes of the few well-known international tribunals and their trial decrees.[79] In the *Mehinovic* case, for example, Judge Shoob agreed with the ICTY that:

> Common Article 3 [of the Geneva Conventions] prescribes "minimum mandatory rules applicable to internal armed conflicts…[that] reflect elementary considerations of humanity

> applicable under customary international law to any armed conflict, whether it is of an internal or international character."[80]

Additionally, following the ICTY decisions that construed the conflict in the former Yugoslavia as international in nature,[81] he pronounced that the acts of "inhuman treatment [including torture], willfully causing great suffering or serious injury, and unlawful confinement" perpetrated by defendant Vuckovic in the course of war crimes impinged on other treaty and customary proscriptions against "grave breaches."[82] Furthermore, these same atrocities executed in furtherance of uprooting non-Serbian ethnicities in Bosnia-Herzegovina were adjudged as equivalent to "crimes against humanity" directly outlawed by international customary law.[83] In a legal sense, the commission of the harms to the plaintiffs was never sustainable, regardless of whether Vuckovic "participated directly…[or] actively encouraged, aided, and even supervised."[84] On balance, Judge Shoob maintained that the ordeals particularized and suffered by the Muslim refugees were indeed enforceable under the ATCA.

The next group of cases coming under discussion are those that were directed against abuses of power by an array of wire-pulling officials who worked in high places within the military and political establishments when the human rights misdeeds began. Among them are *Forti v. Suarez-Mason*[85] (1988), *In re Estate of Marcos Human Rights Litigation* (*Trajano v. Marcos*)[86] (1992), *Hilao v. Marcos*[87] (1994), *Paul v. Avril*[88] (1992), *Todd v. Panjaitan*[89] (1994), *Xuncax v. Gramajo*[90] (1995), and *Abebe-Jiri v. Negewo*[91] (1996). Under the doctrine of command responsibility, the high-ranking government overseers in each of these cases were no longer safely sheltered behind the scenes without incurring a shred of punishment. Rather than being granted exoneration, they were declared responsible by U.S. courts under the ATCA and TVPA for their subordinates' crimes in times of peace or warfare.

In doing so, U.S. judges routinely declined the defendant commanders the opportunity to warrant their behavior by recourse to a foreign sovereign immunity concept or a nonjusticiable political question. As a rule, two circumstances conditioned the resulting judicial dismissal of these implausible subterfuges. The first was that the defendant's government had already waived his immunity and consented to surrender him to the U.S. proceedings for trial.[92] Another dominating factor was the matter of truth discerned by judges: that the instruction of inferiors to carry out flagrant crimes evidently far exceeded the compass of the superiors' accorded authority, at variance with customary law or *jus cogens*.[93] Moreover, in the *Forti*, *Hilao*, and *Paul* cases, U.S. courts reasoned that the injustices under attack could not survive scrutiny under the act-of-state doctrine because they were neither governmental nor public in nature.[94]

As the global community endeavors to move forward on its path toward economic integration, the appropriateness of MNC business practices has concomitantly surfaced as yet another focal point of litigation under the ATCA. The cases coming to the forefront in conflict with MNC misdeeds are *Doe v. Unocal*[95] (1997) and *National Coalition Gov't of the Union of Burma v. Unocal*[96] (1997). For years, practicing attorneys and NGOs[97] had dedicated themselves to defending the human rights of injured Burmese locals as well as exiled individuals and refugees in flight from high-handed politics in Burma.[98] They were suing as designated defendants in U.S. courts California-based Unocal and its chief executives (hereinafter Unocal) and a French-headquartered oil company, Total, as well as the ruling junta of Burma and its nationalized oil business.

The cause for litigation arose from a series of shocking allegations. To enhance their profits from the Yadana natural gas project in southern Burma, Unocal and Total had indirectly incited the Burmese military dictatorship to violate Tenasserim villagers' international fundamental rights. As one of the joint venturers, the junta was funded by Unocal and Total to undertake a variety of activities critically linked to the project execution such as clearing ground, providing security, and building infrastructure around the oil field. Often, a reign of terror was deliberately employed by the Burmese authorities to intimidate residents of the Tenasserim region into performing their share of the contractually assigned tasks. The alleged crimes took the form of torture, arbitrary detention, rape, murder, coerced relocation, property confiscation, and slave labor. Evidentially, there was no denying that this grisly situation was plotted and progressing under the full knowledge of Unocal and Total.

At the pre-trial stage, Judge Richard A. Paez from the U.S. District Court for the Central District of California set aside the charges against the junta regime and its state-run oil company.[99] Yet, the question over whether Unocal should shoulder any legal onus as "beneficiary accomplice" or "indirect complicity" emerged and continued to dominate the crux of court debate in forthcoming proceedings.[100] By applying a joint action test, Judge Paez determined that the plaintiffs had sufficiently provided a prima facie case to activate the ATCA action. It sounded obvious that Unocal[101] and the Burmese government had acted "in concert with one another" in prejudice of the plaintiffs' human rights for the sake of facilitating the petroleum project achievement in the Yadana field.[102]

Judge Paez identified Unocal's "accepting the benefit of and approving the use of forced labor" as tantamount to the historically notorious slave trade that was stringently prohibited and vitiated by international customary law. This offense was so severely incriminating that Judge Paez indicated that even though Unocal operated the

challenged act of enslavement in the pure person of a private actor absent government synergy, the company had nonetheless placed itself in a position that was exceedingly untenable as a matter of law.

In later consolidated motions for summary judgment filed by Unocal, a reassigned federal trial judge, Ronald S.W. Lew, however, laid out relatively bewildering terms of culpability in the matter of labor enslavement and other breaches faulted in the *Doe* case. It was irrelevant that Unocal had clear cognizance from the outset of the ongoing human rights abuses inflicted by the Burmese junta in relation to the Yadana project development. Moreover, the practice of forced labor in question had indeed brought forth a great deal of tangible financial interests to Unocal itself. Contrary to Judge Paez's prior declared posture, Judge Lew refused to bring Unocal to account pursuant to the pleas of Burma's victims. The creation of the split decision outcome at this later procedural motion hearing principally originated from two prongs of reasoning.

In Judge Lew's opinion, the administration of slavery or slave trading long prohibited by *jus cogens* norms need not call for state involvement as a component to give rise to a tort under the ATCA.[103] The contested forced labor in the *Doe* case, however, satisfied neither a public service requirement as asserted by Unocal nor a definition of "modern slavery" pressed by the violated Burmese.[104] Instead, Judge Lew opined a different construction: Unocal's "indirect" entanglement in terms of knowing of and gaining from the coerced labor program did not reach the level of "active participation," a prerequisite to rightfully triggering liability on the part of Unocal.[105] Further, a "joint action" test resulted in another postulate behind Judge Lew's dismissal of other ATCA claims on physical violence (murder, rape, and torture) and forced relocation.[106] By that standard, tort establishment was justifiable only after a showing of a substantive cooperative nexus (e.g., conspiracy, willful participation, or some degree of influence or control) between Unocal and Burma in the entire system of human rights violence. Unocal had, in fact, shared a common goal with the Burmese military of producing lucrative profits from the Yadana oil exploitation. However, Judge Lew contended that the proof against Unocal plainly fell short of unveiling a "proximate cause." Consequently, in order to build the case the *Doe* plaintiffs needed to convince the court that Unocal did play an overriding and inseparable role in prompting the junta rulers to carry out the crimes against the inhabitants of Tenasserim.

Unocal's third-party tort liability in the *Doe* suit was pursued to the Ninth Circuit Court of Appeals.[107] Partially reversing Judge Lew's disposition, a three-judge panel on the Ninth Circuit adjudged Unocal responsible on all counts other than torture by reason of an "aiding and abetting" rationalization.[108] On 14 February 2003, the appellate court

nonetheless recanted the panel's opinion and ordered a rehearing starting in June on an en banc basis.[109]

In the brief aftermath of Judge Lew's disclaimer to rule on state law-based assertions, the same Burmese complainants fighting in federal courts resorted to the Superior Court of California to launch a second-tracked *Doe* suit. California Judge Victoria G. Chaney persistently favored a jury trial to address the overdue justice awaited for eight years by victimized Burmese villagers.[110] The state trial slated for June 2005 was expected to resolve the outstanding issue of whether Unocal bears any vicarious liability for the coerced labor imposed by the Burmese military, as an agent or independent contractor, for the promotion of economic gains from the Yadana venture. Partly impacted by the U.S. Supreme Court decision in *Sosa v. Alvarez-Machain* that admitted the viability of future ATCA actions[111] and partly pressured by the upcoming state jury trial, Unocal on 13 December 2004 announced a tentative confidential settlement reached with the plaintiffs under the supervision of the federal Ninth Circuit. In principle, Unocal would compensate the plaintiffs, establish funds to improve living conditions, heath care, and education of the people in the pipeline region, and promise the protection and enhancement of their human rights conditions.[112]

Alongside the *Doe* litigation, there are scores of other ATCA-and TVPA-founded suits emerging in U.S. courts in confrontation of MNC activities that have grievously contributed to a series of excesses in the Third World. The MNC-related atrocities unearthed by those lawsuits are outrageously wide-ranging, representing war crimes, crimes against humanity, genocide, environmental damage and its attendant impairment to local peoples' health, and other crimes similar to those already shown in *Doe*.[113] In several instances, human rights activists have even turned to the ATCA as a mainstay to track MNCs' wartime evildoings of exploiting forced labor to boost their capital returns, which in turn substantially powered and prolonged Nazi and Japanese war efforts.[114]

On 28 July 1999, California legislators passed a milestone law that formally voided the corporate utilization of "slave labor" or "forced labor" during World War II for financial ends.[115] Based on that enactment, a class of tormented victims is entitled to sue a host of corporate accessories to the Nazi regime and its allies for monetary compensation in California state courts. The statute of limitations granting the pursuit of such long-delayed civil justice was set as 2010. California's authorization of recovery for World War II labor enslavement has sent a meaningful and encouraging message to the human rights community. It implicitly validates and sponsors the growing ATCA litigation movement against a modern form of corporate villainies committed across national borders. Notwithstanding years of unfailing endeavors expended by human rights activists in hopes of bringing MNCs into the limits of the global human rights governance,

the Bush Administration has repeatedly attempted to make the California law and the ATCA abrogated in U.S. courts.[116]

Besides the ATCA jurisprudence, another statutory arena frequently associated with human rights lawsuits in U.S. courts is the FSIA. Thanks to congressional implementation of the 1976 immunity law and, in particular, its 1996 anti-terrorism amendments, human rights advocates had garnered phenomenal legal victories from the 1980s through 2003. They recurrently asked U.S. courts to obviate the vindication of foreign sovereign immunity, the act of state, head-of-state immunity, and *forum non conveniens* raised by sovereign rights abusers in an attempt to avoid being adjudicated in the United States.

Two apposite cases are examined here. One is *Letelier v. Republic of Chile*[117] (1980). It blamed Pinochet's Chile and other participators for involvement in the bombing deaths of former Chilean ambassador and foreign minister, Orlando Letelier and Ronni Karpen Moffitt, in Washington, D.C. The other case is *Liu v. Republic of China (ROC)*[118] (1989), in which the ROC as well as other involved individuals were sued over the murder of a Chinese American dissident, Henry Liu, in California. As a result of the lifting of sovereign immunity by Congress in the tortious activity exception of the FSIA (28 U.S.C. § 1605(a)(5)), U.S. federal trial and appellate courts in *Letelier* and *Liu* respectively negated immunity requests from Chile and the ROC.[119] After brushing aside the defense of sovereign immunity and asserting jurisdiction under 28 U.S.C. § 1330, judges deliberating on the two courts moved on to undercut governmental attempts to call for absolution from tort liabilities under the act-of-state theorem.

Two rationales came into play in shaping those pragmatic judicial choices. The courts had no doubt that an offense of murder had uniformly attained a degree of worldwide censure.[120] For that very important reason, the commission of the murders at issue could not in any way be construed as being in the sphere of public business that went beyond inquiry by the U.S. bench.[121] In light of the murder case in *Liu* occurring within U.S. jurisdiction, the Ninth Circuit's three-judge panel additionally took the view that a court disposition of this kind would hardly constitute any encroachment upon the sovereignty of the ROC.[122] Nor could it possibly engender "more embarrassment than the exposures already made by the ROC courts" that had convicted and sentenced the persons embroiled in the Henry Liu homicide prior to this civil damages suit entered by Liu's wife in the USA.[123]

The legislative removal of sovereign immunity in another implied waiver exception of the FSIA (28 U.S.C. § 1605(a)(1)) provoked the Ninth Circuit to repudiate Argentina's petition for immunity protections in *Siderman De Blake v. Republic of Argentina*[124] (1992). The litigation grappled with the torturing of a Jewish Argentine, Jose Siderman, and the ensuing takeover of his family's property by Argentina's military

regime during the nefarious "dirty war." Led by Judge Betty B. Fletcher, the Circuit panel of three judges voted in favor of Siderman's torture claim.[125] Through the authority of a letter rogatory sent to a California court seeking procedural assistance, Argentina had earlier engaged that unknowing state court in quickening the course of its domestic persecution scheme for which the Sidermans now sought redress in U.S. courts.[126] Argentina had vigorously asked the California court to serve documents on Siderman for the purpose of carrying on virulent criminal proceedings in Argentina against him. By doing so, Judge Fletcher inferred that Argentina had tacitly relinquished its sovereign immunity from the accusation of torture in the *Siderman De Blake* case.

On 24 April 1996, members of Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA)[127] with a statutory provision added to the FSIA immunity exceptions group. The legislative desire to prevent terrorist countries from coming under the general FSIA immunity umbrella had been brewing for some time.[128] In the years leading up to the crafting of this exclusion law, it seemed to be quite a settled rule for federal courts to discard opportunities of reviewing state terrorism-related cases by reason of a diversity of immunity safeguards typically installed under the FSIA.[129] Yet, rising dissatisfaction from Capitol Hill over those federal court rulings eventually changed the jurisprudential landscape in the United States regarding sovereign immunity. It accounted for the genesis of the removal clause in the FSIA that marked a U.S. resolve to combat state-practiced or backed terrorism endangering the life and security of Americans anywhere.

Under the enactment (28 U.S.C. § 1605(a)(7)), a federal court has subject matter jurisdiction to take up any cases against foreign sovereign involvement in international terrorism, in spite of that conduct carrying a public character.[130] Yet, 28 U.S.C. § 1605(a)(7)(A)-(B) contains four conditions under which U.S. courts may disavow to review such a contention: (1) a defendant foreign sovereign is not recognized as a state sponsor of terrorism by the State Department; (2) a claimant has failed to offer the violating state a choice of international arbitration if the terrorist conduct under challenge came about within that state's borders; (3) neither a claimant nor a victim was a U.S. national at the time the event occurred; and (4) the misdeed, if otherwise committed by U.S. agents in American territory, would not be actionable in the U.S. justice system. Five months later, on 30 September 1996, Congress adopted yet another bill, called the Civil Liability for Acts of State Sponsored Terrorism (also known as the *Flatow* Amendment (28 U.S.C. § 1605 note)), to furnish a cause of action for the enforcement of 28 U.S.C. § 1605(a)(7).[131] The amendment empowers the U.S. judiciary to award not only compensatory but punitive damages against a foreign state's officials, employees, and agents whose illicit behavior conforms with the terms of section 1605(a)(7).[132]

Litigation of this kind is not in the least restricted to being brought by a victim or relative. Litigants may well include a victim's longtime companion.[133] The prescription of § 1605(a)(7) permitted claimants to retrospectively sue sovereign violators and their "agency or instrumentality" (28 U.S.C. § 1603(a)(b))[134] for statutorily described terrorist activities.[135] There is nevertheless a ten-year statute of limitations (28 U.S.C. § 1605(f)), which means that actions brought in this context are admissible no later than 24 April 2006.

As a consequence of the fresh legislative imprimatur, a profusion of international law cases developed after the emergence of section 1605(a)(7) to counterweigh foreign terrorism have in large part displayed a remarkable accomplishment record. Take a look at a long line of kindred cases: *Alejandre v. Republic of Cuba*[136] (1997), *Flatow v. Islamic Republic of Iran*[137] (1998), *Cicippio v. Islamic Republic of Iran*[138] (1998) and its companion cases,[139] *Rein v. Socialist People's Libyan Arab Jamahiriya*[140] (1998), *Daliberti v. Republic of Iraq*[141] (2000), *Eisenfeld v. Islamic Republic of Iran*[142] (2000) and its two other like cases,[143] *Elahi v. Islamic Republic of Iran*[144] (2000), *Smith v. Islamic Emirate of Afghanistan*[145] (2003), and *Acree v. Republic of Iraq*[146] (2003). Their legal challenges were against brutal terrors levied under the auspices of rogue countries. The terrors incurred unspeakable torments, injuries, and deaths of a great many U.S. citizens, including the victims of the 11 September 2001 incident. The modes of terrorism brought before U.S. courts ranged from aircraft hijacking and mid-air explosion to suicide bombing, assassination, abduction, prolonged internment in harsh and inhumane conditions, homicide, and physical and mental mistreatment.

Pursuant to the exception clause of 1605(a)(7) for terrorism, these injurious acts all were adjudicated according to the statutory language of "extrajudicial killing," "torture," "hostage-taking," or "aircraft sabotage"[147] (wordings that were borrowed verbatim from the TVPA and from international treaties). More noticeably, the particularized tortfeasers—rogue countries and their organizations and officeholders—did play a central and undeniable element in fomenting, via their authority, the tragic occurrences complained of by terror survivors and family members. Without their engagement or "provision of material support or resources," U.S courts ruled that the wrongful actions executed by terrorist groups or state agents could not have been consummated to the detriment of the international human rights of American victims.

Beyond overriding the defendant countries' demand for dismissal structured on the ordinary FSIA articles,[148] a federal trial court seated in the District of Columbia invalidated other postulates raised in their defense: the act of state, head-of-state immunity, and *forum non conveniens*.[149] The judicial disallowance of the act of state proffer mostly

resulted from the perception that the disputed conduct in itself was squarely unlawful and transpired outside of the jurisdictional province of a defendant country (Iran). In the alternative, there was no room for judicial interference, by invoking the act of state doctrine, in the field of executive policy espoused by Congress that placed a sovereign defendant (Iraq) on a terrorism alert list. The head-of-state immunity account was likewise rebuffed, because the court recognized that one of the purposes of the FSIA exclusion stipulations against terrorism was to force implicated senior foreign officials to answer for the terrorist harms done to Americans. Moreover, solidly refuting the viability of *forum non conveniens*, the U.S. District Court for the District of Columbia understood the § 1605(a)(7) scheme as expressly indicative of Congress's unwavering determination to cope with Americans' injured interests solely and exclusively in the U.S. legal system.

On the other hand, as outlined in the remainder of this chapter, human rights activists have tried in vain to bring a host of violators to international justice in accordance with the ATCA and the TVPA. They consisted of non-state political or religious entities, the U.S. government and its ranking decision makers, and foreign territorial states in addition to a now-ousted Haitian head of state. In *Tel-Oren v. Libyan Arab Republic*[150] (1984), human rights counsel[151] accused Libya, the PLO, and various Arab organizations of bolstering the terror assault of a tourist bus in Israel in which numerous Israelis and foreign visitors were taken captive, tortured, and murdered. The federal court of first instance nonetheless resisted tackling the acts of terrorism in the context of the ATCA.[152] Affirming the lower court's dismissal, three concurrences from the District of Columbia Circuit Court were severally delivered by judges Harry T. Edwards, Robert H. Bork, and Roger Robb.

The question of whether the ATCA was merely a jurisdictional statute or a statute creating a private right of action sparked a heated debate between Judge Edwards and Judge Bork. Judge Edwards upheld the *Filartiga* precedent by treating the ATCA as a congressional enabling law for both jurisdictional and cause-of-action purposes. In spite of that agreement, the lower court's judgment was sustained on the grounds that the Act did not cover non-official torture inflicted by non-state actors such as the PLO.[153] Moreover, the international community had yet to unanimously acknowledge the character of terrorist activities as misdeeds that were utterly forbidden by the law of nations. Conversely, Judge Bork, agreeing with what trial Judge Green opined, read the ATCA as controlling nothing but tort jurisdiction in U.S. courts.[154] Lacking a substantive cause of action endowed by the ATCA, an alien torture victim assumed the burden of showing that the law of nations or a U.S. treaty or a federal law plainly (rather than implicitly) instructed the Court to remedy his or her situation. For Judge Bork,

human rights attorneys had simply failed to do so in the case of *Tel-Oren*.[155]

Finally, Judge Robb maintained that the issue raised in *Tel-Oren* was a nonjusticiable political question.[156] The international status of the PLO was inextricably associated with sensitive diplomatic affairs mandating a unified single voice from the U.S. government. In effect, the executive and legislative departments both stood in a better position to investigate the authenticity of the terrorist violence. The *Tel-Oren* case was unable to procure further deliberation from the U.S. Supreme Court, after the Court denied a writ of certiorari in line with the advice of the State Department.[157]

Along with *Tel-Oren*, a parallel judicial repugnance against ATCA claims extended to *Doe v. Islamic Salvation Front (FIS)*[158] (2003), *Goldstein v. United States*[159] (2003), and *Hoang Van Tu v. Koster*[160] (2004). Accounts of wrongs in *Doe* emanated from the performance of countless savageries such as killing, torture, rape, and kidnapping against Algerian civilians. The charged parties were the militant FIS organization and Algerian Anwar Haddam, with the latter allegedly operating as a public mouthpiece for the former in Washington, D.C. The *Goldstein* complaint, pressed by two Jews now residing in Germany, rebuked the U.S. government for its inability to timely curb the Nazi decimation of Jews at Auschwitz and to return Jewish property looted by U.S. soldiers in Hungary. In the third case of *Hoang Van Tu*, former U.S. servicemen and the U.S. government were jointly listed as tortfeasers by surviving victims and relatives from Vietnam. The incident involved the scandalous carnage of over a hundred My Lai villagers in a brief shooting spree during the drawn-out Vietnam War. In all three cases, attempts to obtain compensation payouts from the wrongdoers floundered completely. Not conferring any remedial approaches, U.S. courts instead overruled the injuries in tort on grounds of a lack of standing,[161] incompetent attestation of evidence,[162] the rule of sovereign immunity,[163] and a time bar argument.[164]

More recently, the U.S. Supreme Court case of *Sosa v. Alvarez-Machain*[165] (2004) has sent out rather mixed signals about the future prospect of relying on the U.S. legal system to sue for tort on the basis of the ATCA. The action was fought by Paul L. Hoffman and other rights advocates[166] as an extended episode surrounding *United States v. Alvarez-Machain*.[167] A former Mexican police officer[168] was charged with abducting a Mexican doctor, Humberto Alvarez-Machain, to the United States to face prosecution for his alleged role in assisting with the torture and murder of a U.S. agent assigned to Mexico for anti-drug enforcement. On the question of the ATCA's force, the full Supreme Court agreed that the statute was no more than jurisdictional in nature and authorized federal courts to originally entertain a very limited class

of cases "defined by the law of nations and recognized at common law."[169]

Writing the controlling opinion, Justice David H. Souter provided illumination in this respect by pointing out that:

> The fact that the [ATCA] was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature.[170]

Admittedly, there was no evidence indicating what causes of action were virtually contemplated by the First Congress during the formulation of the ATCA. In spite of the explanatory paucity on this issue, Justice Souter held, it was perfectly reasonable to consider, by reference to the statute's historical context, that Congress at the time anticipated three specific kinds of offenses alone to be the "tort" redressed in the ATCA. These were "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[171]

Further, Justice Souter, though not procuring a unanimous vote from this point onward,[172] advocated exercising "judicial caution" in the transformation of the law of nations into novel rights of action for the purpose of enforcement under the ATCA.[173] Among the concerns compelling such prudential action from a court, two stood prominently and deserved mention for comprehending what the *Sosa* majority held in mind concerning the fate of emerging ATCA complaints in the future. One was that crafting fresh causes for international law violations could likely run the risk of obtruding into the political domain of foreign policy decision making.[174] After all, ATCA litigation had to a considerable degree almost always required sitting in judgment on the misdeeds of foreign governments or their officials and holding them accountable for tort liabilities thereafter. Another reason was the negative attitude of Congress. It was apparent that legislators on Capitol Hill were not affirmatively encouraging a mode of judicial activism to supercede their lawmaking power to enact any new substantive ATCA torts. This interpretation was abundantly evidenced by, for instance, the Senate's imposition of the non-self-executing treaty doctrine on the ICCPR in a bid to hamper U.S. judges from freely reading and executing the Covenant rights without prior congressional ratification. Despite postulating the operation of "judicial caution," the *Sosa* majority did not intend to nullify the Second Circuit's *Filartiga* decision and a sequence of companion rulings entered serviceably by federal courts in the past decades.[175] Nor did it rule out the possibility that future ATCA cases could be developed in this way for the benefit of tort victims. Rather, "a restrained conception of the discretion a federal court should exercise" applied in addressing new actionable international norms in the context of the ATCA.[176] The modern governing rule in this aspect was that:

> [C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized [when the ATCA was enacted].[177]

How could a judge feel so assured that a norm was "sufficiently definite" to warrant its implementation under the ATCA? Concerning this point, Justice Souter writing for the majority added that an exercising of judgment by the bench was necessary as to "the practical consequences of making that cause available to litigants."[178] Equally noteworthy, exhausting domestic legal procedures in a victim's homeland should be taken into consideration before a new cause of action was legally heard and recognized by U.S. judges. Though not employed in the present *Sosa* case, Justice Souter made a further proposition that "federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."[179]

Regarding the actual subject of arbitrary arrest under dispute between Alvarez-Machain and Mexican policeman Jose Francisco Sosa in the context of ATCA litigation, the majority ended with a decree in favor of Sosa's position. Here, the U.N. Universal Declaration as grounds for the claim was dismissed owing to its precatory and non-binding character, while the Senate's non-self-executing declaration controlled the application of the ICCPR.[180] Further, there were two dominant grounds that the majority suggested should make nugatory Alvarez-Machain's allegation of a customary law ban on arbitrary detention. Nowhere had jurisprudential authorities signified that this prohibitory principle had been raised to the level of customary law status.[181] Moreover, the *Sosa* Court overrode the version of arbitrary detention Alvarez-Machain claimed to have suffered in the process of his abduction to the United States for trial by articulating that:

> [A] single illegal detention of less than a day [in Mexico], followed by the transfer of custody to lawful authorities and a prompt arraignment [in the U.S.], violates no norm of customary international law so well defined as to support the creation of a federal remedy [in the ATCA].[182]

Another group of actions, while brought against foreign sovereign states for international tortious infringements, were invariably thwarted because of three sets of core intervening elements: (1) the normal immunity entitlements in the FSIA, (2) the U.S. Supreme Court's subsequent narrow reading of the FSIA application, (3) and adverse executive positions. Typical are the cases of *McKeel v. Islamic Republic of Iran*[183] (1983), *Persinger v. Islamic Republic of Iran*[184] (1984), *Ledgerwood v. State of Iran*[185] (1985), *Von Dardel v. USSR*[186] (1990),

Denegri v. Republic of Chile[187] (1992), *Saudi Arabia v. Nelson*[188] (1993), *Princz v. Federal Republic of Germany*[189] (1994), *Cicippio v. Islamic Republic of Iran*[190] (1994), *Smith v. Socialist People's Libyan Arab Jamahiriya*[191] (1996), *Hwang Geum Joo v. Japan*[192] (2003), and *Roeder v. Islamic Republic of Iran*[193] (2003). To be more specific, human rights activists and advocacy NGOs in these civil liability lawsuits[194] confronted the misbehavior of foreign countries and their agencies on the basis of the ATCA and the FSIA. The accused violators were involved in hostage taking, arbitrary arrest and confinement, torture, wrongful death, enslaved prostitution, and other gross human rights outrages. In rendering their judgments, U.S. courts nevertheless objected to the applicability of the ATCA[195] and the FSIA exception clauses[196] to eliminate immunity grants from the sovereign defendants.

The congressional device of the FSIA and the *Amerada Hess* case law have constrained U.S. courts from denying immunity relief to offending countries and their agencies or instrumentalities. Affected by the U.S. Supreme Court's *Amerada Hess* decision, U.S. courts have repeatedly pronounced that civil actions lodged under the ATCA against foreign sovereigns and their agencies must concurrently meet the FSIA exception conditions to allow sovereign immunity to be removed. Yet, as a matter of fact, the structure of the FSIA itself leaves ATCA-based actions least likely to be successful in the United States. The FSIA provisions make immunity suitability the norm (28 U.S.C. § 1604). The anomalies enumerated in the FSIA are few and do not purportedly reach out to international human rights breaches. In these circumstances that lack clear legislative incorporation of a human rights component into the FSIA, the U.S. judiciary would normally choose not to interpret that statutory perimeter so broadly as to embody *jus cogens* violations.[197] The restrictive posture taken by the bench thereby enables a foreign country and its agency to claim impunity from their faulted wrongs by depending on the FSIA as a readily obtainable safeguard to blunt the pursuit of civil justice by human rights activists. Moreover, where an executive influence is added to such subtle sovereign matters, U.S. courts would almost always stand up for a state perpetrator in open flouting of international human rights precepts.

For instance, in the *Von Dardel* case, the approval of the State Department through a statement of interest significantly reinforced the judicial will to qualify the U.S.S.R. for the right to maintain its sovereign immunity.[198] The court holding, however, was made with little concern that the unlawful imprisonment of a Swedish representative by the Soviet Union was blatantly at odds with the long-standing security of diplomatic personnel in international jurisprudence. In *Nelson*, an American employee was allegedly incarcerated and tortured by Saudi agents shortly after his report to Saudi authorities of the safety hazards existing at the state-owned hospital in which he served. Again, the State

Department's role as a friend of the court was decisive in vindicating Saudi Arabia's non-compliance with international human rights norms. It tipped the federal high court toward extricating Saudi Arabia from the civil redress sought by that American victim.[199] Similarly, U.S. amicus arguments exerted some bearing on the voting decision of a federal appeals court, helping to produce an outcome that asserted an extension of absolute sovereign immunity to the government of Japan and deprived former "comfort women" of any appropriate legal recourse to amend their decades-long grievances.[200] In all likelihood, the participation of the United States in a number of lawsuits as a co-defendant had led adjudicating judges to side with yet other governmental wrongdoers.[201]

An executive constituent likewise wielded its powerful leverage in a head-of-state immunity case. In *Lafontant v. Aristide*[202] (1994), legal counsel Andrew D. Greene berated then-Haitian President Jean-Bertrand Aristide for ordering Haitian soldiers to murder a former Haitian official plotting a coup d'etat to prevent Aristide from taking office. In deference to a suggestion of immunity letter sent by the State Department, Judge Jack B. Weinstein of the U.S. District Court for the Eastern District of New York overthrew the attorney's allegations based on the FSIA and the TVPA.[203] The concept of head-of-state immunity provided a basis to structure his holding in support of Aristide's position. Judge Weinstein noted that the Haitian government had no intent to disclaim President Aristide's immunity. Further, legislative history surrounding the FSIA, together with international comity and the TVPA, nowhere signaled the annulment of reciprocal head-of-state immunity conventionally honored among the community of sovereign states. In Judge Weinstein's view, that mode of immunity controlled and patently gave legitimate heads of state preferential treatment in legal matters. Whether Aristide ultra vires ordered the extrajudicial killing at issue was utterly extraneous to court analysis. Rather, Aristide as Haitian President enjoyed an inviolable privilege to be free from any civil prosecution in U.S. courts.

Analogously, deference to an executive factor has excluded relying on international human rights claims to fight against the impropriety of U.S. policy formulation in the realm of national security. *Crockett v. Reagan*[204] (1983), *Greenham Women against Cruise Missiles v. Reagan* (1985), *Sanchez-Espinoza v. Reagan*[205] (1985), *Nicaragua v. Reagan* (1988), and *Saltany v. Reagan*[206] (1989) stand for this class of lawsuits. Descriptively, rights lawyers and the CCR, alongside a group of congressmen, invoked the ATCA mechanism to outlaw the deployment of cruise missiles in the U.K. by President Ronald Reagan's Administration. In addition, the interventions in Central America and the bombing of Libya during the Reagan years came under legal attack. To establish the validity of their ATCA litigation, human rights activists predicated their arguments chiefly on: the 1899 and 1907 Hague Conventions, the 1925 Geneva Protocol, the Nuremberg Principles, the

Genocide Convention, the Treaty of Washington, the U.N. Charter, and the OAS Charter.

In response, U.S. courts espoused different legal formulas to throw out those international lawsuits. The barriers broadly included: a political question, the last-in-time doctrine, the non-self-executing thesis, the act of state, head-of-state immunity, sovereign immunity, and presidential immunity inherently flowing from his constitutional power to command the U.S. armed services.[207] In the *Nicaragua v. Reagan* case, the District of Columbia Circuit Court connoted yet another dualist notion by which to abdicate from examining the legality of President Reagan's secretive foreign affairs intended to bring down the leftist government of Nicaragua. The concept reasoned by the D.C. Circuit was that all ICJ decisions, including its 1986 judgment voiding U.S. clandestine aid activities in Nicaragua, only "operate[d] between and among [national] governments."[208] They were not enforceable by private individuals against their own national government in U.S. courts.

Reviewing this chapter in tandem with its predecessor swiftly makes us draw a striking distinction regarding international legal application between democratic societies in Europe and the United States. In the former, human rights practices are progressively gravitating toward a concept of monism that includes supranationalism. Contrastingly, U.S. courts have been more prone to disavow international law and dispositions either as a rule of decision or as a complement to municipal law constructions. This phenomenon was especially salient in those cases lacking political endorsement from decision makers. Besides that executive element, some examined cases appeared to show other revelations that legal and attitudinal components were not without a certain sway over litigation outcomes in U.S. courts.

Here, two overriding correlated questions arise accordingly. Which of the aforementioned three constituents is of the most significance in construing U.S. judges' decision-making processes? And, to what extent are human rights activists' litigation strategies able to improve in order to accelerate the pace of moving the United States into shoring up today's globalization of justice? To answer those questions, this work elects to apply the legal-centered paradigm as an approach to exploring a string of cases associated with juvenile and foreign national executions as well as Haitian and Cuban refugees. Before entering into that legalistic inquiry, it is essential to first survey all pertinent international law (in Chapters 3 and 5) so as to set up a line of yardsticks against which to judge the propriety of U.S. court decisions on human rights issues. At the same time, the chapters demonstrate how U.N. and Inter-American human rights bodies embarked on their policy making of creating international rules as a result of interest articulation/aggregation by human rights activists.

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CHAPTER 3:

Death Penalty 1: International Norms and Enforcement

In the years immediately following World War II, a vast majority of countries deeply believed in the deterrent value of employing the death penalty in domestic criminal justice systems. This mainstream perception was correspondingly projected in a series of international actions against war criminals at the Nuremberg and Tokyo trials as well as the drafting sessions of the Genocide Convention.[1] To ensure the operation of the death penalty by member countries in a fair and impartial manner, human rights treaty negotiators later laid out a panoply of procedural safeguards for the benefit of capital offenders such as legal representation, the need for a death sentence to be judicially certified, and the chance for the condemned to seek a pardon or commutation and a stay of execution pending remedial proceedings. Yet, over time, the concept of capital punishment, under the influence of international progress on the subject of human rights, has incrementally evolved from recognition of the mechanism as an appropriate sanction to the current near-universal call for its revocation.

TREATIES AND CUSTOMARY NORMS

Global Sources

The Universal Declaration of Human Rights

During the drafting of Article 3 of the UDHR, lengthy debates arose among delegates over whether to make capital punishment an exception to "the right to life." Pursuant to advice from Eleanor Roosevelt and Rene Cassin, the U.N. General Assembly determined the right to life in categorical terms with no reference to the death penalty for the purpose of keeping pace with the nascent movement toward abolitionism at the time.[2] Since then, Article 3 of the UDHR has constantly provided crucial normative guidance on the use of the death penalty for multilateral treaty

prescriptions that subsequently emerged in the ICCPR and the European and American Conventions.

The four Geneva Conventions

While vitiating capital punishment in times of peace, major abolitionist treaties on international and regional planes are largely amenable to its tentative revival in wartime. As a result, humanitarian law characteristically functions as a complementary instrument in supervising the due treatment of condemned civilians and war prisoners in the course of international and internal armed conflicts.[3] Above all, the Fourth Geneva Convention in Article 68(2) emphatically contributes an abolitionist tone to the death penalty system by encouraging States to halt death penalty implementation in peacetime so as to shield their nationals from being potentially executed by an occupying power should their territory be subjugated by outsiders.[4]

The International Covenant on Civil and Political Rights

At the Third Committee of the U.N. General Assembly meeting for the negotiations on the International Covenant on Civil and Political Rights (ICCPR), Uruguay and Colombia propounded an abolitionist approach with solid concurrence from no more than four countries—Finland, Panama, Peru, and Ecuador.[5] Rather, most governments in attendance preferred inserting a capital punishment phrase into the right to life clause of the Covenant in reaction to the then worldwide reality in favor of execution. In its contemporary compromise fashion, the Covenant, however, anticipates the removal of the death penalty in the long run by calling for member countries not to invoke its Article 6 as an apologetic weapon to postpone or exclude any abolitionist practice.[6] Additionally, the Covenant limits the death sentence to the most serious crimes (Article 6(2)) and forecloses its imposition on pregnant women and delinquents under age 18 (Article 6(5)).

According to Article 4(2) of the Covenant, in no event can contracting countries derogate from their obligations to the edicts in Article 6. Although the Covenant is silent on the issue of treaty reservations, the Human Rights Committee strongly opposed any manner of circumvention from the power of Article 6(5) in light of its stipulation bearing customary legal status.[7] Because the ICCPR was conceived as running counter to the goal of Article 3 of the UDHR, a group of abolitionist countries from Latin America and Western Europe continued to advocate for the unconditional right to life on distinct U.N. fronts.[8] The fruit of that campaign finally ripened in the form of the U.N. Safeguards and, more conspicuously, the Second Optional Protocol to the ICCPR.

The U.N. Safeguards

In the early 1980s, the U.N. General Assembly and its Sixth Congress entrusted the Committee on Crime Prevention and Control with the task of refining the content of Article 6 in the ICCPR.[9] To achieve that end, since its March 1984 meeting the Committee has embraced an array of resolutions designed to strengthen various aspects of the Covenant's death penalty provisions.

The first product of this kind was the *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*.[10] Largely inspired by Covenant Articles 6, 14, and 15, the document identifies the scope of "most serious crimes" as "intentional crimes, with lethal or other extremely grave consequences." Further, the U.N. Safeguards prohibit mothers of young children and the insane from being sentenced to death and mandate the execution of death row inmates to take place only based on "clear and convincing evidence" of guilt and with the minimum possible suffering. In order to influence the U.S. Supreme Court's upcoming deliberations on *Penry v. Lynaugh*[11] (1989), the Crime Prevention Committee took a move forward in 1988 by including the mentally retarded into the protected categories of persons under the *Implementation of the Safeguards*.[12] Despite its failure to assign a definite age for the elderly, the Committee nevertheless asked U.N. members to set a maximum age beyond which application of the death penalty would be eliminated outright. In 1996, the renamed Commission on Crime Prevention and Criminal Justice placed a notable emphasis on the viability of relying on the U.N. Standard Minimum Rules to manage the treatment of capital malefactors.[13] Overall, these U.N. resolutions, although non-binding in substance, are conducive to shaping and fortifying customary international norms in the death penalty sphere.[14]

The Second Optional Protocol to the ICCPR

Amid the Crime Prevention Committee's elaboration on the capital standards of the ICCPR, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities began working on a treaty aimed at essentially extirpating use of the death penalty globally.[15] After years of research on this question by Special Rapporteur Marc Bossuyt (1984–1987), the Second Optional Protocol to the ICCPR was formally passed by the General Assembly on 29 December 1989 and came into effect on 11 July 1991.

As the first universal abolitionist treaty, the Second Optional Protocol in Article 2 nonetheless permits party members, at the time of ratification or accession, to announce their retention of the power to resume capital sanctions during international armed conflict. The death penalty implemented in that context is confined to the most egregious military crimes such as espionage, acts of sabotage against military

installations, or intentional offenses incurring one or more casualties as provided by Article 68(2) of the Fourth Geneva Convention.[16] An effort to bring about a large number of ratifications was the driving force that spurred the introduction of conditional abolitionism into Second Protocol Article 2 by Mr. Bossuyt. Yet, in view of Article 6(1) of the Second Optional Protocol and Article 6(2) of the ICCPR, contracting countries must carry out the military death penalty in line with due process safeguards as differently set forth in the ICCPR and the Geneva Conventions.[17]

Other Abolitionist Instruments

The abolitionist concept has routinely taken root in international instruments covering the creation of war crimes tribunals. The statutes for the second generation of international ad hoc and permanent criminal courts unequivocally reject any possibility of using capital sentences to punish the most nefarious convicts in the world.[18] Lobbied by the European Union (EU) and other abolitionist countries as well as NGOs, the U.N. Human Rights Commission has since 1997 brought this subject matter recurrently to international notice.[19] It appeals for a worldwide moratorium, in anticipation of engendering a climate of support eventually leading to national eradication of death penalty policies through that phasing-out process.

Specialized U.N. Treaties

Elsewhere, international society has developed several thematic treaties instrumental in protecting the welfare of persons facing capital charges and on death row, such as the 1963 Vienna Convention on Consular Relations. Its Article 36(1)(b) and (c) spells out a set of benefits applied to alien offenders and their home governments: consular notification and communication. Indeed, consuls or consular employees in the capacities of delegates of a sending country are the intended candidates of privileges and immunities in the Convention. However, non-consular foreign defendants, including those condemned to death, may rightfully invoke Convention Article 36(1)(b) to launch an attack on the defective criminal procedures that they underwent in a receiving country. Under Article 36(1)(b), a host country is obligated to speedily inform an alien arrestee or detainee of the right to consular access and, pursuant to his or her wishes, also allow for timely contact with the responsible consular officer. In turn, the representative consul has a corresponding right grounded in Article 36(1)(c) to pay regular visits to the charged foreigner and to supply all necessary legal assistance in the upcoming proceedings.

The formulation of Article 36(1)(b) is attributed to an accommodating effort made between countries which insisted on automatic consular notification by a receiving country and those which saw such a compulsory clause as unachievable in a pragmatic sense.[20]

The opposition camp raised a number of specific concerns to undergird their view. For instance, they felt there was a privacy obligation to revere the will of an alien detainee as to whether or not to reveal the fact of the detention to the home consulate. In addition, keeping consulates posted of every arrest might put a massive burden on a host country. For the dissenters, it was preferable to place the consular advice issue in a human rights treaty, given that the issue was characterized as part of due process, the enforcement of which was important throughout the criminal justice proceedings. Furthermore, some of the Convention delegates were skeptical that a host country would truthfully conduct the notification requirement and, subsequently, honor that detained alien's petition for consular help. Regardless of their awareness of this legal loophole, the negotiators struck a final version of Article 36(1)(b) that fell short of taking any precautionary steps to do away with such potential abuses.

Surprisingly, they provided for access to consular aid solely on the condition of an accused alien's own request. In the last sentence of Article 36(1)(b), the treaty delegates, however, demanded that a host country apprise a foreign detainee without delay of the right to have his or her consulate notified of the detention. The main purpose of Article 36(1)(b) is to warrant that an alien arrestee or detainee will always receive evenhanded procedural treatment in foreign lands by virtue of the treaty-sanctioned consular support. Simultaneously, the treaty prescription licenses a sending country via its consular officers to actually monitor the situation its imprisoned citizen has encountered abroad. As noted below, it was violations by the United States of Article 36(1)(b) and (c) that compelled condemned foreigners along with their home governments to put the issue not only before U.S. courts but also at the center of international attention.

Next, Article 5(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter the Racial Convention) entitles everyone to the right to claim equality before the law without any adverse distinction based on race, color, or national or ethnic origin. Convention Article 2(1)(c) urges States parties to overhaul on a periodic basis their laws and practices that may call forth "the effect of creating or perpetuating racial discrimination." When examined jointly with the Convention definition of racial discrimination in Article 1(1), it becomes obvious that the Racial Convention equips municipal courts with rather lenient standards—purpose (intent) or effect—for determining the existence of racial stereotypes in criminal justice proceedings alleged by ethnic minorities under sentence of death.[21]

In other words, to measure up to the Convention-set demarcations of discrimination, all that a death row inmate needs to do is to convince judges by adopting the following method for evidentiary substantiation: a country's (facially neutral) laws or practices in the capital justice system

have caused statistically significant harm in sentencing outcomes against his or her race.[22] Beyond that task, it is needless for the inmate concerned to continue by bearing out whether or not the disputed laws or practices are deliberately legislated or performed to the detriment of his or her interest. Once a prima facie case of racial disparity prevails, the burden of proof immediately shifts to responsible administrators. In order for the inmate's claim to be disproved, the authorities must establish that their reason for maintaining the charged capital policies takes precedence over the imperative of suppressing discrimination pursuant to the Racial Convention.

While conceding the legitimacy of structuring a treaty reservation, the Racial Convention in Article 20(2) stringently overrules qualifying the treaty power in a manner incompatible with the object and purpose of the Convention. As discussed below, from the separate perspective of *jus cogens*, the prohibition against racial prejudice doubtless binds the community of nations at all times, including states of war or any other form of national emergency.

The third keynote treaty presented here is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the Torture Convention). In earlier days, U.N. and regional human rights systems did not actually consider the death penalty to represent one type of "cruel" punishment as denoted in the Convention.[23] From the late 1960s onward, some human rights forums—the U.N. Human Rights Committee and the European Court of Human Rights—nonetheless commenced exploring the reach of the normative cruelty bar in the context of the death penalty. The underlying stimulus for this inquiry was related in part to one particular vision then dominating among party members to the ICCPR and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the majority's perception, an international right to life provision did not essentially forbid national recourse to the ultimate drastic measure against criminal defendants, leaving no room for tackling certain capital-related matters with clear human rights implications such as methods of execution and the death row phenomenon. Out of that shared concern, the U.N. and European human rights institutions methodically generated a line of instructive case decisions in favor of death row inmates that rested on the theory of cruel, inhuman, and degrading treatment or punishment. The topics addressed spanned the use of the gas chamber for execution[24] and a delayed notification of reprieves[25] to the protracted death row ordeal.[26]

At first glance, the Torture Convention is seemingly foreign to the administration of the death penalty because Article 1 purely confines the meaning of official torture to an act other than "pain or suffering arising only from, inherent in or incidental to lawful sanctions." Yet, a reading of Convention Articles 1(1) and 16(1) together immediately reveals a

rendering starkly contradictory to that direction of interpretation. This is because the Torture Convention in Article 16(1) also bans "other [official] acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in [A]rticle 1." Such a perspective is reinforced by the development that a sizable number of countries have associated the Convention norms with capital punishment issues in their periodic reports to the Committee against Torture. So too is the decision of *Soering v. United Kingdom and Germany*[27] (1989), handed down by the European Court of Human Rights (ECHR), which found prolonged death row incarceration to be inhuman or degrading treatment. *Soering* lends substantial weight to the advocacy by the human rights community that the death row phenomenon is uncompromisingly barred by international law.

Taken collectively, the described events have driven the United States to be all the more certain that the jurisprudence germinated from the U.N. Torture Convention may someday invite a deluge of litigation targeting its oft-criticized domestic death penalty system. To stave off such recognized potential counteractions from abolitionists, the U.S. government turned to relying on the famous "*Soering* understanding," alongside another general reservation, to narrow the Torture Convention language so as to be read exclusively in its own constitutional light. Despite the U.S. intent to truncate the full force of the Torture Convention by way of Senate-crafted restrictions, according to Convention Articles 1(2) and 16(2), its definitions are to be applied without prejudice to any wider applications contained in other international or municipal provisions. On this principle, the Convention's proscription against torture and other cruel behavior is subject to neither cancellation in a state of public emergency nor limitation at the time of ratification.[28]

Fourth and finally, Article 37(a) of the Convention on the Rights of the Child specifies juveniles under age 18 as persons secured from the death penalty. In agreement with Article 51(2), member countries lodging treaty reservations must pay serious heed not to detract from the Convention's object and purpose that underscore the overriding importance of guaranteeing and promoting the welfare of children prior to their coming of age. Comparable to the preceding treaty provisions against torture and other cruel or inhuman conduct, the Child Rights Convention in Article 41(b) also admits of the preeminence of other legal norms over the Convention to the extent that the former "are more conducive to the realization of [children's] rights." As a whole, countries contracting to the Convention are duty-bound to spare teenage felons from capital punishment in homogeneity with Article 37(a). Regardless of the gravity of a national situation, no case could ever justify skirting that treaty precept.[29]

Regional Sources

The European System

The European Convention for the Protection of Human Rights and Fundamental Freedoms was brought into effect in the early post-war year of 1950. At that time, death penalty enforcement was rife throughout the European continent and the memory of the execution of Nazi war criminals remained vividly etched in the minds of Europeans.[30] By making capital punishment an exception to the right to life clause under Article 2(1), this regional treaty draws some parallels to the ICCPR and the American Convention on Human Rights. From a chronological perspective, those treaties have faithfully mirrored an evolving metamorphosis in international death penalty jurisprudence. By comparison, the European Convention is the least advanced in the sense that it says little about due process rights for capital transgressors, save for declaring that the death sentence must be underwritten by a court of law.[31] Accompanied with these deficient procedural references, the Convention was additionally unable to juxtapose youngsters, pregnant women, and the elderly as a cluster of protected persons to be altogether excluded from capital procedures. The inability of the Convention to recount capital safeguards at full length in Article 2(1) is quite understandable given that international discussions on these issues were sporadic at best during the early post-war years when the Convention was drafted and came into being.

Yet, Article 15(2) of the European Convention points to Article 2 as one of a small number of non-derogable rights acknowledged in the Convention that are categorically inviolable even if member States are on the verge of or under extraordinarily urgent national crises. The sole permissible deviation from the Article 2 provision is a scenario of "deaths resulting from lawful acts of war." Since a range of procedural principles connected with capital punishment is securely granted under the Geneva framework of humanitarian law,[32] it is plausible to maintain that the requirement in Article 2(1) for minimal death penalty proceedings cannot in any way be reduced to nullity on the plea of international or internal armed strife. Another noteworthy question concerns reservations. Here, the answer lies in European Convention Article 64, which strictly rejects the making of "reservations of a general character" by contracting members that would materially eviscerate the Convention's intended purpose of safeguarding individual basic rights and freedoms.

The final issue regarding the European Convention is whether or not its Article 3 prohibition on torture or inhuman or degrading treatment avails itself in the context of capital punishment. In *Soering,* the ECHR impugned the overtures made by Amnesty International (AI) that the

death penalty system per se encroached on Article 3 of the European Convention.[33] By looking at the Convention's drafting history and its Protocol No. 6, the European Court instead insisted that the construction of Article 3 be made in harmony with Article 2(1), which recognizes the legitimate use of the death penalty. In spite of the Court's refusal to quash the capital machinery on Article 3 grounds, the death row phenomenon nevertheless was adjudged to be contrary to the prohibition of Article 3 against inhuman and degrading treatment. This was because inmates on death row constantly undergo years of extended incarceration, with anxieties and anguishes repeatedly falling upon them while living in the shadow of impending execution.

Again, as in the case of Article 2(1), the authority controlling a derogation or reservation to Article 3 comes from Articles 15(2) and 64 of the European Convention. Under Article 15(2), no derogation from the ban in Article 3 against torture and inhuman behavior is acceptable. And, under Article 64, any parties wishing to formulate reservations to Article 3 must not take a blanket approach so as to abridge any essential part of Convention governance on human rights and freedoms.

Insufficient as the European Convention is in mapping out capital safeguards, its ensuing enacted Protocol Nos. 6 and 13 speak volumes for the manner in which European capital jurisprudence has over time dynamically progressed into the most sophisticated in the world. Acting as a paradigm for the U.N. and the Organization of American States (OAS) to construct their later individual equivalents, Protocol No. 6 of 1983[34] marked the first treaty to advocate the cessation of the death penalty multilaterally. To promote active endorsement by the members of the Council of Europe, Protocol No. 6 in Article 2, however, barred the infliction of capital punishment in peacetime alone. It leaves treaty members some measure of latitude to legislate away abolitionist undertakings made in normal times for a category of crimes "committed in time of war or of imminent threat of war."

Apart from those two designated junctures for capital administration, Article 3 of Protocol No. 6 stringently forbids treaty contractors to reinstate capital practices during "other public emergency threatening the life of the nation" by the strength of the derogation clause in Article 15(1) of the European Convention. Moreover, Article 4 of the Protocol flatly bans any reservation based on Article 64(1) of the European Convention to alter its abolitionist substance. Yet, a State party may make use of the Protocol's Article 5 to proclaim that the death penalty be ruled out nowhere but in certain parts of its territorial domain. With regard to the severity of criminal elements and time frames admissible for death sentences, certain discrepancies are detectable between the U.N. Second Optional Protocol and Protocol No. 6. The former limits the enunciation of capital punishment by a reserving country to nothing but "a most serious crime of a military nature committed during wartime."[35]

The latter gives sovereign parties an imprimatur to "make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war."[36]

To answer the growing support from Council of Europe members for an absolute abrogation of capital punishment, the Council's Steering Committee for Human Rights embarked on drafting Protocol No. 13. On 1 July 2003, the Protocol[37] finally entered into full effect after nearly two decades of limited abolitionism in European democracies. It outlaws the invocation of the death penalty as a punishment mechanism in all circumstances, thereby filling the void long left by Protocol No. 6 that conceded its revitalization "in time of war or of imminent threat of war." Meanwhile, the Council of Europe has energetically engrafted the idea of progressive abolitionism into its entire region by committing member applicants at a minimum to espousing Protocol No. 6 and suspending all domestic executions as a prerequisite for admission to any Council activities.[38] The Council agenda on the eradication of capital punishment also remarkably stretches well beyond the zone of Europe. By constantly declining the surrender of alien criminal fugitives to capital trials in their home countries, the Council members are intent on thrusting retentionists in other regions into fundamental policy reform away from the employment of the death penalty.

The American System

Adopted a few months ahead of the UDHR, the American Declaration of the Rights and Duties of Man impliedly couches a conviction of abolitionism in Article I, after its drafters consulted the proposed text for the UDHR as approved by the U.N. Human Rights Commission. In its original perception, the OAS treated the American Declaration as nothing more than a non-binding hortatory document. Through the Statute of the Inter-American Commission and amendments to the OAS Charter, however, the Declaration has gradually evolved into an instrument that authoritatively delineates the contours of individual human rights to be followed by the USA and other OAS members not parties to the American Convention.[39]

Another cardinal instrument coping with human rights for the Western Hemisphere is the American Convention on Human Rights. Article 4 of the American Convention tracked commensurate provisions in European and U.N. treaties by laying down capital punishment as a lawful exception to the right to life. Dissimilar to the European Convention, both the ICCPR and the American Convention demand that pronouncing capital punishment must be limited to individuals other than pregnant women and juveniles and only for the most serious crimes. As the most refined among the three, the American Convention uniquely disqualifies the elderly over age 70 from being sentenced to death. In echoing a hemispheric time-honored tradition of protecting asylum

seekers fleeing political persecutions, OAS member States additionally proscribe in the Convention the levying of death sentences on political offenders.[40] Let us take a closer look at the American Convention and the ICCPR. Some degree of differentiation is swiftly discernible between these two more evolved human rights treaties. The American Convention in Article 4(3) expressly bans abolitionist countries from reverting to their past paths of embracing capital punishment policies, while the ICCPR avoids any such recommendation. Rather, the 1966 U.N. Covenant pleads with contracting countries not to capitalize on its Article 6 as an excuse for retentionism on account of that provision's want of a thoroughgoing renunciation of the death penalty.

Under Article 27(2) in the American Convention, a State party is enjoined from obviating the above Article 4 mandates even "in time of war, public danger, or other emergency that threatens [its] independence or security." As far as the power of a reservation goes, the Inter-American Court of Human Rights has determined that any truncation of Article 4 must not deviate from the Convention's pursued goal in the realization of international human rights justice for its regional peoples.[41]

The advent of the Protocol to the American Convention on Human Rights to Abolish the Death Penalty[42] constitutes another memorable milestone by moving the region's human rights regime a step closer to the idea of abolitionism. As early as 1969 when the American Convention was formally sponsored at San Jose, Costa Rica, a few pro-abolitionist delegates concurrently issued a declaration evincing their desire to promote the creation of a hemispheric abolitionist protocol in the future.[43] The statement in support of rescinding the death penalty in Latin America quickly stimulated both the U.N. and the Council of Europe to follow its lead. Despite the unmitigated enthusiasm revealed by some participants in the San Jose conference, the Inter-American system, however, was several years behind its European counterpart in heading in that direction.

In summary, Protocol No. 13 has so far exemplified the most consummate code ever completed in human history that unyieldingly overrules applying the death penalty as a tool of criminal retribution and deterrence. In antithesis, the other three abolitionist protocols all uniformly manifest signs of tolerance with regard to national resurrection of the sentence of death during a state of war. The U.N. Second Optional Protocol and the Inter-American Protocol nonetheless are slightly heterogeneous from their European counterpart in one sense. Both expect ratifying countries to terminate death penalty enforcement on all occasions unless they particularly convey their wish to resume its wartime employment at the moment of ratification or accession. Along with that common thread between the two, the Inter-American Protocol in Article 2(1) roughly duplicates the language of its U.N. analogue by

limiting a reserving country to executing the death penalty in wartime solely for "extremely serious crimes of a military nature."

The African System

The 1981 African Charter on Human and People's Rights provides for the right to life under Article 4 but makes no reference to capital punishment. In theory, subsidiary sources such as the UDHR and the ICCPR may assist in ascertaining the legitimacy of making a reservation or derogation to Article 4. This rationale flows from Article 60 of the African Charter, which instructs the African Commission on Human and People's Rights to "draw inspiration from international law on human and peoples' rights." Another treaty relevant to administering the penalty of death in Africa is the African Charter on the Rights and Welfare of the Child.[44] In that Charter, Articles 5(3) and 30(e) make clear that death sentences must never be pronounced on minors under age 18, expectant women, or mothers of infants and young children. Similarly, pursuant to Charter Article 46, the Charter's Committee of Experts is empowered to "draw inspiration from International Law on Human Rights" for its deliberations.

The Arab System

Currently, the Islamic regime on human rights remains fairly primitive in its formation. As the region's single treaty extending to the matter of the death penalty, the 1994 Arab Charter of Human Rights[45] in Article 10 legitimates the use of capital punishment for "the most serious crimes." On the other hand, it invests persons convicted of capital crimes with the opportunity to seek pardon or commutation of their sentences. Moreover, the Charter's Articles 11 and 12 solidly repudiate the condemnation to death of a category of prescribed persons: political offenders, children under age 18, pregnant women, and nursing mothers for a reprieve of up to 2 years from childbirth. As of 27 June 2004, none of the League of Arab States' 22 participants had ratified the Arab Charter. Instead, under the assistance of international experts and NGOs, the League is in the process of re-drafting the Charter with an eye to bringing it to a new and higher level that would be more consistent with major U.N. human rights norms.[46]

Customary Norms

The topics under review in this section are systematically divided into: the capital sentencing bar for juveniles, due process safeguards, the prohibition of torture and cruel treatment, and the sanction against racial discrimination. As the following accounts indicate, each of the four has matured into the status of international customary law.[47]

Juvenile Death Penalty

Throughout the 1990s, a small minority of countries were documented as the few intransigents on earth regularly meting out death sentences against juvenile convicts: China, Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, and the United States.[48] Eventually, all of them would either legally or practically invalidate the execution of juvenile offenders within their jurisdictions. Aside from the USA and Somalia, every country in international society has concurred in upholding the Convention on the Rights of the Child generally and its provision on eliminating the juvenile death penalty particularly.[49] Moreover, the degree of unanimity is well supported by the early rulings of the Inter-American Commission and the U.N. Human Rights Committee that putting minors to death was utterly ill-founded and out of touch with evolving developments under customary law.[50] In its later comments on U.S. reservations to the ICCPR, the U.N. Committee impliedly stated age 18 as a customary legal barrier that needed to be first overcome before the death penalty can be rightfully imposed.[51] However disappointing that these remarks fell short of setting an express age of 18 as a lowest threshold, the repudiation of juvenile death sentencing has for years grown and elevated into a peremptory standard binding on all world sovereigns with no possibility of accommodation. Proof that the juvenile customary norm has been universally appreciated as having *jus cogens* force can be handily gleaned from scholarly review,[52] international abolitionist instruments, and a succession of decisions enunciated by the Inter-American Commission. For one, the constituent Rome Statute of the ICC not merely incorporates the idea of abolitionism into its criminal sentencing procedures. More prominently, it also sets out in Article 26 that the ICC's authority does not extend to defendants aged less than 18 at the time that the statutorily defined crimes were allegedly performed. Given that the ICC functions as the first global permanent tribunal to cope with the most grievous wrongdoings in the world, it could not be more palpable that each of its statutory regulations must be emblematic of the effect of leading global opinion.

Due Process, Torture and Cruel Proscriptions

Alongside the universal foreclosure of the juvenile death penalty, due process of law, and the outlawing of torture and cruel practices all are reflected in core human rights documents, as patently depicted in Table 3.1. Viewing these norms as customary international law, the Human Rights Committee of the ICCPR asked treaty members not to frustrate and dilute their legal effect via the making of reservations.[53] By the same token, the International Court of Justice thought common Article 3 of the four Geneva Conventions that addressed, among other concerns, torture and due process to have binding force on non-objecting

countries as a matter of customary law.[54] With exceedingly exigent conditions in the offing or underway, those countries are still required to honor in good faith common Article 3 as the minimum possible code of conduct. By that logic, it stands to reason that the same guidelines are equally apposite in the management of national justice systems during peacetime.[55]

Racial Discrimination

The historical efforts to stamp out invidious racial prejudices can be traced back to the early nineteenth century, when Britain's movement was launched to counter the inglorious practice of slave trades and slavery. At the urging of transnational abolitionists,[56] the British government plunged into a decades-long crusade to fight endemic trafficking of black Africans for enslaved labor far and wide to such places as the Americas and West Indies.[57] Sovereign perpetrators repeatedly were pressured into signing a series of anti-slave trading treaties as a result of Britain's recourse to the combined powerful weapons of naval fleets, diplomacy, and economic incentives.

The termination of World War I ushered in an era of global resolve to entirely eradicate that chronic misconduct worldwide by means of international organizations. One notable example was the setting up of a study commission by the League of Nations that resulted in the entry into force of the Slavery Convention in 1927.[58] Under Article 8 of the Slavery Convention, the Permanent Court of International Justice, an organ independent of the League, was given authority to hear referred disputes arising between treaty participants. Pursuant to the same treaty's Article 7, States parties were put under obligation, through periodic reporting, to inform the League Council of the conditions as to their implementation of the Convention in domestic jurisdictions. Another central initiative undertaken by the League of Nations for the purpose of vindicating racial fairness was supporting a series of post-war minority rights accords concluded outside of its venue by the victorious allies and some European countries of concern to the victors. By doing so, the League sought to forestall the latter from disrupting the rights enjoyment of their domestic non-dominant ethnicities in the fields of religion, culture, education, and politics.[59] Almost immediately, the League became an arbitral apparatus consigned to receive complaints from underprivileged races residing dispersedly across the European continent. The lessons of the Holocaust learned from the macabre butchery of Jews by Nazi Germany further elevated international willingness to safeguard individual human rights to an all-time high, resulting in the direct inclusion of the principle of equality in the U.N. Charter.[60]

Since its creation, the U.N. has confronted a range of nefarious countries that too often claim that the question of racism falls wholly within the domain of their internal affairs. For instance, the U.N.

Commission on Human Rights and its Sub-Commission were installed with some investigative functions for keeping in check various kinds of unequal differentiations purposely applied against minority groups at the local level. In order to suppress and halt intolerance everywhere, including Southern Rhodesia and South Africa, the U.N. orchestrated a thematic focus on combating racial issues on a long-term basis. Additionally, the global rejection of national distinctive disparities has been solidified by the genesis of a string of human rights treaties equipped with separate oversight mechanisms in the U.N. and regional systems. These multilateral documents not only set forth the fiats requiring member sovereigns to effectuate policies of racial equality in a faithful manner. They also criminalize bias-originated actions such as genocide and apartheid under international law. On the domestic front, many countries affirmatively upheld the notion of equality by means of domestic enactments. Assuredly, after a more than two-century global mission against the once-thriving institutions of the slave trade and slavery, the legitimacy of which was taken for granted by a throng of obnoxious sovereigns, the canon overriding racial discrimination has today evolved into a peremptory norm.[61]

In other words, with the incredible enhancement of the global human rights regime, the death penalty system can no longer defy a torrent of criticism from the EU and other abolitionist countries. The system is heavily faulted because of its flawed characteristics of unfairness, arbitrariness, mistrial, and cruelty. In various international and regional venues, the idea of extirpating capital punishment has unremittingly grasped the intense attention and interest of sovereign participants and prompted their careful study of its achievability. The notion of abolitionism is sure to become an irresistible trend in the modern world, especially in light of more than half the countries in the world having already renounced the death penalty either in practice or in law.

Table 3-1. International law on capital punishment

Instrument	Right to Life and Abolition	Banning Death Sentencing of Juveniles	Consular Notification and Access	Due Process and Equality before Law	Banning Cruel Prison Conditions	Banning Racial Bias
Global						
UDHR of 1948	3			7, 8, 10	5	2, 7, 10
3rd Geneva Convention of 1949				87, 100, 101, 107 (capital) 3, 82, 84, 86, 99, 102-106 (general)	3, 87	3
4th Geneva Convention of 1949	68(2) (implicit)	68(4)		3, 75	3(1)(a), 37, 85	3
Vienna Consular Convention of 1963			36(1)(b) and (c)			
Racial Convention of 1966				5(a)		5(a)
ICCPR of 1966	6(6) (hortatory) [NR via reading] and [ND]	6(5) [NR via reading] and [ND]		6(2) and (4) (capital) [NR via reading] and [ND via 4(2)] 9(4), 14, 26 (general)	7 [NR via reading] and [ND] 10(1)	2(1) [part ND][a] 26
1977 Protocol I to Geneva Convention		77(5)				
1977 Protocol II to Geneva Convention		6(4)				

U.N. Capital Safeguards of 1984		3		2, 4, 5, 6, 7, 8		
Torture Convention of 1984					16(1) [NRand ND][b]	
U.N. Capital Safeguards of 1989				1(a) and (b)		
Child Rights Convention of 1989		37(a) [NR and ND][c]		12(2), 37(d)	37(a) [NR and ND][d] 37(c)	2(1) [part ND][e]
1989 Second Optional Protocol to ICCPR	1 exception: 2 (wartime revival via a reservation)					
1993 Statute of ICTY	24(1)					
1994 Statute of ICTR	23(1)					
U.N. Capital Safeguards of 1996				referring to U.N. Standard Minimum Rules		
1998 Statute of ICC	77					

Table 3-1, continued

continued

Instrument	Right to Life and Abolition	Banning Death Sentencing of Juveniles	Consular Notification and Access	Due Process and Equality before Law	Banning Cruel Prison Conditions	Banning Racial Bias
Regional						
European– European Convention of 1950				2(1) (capital) [ND via 15(2) and humanitarian law] 5(2)(3)(4), 6(1)(3), 13 (general)	3 [ND]	14
1983 Protocol No.6	1 exception: 2 (wartime)					
2002 Protocol No.13	repeal at all times					
American– American Declaration of 1948	I			II, XVIII, XXV, XXVI	XXV, XXVI	II
American Convention of 1969	4(3) (no revival) [NR via reading] and [ND]	4(5) [NR via reading] and [ND]		4(2) and (6) (capital) [NR via reading] and [ND via 27(2)] 7(4)(5)(6), 8, 24, 25 [part ND][f] (general)	5(2) [ND]	1 [part ND][g] 24

1990 Protocol to American Convention	1 exception: 2 (wartime revival via a reservation)					
African – African Charter of 1981[h]	4			3, 7(1)	5	2, 3, 19
1990 African Charter on Rights and Welfare of Child		5(3)				
Arab– 1994 Arab Charter of Human Rights		12				

[NR]: a non-reserved norm at the time of treaty ratification.

[ND]: non-derogable in times of official public dangers.

[a] In light of Article 4(1) of the ICCPR, discrimination on the limited grounds of race, color, sex, language, religion or social origin is intolerable even in times of public emergency, cf., ICCPR, art. 2(1) (particularizing a wider range of disparity).

[b] NR and ND are in accordance with the Human Rights Committee's comment and the ICCPR, see Article 16(2) of the Torture Convention.

[c] NR and ND arises from the Human Rights Committee's comment and the ICCPR, refer to Article 41(b) of the Child Rights Convention.

[d] Ibid.

[e] A derogation is partially restricted on the basis of the ICCPR, see Article 41(b) of the Child Rights Convention.

[f] According to the Inter-American Court, at a minimum Articles 7(6) and 25(1) (the right to simple and prompt recourse to a competent court) fall within the meaning of Article 27(2) "judicial guarantees essential for the protection of [non-derogable] rights" and thereby are not susceptible of cancellation in time of official emergencies, see *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1), and 7(6) of the American Convention on Human Rights)*, Advisory Opinion, OC-8/87 of 30 January 1987, Inter-Am. Ct. H.R., Series A: Judgments and Opinions, No. 8(1987), in Elizabeth A. Faulkner, "The Right to Habeas Corpus: Only in the Other Americas," *American University Journal of International Law & Policy* 9 (1994): pp. 659, 669-674.

Table 3-1, continued

[g] While Article 1 sets forth a list of more wide-ranging prohibited grounds of discrimination, Article 27(1) regards a derogation as invalid purely for distinction based on narrower causes of race, color, sex, language, religion or social origin.

[h] The African Charter does not introduce a general derogation clause. But, its Article 60 provides that: "The Commission shall draw inspiration from international law on human and people's rights." So far, it remains unknown whether the African Commission and Court will follow the list of non-derogable rights laid out in U.N. treaties for future decisions, see Buergenthal, *International Human Rights in a Nutshell*, p. 176.

INTERNATIONAL REMEDIES

Since the United States does not recognize the competence of human rights treaty institutions to deal with private petitions,[62] international legal avenues accessible to persons sentenced to death in the United States are very limited. In fact, after exhausting judicial relief in U.S. courts, human rights activists representing condemned offenders are entitled to lodge individual complaints with only two human rights bodies on international and regional levels: the Inter-American Commission on Human Rights (IACHR) and mechanisms within the U.N. Commission on Human Rights. However, concerned States parties may also utilize the Inter-American Court of Human Rights and the International Court of Justice as ideal forums to seek an advisory opinion or an international judgment in support of their positions.

The U.N. Commission on Human Rights and its Special Rapporteur on Executions

Private communications addressed to the Human Rights Commission must satisfy the condition of "a consistent pattern of gross and reliably attested violations of human rights" and be examined under the confidential 1503 procedure.[63] While the Commission's mandate under this procedure focuses exclusively on deliberating cases of massive and widespread human rights violations, the function of the Special Rapporteur to the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions does not. Established in 1982 by the Commission on Human Rights and given a broadened mandate in 1992 to investigate all forms of violations of the right to life, the Special Rapporteur on Executions is entitled to receive individual complaints so as to facilitate

> examin[ing] situations of extrajudicial, summary or arbitrary executions and…submit[ing] on an annual basis his findings, together with conclusions and recommendations, to the Commission on Human Rights, as well as such other reports as the Special Rapporteur deems necessary in order to keep the Commission informed about such serious situations of extrajudicial, summary or arbitrary executions that warrant its immediate attention.[64]

This individual petitioning process was triggered by attorneys Robert F. Brooks and William H. Wright, Jr. from Hunton & Williams. Following a failed appeal in *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997), these counselors turned to U.N. Special Rapporteur Bacre Waly Ndiaye for charging the U.S. government with ignoring the treaty rights of consular notification and assistance in prejudice of their client Mario

B. Murphy and other foreigners confined on death row nationwide.[65] A similar action was taken by Amnesty International as well.[66] The result was the inclusion by Ndiaye of material critical of the United States' consular treaty breaches in his mission report to the U.N. Commission.

The Inter-American Commission on Human Rights

As an OAS member that is not a party to the American Convention, the United States is duty-bound to accept the jurisdiction of the Inter-American Commission on Human Rights (IACHR) rather than that of the Inter-American Court.[67] For this reason, human rights activists have filed a series of petitions on behalf of condemned persons seeking rulings from the IACHR. In acting on human rights advocates' cases, the Commission may opt to invoke the force of Article 25(1) in its Rules of Procedure, requesting precautionary measures from the USA with the aim of putting off the execution of the petitioners pending deliberation on the merits of the claims.[68] In the final substantive stage, the Commission has the authority to compile its findings, conclusions, and recommendations in a report to the accused State party, for example, the United States in death penalty cases, based on the alleged violations of the American Declaration. If the United States is later found responsible for ongoing deviations from these recommendations, the Inter-American Commission may decide to publish the report and transmit its decision on U.S. infringements to the OAS General Assembly.

Unfortunately, the OAS General Assembly has typically demonstrated lukewarm interest in bringing transgressing countries back to the compliance track. And, on no account can the contested cases presented against non-parties to the American Convention proceed forward to the phase of the Inter-American Court.[69] As a consequence, when facing accusations by human rights activists before the Commission, the United States at worst begets a public censure without necessarily being constrained to correct its international breaches domestically. Although the Inter-American Commission exerts little obligatory effect on U.S. authorities, human rights defenders nonetheless have continued resorting to the Commission as an instrument for exposing U.S. capital defaults to the international limelight. By taking action in this way, human rights advocates anticipate that their cases will receive favorable publicity resulting in clemency of their clients, or that the U.S. movement toward abolition of the death penalty will be strengthened by the Commission's critical reporting. Moreover, in their calculations, this petition campaign may help build up favorable precedents in furtherance of prospective wins in the Inter-American system and elsewhere.

Roach and Pinkerton v. United States (1987) constituted the first petition addressed by the Inter-American Commission against the United

States' death penalty policy. In that case, the lineup of human rights defenders was composed of Professor David Weissbrodt and attorney Mary McClymout, with co-sponsorship by the ACLU and the International Human Rights Law Group and a separate petition from Amnesty International. Eighteen organizations appeared as amici in support of the complaint. At the heart of the *Roach and Pinkerton* case lay a controversy over whether South Carolina and Texas could perform the executions of James T. Roach and Jay Pinkerton in disregard of the universal prohibition of the juvenile death penalty. By raising worldwide awareness of detestable capital practices in South Carolina and Texas via the IACHR and its ruling, human rights defenders attempted to widen international pressures on "the legislatures, courts, and executives" of retentionist U.S. states for a policy turnaround.[70]

At the IACHR, the Commissioners noted that the principle forbidding capital offenses for juvenile offenders, while devoid of a universal consensus on the minimum age for death penalty eligibility, had over the years risen to the status of *jus cogens* within OAS member countries.[71] As a result, a customary norm to ban the condemnation of children to death was "emerging" in international jurisprudence.[72] For all its recognition of this rule as possessing customary legal force, the Inter-American Commission, however, arrived at a conclusion premised on the American Declaration. It held that the execution of Roach and Pinkerton and the existence of divergent capital practices in U.S. states based on varying minimum permissible ages for death sentencing were essentially antipathetic to the rights to life and equality before the law, as stipulated in Articles I and II of the Declaration.

On the verge of South Carolina and Texas subjecting Roach and Pinkerton to execution, former President Jimmy Carter, the U.N. Secretary General, and the Inter-American Commission joined the ranks of those pleading for clemency. Brushing aside the calls for deferments, the two states insisted on moving ahead to carry out the death sentences before the Commission was able to finalize its decision. The publicizing of the *Roach and Pinkerton* case in international and domestic arenas nevertheless swiftly provoked the U.S. Supreme Court to grant a writ of certiorari in *Thompson v. Oklahoma*[73] and, for the first time, to review the constitutionality of juvenile death sentencing within the United States.

The second U.S. death penalty case reviewed by the Inter-American Commission was C*elestine v. United States*[74] (1989). In the *Celestine* case, Professor Bert B. Lockwood and attorney S. Adele Shank invoked Articles I, II, and XXVI of the American Declaration, accompanied by statistical studies on racial discrimination in death sentencing, to form the basis of their petition arguments. They posed challenges to the Supreme Court's prior holding in *McClesky v. Kemp*[75] and Louisiana's allegedly

race-driven infliction of the death penalty on Willie L. Celestine. During the course of its deliberations, the Commission accorded a significant weight to the *McClesky* reasoning as a basis on which to dismiss the human rights activists' allegations on behalf of Celestine. In the Commissioners' view, the cited statistical data alone did not make an adequate prima facie showing that the U.S. authorities had instilled a discriminatory component into their capital decision-making process. Unable to meet the test of admissibility by failing to demonstrate violations of the American Declaration, the *Celestine* case was unsuccessful in its attempt to obtain substantive consideration by the Inter-American Commission.

A few years after the loss in the *Celestine* case, human rights activists, including Professor Lockwood, once again raised the issue of racial bias in U.S. death sentencing decisions before the IACHR. In *William Andrews v. United States*[76] (1996), Professor Richard J. Wilson, Director of the International Human Rights Law Clinic of American University, brought a petition to assail prejudicial criminal justice in the state of Utah, following a request from AI USA Death Penalty Coordinator Ashanti Chimurenga.[77] Additionally, Rights International (Francisco F. Martin) and the Center for International Human Rights Law, Inc. (Professors David Baldus, Bert B. Lockwood, and Robert Rosen) advanced amicus briefs articulating an objective test of tribunal impartiality. The purport of the *Andrews* complaint was to amass an international focus on the unfair trial of William Andrews and compel the governor of Utah and the State Department to stay Andrews' execution.

As in the cases of *Roach and Pinkerton* as well as *Celestine*, human rights activists were unsuccessful in stalling the execution while awaiting the IACHR's decision. Yet, there were some crucial points distinguishing the *Andrews* case from the *Celestine* petition. The legal team in *Andrews* propitiously swayed the Commission into applying neutral criteria based on reasonableness and the appearance of impartiality to measure whether Utah's criminal procedures adversely operated against Andrews simply due to his skin color. Furthermore, the Commission took side with Andrews predicated on a number of the American Declaration's clauses. The U.S. government was held legally liable for putting Andrews through unfair judicial proceedings and protracted torment on death row. Under Articles I, II, and XXVI of the Declaration, this misconduct was in contradiction of the right to life, the right to equality before the law, the right to a fair trial, and freedom from "cruel, infamous or unusual punishment."

On 24 May 1999, with the drafting assistance of Professor Wilson, attorney Sandra L. Babcock and Professor William A. Schabas approached the IACHR to redress the unjust situation of a Canadian

imprisoned on Texas' death row.[78] The mistreated inmate in this case was Joseph Stanley Faulder, who was convicted and sentenced to death without ever being informed of his treaty-endowed consular rights. The complaint attributed to the Texas authorities the injuries that Faulder had for years undergone as a result of being denied consular notification and access and then subjected to lengthy incarceration on death row. In order for Faulder's execution to be temporarily postponed during the pendency of the Commission's review of the merits of his complaint, Babcock petitioned for precautionary measures. Yet, the issuance of a provisional request by the Commission proved unavailing, when the Texas government turned its back on that intervention by executing Faulder on 17 June 1999 despite intense protests by NGOs. The *Faulder* case is currently under investigation by the Commission for admissibility requirements.

With the arrival of the twenty-first century, the IACHR endorsed a dense body of dispositions salutary to the enrichment of international capital law. The controversial issues primarily centered on the juvenile death penalty, unfair trials, and consular breaches. The first cluster of cases lodged with the Commission involved juvenile capital punishment and consisted of *Michael Domingues v. United States*[79] (2002), *Douglas Christopher Thomas v. United States*[80] (2003), *Gary T. Graham (Shaka Sankofa) v. United States*[81] (2003), and *Napoleon Beazley v. United States*[82] (2003). Human rights vindicators arguing the commutation of death sentences for the four American youths incarcerated in the United States came from (1) Clark County in Nevada (public defender Mark Blaskey) (*Domingues* at the IACHR); (2) the International Human Rights Law Clinic at American University (*Thomas*); (3) the Virginia Capital Representation Resource Center (Robert Lee) (*Graham*); and (4) Sheinfeld, Maley & Kay, Austin, Texas (attorneys David L. Botsford and Walter C. Long) (*Beazley* at the IACHR).

In buttressing international law-based remedies for the juvenile complainants, the Inter-American Commission set out underlying positions considerably apart from the ones it once articulated in the *Roach and Pinkerton* case. The Commission recognized that, since the 1987 *Roach and Pinkerton* decision, the international protection of child offenders from capital punishment had dynamically ripened into a rule of not merely customary law, but one with *jus cogens* effect. In international origins of law, the notion of "the age of majority" for the purpose of death sentencing was unequivocally designated as age 18. These observations could verifiably follow from worldwide practice and multilateral and municipal instruments[83] that spoke to "evidence of recognition of the indelibility of [that] norm by the international community as a whole."[84] Given the "prevailing [global] standards of decency" establishing the preclusion of juvenile capital punishment as

one of international customary and peremptory principles, the Commission without hesitation concluded that the defendant U.S. government had acted at variance with the right to life as delimited in Article I of the American Declaration.[85]

Juan Raul Garza v. United States[86] (2001) stood for the second class of recent rulings made by the IACHR in relation to capital punishment. In that case, human rights activists[87] alleged that U.S. courts disavowed equitable justice to a drug kingpin, Juan Raul Garza, by building his federal capital sentence on inadmissible evidence. While insistently rejecting the theory that Article I of the American Declaration instructively made the institution of the death penalty per se null and void, the IACHR affirmed that its arbitrary application was by all means prohibited under Article I.[88] By the Commission's definition, the circumstances of "arbitrary" might entail:

> a failure on the part of a state to limit the death penalty to crimes of exceptional gravity prescribed by pre-existing law, denying an accused strict and rigorous judicial guarantees of a fair trial, and notorious and demonstrable diversity of practice within a member state that results in inconsistent application of the death penalty for the same crimes.[89]

Under the first "arbitrary" parameter, the Inter-American Commission found there existed no reasonable interpretation precluding the United States from trying Garza on capital charges for a series of crimes he was accused of committing in furtherance of his narcotic trafficking enterprise. The multiple homicides perpetrated by Garza did constitute most serious crimes, to which the operation of capital punishment was permissible as an exceptional countermeasure. Neither did the death penalty regime in the United States strictly fall into the third construction of "arbitrary." In reality, U.S. administrators terminated a brief hiatus of capital punishment in 1976. Since then, that drastic penal scheme has been re-activated in numerous states as a sanction against felonious criminals, including drug-related murderers like Garza. Sufficiently enough, such a domestic practice attested to the consistency of the United States in its application of the death penalty over an extended period.

Conversely, in connection with the second prong of the definition for "arbitrary," the Commission ruled in favor of Garza's claims. The focal point of controversy here was with regard to four additional prior murders allegedly carried out by Garza outside of U.S. jurisdiction, namely, in Mexico. Neither Mexican nor U.S. law enforcement were able to prosecute Garza at the time he committed the crimes, the former due to insufficient evidence and the latter for lack of jurisdiction.[90] While impertinent to the criminal charge and trial against Garza in the instant

case, the four crimes of murder nonetheless were specially introduced by the U.S. government as aggravating factors at Garza's punishment proceeding. To a significant extent, just as the prosecution intended, these unsubstantiated offenses motivated the trial jury to pronounce a death sentence on him. Considering this point, the Commissioners determined that Garza had been treated unjustly in the sentencing procedure and was not accorded the most stringent due process of law required by international standards in cases where human life is at stake. In the Commission's final analysis, U.S. authorities were, consequently, obligated to take all necessary actions to expeditiously repair their misconduct to Garza in accordance with Declaration Articles XVIII, XXVI, and I by commuting his death sentence.

Further, the IACHR for the first time addressed the relationship of consular rights to the death penalty in two consular cases taken before it by human rights advocates: the Center for Justice and International Law (*Villareal*)[91] and Professor John B. Quigley with attorney S. Adele Shank (*Fierro*).[92] Both of the cases involved Mexican inmates respectively housed in Arizona and Texas prisons as a result of committing capital murders. Their trials were conducted without advising the defendants of their right to seek consular assistance, as explicitly provided for in Article 36(1)(b) of the Vienna Consular Convention . On behalf of Mexican national Ramón Martinez Villareal, the complaint progressed simultaneously on two separate legal tracks. On 16 May 1997, the very day that the *Villareal* case commenced the petition process in the Inter-American system, the government of Mexico also mounted *United Mexican States v. Woods*[93] (1997) in U.S. federal courts. Doubtless, the strategic plan of launching two challenges at once in different forums was designed to boost the case publicity and enhance the possibility of reversing the planned execution of Villareal in the state of Arizona.

Despite lacking clear-cut treaty authorization to settle the disputes arising under the Vienna Consular Convention between States parties or States parties versus individual citizens, the IACHR saw fit to claim competence to handle the cases of *Villareal* and *Fierro*. The Commission took the position that the 1948 American Declaration could only be effectively understood by close reference to the evolving body of international human rights law, the sources of which would come from the provisions of other rights instruments presently dominating on international and regional planes.[94] And, Vienna Convention Article 36(1)(b) aptly served as one of those meaningful guidelines against which to ascertain whether or not the American Declaration was violated by OAS countries. To examine the merits of the accusations made in *Villareal* and *Fierro*, the Commission proceeded to study the opinions on consular rights from the Inter-American Court and the ICJ.[95] The inquiry led the Commission to conclude that the breach of Article 36(1)(b) by

U.S. authorities indeed substantially undermined the capabilities of the Mexican defendants, such as in seeking crucial evidence to mitigate the severity of their sentences at trial. It was therefore beyond question that such an act constituted one form of due process violation plainly banned by Declaration Articles XVIII and XXVI.[96] In addition, should the United States obstinately perform the disputed executions in these consular rights cases, it would amount to the arbitrary deprivation of the lives of the two Mexicans in contempt of Article I of the American Declaration.

In specific reference to precautionary measures requested by the IACHR, the Commission in a number of the above-discussed cases emphasized their legitimate application to all parties to the OAS Charter without exception, including the United States.[97] For its reluctance to stay the execution of prisoners in cases brought before the Commission in spite of interventions by regional institutions, the United States was perceived as having materially hamstrung the investigative functions of the Inter-American system. Relentlessly, such U.S. defiance had left the condemned persons no chance of seeking hemispheric relief and subjected them to perpetual and irredeemable harm. It was with this reasoned analysis in mind that the Inter-American Commission assertively instructed the USA to correct its defaulting of fundamental human rights obligations incurred under the OAS Charter and the American Declaration.

As of January 31 2005, at least six additional petitions waged by human rights advocates in the interests of individuals sentenced to death in the United States were pending before the Inter-American Commission. Four of them have raised challenges against the death row phenomenon and deficient criminal proceedings routinely overlooked by U.S. courts.[98] The other two pertain to U.S. retractions from its consular notification duty at the expense of the due process rights of foreign death row detainees.[99]

The Inter-American Court of Human Rights

In addition to supporting individual complaints against the United States before the regional Commission, on one occasion Mexico asked the Inter-American Court for an advisory opinion to illuminate the issue of its nationals imprisoned on U.S. death row absent prior consular awareness.[100] Apart from Mexico and the United States, six other nations in the region (Costa Rica, El Salvador, Guatemala, Honduras, Paraguay, and the Dominican Republic) joined the advisory proceedings. The Ambassador of Canada to the government of Costa Rica also attended as an observer. Further, amicus declarations supporting Mexico's position were severally or collectively put forward by 18 Mexican and U.S. rights advocates,[101] including legal counsel in the U.S. court cases of *Faulder v.*

Johnson[102] (Sandra L. Babcock), *Ohio v. Loza*[103] (Laurence E. Komp), and *Murphy v. Netherland*[104] (William H. Wright, Jr.).

On 1 October 1999, the Inter-American Court published its opinion stressing the essentiality of apprising foreign nationals of their consular rights in the course of law enforcement on U.S. soil. Article 36 of the Vienna Consular Convention was characterized by the Court as indispensable, a fundamental individual right conferred upon all alien arrestees to ensure that subsequent judicial proceedings in a host country against them would function fairly and appropriately in concert with international standards.[105] In circumstances devoid of consular compliance, the Court determined that levying capital punishment on foreign nationals was synonymous with arbitrarily divesting them of their lives, as forbidden by Article 6 of the ICCPR and Article 4 of the American Convention.[106] Moreover, by citing Article 29 of the 1969 Vienna Convention on the Law of Treaties as a commanding principle of construction (i.e., that a treaty is binding upon each party in respect of its entire territory), the Inter-American Court manifestly overruled national reliance on states' rights under a federal structure to sidetrack consular treaty obligations.[107]

Notwithstanding its admonitory and unenforceable character, this position of the Inter-American Court further deteriorated the already sour relations between the USA and other OAS members accusing the United States of recurrent consular rights violations. In fact, it dealt a serious blow to U.S. regional leadership in the Western Hemisphere in the fields of politics and human rights. On top of endangering its international status, the arguments raised by the United States to defend its defiance of consular rights would be greatly discredited in the coming litigation initiated by human rights activists pursuant to the Court's decision.

The International Court of Justice

Finally, another potential vehicle for remedying U.S. treaty violations is through the International Court of Justice (ICJ). The World Court's judgment in contentious cases is final and not open to appeal. If one party does not obey the Court's issued decision, the other party may invoke Article 94 of the U.N. Charter to press for settlement at the Security Council. The United States withdrew its general acceptance of ICJ compulsory jurisdiction based on the reciprocity principle under Article 36(2) of the ICJ Statute during its legal dispute with Sandinista Nicaragua. In spite of that rescission, the U.S. government stands no chance of immunizing itself from some treaty-derived mandates, by which the United States must relegate its contest with other countries to the ICJ for compulsory disposition. Indeed, when the USA became a party to the Vienna Consular Convention in 1969, it expressed the desire to subordinate any differences arising from the Convention to the

oversight of the ICJ. To this precise end, the United States additionally ratified the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes.[108] Article I of the Optional Protocol reads:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a party to the present Protocol.

In *Paraguay v. United States of America*[109] (1998), pro bono attorneys at New York's Debevoise & Plimpton[110] represented Paraguay by attacking the inability of the USA to discharge its consular treaty commitments owed to Angel F. Breard. Regardless of urgent provisional measures demanded by the ICJ, the defense undertook vainly to convince the U.S. Supreme Court of the necessity to take up the *Breard* case and vacate the controversial sentence of death entered and affirmed by the lower courts.[111] Apparently feeling the heat from Paraguay,[112] then Secretary of State Madeleine Albright pleaded with the governor of Virginia for a temporary reprieve of the execution as well. Bluntly declining the demands for a stay, the Virginia administration insisted on putting Breard to death as scheduled. On 10 November 1998, the ICJ took the case off the docket under the mutual agreement reached between Paraguay and the United States. The dramatic reconciliation came as the U.S. embassy in Paraguay issued a public apology to the government and people of Paraguay for omitting to apprise Breard of the consular rights to which he was entitled.[113]

The ICJ recently rebuked the United States for not halting imminent executions in response to the Court's provisional measures orders. In *LaGrand (F.R.G. v. U.S.)* (2001), a legal team speaking for Germany,[114] including Donald F. Donovan from New York's Debevoise & Plimpton, took issue with the United States on consular rights implementation. They contended that two German brothers (Karl and Walter LaGrand) had been tried and sentenced to death without advice of their consular rights, in violation of Article 36(1)(b) of the Vienna Convention. In the initial stages of the ICJ proceedings, Walter LaGrand nonetheless received a lethal injection on 3 March 1999, the same day that the Court indicated that the United States should impose an emergency stay.[115]

On 27 June 2001, the ICJ set forth a landmark decision identifying several salient errors committed by the USA in the execution of the LaGrands. The *LaGrand* Court first began by positing the interrelated nature of Convention Article 36(1)(b) and Articles 36(1)(a) and (c). On the neglect to supply the LaGrand brothers with consular information as expressly stipulated by Article 36(1)(b), the United States concomitantly

encroached upon Germany's sovereign right under Article 36(1)(a) and (c) to access and protect its citizens traveling abroad.[116] These treaty provisions specifically incorporated the right of a foreign consulate to freely communicate with and render assistance to its nationals taken into U.S. custody. In substance, the World Court envisaged Article 36(1) as conferring a set of rights both on the sending country and on its citizens that could be upheld by the former under the authority of Article I of the Optional Protocol. As opposed to the earlier understanding of the Inter-American Court, the ICJ stopped short of declaring that the individual right to be advised without delay pursuant to Article 36(1)(b) had acquired the standing of an international human right.[117]

Further, the *LaGrand* Court thoroughly deliberated on the subject of procedural default, a legal barrier that frequently provided the basis for the U.S. bench to overrule claims of consular rights violations when raised for the first time not at trial but during the post-conviction review. The Court recognized the adverse impact brought about by the application of the procedural default doctrine on the ability of the LaGrand brothers to appeal their convictions and sentences on the basis of the consular rights violations.[118] As such, its application had unmistakably impaired the right of Germany to legally assist their nationals in breach of Convention Article 36(2), obliging the host country to give full effect to the rights accorded under Article 36(1).

On the question of the legal power of provisional measures, the *LaGrand* Court sought guidance from the object and history of the ICJ Statute in general and the Statute's Article 41 in particular. Its conclusion was that the order from the Court of 3 March 1999 to defer Walter LaGrand's execution was of crucial importance "to safeguard, and to avoid prejudice to, the rights of the parties as determined by [its] final judgment."[119] Inasmuch as the said edict was generated pursuant to Statute Article 41, judges sitting on the ICJ considered that the United States was bound to promptly take all steps at its disposal to block the execution decision made by the Arizona government, pending the disposition of the lawsuit before the Court. While taking full notice of current measures taken by the USA at state and local levels to prevent future violations, the World Court nonetheless asserted that, in any comparable future cases, "the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention."[120]

Another recent litigation that concluded with a hospitable ICJ judgment was *Avena and Other Mexican Nationals (Mexico v. United States of America)*[121] (2004). Mexico alleged that 52 Mexican nationals had been sentenced to death by justice systems across nine U.S. states without consular knowledge.[122] Fighting for their treaty rights based on

Article 36(1)(b) were Mexican officials and attorneys[123] and a team of individual rights activists that included Sandra L. Babcock,[124] Cristina Hoss,[125] Mark Warren,[126] Pierre-Marie Dupuy,[127] and several attorneys from Debevoise & Plimpton.[128]

As in the *LaGrand* case, the ICJ was unyieldingly critical of the U.S. government for its continued apathy to consular treaty rights enshrined in Article 36(1), to the prejudice of Mexico and its citizens under U.S. detention. Since this segment of the comments made by the Court in the two cases are almost identical, there is no need to recount them here. Yet, it merits attention that the *Avena* Court placed the Article 36(1)(b) device of consular information on parity with the renowned "Miranda rule" espoused by U.S. law authorities, in view of its overriding importance in ensuring foreigners' due process rights.[129] In addition, in the sense of the ICJ judges, the language of "without delay" in Article 36(1)(b) nowhere couched a concept of "unqualified immediacy" that necessarily obligated U.S. law enforcers to provide advice of consular rights "upon arrest and before interrogation" of a foreign suspect.[130] Rather, the phrase indicated the need for the United States to carry out its consular duty as soon as the alienage or probable foreign nationality of that person came to light, the exact timing of which would depend on the circumstances.

In particular, the *Avena* Court elaborated on the question of remedies with regard to "the review and reconsideration" of violated foreigners' convictions and sentences as required by the prior *LaGrand* decision.[131] In the Court's interpretation, the process of review and reconsideration must proceed effectively by undertaking full examination of consular treaty violations and any resulting prejudice to the convictions and sentences of the condemned Mexicans. Moreover, it was essential that the process be conducted in the framework of judicial, not executive clemency, proceedings. In the concluding statement, the Court further clarified that its disposition in the *Avena* lawsuit should apply to foreigners other than Mexicans who were similarly subjected to criminal prosecutions in the United States.[132] Deplorably, the U.S. reaction to this ICJ judgment was far from completely positive. On one hand, on 28 February 2005, President Bush sent a memorandum to Attorney General Alberto R. Gonzales, determining that state courts would redress the consular harms to the 51 Mexican nationals named by the ICJ in the *Avena* case "in accordance with general principles of comity."[133] On the other, the State Department on 9 March 2005 repeated its past pattern of defiance against the ICJ by recanting its specific acceptance of ICJ competence to adjudge consular-related cases under the Optional Protocol to the Vienna Consular Convention .[134] Hence, the United States withdrew from the Optional Protocol so that any future consular rights disputes with foreign sovereigns could not be examined by the World Court.

Given sluggish and inefficacious international enforcement, human rights activists perceivably would encounter enormous difficulties in bringing the USA into compliance with the opinions handed down by the U.N. and Inter-American systems. The fact that adjudicators on the U.S. bench have normally demonstrated equally unreceptive attitudes as executive officials did toward international decisions adds another tier of hurdles to the settlement of claims of treaty non-observance.[135] Even in the recently winning case of *Roper v. Simmons*[136] (2005), the U.S. Supreme Court did not look to any of the described IACHR decisions as an aiding tool for rendering juvenile capital punishment unconstitutional. On very rare occasions, international tribunal opinions, however, did inform U.S. judges to vote for death row inmates. Alongside one dissenter in *Issa*,[137] the other judge in a death penalty case that willingly gave full credence to the ICJ's judgment in *LaGrand* to date was from the United States District Court for the Northern District of Illinois. In *Madej v. Schomig*[138] (2002), federal district Judge David H. Coar acknowledged the relevance of that ICJ disposition to U.S. court proceedings, although he ultimately vacated a Polish national's death sentence instead on the ground of the U.S. Constitution's Sixth Amendment right to effective counsel. For all of these reasons, launching litigation based on international law directly in U.S. courts may well be a comparatively more promising and swifter method to mend ongoing U.S. misconduct in the sphere of capital punishment.

U.S. RATIFICATION AND STATUTORY IMPLEMENTATION

The United States has supported some international instruments that provide principles controlling the employment of the death penalty: the UDHR, the Third and Fourth Geneva Conventions, the Vienna Consular Convention, the ICCPR, the Torture Convention, the Racial Convention, and the American Declaration. After signing the American Convention on Human Rights on 1 June 1977 and the Convention on the Rights of the Child on 16 February 1995, political leaders in the United States have thus far displayed little eagerness in ratifying the two treaties. On 6 May 2002, over objections from the international community, including a good many ardent NGOs, the Bush Administration unilaterally vitiated its predecessor's signature on the Rome Statute. The withdrawal action steered U.S. authorities diametrically away from the direction of Statute Article 77, which without reservation forswears any prospect of promulgating capital punishment on persons convicted of globally enumerated crimes by the permanent International Criminal Court.

In spite of the context that the UDHR today is embodied into many countries' constitutions and other forms of internal laws, the U.N. Declaration has yet to advance to full recognition as a source of law

binding on the USA domestically.[139] Analogously, the U.S. government has regularly opposed the legal force of the American Declaration as proclaimed by the Inter-American Commission to override U.S. capital and refugee practices. And, numerous attempts are made to depend on the American Declaration in human rights litigation only to be brusquely thrown out by U.S. courts. [140]

On the subject of treaty power, the Bricker legacy of making all human rights treaties non-self-executing has continued to unleash a profound impact, well into U.S. ratification of the Torture Convention and other subsequent treaties.[141] To enhance the Senate treaty approval rate, particularly since President Jimmy Carter, each administration has customarily employed additional forms of treaty limitations—reservations and understandings—to doubly secure U.S. laws from being preempted by treaty power. In essence, these diverse qualifications introduced by Senate members to thwart treaty governance have routinely placed death row inmates in a practically adverse position to argue their treaty rights in U.S. courts.

Reservations, Understandings, and Declarations (RUDs)

The Fourth Geneva Convention

The targets that Convention Article 68(2) purports to address are civilians and foreigners who remain in the occupied territory and stand trial as a result of engaging in such crimes as espionage and sabotage. Where capital punishment in a vanquished country has ceased to exist before a military occupation, Article 68(2) enjoins the belligerent occupant not to impose that sentence upon them. During the drafting debate on Article 68(2), negotiators were generally split along two lines.[142] Victorious countries, including the USA, whose territories had never been seized by Nazi Germany, were jealously safeguarding the intactness of their future authority in the making of capital decisions against criminal convicts in a defeated country. Moreover, U.S. delegates continued to caution emphatically that the abandonment of the death penalty pursuant to Article 68(2) might unexpectedly fuel summary executions by the armed forces of an occupying country as a substitute measure to serve the cause of justice they sought. This assessment subscribing to the likelihood of capital reinstatement by the invader was also endorsed by Canada, the United Kingdom (UK), and Australia.

On the other hand, the countries that experienced grave Nazi ravages during World War II took the opposite position at the drafting conference. Their single concern was to forestall the potential recurrence of any event in which an outside aggressor might considerably abuse the capital justice system at the juncture of armed hostilities to persecute innocents for the achievement of ethnic extermination. At present,

Article 68(2) is a plain reflection of the latter's desire to make unlawful the re-activation of renounced capital punishment by the subjugator. Dissenting to that Article 68(2) text, the U.S. government proffered a reservation as a counterbalance that refuses to relinquish the levying of death sentences on civilian wrongdoers in a conquest, even if the losing country had long removed the death penalty from its jurisdiction prior to the military takeover.

The Torture Convention

The Torture Convention was deemed non-self-executing on U.S. soil to the effect that Convention safeguards are not judicially enforceable until Congress authorizes its implementation through legislation. Currently, there is little prospect of lawmakers giving effect to the entire Convention and to other human rights treaties domestically, because it is typically believed that U.S. laws cover a range of human rights protections far more adequately than any international body of law.[143]

While the United States remains subordinate to the power of the International Court of Justice under more than 70 treaties to which it is a party, its animosity toward the ICJ in the *Nicaragua v. United States* case has persistently affected the ICJ referral clause in the Torture Convention.[144] Under the U.S. reservation, Article 30(1) of the Torture Convention committing the resolution of disputes to the ICJ was rewritten. Unless expressly granted by U.S. decision makers on a case-by-case basis, the World Court lacks competence to deal with any Convention questions involving the United States.

Over and above this, by announcing a blanket reservation to Article 16 of the Torture Convention, U.S. officials signaled the concept that the death penalty was to be solely circumscribed by a constitutional definition of "cruel and unusual punishment."[145] The U.S. Supreme Court has never declared any method of execution to be unconstitutional.[146] Nor has it seen fit to adjudicate the question of the death row phenomenon. As a matter of fact, this reservation to Article 16 is intended to perpetuate the death penalty regime in U.S. territory without regard to the rest of the world now heading toward abolition. Moreover, the *Soering* understanding crafted by U.S. policy makers purports to hedge off any prospective legal actions in the United States challenging the death row phenomenon. It states that:

> [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.[147]

Under this attached understanding clause, to the extent that a scheme of capital punishment operates under the ambit of the U.S. Constitution, domestic courts can freely dismiss the assertion by human rights activists that undergoing a lengthy incarceration while awaiting execution is inhuman and degrading treatment.

Beyond the foregoing Senate-erected barricades, a federal-state understanding affixed to the Torture Convention's instrument of ratification warrants states' autonomy to formulate policies in the domain of constitutionally preserved affairs, including capital punishment procedures presently conducted by 38 U.S. states. With this guarding provision installed, the U.S. government is comfortably positioned to excuse its retentionist states from the dominance of international capital law.

The ICCPR

Besides a non-self-executing declaration to stymie capital culprits from enforcing the ICCPR in U.S. courts, an array of reservations was lodged by the Senate for the sole end of hampering the domestic reach of Covenant Articles 6 and 7.

At the Senate ratification hearing, advocacy groups such as AI, the ACLU, Human Rights Watch, International Human Rights Law Group, and the Lawyers Committee for Human Rights strenuously challenged the intent of U.S. policy makers to use reservations for the convenience of operating and retaining the domestic death penalty system.[148] Exception was likewise taken by some Covenant parties, mostly from the EU, and experts serving on the Human Rights Committee.[149] Their protest was driven in this instance by the non-derogable and customary properties of Articles 6(5) and 7. Treating the Human Rights Committee's demurral as particularly objectionable, the Senate threatened in June 1995 to withhold financial contributions from the Committee unless the entire situation was resolved to the satisfaction of the United States.

Before the *Roper* holding made the execution of juvenile offenders unconstitutional, the all-embracing reservation to Covenant Article 6 availed the USA of wielding an untrammeled right to pass death sentences on any persons other than pregnant women. As a result, inflicting the punishment of death against individuals aged 17 or younger might be defensible when viewed through a U.S. constitutional angle, regardless of the United States running the risk of being charged with violations by other Covenant members. Additionally, the institution of a reservation on Covenant Article 7 turns the United States into the single country capable of skirting the *Soering* impact in consistency with the earlier rigid conditions established by the Senate to blunt the Torture Convention. Resting on that reservation, the treaty wording of "cruel,

inhuman or degrading treatment or punishment" would be limited to the application of constitutional prohibitory principles. This restrained treaty construction leaves condemned prisoners no recourse to judicially redress the death row phenomenon and the methods of execution they may be subjected to. By the same token, in parallel to the narrowed effect of the Torture Convention by the Senate, the purpose of adding a federal-state understanding was to preclude implementing Article 50 of the International Covenant. In so doing, political elites in the U.S. government deliberately negated the extending of Covenant prescriptions to state and local levels.

The Racial Convention

U.S. senators have systematically created multiple techniques to obstruct any foreseeable legal actions on all fronts that are dependent on the Racial Convention. Under the non-self-executing declaration, it is almost impossible for individual minorities enduring unjust death sentencing to offensively raise the Convention in domestic courts. Even if federal legislators accord effect to the Racial Convention at a later date, the federal-state understanding, however, may allow judges to technically avert a decision that would nullify state-created racial disparities in the area of capital punishment. Internationally, a reservation to Convention Article 22 further obviates the authority of the ICJ to rectify the existence of racial prejudices in the dispensation of capital justice within the United States.

Administrative Regulations

The Vienna Consular Convention

Prior to the Vienna consular treaty going into force on 24 December 1969, the Johnson Administration formulated a set of federal regulations in 1967.[150] The rules instructed the Department of Justice and the Immigration and Naturalization Service (INS) to honestly discharge U.S. bilateral treaty duties regarding consular notification. Under the prescribed ordinances, administrative agencies must tell all foreign detainees of their rights to consular access without any differentiation founded on nationality. In accordance with the reciprocal terms of some bilateral treaties negotiated with given sending countries, U.S. authorities would undertake notification of consulates irrespective of whether or not their nationals in detention give their consent. In the alternative, where no such requirement exists under a bilateral treaty, justice and immigration officers will forthrightly transmit the detention information to the consular post after verifying the wishes of the involved alien. Since the stated federal provisions were introduced in 1967 precisely because the United States was in the process of ratifying the Vienna

Convention, U.S. courts occasionally have visualized these two regulatory rules as legislative cognates implementing the universal consular treaty.

In light of the number of human rights treaties ratified by the USA, it would seem that, over the decades, human rights activists have successfully shifted U.S. attitudes to favoring the nascent global justice system. Yet, the RUDs just examined overturn that impression. Rather, the Bricker influence remains deeply ingrained in directing the ongoing U.S. political antagonism to the international human rights regime. Against this background, the conversion of U.S. courts into participants in the legal globalization movement becomes imperative. The theory is palpably understandable. In a broader sense, judges on the U.S. bench are viewed as autonomous policy makers in the separation-of-powers form of government. Incontrovertibly, they enjoy ample scope to exercise constitutionally accorded authority in countenancing international capital standards over the domestic unilateral force that rejects the global trend toward abolishing capital punishment and underwriting consular rights. As a case in point, *Roper v. Simmons* exhibits how the Supreme Court majority performed its independent power of judicial review in implicitly superseding the Senate reservation to ICCPR Article 6(5), when it required state capital punishment policy to align with a developed international opinion and a national consensus against the juvenile death penalty.

CHAPTER 4:

Death Penalty 2: International Norms in U.S. Courts

THE LEGAL MODEL AND FUNCTIONALISM APPLIED

An array of suppositions around the legal model and functionalism entails special elucidation here. To begin, the key postulate built on refugee and death penalty cases maintains that international law is likely to be more influential in the situation of the former, providing U.S. judges literally follow the legal model in the making of their decisions. The basic premises for this prime assumption rest on an observation that the statutes governing refugees originate part and parcel from international sources of law. Specifically, Congress incorporated some central elements of the U.N. Refugee Protocol into the 1980 Refugee Act for the sake of keeping its statutory protection of refugees in step with internationally agreed-on principles. Yet, the laws dealing with the system of capital punishment within the United States germinated mainly from municipal authorities, including the Senate reservation devised to circumscribe Article 6(5) of the ICCPR on the exclusion of juvenile culprits from execution.

A number of underlying causes prompt this book to derivatively construct a sub-divided thesis based on the issue of capital punishment. In juvenile death penalty cases, the Senate treaty constraints on many occasions controlled the power of the ICCPR in U.S. courts as a rule of decision. In the post-*Roper* epoch, the Eighth Amendment bar to cruel and unusual punishment instead provides the bedrock for minors to be exempt from capital trials. Antithetically, the United States does not set any qualification to its consent to the Vienna Consular Convention . Founded on these backdrops, we are lead to theorize that judges on the U.S. bench are susceptible to domestic law in the area of juvenile death sentencing, but to international law in the area of the right to consular information.

A two-pronged technique (qualitative and quantitative) is applied to explore whether the proposed hypotheses are accurate in predicting the interconnection between court voting preferences and objective legal rules. The qualitative approach traces the content analysis of four types of case decisions (juvenile, consular, detention, and return). Two court postures call for an additional stage of clarification. The court dismissal of international law takes place when judges endorse one or more executive claims in the form of antagonistic municipal laws and precedents as well as Senate-imposed treaty restrictions. On the other hand, a favorable stance is conditioned on judges' willingness to assign significant weight to court arguments made by human rights defenders in terms of the direct or indirect power of international law.

In the quantitative technique of investigation, the percentages of judges in dissimilar positions are compared to gauge the viability of the suppositions established above. Overall, three camps of judges are readily discernible according to the record of their holdings (Tables 4-1, 4-4, and 6-1 to 6-3). Judges who have invoked international law at least once either as a rule of decision or as an aid to inform decision-making processes are classified in the "Favor" category. The "Never Accept" category contains a group of judges who determinedly and always stood in opposition to international law. It should be noted that there were also case adjudicators who repeatedly ruled for or against international norms. However, some of these judges acted inconsistently, in that they would show sympathy to international law for death row inmates while remaining adverse to it for asylum seekers. Regardless of this pattern of decisional iteration or disparity, their vote would be reckoned no more than once in our statistical data and classified pursuant to the foregoing rules establishing the "Favor" and "Never Accept" categories. Besides the two behavioral groupings, judges in the "Unknown" category refer to those who reveal nothing in their opinions on international norms although that field of law was implicated in the causes of action that they heard.

Based on functionalism, this study posits that human rights advocates have not won a great many cases in death penalty and refugee spheres, but may have contributed to a slight shift in American judicial perceptions that could undercut unilateralism and dualism in the USA over the long haul. The functionalist hypothesis concentrates exclusively on the facets of legal and social integration promoted by human rights activists in the context of the juridical globalization crusade. It is factually examined through four distinct phases of test designs as introduced below that would yield a diversity of statistics for verification purposes.[1]

The research data applied for validating functional theory requires an operational process of numerical calculations with regard to

socialization and policy-making/implementation/adjudication (*legal integration*) and recruitment and articulation/aggregation (*social integration*).

(1) ***Socialization*:** To ascertain how profoundly and expansively human rights activists have been able to move U.S. adjudicators into the globalizing legal system requires an enumeration of the number of judges in capital and refugee cases who a) directly followed international law, b) construed municipal legal provisions in reference to that law, or c) totally repudiated international legal relevance.

(2) ***Policy making/implementation/adjudication*:** In an attempt to comprehend the comparative degree of judicial activism or conservatism in the United States, the number of friendly judges who at least once backed up international legal claims raised by human rights activists needs to be calculated and compared with that of judicial opponents who never accepted international law as supplements to municipal law or as a rule of decision.

(3) ***Recruitment*:** Measuring the level of group success in enlisting other activists to speak out for condemned juvenile offenders, foreign nationals on death row, or asylum detainees and interdictees from Haiti and Cuba can be achieved by determining the number of NGOs joining cases based on international human rights in the capacity of litigators or amici in U.S. courts.

(4) ***Articulation/aggregation*:** Lastly, it is necessary to tally the increasing number of legal actions in order to assess whether human rights campaigners over the decades have widened the extent of their articulation/aggregation activities in U.S. courts.

THE JUVENILE DEATH PENALTY

In challenging the juvenile death penalty, human rights NGOs, individual activists, and domestic judges squarely carried out what Almond called system and process behavior. The interplay of these functional activities has over time spawned dual outcomes that purposefully increased the visibility and pressure of the appealed juvenile issue on either internal or international planes.

One upshot was a robust demonstration of transnational civic activity. From its very inception, the international normative proscription of child death sentencing enunciated by international and regional forums, with abolitionist NGO influence and impetus working behind the scenes, to some extent had repercussions on the United States proper. Ultimately, this international law impact was assembled and metamorphosed into the petitions of *Thompson v. Oklahoma* (1988) and *Stanford v. Kentucky*[2] (1989) conducted by individual rights defenders as well as NGOs such as Amnesty International (AI) and the International

Human Rights Law Group. Their strategy of filing case petitions and seeking publicity at varied venues outside the USA meaningfully focused international attention on the United States' longstanding aberrant practice of juvenile capital punishment. Doubtless, contemporary communication techniques as well as swelling global consciousness in the realm of individual human rights commensurably played a momentous role in catalyzing and boosting the intensity of that intended international publicity. The fruit of those combined developments, as in the examples of *Williams v. Texas*[3] (2003) and *Roper v. Simmons* (2005), was a striking indication of a widely transnational campaign spillover. As a result, still more advocates and networks overseas committed themselves to taking part in this abolitionist enterprise, such as Nobel Peace Prize Laureates, the Bar of England and Wales, the World Organization against Torture, and the World Organization for Human Rights USA.

The second aftereffect addressed here was an augmentation of foreign policy overtones arising from the United States' adamant imposition of the death penalty for juvenile crimes. What ostensibly sounded to U.S. authorities like domestic policy making on the execution of juvenile offenders was actually a matter of international affairs in the context of today's human rights globalization. Inescapably, the United States' juvenile death penalty policy was unrelentingly monitored and adjudged as circumventing a universal human rights benchmark. What's more, in *Roper*, a stream of intense concern and protest arose from the Council of Europe's 45 members along with Canada, Mexico, and New Zealand because of the U.S. injury to Christopher Simmons' international law interests.[4] A kindred example of an overseas intervention in U.S. juvenile capital punishment was the letter sent by the European Union to then-Governor Paul E. Patton of Kentucky requesting clemency for Kevin N. Stanford, who had been one of the unsuccessful petitioners in the U.S. Supreme Court case of *Stanford*.[5] The gravity of this internally-generated endangerment to international relations amply explained why a group of former American diplomats expressed strong criticism in their capacity as amici curiae in support of Simmons' petition to the Supreme Court for a writ of certiorari.[6] As will be seen later, those two movement accomplishments—widened civic activity and foreign sovereign pressure—out of multiple interactions between discrete players in the course of system and process pursuits have notably occurred in consular and, to a lesser degree, refugee cases. For the moment, let us return to the subject of functional explications for the appellate efforts made on behalf of condemned minors in our selected cases.

In the process of communication, human rights advocates seeking the elimination of the juvenile death penalty consulted with one another on legal arguments and shared case information. Even later on, this

functional discourse continually penetrated the stage of interest articulation/aggregation as cases were filed in U.S. courts as well as with U.N. and Inter-American institutions.

From the outset, the encouraging victories in *Filartiga*, *Rodriguez-Fernandez*, and *Cardoza-Fonseca* had stimulated the interest of human rights activists in bringing forward international law claims in U.S. courts on behalf of juvenile death penalty cases. On the strength of the publicity created by the *Roach and Pinkerton* complaint before the IACHR, Professors Victor L. Streib from Cleveland State University and Harry F. Tepker from Oklahoma University smoothly obtained from the U.S. Supreme Court a meritorious hearing in *Thompson*. In *Domingues v. State of Nevada*[7] (1998), a group of law school students in the Civil Litigation Clinic at the University of San Francisco, under the supervision of Connie de la Vega, assisted the Public Defender's Office of Clark County, Nevada in preparing a defense petition for post-conviction relief grounded on international law.[8] Consequently, the public defenders in the *Domingues* case competently raised Article 6(5) of the ICCPR and customary law in an appellate motion lodged with the Nevada Supreme Court for the correction of Michael Domingues' death sentence. Equally noteworthy, the Death Penalty Information Center, the International Justice Project, Human Rights Advocates, the American Bar Association's Juvenile Justice Center, and other rights groups operated as a sort of information clearinghouse. They made effective use of the Internet to supply recent updates, case briefs, amicus materials, and other technical and educational assistance to large numbers of legal experts and to an unspecified global audience. Although not confined to this medium, it was largely through this critical task of relaying electronic messages that education of the general public about the international rescission of juvenile capital punishment and the mustering of grassroots participation were able to forge ahead uninterruptedly.

Internationally, law student Jennifer Fiore and Professor de la Vega acted further afield in the name of Human Rights Advocates and Minnesota Advocates for Human Rights. The channel they invoked for advocating their campaign cause of juvenile abolitionism was the Human Rights Commission. What Fiore and de la Vega had in mind was that procuring a satisfactory endorsement from the U.N. body might hopefully propel the U.S. high court into considering the *Domingues* application for a full judicial review. Their effort to articulate the abolitionist idea eventually came to fruition with the Commission passing consecutive resolutions pleading for national suspension of capital punishment against law-breakers, including youngsters.[9] In the wake of being denied a petition for certiorari by the U.S. Supreme Court, Clark County public defender Mark Blaskey subsequently pursued international law remedies in the Inter-American system. As discussed in

the previous chapter, the IACHR ruled in favor of Domingues and declared the United States in breach of the American Declaration. Analogously, the positive decisional effect brought about by the Commission extended to *Napoleon Beazley v. United States*, a petition instituted a few months later following the refusal by the U.S. Supreme Court to grant merits review on 1 October 2001.[10]

Alongside the articulation/aggregation movement directed on the international front, rights attorneys and amicus participants consolidated their voices in U.S. courts with a view to enforcing the international principle against states' death sentencing of youths. Two strategic schemes prominently stood out during the progress of their cases. One was to capitalize on the death penalty appeals of youthful defendants that were brought out in the open at the Inter-American and U.N. Commissions in an effort to constrain the federal Supreme Court's disposition of the *Thompson* and *Domingues* petitions. The other involved structuring court contentions in a manner that differed depending on the applicability of relevant treaties at the moment direct appeals or appeals for post-conviction relief were pressed in the courts.

In the latter instance, the fact that the United States had not yet ratified the ICCPR and the American Convention drove human rights fighters in *Thompson* and *Stanford* to develop their seminal arguments solely from customary international law sources. Specifically, in cooperation with amici such as Amnesty International, Victor L. Streib and other attorneys approached the U.S. Supreme Court by asserting a thesis of indirect incorporation. Under that thesis, customary law and a worldwide consensus (i.e., foreign national practice and the *Roach and Pinkerton* decision) would be used as an instrumental aid to inform an Eighth Amendment inquiry into the constitutionality of the juvenile death penalty practice.[11] Besides backing indirect incorporation as a minimum strategic position in the *Thompson* and *Stanford* appeals, the International Human Rights Law Group uniquely propounded yet another method of pure incorporation.[12] The tenor of that concept implied that, as a non-persistent objector, the U.S. government was forthrightly obligated by customary common law to eradicate the age of 17 or younger from death penalty eligibility. Given that taking life by execution was irreversible, the Law Group additionally insisted the USA discontinue the practice so as not to frustrate the object and purpose of the cited treaties, in accordance with Article 18 of the 1969 Vienna Treaties Convention.

After the Senate formally espoused the ICCPR on 2 April 1992, human rights advocates set about broadening the purview of their court arguments beyond the conventional customary legal viewpoint. For example, realizing that a U.S. Supreme Court review on *Domingues*, if given, would potentially affect the destinies of 73 other death-sentenced

juveniles, Professor de la Vega and her law student Fiore promptly and unhesitatingly filed an amicus brief praying the Court for conferral of certiorari.[13] Parallel amicus actions taken by de la Vega and other campaigners on behalf of a number of human rights organizations were also instituted in *Beasley/Beazley*,[14] *Roper*, and *Williams* during certiorari proceedings.[15] In the presented amicus statements, de la Vega and others underscored the self-operating essence of Covenant Article 6(5) within U.S. jurisdiction without recourse to prior congressional approval. The purpose of constructing this claim was to rebut the Senate intent to use treaty qualifications to stunt the effectiveness of Article 6(5) domestically.

Two principal factors underpinned the argument for direct treaty enforcement. The United States would run counter to one of the Covenant's objects and purposes, namely underwriting a right to life, if the government permitted its constituent states to sentence minors to death in conflict with a *jus cogens* norm like Article 6(5). In itself, Article 6(5) created a cause of action directly maintainable in U.S. courts because its prescription explicitly spelled out prohibitory language and designated the individual as the actual beneficiary intended to receive the safeguards of Article 6(5). Yet, out of a concern that the Senate declaration making the core of the International Covenant non-self-executing might undermine their entire effort to seek post-conviction relief for the benefit of the juveniles on death row, de la Vega and others ultimately shifted their position to uphold the defensive utility of Article 6(5).

This defensive approach to indirectly effectuating international law in domestic courts was employed as well by attorneys Steven M. Presson and Robert W. Jackson in *Hain v. Gibson*[16] (2002). In particular, to dispel the force of the Senate reservation in this context, they proffered, among other things, that the reservation in controversy was nugatory since the Constitution did not empower the Senate with the authority to confine treaty power during its advice and consent to the ratification of treaties.[17] Further, in their analysis, the *jus cogens* norm banning the condemnation of juveniles to death played a useful role in charting the constitutional notion of cruel and unusual punishment as well as reinforcing the rightfulness of Article 6(5) over the Senate reservation.[18] Moreover, applying international law and the evolving standards of decency charted by *Atkins v. Virginia*[19] (2002) to inform a constitutional interpretation emerged in *Villarreal v. Cockrell*[20] (2003) and *Roper v. Simmons*.

In the alternative, attorneys David L. Botsford and Walter C. Long chose an offensive scheme throughout the habeas petition of *Beasley/ Beazley* by pointing out that Article 6(5) took precedence and nullified a Texas penal code provision qualifying 17 as the minimum age for capital

punishment.[21] As an authoritative mainstay, the Human Rights Committee's language on the legitimacy of reservations to the ICCPR was invoked in an attempt to defuse the Senate reservation established to legitimize juvenile death sentencing.[22] From the Committee's standpoint, this type of reservation unquestionably eviscerated the Covenant's spirit and purpose, and it would be preferable for the USA to retract its attachment to the Covenant. On the analogy of the United States lodging a declaration admitting the Committee's competence to consider inter-State complaints, Botsford and his colleague further argued, the United States should therefore be bound by all Committee opinions, including the one regarding the unacceptability of the reservation to Article 6(5).[23] The same assertions based on an offensive strategy were raised before the Supreme Court of Alabama when counselors John C. Robbins and Dennis Jacobs entered an action in *Ex parte Pressley* (2000).[24] So too did other representing lawyers, who resorted to Article 6(5) as a cause of action in the subsequent cases of *Ex parte Burgess*[25] (2000), *Wynn v. State*[26] (2000), *Ex parte Carroll*[27] (2001), *Servin v. State*[28] (2001), and *Dycus v. State*[29] (2004).

By contrast, the accused state governments contended that the Eighth Amendment prohibition on cruel and unusual punishment should be construed purely from U.S. perceptions, which the governments indicated was best deciphered by means of domestic legislative enactments at federal and state levels.[30] Foreign laws and international treaties were not germane in this context because nations were substantially idiosyncratic in cultures, heritages, and homicide rates and because the mere signing of treaties produced no legal effect in the United States. Arguing in Nevada's defense, state attorneys rested on the *Stanford* precedent, arguments of persistent objection, a state-federal division of power, and the aforementioned Senate reservation to justify sustaining the death sentences of Michael Domingues and Robert Paul Servin. Likewise, in an amicus brief submitted in October 1999 at the invitation of the federal Supreme Court, the U.S. Solicitor General recognized the power of the Senate reservation to exclude the application of Article 6(5) domestically.[31]

As shown in Table 4-1, during the phase of what Professor Almond delineates as policy making/implementation/adjudication, U.S. judges voting to certify the states' positions are roughly 3.40 times as numerous as those acting to the contrary. However serpentine their journey, human rights activists finally succeeded in dismantling the entrenched state mechanism that had for centuries worked to sentence minors to death in the United States. In the late 1980s, they helped to set good law in *Thompson*, immunizing those aged 15 or less from capital punishment, but failed in other appeals to rectify the policy in retentionist states of specifying 16 or 17 as the minimum legal age at the time of the offense

for death sentencing. In the *Domingues* case, human rights activists lost the opportunity to have the Supreme Court address the Covenant-based question, after the Court followed the Solicitor General's suggestion and denied a writ of certiorari on 1 November 1999. Subsequent cases such as *Ex parte Pressley*, *Beasley/Beazley*, and *Hain* also met with the same setbacks.

Despite those losses, some Supreme Court justices in other cases filed dissents from the majority's denial of merits consideration, in light of the existing domestic and international consensus against "this shameful practice."[32] After a decades-long struggle for the lives of juvenile death row inmates, human rights defenders harvested some degree of victory when Kevin N. Stanford garnered a reduction of his sentence to life without parole from Governor Patton on 8 December 2003. Most significantly of all, the U.S. Supreme Court on 1 March 2005 delivered a landmark ruling in *Roper v. Simmons*, ending the juvenile death penalty system installed in 19 remnant states as constitutionally unwarrantable.

Judgments Based on a Municipal Law Rationale

Besides looking to executive opinions, sitting judges mainly based their rejection to an international proscription against juvenile capital punishment upon municipal legal rules, court precedents, or the Senate reservation to Covenant Article 6(5).

In *Roach v. Aiken*[33] (1986), a three-judge panel from the federal appeals court for the Fourth Circuit[34] dismissed the petition of James T. Roach to stay his execution until a hearing by the Inter-American Commission on the merits of *Roach and Pinkerton v. United States* was completed. Three rationalizations were responsible for this judicial outcome.[35] First, even assuming that the Commission's decision was binding on the USA, the majority asserted, the Inter-American body had never ruled that the execution of persons like Roach for the offenses committed at the age of 17 would be at variance with the international rule barring cruel, inhuman, or unusual punishment. Second, there were no executive instructions enjoining the Court to halt the execution in question. The U.S. Secretary of State did not request that the Court follow the Commission's precautionary measures. Neither did the governor of South Carolina, who had overtly declined to act on the Commission's plea to give a hiatus to Roach's execution. Third and most importantly, judges on the panel pointed out that:

> We are not advised that the United States has any treaty obligation which would require the enforcement, in the domestic courts of this nation, state and federal, of any future decision of the Commission favorable to Roach.[36]

In the *Thompson* dissent, joined by Chief Justice William H. Rehnquist and Justice Byron R. White, Justice Antonin Scalia made several core points in disapproval of international law claims. The parameters of the Eighth Amendment in terms of evolving standards of decency in a civilized society could be aptly appraised only by reference to internal enactments regarding the threshold age of capital punishment.[37] The insights of foreign countries, however enlightened, were totally extraneous in this context.[38] Rather, it was domestic statutes written by elected representatives that truly reflected the sentiment of the American public regarding juvenile death sentencing. In light of the climbing rate of heinous crimes perpetrated by teenagers, the federal government and numerous states were compelled without choice to reduce the age for adult trials from 16 down to 15 in penal laws. The ramification of that action jointly taken by federal and state agencies perfectly symbolized that the system of capital punishment might be potentially applied to individual persons younger than sixteen. Distinct from the plurality opinion constitutionally taking side with human rights activists, Justice Scalia found that a national consensus had not demonstrably formed that would allow the Court to oppose all death sentencing of juveniles aged 15 in the United States.

Again, in the *Stanford* majority, Justice Scalia led the same group of his fellow justices from the *Thompson* dissent to resist the international climate against the juvenile death penalty, but this time with additional votes coming from Justices Anthony M. Kennedy and Sandra D. O'Connor.[39] Following the line of reasoning in the *Thompson* dissent, the *Stanford* Court viewed American conceptions of decency, rather than the pattern of foreign sentencing practices, as the key to understanding the substance of the Eighth Amendment.[40] The practices of other nations did not meet the prerequisite of the Eighth Amendment: that the practices under review had to be accepted first by the American people. In that connection, domestic laws then swiftly came into play in the Court's decision-making process. What the majority discovered was that a national consensus on the propriety of capital trials for child defendants had yet to emerge within the United States.[41] In fact, many jurisdictions retained laws authorizing those aged 17 or under to face adult criminal liability, including death sentencing. Based on those observations, the *Stanford* Court accordingly rebuffed the allegations that Kentucky and Missouri had disregarded the Eighth Amendment's cruel and unusual ban by condemning to death two juveniles aged 17 and 16 respectively at the time of the murders.

Similarly, the majority justices on the Supreme Court of Nevada[42] employed precedent and the Senate reservation to dismiss the redress sought by the *Domingues* appeal. Without making any comment on the customary law assertions raised by human rights activists, the majority

published a judgment cursorily conceding the validity of the U.S. reservation to Article 6(5) of the ICCPR. According to the majority's interpretation, Senate members intended to maintain the ability of states to continue juvenile capital punishment at the time of their consent to ratification of the Covenant.[43] There was no latitude enabling Domingues to take issue with Nevada's death sentencing decision based on the U.N. Covenant. By depending on the *Stanford* precedent as yet another basis for its decision, the Nevada high court sustained the lawfulness of executing Domingues for the crime he committed at the age of 16.

The treatment by the *Domingues* majority of Article 6(5) as subordinate to the Senate reservation brought some leverage to bear on the resulting votes of the *Beasley/Beazley* Courts. Predicated on procedural default, Judge Thad Heartfield of the U.S. District Court for the Eastern District of Texas disallowed the ICCPR claims raised against Napoleon Beazley's death sentence and inaccessibility to clemency relief.[44] At the same time, he invoked the Senate treaty restrictions as an independent basis for setting aside those Covenant-derived causes of action as meritless. For further illumination, some quintessential words from the Fifth Circuit Court in *Gisbert v. United States Attorney Gen.*[45] were borrowed and rephrased as follows:

> The imposition of the 'norms' of international law are only helpful to the courts when there are no treaties, executive or legislative acts, or judicial decisions that are in place that are instructive on the issue.[46]

By quoting this paragraph, it could be arguably presumed that Judge Heartfield would be more open to the power of international law in U.S. court, provided that neither executive nor legislative acts nor judicial decisions were available to resolve the issue of juvenile capital punishment. Reverting to the instant case, however, he made clear that, by lodging a reservation to Article 6(5), senators on Capitol Hill expressly wanted to retain the integrity of states' prerogatives in managing their individual juvenile justice systems. On the *Gisbert* principle, the Senate reservation infallibly controlled as a legislative act. So did the *Stanford* case, erected as a valuable precedential reference by the federal Supreme Court more than 10 years ago, which positively affirmed that the mechanism of capital punishment was rightful for those older than 15 years of age. In addition, Judge Heartfield rejected the domestic utility of the other ICCPR provisions put forward by Beazley to vindicate his rights to due process and equal treatment, by virtue of the Senate's non-self-executing declaration.

At the U.S. Court of Appeals for the Fifth Circuit, Judge Rhesa H. Barksdale likewise acknowledged the reservation's value, but struck down the international arguments entirely on the ground of the procedural default doctrine.[47] The case was procedurally precluded from

review, in that defense attorneys did not timely bring up the international law claims when direct appeal and habeas review proceedings were under way in state courts. Moreover, Judge Barksdale reasoned that none of the exceptional circumstances of "cause and prejudice" or "miscarriage of justice" existed to overcome procedural default. The failure to fulfill "cause and prejudice" lay in the fact that the ICCPR, ratified by the Senate in 1992, could not possibly be said to be novel to Beazley's state counsel, given that his state trial and habeas hearings began no later than early 1995. Since the reservation at bar prevailed, Judge Barksdale considered, human rights defenders were misleading in contending that the Texas state law authorizing the death penalty for Beazley had breached Article 6(5)'s obligatory treaty effectiveness in conflict with the Supremacy Clause of the federal constitution. Rather, there was no identifiable issue of constitutional error resulting in a "miscarriage of justice" that would allow for the elimination of procedural default.

This display of judicial amenability to the Senate reservation found considerable resonance in the principal ruling authored by Justice Ralph D. Cook on the Alabama Supreme Court in *Ex parte Pressley*.[48] Justice Cook not only conceded the viability of all pertinent Senate-inserted treaty restraints, including the reservation to ICCPR Article 6(5), which gave full license to the state practice of juvenile capital criminalization to the exclusion of the international law foreclosure.[49] In addition, he heavily relied on *Stanford* to constitutionally uphold the death sentencing by the Alabama government of a youngster (Marcus Pressley) perpetrating capital murders at 16 years old.[50]

In the *Ex parte Pressley* petition, however, one of the six concurring justices, J. Gorman Houston, Jr., openly expressed support for the binding force of the ICCPR on state courts, in concert with Justice Charles E. Springer's dissent in the *Domingues* case.[51] The support grew out of his cognizance of a constitutional obligation under the Supremacy Clause of Article VI(2) to conform to the precept of Covenant Article 6(5). Despite that thought in mind, Justice Houston subsequently revealed some degree of retraction. Ultimately, the disavowal by the federal Supreme Court to grant review in *Domingues* generated a sort of ripple effect on the mind of Justice Houston, leading him to believe that the Supreme Court had suggestively decreed the primacy of the Senate reservation over ICCPR Article 6(5). As a lower court justice, he thus felt constrained by that superior judicial implication as warranting the applicability of capital punishment to Marcus Pressley.

Just less than six months apart, the Supreme Court of Alabama admitted the value of the *Ex parte Pressley* precedent to control the Article 6(5) claim in *Ex parte Burgess*[52] (2000), another case involving a 16-year-old offender. More than a year later, the identical declaration

was again made disadvantageously to a 17-year-old in *Ex parte Carroll*[53] (2001). In *Wynn v. State*[54] (2000), the *Ex parte Pressley* case law also served as cause for the Court of Criminal Appeals of Alabama to disaffirm the right of Gregory Renard Wynn to seek immunity from the death penalty under Covenant Article 6(5) for the murders he committed at the age of 17. In *Servin v. State* (2001) challenged by public defenders on behalf of a 16-year-old defendant, the precedential effect germinated from the *Domingues* case returned once more to certify the legitimacy of the Nevada Supreme Court[55] to thwart the domestic implementation of Article 6(5).[56]

In like manner, the *Hain v. Gibson* petition for a writ of federal habeas corpus based on the ICCPR and *jus cogens* foundered as well. In response to that petition, a three-judge panel from the U.S. Court of Appeals for the Tenth Circuit led by Judge Mary Beck Briscoe[57] unanimously looked to the Senate reservation and the non-self-executing declaration to dismiss the Article 6(5) claim.[58] Regarding the claim put forth by human rights attorneys of the *jus cogens* principle quashing the juvenile death penalty, a number of rationales were drawn on by the panel to controvert its governance. First, in Judge Briscoe's observation, it was extremely questionable that the norm removing juveniles from capital punishment had nowadays reached the status of *jus cogens* in international jurisprudence. In fact, the "moral" or "political" incentives, rather than a "sense of legal obligation" drove some countries to willingly adopt abolitionist policies toward juvenile criminals.[59] Second, even if this norm constituted a rule of *jus cogens*, Judge Briscoe maintained that it was of no help to exempt Scott Allen Hain from being sentenced to death, given that the *Stanford* disposition handed down by the Supreme Court was binding on the Circuit panel in this instant case. It was well-established by the *Stanford* holding that the levying of the death penalty for crimes committed at 16 or older (as in the case of Scott Hain) was not unconstitutional under the cruel and unusual punishment prohibition. Finally, to elucidate whether customary international law or *jus cogens* foreclosed the codification of juvenile capital offenses, Judge Briscoe quoted the words of the U.S. Sixth Circuit Court in *Buell v. Mitchell* as an answer:

> [This] is a question that is [properly] reserved to the executive and legislative branches of the United States government, as it [is] their constitutional role to determine the extent of this country's international obligations and how best to carry them out.[60]

Filed on 15 April 2004, the *Dycus* ruling dealt a blow to the direct appeal by human rights attorneys of the conviction and sentence of Kelvin Dycus founded on, among other authorities, the ICCPR and *jus*

cogens. Sitting en banc, the Supreme Court of Mississippi[61] found no merit in those international claims by reason that:

> Dycus has cited no applicable laws in the United States nor in Mississippi where international law has been applied to a death penalty case in a state court.[62]

On one occasion, judges flatly renounced the applicability to the juvenile death penalty of the evolving standards delimited by the Supreme Court in *Atkins v. Virginia* to invalidate the execution of mentally retarded offenders. The case in point is *Villarreal v. Cockrell*, decided *per curiam* by the federal Fifth Circuit on 26 August 2003. Presiding over the panel hearing to rule on the propriety of bestowing summary judgment and denying habeas relief by the federal district court, Judge Rhesa H. Barksdale[63] averred that the *Villarreal* appeal involving the death sentencing of a 17-year-old juvenile inmate did not fall into the compass of the influence created by the *Atkins* edict.[64] Instead, the case law of *Stanford* dominated the issue. No institution other than the Supreme Court itself could adjudge whether the *Atkins* precedent and its rationales had reference to the case of appellant Raul Omar Villarreal. Another supporting source for Judge Barksdale to enter a decision adverse to international law arguments was the Fifth Circuit's similar rejection of the earlier case of *Beazley v. Johnson*.

On the same day that the *Villarreal* judgment was issued by the Fifth Circuit, the *Simmons* dissent on the Missouri Supreme Court[65] argued that "neither a historical nor a modern societal consensus" had surfaced domestically to rebuke the states' codification of ages 16 or 17 for capital offenses.[66] Under the doctrine of *stare decisis*, juvenile death penalty jurisprudence was unchanged and remained bound by the federal high court's judgment in *Stanford*. As a rule, the dissenters pointed out that the authority resided with the U.S. Supreme Court to overturn that decision. For that reason, it would be more suitable for Simmons to explore other legal avenues than state court review in order to remedy his allegedly unconstitutional sentence for a capital murder committed at age 17. The comment of the *Simmons* dissent was largely echoed by the *Roper* dissenters from the U.S. Supreme Court. Securing votes from Chief Justice Rehnquist and Justice Thomas, Justice Scalia denounced the *Simmons* majority for its abandoning the path of *Stanford* by constitutionally relieving individuals under the age of 18 from capital punishment.[67] Moreover, he deeply queried the validity of the numerical data that his majority peers used to corroborate the development of a new domestic consensus against the juvenile death penalty. For him, irrespective of being passed more than 15 years ago, *Stanford* was not antiquated and disconnected with contemporary American public opinion on the issue of juvenile capital offenses. Instead, its regulatory power

ought to continue to reign in the United States. "'Acknowledgment' of foreign approval has no place in the legal opinion of this Court," Justice Scalia added.[68]

Judgments Based on an International Law Rationale

Liberal justices at federal and state levels resorted to apposite international law suggested in amicus briefs for their construction of the Eighth Amendment. There were additional occasions where the ICCPR was accepted as actionable notwithstanding the multiple constraints instituted by the Senate during the ratification process.

In the *Thompson* case, Justice John P. Stevens published a plurality opinion on behalf of Justices William J. Brennan, Jr., Thurgood Marshall, and Harry A. Blackmun, objecting to the employment of capital punishment against children aged 15 or younger. Looking at *Trop*, *Coker*, and *Enmund*[69] as interpretive guidelines, Justice Stevens agreed with the pertinence of foreign death penalty laws presented in an AI amicus brief[70] in helping to demarcate the contours of the Eighth Amendment prohibition. The same was true regarding the expertise of professional organizations such as the American Bar Association and the American Law Institute.[71] These organizations' professional opinions were thought by the plurality to be as relevant as state statutes and jury sentencing practices when probing modern societal attitudes toward the capital sentencing of 15-year-olds. Comparably, in the eyes of Justice Stevens, a number of treaties signed by the United States—the ICCPR, the American Convention, and the Fourth Geneva Convention—had an indispensable part to play in facilitating the procedure of constitutional analysis.

Concluding its survey of material, the *Thompson* Court declared its reasoning for rendering a judgment in support of the contentions raised by human rights advocates. The sentencing of children less than 16 to death could never withstand the tests of proportionality or penalogical components such as juvenile culpability and the rationale of deterrence. In particular, such sentencing was incapable of taking into account juvenile defendants' immaturity and incapacity to understand the full consequences of their criminal acts. Thus, Oklahoma's capital system did not satisfy civilized standards of decency as plainly defined and stated by the multiple sources referred to by the Court. On that consideration, the *Thompson* plurality demanded that Oklahoma act consistently with the Eighth and Fourteenth Amendments by terminating its cruel and unusual capital punishment against juvenile offenders like William W. Thompson.[72]

Less than two years later, the members of the *Thompson* plurality, however, were unable to garner enough votes to shape a controlling opinion in the *Stanford* Court. In a dissenting opinion to the *Stanford*

case, Justice Brennan followed the *Thompson* methodology to annul child capital punishment for crimes performed at 16 and 17.[73]

In the *Domingues* case, dissenter Springer on the Nevada Supreme Court firmly turned aside Senate intent to hamper the implementation of the ICCPR domestically. Had the reservation to Article 6(5) gone into full force, Justice Springer explained, the United States would join the ranks of the few other remaining countries on earth like Iran, Iraq, Bangladesh, Nigeria, and Pakistan that flagrantly espoused the practice of child executions.[74] Under such circumstances, the federal government inescapably placed itself in direct default of treaty obligations now that the Covenant as part of "the supreme Law of the Land" required of the United States not to proclaim the death penalty on juveniles under 18. Writing another dissenting opinion, Justice Robert E. Rose called into question the viability of the Article 6(5) reservation because Article 4(2) of the Covenant banned any derogation from Article 6 and because academics shared a mutually negative view of the controversial reservation.[75] In conclusion, Justice Rose proposed a hearing of experts to fundamentally settle this dispute once and for all.

In *Servin v. State*, Justice Rose concurred with the majority opinion that pronouncing the death penalty by the trial court on 16-year-old teenager Robert Paul Servin was too excessive, but he believed the basis for this controlling opinion should additionally emanate from international customary law. Re-examining the legality of the Senate reservation to ICCPR Article 6(5), he was convinced this time with confidence that the reservation should stand for three crucial reasons.[76] First of all, the Covenant contained no explicit provisions demanding that States parties cease to incorporate treaty reservations, nor did it call for the object-and-purpose test to verify the acceptability of these reservations. Second, the practice of placing reservations on human rights treaties had reportedly become prevalent among States. One evidence for that was: "approximately one-third of the parties to the ICCPR made reservations to over a dozen substantive provisions."[77] Lastly, regardless of the fact that 11 parties to the Covenant raised objections to the U.S. reservation to Article 6(5) as violating the treaty purpose, none of those objectors acted within the 12 months after this reservation was communicated to member parties. As a consequence, Justice Rose argued, the Senate reservation to Article 6(5) remained in force pursuant to the 1969 Vienna Convention on the Law of Treaties.

Nevertheless, Justice Rose continued by deliberating on the postulate made by appellant Servin that the norm precluding capital offenses for juvenile offenders had today ripened into the hierarchy of customary international law as assented to by a sizable number of nations in the world.[78] In this respect, Justice Rose noted that Professors Harold H. Koh and Louis Henkin as well as numerous other commentators all

countenanced this customary law point of view to vitiate the national operation of the juvenile death penalty system. In the mind of Professors Koh and Henkin, unless federal directives dictated otherwise, domestic courts must honestly enforce customary principles to which the U.S. government did not timely protest during their formation because principles of this kind would constitute one form of federal law superior to state law. According to scholarly perceptions, the norm outlawing juvenile capital punishment was precisely one of those customary norms regulating the USA. More conspicuously, Justice Rose detected that the espousal of this norm by large numbers of nations had prodded several U.S. states to permanently terminate the use of the death penalty to punish juvenile defendants. On this line of logic, Justice Rose concluded that:

> I am persuaded that banning the execution of juveniles is a customary international norm and this ban should be recognized as binding on the United States. In my view, this is an additional reason to reduce Servin's penalty to life imprisonment without the possibility of parole.[79]

Dissenting from the majority's denial of certiorari without comment in *Patterson v. Texas* (2002), Supreme Court Justice Stevens took the unusual step of issuing an opinion to explain his justifications for reexamining the Court's long-untouched jurisprudence on the juvenile death penalty. He stated:

> Given the apparent consensus that exists among the [U.S. states] and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate for the Court to revisit the issue at the earliest opportunity.[80]

Thus, Justice Stevens strongly conveyed his high esteem not merely for domestic but also for pervasive international perspectives. His statement was given full credence by Justices Ruth B. Ginsburg and Stephen G. Breyer as well.

The final case that merits special treatment is the recent remarkable triumph gained by the *Simmons/Roper* appeals in the Missouri and U.S. Supreme Courts. Sitting Justice Laura Denvir Stith and her concurring peers,[81] made null and void her court's previous decree affirming Simmons' conviction and capital penalty during post-conviction review.[82] Instead, Simmons was re-sentenced to imprisonment for life without any prospect of "probation, parole, or release except by act of the Governor."[83] This exultant outcome, in which the state court overthrew the *Stanford* precedent, won the blessing of Justice Kennedy

and four associates[84] when the case was heard and decided by the federal high court.

Justice Kennedy, like Justice Stith, carefully followed the *Atkins* analytical methodology to arrive at his final judgment. In *Atkins*, the U.S. Supreme Court responsively acted on international opinion and used it as one of the weighty indicia to evince that the dynamically evolving conception of the Eighth Amendment banned the death sentencing and execution of persons with mental disabilities.[85] Correspondingly, to grasp contemporary global attitudes concerning the juvenile death penalty, Justice Kennedy gave respectful consideration to accounts from amici such as the EU, former U.S. diplomats, and the Bar of England and Wales.[86] The elements of international opinion referenced by these veteran advocates embraced the Child Rights Convention, the ICCPR, and other cardinal multilateral agreements. Further, mainstream national practice was adduced with a finding indicating that the USA ranked with Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, Congo, and China as the world's few remnants officially condoning the juvenile death penalty in the 1990s. To date, however, all foreign sovereigns on this list had reportedly either abolished the practice or publicly disavowed it. Since the 1689 English Declaration of Rights was the paragon for the Eighth Amendment, Justice Kennedy additionally found it helpful to examine British practice in this aspect. He observed that British cessation of executing juvenile offenders predated international human rights covenants and that the first steps in this direction transpired in the 1930s. Taken as a whole, Justice Kennedy averred that all of these signs solidified his conclusion that the Eighth Amendment now forbids the condemnation of youths aged lower than 18 to death.

Qualitative/Quantitative Summary

This case study of juvenile death sentencing leads to the following summation. Adjudicators on the U.S. bench who disallowed the application of international law included: dissenters in *Thompson* and *Simmons/Roper*; and the majority or the full court in *Roach*, *Stanford*, *Domingues*, *Beasley/Beazley*, *Ex parte Pressley*, *Ex parte Burgess*, *Wynn*, *Ex parte Carroll*, *Servin*, *Hain*, *Villarreal*, and *Dycus*. On the other hand, the plurality in *Thompson*; the dissenters in *Stanford*, *Domingues*, and *Patterson*; the concurrer in *Servin*; and the majority in *Simmons/Roper* all took a stand oppositely discrepant from the "Never Accept" category. A look at Table 4-1 discloses the phenomenon that a far greater number of judges disclaimed the force of international safeguards protecting juveniles' right to life. This result entirely coincides with the prediction earlier in this chapter that judges are likely to cling to domestic law in the domain of the juvenile death penalty. To put it in a different way, the data in Table 4-1 denotes the impression that

municipal legal provisions had wielded a vast measure of sway in determining judges' voting behavior in the 15 selected juvenile death penalty cases. Further, the legal model appears competent to explain that judges and justices all spoke in unison against international law arguments in the cases of *Roach*, *Beasley/Beazley*, *Ex parte Burgess*, *Wynn*, *Ex parte Carroll*, *Hain*, *Villarreal*, and *Dycus*.

A careful dissection of other court decisions studied in this book, however, quickly dismisses such an impression. Nowhere did U.S. laws contain a provision offering the definite source of reference for a constitutional reading. Yet, as already described, U.S. Supreme Court justices were always ready to invoke discrete legal evidence in support of their individual selected positions. The inability of the legal model to account for judges' decision-making processes also became fairly obvious when judges during their deliberations on the *Domingues* case were in discord over the enforceability of the Senate reservation or Article 6(5) of the ICCPR. If the legal model (which posits that neutral legal rules are the single factor controlling judges' voting choices) is always a valid predictor, such legal wrangles dividing the Nevada Supreme Court into majority and dissenting camps should not have occurred. Again, in the *Servin* appeal, why was the Nevada Supreme Court unable to procure unanimity toward international law claims? The same holds true in *Ex parte Pressley*, in which Justice Cook wrote a principal opinion faithfully in sync with senators' preference to exclude the power of Article 6(5), while Justice Houston reluctantly concurred because of the federal high court's repudiation of a merits hearing in *Domingues*. The *Simmons* ruling from the Missouri Supreme Court not only overrode the ill-famed *Stanford* judgment. In addition, it was indicative of the sharply conflicting constructions of the tenability of juvenile capital punishment existing between the majority and dissenters. A parallel division of opinion seemingly appeared in *Patterson* as well.

The outcome in Table 4-1 equally demonstrates that sitting judges have always drawn on divergent legal principles in reaching juvenile death penalty decisions. Assuming that the legalistic explanation is perfectly legitimate in making sense of judges' voting preferences, then the statistics in Table 4-1 should have consistently registered without variation that 100% of judges favored international law or otherwise. This is because the legal model applied in our research predicts that no elements other than objective legal rules would govern all case outcomes. Without an element of human interpretation instilled, law itself, once enacted, is static in black and white letters and uniformity should be anticipated in its application. Yet, the statistical findings glaringly portray a dissimilar scenario of judicial behavior. In brief, the referenced contradictions suggest that elements apart from objective legal canons may bear on how judges deal with juvenile death penalty

cases. Since judges are theoretically independent of outside political influences in casting their decisional votes, it seems that judges' attitudes may serve as a significant factor in shaping the case outcome. Thus, future research is required to expand the exploration of judges' voting outcomes from the current legal model to attitudinal-centric inquiries.

Table 4-1. Judicial decision making with legal model explanations in 15 juvenile death penalty cases

Judges at Different Court Levels	Favor International Law at Least Once	Never Accept International Law
State Level		
State Appellate		5
State High Court	6	30
Federal Level		
U.S. District Court (Eastern Texas)		1
U.S. Appellate		11
U.S. Supreme Court	9	4
Total	**15/66** (22.73%)	**51/66** (77.27%)

EXECUTION OF FOREIGN NATIONALS

Human rights activists established a striking and synergistic transnational network in battling states' neglect to speedily advise foreign nationals facing the death penalty of their right to consular notification under the Vienna Convention. In that campaign, individual activists formed coalitions with aggrieved foreign governments and advocacy groups in the USA and elsewhere to pursue a broad spectrum of system and process activities on both domestic and international fronts. Moreover, modern websites and electronic mail worked as useful media in disseminating and gathering human rights materials for campaign promotion.[87] Besides facilitating those communications, the Internet substantially intensified the level of interaction among like-minded advocates by transmitting amicus briefs and pleadings for their comments and approval before legal arguments were actually made in U.S. courts.

As early as 1992, AI Canada's Death Penalty Coordinator Mark Warren and attorneys Sandra L. Babcock, Robert F. Brooks, and William H. Wright, Jr. entered on their collaboration in constructing consular treaty claims in *Faulder v. Johnson* (1996) and *Murphy v. Netherland* (1997).[88] By posting over a hundred U.S. cases of consular rights

violations and updated news articles as well as other pertinent consular information on websites, for instance, the Death Penalty Information Center and Warren-led AI effectively imparted educational messages to the public and government elites worldwide. To raise consular officers' awareness of their treaty rights within the United States, the International Human Rights Law Clinic at American University hosted a one-day conference in Washington, D.C. on 30 June 1999 with AI's death penalty expert Warren and attorney Babcock appearing as presenters.[89] By doing this, human rights NGOs and individual activists expanded the scope of their campaign to foreign diplomatic officers and mobilized further pressure for treaty compliance on state and local enforcement agencies.

At the same time, human rights activists engaged in other forms of socialization/communication to push the consular rights campaign a step forward. A sizable number of law professors delivered in law review articles and on Internet sites their legal rationales and policy recommendations, urging U.S. officials to diligently put consular treaties into domestic effect. Not only did their publications enrich the sources for academic studies, but they also instructed consular case lawyers on how to draw up and ready their defense arguments in U.S. courts. Through a variety of law school-designed curriculums and practicing clinics, professors committed to the issue additionally familiarized the next generation of students with consular legal issues. Elsewhere, counselors from McGuire, Woods, Battle & Booth,[90] Yale Law School's Diana Project, and the International Justice Project developed crucial nexuses with consular advocates and researchers by setting up electronic hubs of brief banks revolving around the *Breard/Paraguay* case[91] and others for reference purposes. By filing pleadings grounded in international jurisprudence, human rights activists were able to make adjudicating judges exposed to and embedded in international law environments.

To be sure, all these patterns of socialization had more or less impacted on recruiting a broad pool of additional enthusiasts and consular delegates as well as political leaders abroad into the development of the consular rights campaign. For example, continual consular advocacy by human rights campaigners eventually galvanized Mexican authorities to stand up for its detained nationals on U.S. soil. As a country whose nationals accounted for the largest segment of the foreigners committed to America's death row, Mexico inaugurated a consular dialogue with law enforcement personnel from across the Midwest on 6 October 2000.[92] This program of intended legal suasion was co-hosted by the Center for International Human Rights at Northwestern University Law School. By circulating consular information cards to its citizens traveling to the United States, the

Mexican Consulate has actively taken precautionary measures to bring them into high awareness of consular treaty benefits. On top of litigating in U.S. courts, as shown in Chapter 3, the government of Mexico relied on the Inter-American Court and the ICJ to certify the rightfulness of its challenges to U.S. consular misdeeds. Due to a proposal by Mexico, the U.N. General Assembly supportively introduced the Inter-American Court's advisory opinion into a resolution confirming the significance of implementing consular notification and assistance in conjunction with international due process of law.[93] The cancellation by President Vicente Fox of a 2002 State visit to the USA in protest of repeated consular treaty infractions against Mexicans in U.S. custody marked another peak of strained relations between the two countries.[94] All the actions taken by Mexican elites and rights activists characteristically illustrate how consular omissions by the United States in the end inescapably embroiled its foreign relations with allied countries and stimulated a cascade of still more transnational activities against it.

Beyond the conduits of contact just recounted, the functional converse noticeably took place between defense attorneys, amicus contributors, and scholarly researchers as well as human rights NGOs. In fact, attorneys Babcock and Wright depended on Warren-led AI as one of the information providers for framing appeal briefs in the interest of their respective clients Joseph Stanley Faulder and Mario B. Murphy.[95] Likewise, Argentina, Brazil, Ecuador, and Mexico secured generous assistance from Warren in drafting an amicus brief in support of Paraguay's lawsuit in the United States.[96] Through quarterly on-line newsletters, Warren undertook the facilitation of ongoing discourse between litigating attorneys, academics, and other consular rights supporters.

Often, such communications were two-sided in nature. In some instances, they proceeded on such an extensive scale that the consular rights campaign activity spilled over to enlist still other NGO advocates. As one example, in the *Faulder* case, a number of AI Urgent Actions seeking a stay of reiterative impending executions were released after AI conferred with Faulder's attorney, Sandra L. Babcock. Then, the Urgent Action material promptly inspired two other advocacy groups[97] to make similar appeals to the Texas administration in the interests of Canadian national Faulder. Additionally, at the request of attorney Babcock, AI's Warren discharged the function of keeping information regarding the progress of the *Faulder* case constantly flowing to media reporters.

The *Faulder* case also typified yet another style of interactive dialogue occurring between myriad functional actors. Mostly spurred by published law review articles and a number of pending consular cases, a surging domestic sympathy in the United States toward foreigner nationals under death sentences had rekindled attorney Babcock to again

bring up the consular claim for habeas relief in state and federal courts.[98] In turn, Babcock as a case pioneer offered a stream of ongoing aid to Wright and the *Breard* legal team as well as to other interested litigators.[99] As well, she frequently contributed her strategic acumen in consular cases at lawyers' conferences. Further, in the aftermath of the *Breard* case, periodic collaboration emerged between AI's Warren and several active professors such as William J. Aceves, in the form of critiquing each other's amicus briefings, discussing recent consular developments, and participating on conference panels.[100]

As interest articulation/aggregation came into play, human rights organizations changed part of their campaign agenda to focus on enhancing and maintaining high-profile appeals in the international arena. AI members in Canada and Germany had persistently lobbied their home governments to make vigorous interventions aimed at suspending the executions of Faulder and the LaGrand brothers.[101] Ahead of a U.N. mission for an on-site investigation into the death penalty dispatched to the United States in October 1997, Warren-spearheaded AI and attorney Wright separately contacted U.N. Special Rapporteur Bacre Waly Ndiaye, making him aware of the serious nature of the repeated consular transgressions by individual U.S. states.[102] These campaign efforts eventually incited Ndiaye to feature Faulder and other consular cases in a critical report handed in to the Human Rights Commission. By the end of 1998, AI had already moved the Faulder campaign to a global focal point, as a result of wide distribution of AI's thematic reports on consular rights violations and the death penalty, in addition to well over a hundred intensive interviews given to the media.[103] Moreover, after being lobbied by AI for a number of years, the Human Rights Commission in 1999 backed a resolution requiring U.N. members to fully comport with consular treaty duties owed to all alien criminal suspects arrested or tried on capital charges by their domestic law enforcers.[104] Besides the Human Rights Commission, other international vehicles that availed complainants of the opportunity to vent their consular grievances were the Inter-American system and the ICJ. As depicted in Chapter 3, concerned sovereigns and their mistreated citizens periodically took cases before these bodies in the hope of increasing the compliance pressures on responsible U.S. authorities.

Domestically, in a joint letter dated on 14 May 1997, a group of defense attorneys from 32 law firms called on then-Secretary of State Albright to intervene in *Faulder*, *Murphy*, *Breard*, *LaGrand v. Stewart*,[105] *Flores*,[106] and other consular cases.[107] Kindred actions were taken by a wide array of transnational NGOs and individual advocates[108] for the benefit of the LaGrand brothers and other foreigners facing the death penalty in the United States.[109] Over and above all of those undertakings, cross-border NGOs and individual devotees enlarged their

legal and moral suasions to state political elites, in an effort to extract reprieves for foreign nationals facing imminent executions.[110] More prominently, thanks to what professor Almond characterizes as the "articulation" endeavors of local activists, in September 1999, the state of California became the first jurisdiction in the USA to legislatively put Article 36 of the Vienna Convention into practice.[111]

Turning to the U.S. court system, as illustrated in Appendix I, activist attorneys, professors, and transnational NGOs translated their campaign language into a great many pleadings that were proffered after a process of consultation and coordination. Since the overriding aim at this phase was to win over judges to their side, they took advantage of every opportunity in court to persuade judges into amending states' inveterate violations of treaty and customary consular norms. Their central legal arguments are outlined below.

As a self-executing treaty, the Vienna Consular Convention automatically enjoyed legally binding force on U.S. soil.[112] State laws were necessarily subordinate to the Convention provisions, under the Supremacy Clause of the Constitution and the Supreme Court's holdings in cases such as *Missouri v. Holland*. In light of Convention Articles 5 and 36, individuals were indeed one of the protected subjects intended and designated by the Vienna Consular Convention.[113] Metaphorically speaking, the international rights of consular notification and access accorded to foreign individuals were on a par with the world-noted "Miranda rights," under which criminal suspects in the United States were securely guaranteed due process treatment throughout the course of legal proceedings.[114] It was therefore misplaced to maintain that Article 36 purported nothing but to provide for the efficient performance of consular posts. Individual aliens facing capital prosecutions outside their native land by all means were entitled to benefit from Article 36.

As a full party to the Vienna Convention, it was incumbent on the United States to compel its constituent states to endow foreign nationals taken into U.S. custody with consular treaty safeguards. On no terms could a federal rule of procedural default validly bar the Convention-derived claims. Rather, federal treaty interests should always outweigh that municipal principle, even though the concept of default arose from a kind of federal goodwill venerating state sovereignty in the management of local criminal justice systems.[115] Next, the doctrine requiring an exhibition of actual prejudice in order to prevail on appeal was also problematic, given that the absence of consular assistance could considerably alter case proceedings in ways that would defy accurate analysis by appellate courts. The denial of consular involvement materially crippled the capability of condemned foreigners unacquainted with U.S. legal procedures in a multitude of unpredictable forms, such as deprivation of the consular support necessary to procure a timely plea

negotiation, resulting in a life sentence that could have spared their lives.[116] Neither the language of 28 U.S.C. § 2253(c)(2),[117] a constituent of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) limiting the grounds for habeas corpus appeals, nor its drafting history required that legitimate sources forming the basis for individual complaints need be confined to purely "constitutional" claims.[118] There was no requirement that issues be built in the context of constitutionally-vested rights in order to trigger further appellate review in the wake of a petitioner's habeas corpus claim being rejected by a federal district court. To the contrary, this statutory prescription simultaneously authorized an entire class of death-sentenced foreign nationals to apply for habeas redress based on violations of the Vienna Consular Convention.

Besides these contentions centering on the multilateral consular treaty, human rights activists brought forward other legal arguments to fortify their defensive ground. In the *Ohio v. Loza* amicus brief filed for the Mexican government, Professor John B. Quigley and attorneys S. Adele Shank and Robert S. Frost interpreted the rights accorded under Article 36 as binding on U.S. states as a matter of customary norms.[119] In *Al-Mosawi v. State*[120] (1998), the post-conviction lawyers for an Iraqi death row inmate believed that the Oklahoma criminal court of last resort would swiftly set aside the Consular Convention claim as procedurally defaulted if it was raised on the merits (i.e., as direct grounds for relief). On that consideration, they presented the Convention violation as part of a larger ineffective assistance claim, arguing that appellate counsel failed to adequately represent her client, inter alia, by not raising the treaty claim on direct appeal.[121] More uniquely, attorney Babcock resorted to the Alien Tort Claims Act as a mainstay to seek judicial review of Faulder's death sentencing. The ATCA-based tort claim propounded that state administrators had wrongly stripped Faulder of consular treaty rights and subjected him to the inhumane death row phenomenon in defiance of international jurisprudence.[122]

In legal actions fought for the consular interests of Mexico, Paraguay, and Germany, human rights advocates emphasized that these sovereign challengers had standing predicated on multilateral and bilateral treaties to sue state governments over the alleged consular injustices.[123] Not only could they properly litigate in their own right, but they could also do so in the interest of diplomatically safeguarding their nationals' rights. Equally important, in the capacity of amicus, David J. Bederman and other law professors refuted the political question postulate relied on by Virginia and the amicus federal government to oppose judicial remedies for the consular breach in the *Paraguay* case. In their analysis, the executive branch during the Senate ratification hearing openly admitted the substance of the entire Consular Convention to be self-operating and extending to the USA and its states as "the supreme

Law of the Land." On the authority of that legislative history, the rights in Article 36 indeed were actionable as "cases or controversies" under Article III(2) of the U.S. Constitution.[124]

To repudiate the overture advanced by violating U.S. states that they were immune from foreign sovereigns' lawsuits under the Eleventh Amendment to the U.S. Constitution, an elaborate defense approach was shaped and adopted by human rights attorneys on behalf of Mexico, Paraguay, and Germany. Instead of requesting compensation for the past misdeeds of the state authorities, they argued that the goal of their lawsuits was prospective injunctive relief to block any further state actions to execute aliens sentenced to death in the United States.[125] Another rationale invoked to forestall application of the Eleventh Amendment rested on the absence of any other meaningful remedy: the fact that the states under accusation continually frustrated consular treaty rights by leaving the death sentences incurred by their past wrongs totally unaddressed.

Headed by Lori F. Damrosch, a group of international professors filed an amicus brief in the *Paraguay* case to express their opinion about the binding legal effect of an ICJ provisional order. By their account, Article 94(1) of the U.N. Charter was the source of legal authority that obliged the United States and other U.N. members to carry out all judgments of the ICJ, including its interim stay measures.[126] Speaking for Mexico as an amicus in *Valdez v. Oklahoma*[127] (2002), Sandra L. Babcock and Susan Otto identified three other key explanations to back the thesis that the ICJ judgment in *LaGrand* should be given a full and effective meaning within the United States.[128] The United States ratified the Optional Protocol to the Vienna Consular Convention and consented to surrender to the ICJ's adjudication any of its consular quarrels arising with other States parties. Besides its Protocol-based responsibility, international customary law also committed the USA and other sovereigns in the world community to abiding by international judgments proclaimed by their treaty-sponsored tribunals. Lastly, Babcock and Otto argued, the applicability of the *LaGrand* decision was not limited to the LaGrand brothers nor to German nationals. To do otherwise would deviate from the principle of equality and non-discrimination as recurrently set forth in the Fourteenth Amendment to the U.S. Constitution, Article 26 of the ICCPR, and Article 5(a) of the Racial Convention as well as international customary law.

In general, state administrators responded to these arguments with hostility. Texas, for example, declined to investigate an alleged Article 36 infringement on the theory that it was not a signatory to the Vienna Consular Convention.[129] In that context, any attempt to enforce the treaty through judicial remedies would be unacceptable. Moreover, according to other states' arguments, the Convention claims were procedurally

barred from merits review by courts if not timely raised at the state trial level—ignoring the reality that the cause for the default was the states' own mistake for not providing advice of consular rights in the first place. Nevertheless, the states continued to maintain that the exercise of consular treaty rights must be undertaken in close association with the concept of federalism, which could be facilitated only through the activation of procedural default in U.S. courts.[130] By reference to the Convention's preamble, these state administrations additionally asserted that Article 36 did not bestow judicially enforceable rights on foreign nationals apprehended or incarcerated on criminal charges.[131] Further, departing from human rights activists' reading of the law, the limitation of the grounds for appealing the dismissal of habeas corpus petitions to "the denial of a constitutional right" under 28 U.S.C. 2253(c)(2) was conceived by them to the benefit of their counter-consular posture as categorically disallowing any invocation of treaties to justify a new round of appeals.[132]

Along with defending against the appeals instituted for death-sentenced foreigners, the states also contested the lawsuits mounted by the countries of origins of those harmed individuals. Two underlying averments were put forth to warrant their inhospitable attitude toward remedies for consular treaty breaches. The Eleventh Amendment forbade any such lawsuits that had an essential impact on states' power to prosecute and condemn those countries' nationals for their involvement in criminal acts. And, there was no ongoing violation of federal law that could negate the Eleventh Amendment immunity of the states from litigation brought by foreign sovereign parties; since each of the foreign nationals was now in contact with his or her consulate, the violation of the treaty had ceased. The death sentences in dispute were attributable to clear violations of state criminal laws by the foreign national defendants, and not to any recognizable wrongdoings inflicted by the state authorities. By raising the political question doctrine, the state of Virginia and the amicus U.S. government argued that the one and only resort feasible to foreign sovereigns to vindicate consular treaty rights for themselves and their nationals was through diplomatic means and international mechanisms.[133]

In an amicus brief invited by the U.S. Supreme Court in the *Breard/Paraguay* case, the U.S. Solicitor General explained at length a number of positions supporting the government's confutation of the binding force of the ICJ's provisional measures.[134] With the terms "decision" and "judgment" written into Article 94 of the U.N. Charter, the Solicitor General believed, it made sense to argue that the effectuation of an ICJ decision lay exclusively with the U.N. Security Council. In addition, he continued by proposing that Article 41 of the ICJ Statute pointedly introduced the words "indicate," "ought," and

"suggested" to define the Court's interim edict as at most advisory in nature. The Court itself had never publicly affirmed the binding effect of its interim orders nor had the Security Council ever taken action under such orders to constrain an offending country. Even supposing that the ICJ's instruction requiring a stay of execution was compulsory, the Solicitor General enunciated that the federal government lacked the legal capacity to meddle with the operation of the death penalty in its state units.

In Almond's stage of policy making/implementation/adjudication, many judges in the examined 26 cases had admittedly taken cognizance of states' contravention of consular rights in cases where foreign nationals were subsequently sentenced to death. Yet, as delineated in Table 4.2, in cases litigated by foreign prisoners on death row, judges routinely repulsed relief and tacitly condoned state misconduct through the application of one or more doctrinal impediments: procedural default, no perceived prejudicial harm, no violations of constitutional rights, the last-in-time rule, federal affairs, a statute of limitations, or *res judicata*. In lawsuits addressing the interests of the aggrieved foreign governments (Paraguay, Mexico, and Germany), the constraining force of the Eleventh Amendment was typically the judicial basis for dismissing the consular treaty contentions against U.S. states. On some occasions, a determination that the treaty invested no private rights was the pretext used by unfriendly judges to brush aside the consular concerns of foreign governments and their nationals. To a large degree, U.S. judges disregarded the interim measures of international tribunals, let alone their merits dispositions, by permitting recalcitrant states to proceed with the execution of foreign convicts over human rights activists' outcries.

Judgments Based on a Municipal Law Rationale

Procedural Default

The procedural default doctrine has been invoked in a series of court opinions (*Murphy*, *Breard*, *LaGrand v. Stewart*, *Villafuerte*, *Ibarra*, *Reyes-Camarena*, *Torres v. Gibson*, *Issa*, *Valdez*, *Medellin*, and *Plata*). In these cases seeking direct review or post-conviction relief, both federal and state judges/justices found that the foreign litigants under sentence of death had procedurally defaulted on their Convention claims because they did not duly put forward these issues during the initial stage of state trial or appeals.[135] Appeals courts had authority to look into the merits of procedurally defaulted causes of action to the limited extent that foreign complainants were capable of showing both a cause for the default and an actual prejudice arising from states' treaty violations or a fundamental miscarriage of justice.

For instance, the federal district court and the Fourth Circuit held that the novelty of consular rights claims did not excuse Breard's inability to exhaust the issue in state courts. A reasonably diligent attorney would have discovered the Vienna Consular Convention and its potential applicability to Breard's defense, since treaties were one of the first authorities that an attorney representing a foreign national would consult.[136] At this late stage in the appeals process, mere ignorance by Breard's trial attorneys of the relevant Convention protections was not sufficient to establish cause for not raising the Convention claims in state court proceedings.[137] The paucity of this cause, in turn, rendered the issue of prejudice moot. Additionally, the Fourth Circuit maintained, no miscarriage of justice was in controversy here because Breard could not evidence that he was actually innocent of the offense for which he was convicted and sentenced to death. For the stated reasons, the federal courts adjudged that Breard's cause of action structured on the Consular Convention was defaulted and barred from federal review.

Two more propositions underpinning procedural barriers are projected in the *Breard* decision from the U.S. Supreme Court. One was the viability of the AEDPA clauses under the last-in-time rationale, which will be left for later discussion under a different heading. The other came from the Court's doubtful construction of Article 36(2) of the Vienna Convention. In the majority's viewpoint, it was a well-settled principle of international law that, in the absence of express treaty terms that indicated otherwise, the procedural stipulations of the forum country controlled treaty implementation within its jurisdiction.[138] For the *Breard* justices, Article 36(2) of the Vienna Convention supported this principle by providing that the Convention rights were to be exercised "in conformity with the laws and regulations of the receiving State." Since it was the rule within the United States that claims appealing state convictions must first be raised in state courts, federal courts indeed were empowered to employ procedural default to reject consular rights claims not first heard by state judges.

The *Breard* majority's affirmation of procedural default was thoroughly made use of by the Oklahoma Court of Criminal Appeals to prevent reliance on the ICJ judgment in *LaGrand*, which had been raised by Mexican national Gerardo Valdez in a successor post-conviction habeas petition.[139] Under the Oklahoma Statutes (22 O.S. § 1089(D)(9)), in order for procedural default to be set aside, a petitioner had the burden of demonstrating that the legal basis on which the new claims rested was not available during state trial or direct appeal, or that a "new rule" of constitutional law was now applicable to the case. For Judge Charles A. Johnson, these two scenarios simply did not apply in the *Valdez* case.

In spite of the *LaGrand* disposition issued by the ICJ on 27 June 2001, the underlying legal basis for Valdez's claim (i.e., Convention

Article 36) nonetheless was in place well before his conviction and sentencing. Consequently, the Article 36 safeguards were neither original nor unavailable to Valdez in his prior appeals. Further, in Judge Johnson's interpretation, it was arguable that some segment of the *LaGrand* judgment created a "new rule" in specific regard to its acknowledging Convention Article 36(1)(b) as "individual rights" and the procedural default doctrine as disserviceable to the consular interests of condemned foreigners. However, the Supreme Court's *Breard* decision that validated the relevance of procedural default in the context of consular habeas appeals should dominate. In the final analysis, Judge Johnson added that allowing the ICJ decision to trump the binding *Breard* precedent would trespass *ultra vires* on the realm of foreign policy making that belonged to the political branches and would run afoul of the constitutional framework of the separation of powers.[140]

The legal clout of the *Breard* case law concerning procedural default likewise extended to *Medellin v. Dretke*[141] (2004). Repelling the Vienna Consular Convention claims brought forward by Mexican petitioner Jose Ernesto Medellin grounded on the ICJ's judgments in *LaGrand* and *Avena* that obviated procedural default, Judge Edith H. Jones of the Fifth Circuit opined to the contrary. She stated that:

> We may not disregard the [*Breard*] Court's clear holding that ordinary procedural default can bar Vienna Convention claims….We are bound to follow the precedent until taught otherwise by the [U.S.] Supreme Court.[142]

Harmless Error or Speculation

An absence of prejudice was another form of obstacle typically used by judges/justices to disavow repairing the defective procedures that foreign nationals on death row had endured in the course of their trials.[143] For example, in their view, the mitigating evidence that would have been presented to the jury had the consulate been notified was the same as or duplicative of evidence that trial counsel could have discovered without consular assistance; therefore, the defendant was not harmed by the state's contravention of consular rights. This school of judges persisted in holding that the right to consular information did not arise to the level of a constitutional right requiring mandatory reversal without a display of individualized harm. For this matter, they applied the exacting standard of "harmless error" to find that the sentencing outcomes received by the foreign nationals were not affected by the state's breach of consular treaty duties. In other words, the curtailment of the Convention protections was utterly extraneous to the question of whether death sentences were correctly levied on the foreigners charged with capital crimes. Nothing in that multilateral treaty suggested that an

encroachment on consular treaty terms should necessarily lead to the revocation of convictions or reductions in sentences.

In *State v. Reyes-Camarena*, the "plain error" doctrine led the Supreme Court of Oregon to unanimously uphold the refusal of the trial court to exclude evidence of statements made by Horacio Alberto Reyes-Camarena under circumstances in which the Oregon police did not advise him of his consular communication right. In the opinion of the Court, the error at issue was not plain, because it did not satisfy the *Ailes* factor that the legal error must be "obvious, not reasonably in dispute."[144] Neither the Oregon appellate court nor the U.S. Supreme Court had ever disposed of the issue of evidence suppression associated with consular rights infractions.[145] The applicability of the Vienna Consular Convention had been deliberated by the *Breard* Court in the context of a habeas corpus appeal. It did not set a precedent that qualified Reyes-Camarena to preclude his confession to the police based on consular treaty impingements. Another source employed by the Oregon Supreme Court to underlie its unfavorable position was the case of *Lombera-Camorlinga*, in which the federal Ninth Circuit Court rejected the necessity of removing post-arrest statements made by the appellant absent consular information.[146] For the en banc justices that reviewed *Reyes-Camarena* on direct appeal, this Ninth Circuit ruling:

> not only would…undercut the substance of [the appellant's] argument, were we to reach it, but it demonstrates that the legal point that the [trial] court should suppress statements if the police obtain them before VCCR notification is not "plain."[147]

Chairing a three-judge panel from the federal appellate court for the Tenth Circuit, Judge Robert H. Henry decided against the consular violations allegation raised by Bountaem Chanthadara. The Laotian appellant had not kept a substantial connection with his native country "other than technical citizenship" since he moved to the United States at the age of six.[148] He spoke English fluently and never demanded that U.S. authorities make contact with the Laotian Consulate for his legal aid. Based on this undeniable matter of fact, Judge Henry considered that Chanthadara did not amply prove any prejudice arising from the lack of consular involvement in his case, in which he was convicted by a federal jury for murder, robbery, and use of a firearm in a violent crime.[149]

A rationale of speculation also surfaced in a judgment of the Virginia Supreme Court. Reviewing the appeal of a Pakistani national sentenced to death for fatally shooting two staff members outside of the CIA headquarters, Justice A. Christian Compton perceived as totally speculative the appellant's assertion that, had he been informed of his consular rights, he would not have confessed to an FBI agent about his crimes.[150]

Lack of Constitutional Grounds

Two early appellate court decisions disposing of consular appeals raised in *Murphy*[151] and *Loza*[152] exemplify this category. In order to warrant the awarding of a certificate of appealability following his defeated habeas petition in the federal district court, condemned Mexican national Mario Murphy was required to substantiate the relationship of the state's denial of his consular rights to a violation of constitutional rights, as spelled out in 28 U.S.C. § 2253(c)(2). To similar effect, the Ohio Court of Appeals indicated that a parallel provision in an Ohio civil procedure rule applied to Jose T. Loza, a Mexican national on death row. According to R.C. 2953.21(A)(1), a petitioner for post-conviction relief carried the burden of establishing that his or her divestment of consular rights was directly linked to violations of the Ohio or U.S. Constitutions.

At the Fourth Circuit and the Ohio Court of Appeals, adjudicating judges, however, overrode any chances of redress. The challenged treaty wrongdoings were not synonymous with constitutional violations. The constitutional provision in Article VI(2) might commit the states of Virginia and Ohio to effecting U.S. duties in congruity with the Consular Convention. Notwithstanding that prescription, the Supremacy Clause could not possibly metamorphose a consular treaty violation into a kind of constitutional rights violation. Presuming that the Convention actually vested private individuals with actionable rights in U.S. courts, the judges determined that the scope of those rights and the remedies available for the Mexicans' deprivation would be conditioned by this rule. Thus, the Convention claims in the *Murphy* and *Loza* cases were overruled for failing to fulfill constitutional violation requirements.

The Last-in-Time Rule

The doctrine that a statute later in time prevails over a conflicting treaty provision was one of the numerous justifications afforded by the U.S. Supreme Court to dismiss the *Breard* appeal.[153] The more recently enacted statute identified by the majority under this doctrine was the AEDPA . Under its regulation (28 U.S.C. § 2254(e)(2)), federal courts were empowered to hold an evidentiary hearing only if a habeas applicant who asserted treaty violations had "develop[ed] the factual basis of a claim in State court proceedings." Governed by the precept of last in time, the justices stated that Breard did not demonstrate any impairment arising from consular violations during his earlier state procedures, and, thus, he was now prevented under AEDPA from securing a hearing to examine the merits of his consular rights claim.

No Actionable Right

Cases classed in this category are *Loza*, *Paraguay*, *Kasi*, *Flores*, *Reyes-Camarena*, *Bell*, *Medellin*, and *Plata*. While taking no issue with the

Convention's aim to safeguard the privileges and immunities of consular officers, the adjudicators swiftly rejected the argument that Article 36 conferred actionable rights on foreign citizens and their home countries that could be invoked in court proceedings. In the words of Judge George H. Elliott on the Ohio Court of Common Pleas that heard the *Loza* appeal,

> This court knows of no law, treaty, or judicial precedent which imposes on law enforcement officials an affirmative duty to inform an alien detainee of a right to contact consul.[154]

In *Flores*, Judge Patrick E. Higginbotham from the Fifth Circuit held that admitting a private right of action under the Consular Convention would amount to creating a new exclusionary rule applicable to post-conviction habeas appeals raising consular rights claims, which was strictly barred by the *Teague* principle.[155] Further, the preamble to the Vienna Convention provided another form of pretense for en banc justices on the Supreme Court of Virginia to disclaim any enforceable individual rights stemming from that treaty. As an opinion author in the *Kasi* case, Justice Compton cited the preamble as saying that the "[treaty] purpose…[was] not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States."[156] A few years later, Justice Cynthia D. Kinser from the same high court struck the same note of no assertable private rights in the case of *Bell v. Commonwealth*[157] (2002). The words of the ICJ's *LaGrand* disposition[158] and Convention Article 36(2)[159] were employed and read in a way supporting her negative postulate.

In addition, Judge Edith H. Jones from the Fifth Circuit indicated in the *Medellin* opinion that, despite the *LaGrand* judgment by the ICJ, the Circuit was bound by its prior panel's decision in *United States v. Jimenez-Nava*[160] that declared the unenforceability of Article 36 in U.S. courts. This holding was binding "until the Court sitting en banc or the [U.S.] Supreme Court [said] otherwise."[161] Moreover, the U.S. Supreme Court rebuffed the pleas of Paraguay to cancel Breard's death sentence, deciding that neither the Convention text nor its drafting history signified any intent to offer a cause of action for a foreign sovereign to sue in the U.S on behalf of its condemned national.[162] In speaking this way, the Court patently imparted the notion that there was no attendant right of a foreign government whose treaty interests were impinged on by the United States to pursue legal recourse in federal courts.[163] In *Reyes-Camarena*, the entire Oregon Supreme Court, headed by Justice Robert D. Durham, noted that the U.S. Supreme Court responded to Breard's petition to enforce the Vienna Consular Convention with a passing statement regarding individual rights:

> The Vienna Convention—which arguably confers on an individual the right to consular assistance following arrest—has continuously been in effect since 1969.[164]

For Justice Durham, this statement was not substantial enough to allow him to give assent to the existence of any actionable right under the Convention.[165]

Federal Affairs/No Reciprocity/No Remedy

Although conceding the treaty reach to states pursuant to the Supremacy Clause, Judge Sharon Keller from the Texas Court of Criminal Appeals declined to discard Mexican appellant Felix Rocha's confession used against him at trial as a means to cope with the state's violations of his consular treaty rights. Under Article 38.23 of the Texas Code of Criminal Procedure, evidence would be inadmissible if gathered "in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America." Compared to the language of the Supremacy Clause, in which "Constitution," "Laws," and "Treaties" all were placed in tandem, Judge Keller construed "laws" in this Texas exclusionary statute as implying that a treaty did not constitute one of the laws of Texas or the United States.[166] Using the mechanism of Article 38.23 to quash evidence was not a proper remedy to the consular rights transgressions by Texas law enforcement because the Article was never meant to grapple with that kind of situation, in light of the plain meaning of its provision. Nor was there any question of reciprocity arising if exclusion of the evidence at bar was not granted, since no foreign countries in the world had ever given effect to the Vienna Consular Convention through the application of exclusionary rules.[167]

Rather, Judge Keller regarded dealing with consular treaty breaches to be in the domain of federal questions. "A treaty that [could] be enforced under the Supremacy Clause should not be dependent upon state law for its implementation."[168] Two approaches were therefore advanced to amend the occurrence of consular encroachments within the United States. One was relying on the State Department to "investigat[e] reports of violations and apologiz[e] to foreign governments, and work…with domestic law enforcement to prevent future violations when necessary."[169] The other conduit was through the U.S. Supreme Court, since only the federal court of last resort had authority to stake out the domestic force of Convention Article 36(1)(b) as well as the concomitant consequences of its infringements.[170]

In the *Reyes-Camarena* appeal, the Oregon Supreme Court collectively decided that the diplomatic implications flowing from its state's consular neglect were not "sufficiently real or significant" to overcome the requirement that the appellant preserve the consular claim

at trial before arguing it on appeal.[171] In the *Bell* case, Justice Kinser from the Virginia Supreme Court pronounced no avenue of redress accessible in the context of consular violations, without going further to prescribe any possible options for the purpose of resolving this problem once and for all. Instead, she said, relief like suppression of evidence was not in existence, given that Convention Article 36 did not "create a fundamental right comparable to the [constitutional] privilege against self-incrimination."[172]

An analogous ruling emerged in the case of *State v. Prasertphong*[173] (2003). Arizona Supreme Court Justice Michael D. Ryan was quite aware that whether Article 36 afforded a private right of action to foreign nationals remained divisive in U.S. courts.[174] In his eyes, there was no need to clear up this controversial question because the exclusionary rule to forbid the use of illegally procured evidence against defendants did not apply here. Even provided that an Article 36 violation was actionable, a string of court holdings[175] legalized the perspective that annulment of evidence was not a workable remedy for the consular breaches contested by appellant Kajornsak Prasertphong. Rather, Justice Ryan subscribed to the position of the federal appeals court for the Seventh Circuit that "only the legislature can require that the exclusionary rule be applied to protect a statutory or treaty-based right."[176]

Res Judicata

Besides concurring with procedural default as suggested by the *Valdez* majority, dissenter Gary L. Lumpkin in his own statement brought forward *res judicata* to confute the majority's eventual remand of the capital case for re-sentencing.[177] On Judge Lumpkin's understanding, the doctrine of *res judicata* was relevant here because it barred re-litigating a matter already judicially adjudicated. The *Valdez* majority believed that Valdez had received ineffective trial representation that was responsible for his inability to present medical evidence in his favor, evidence which was now discovered after the assistance of the Mexican Consulate. However, Judge Lumpkin asserted that this incompetent counsel issue had already been considered in previous appeals and submitted to and denied by Oklahoma Governor Frank Keating in his clemency review. While belonging in the category of executive relief, the channel of clemency constituted an important segment of due process conferred upon all party defendants under state law to ensure fair and just treatment in the operation of the Oklahoma legal system. Feeling restrained by *res judicata*, Judge Lumpkin concluded that the denial of executive clemency did not give the Court the authority to override that decision by addressing and sanctioning relief on a previously-heard ineffective assistance claim.

Statute of Limitations

A statute of limitations served as the sole foundation for the Illinois Supreme Court not merely to reject consular remedies for a death-sentenced Polish national (Gregory Madej) but also to preclude his own government from intervening in *People v. Madej/Poland* (2000).[178] A line of rationalizations was literally developed by the Illinois justices to vitiate the exemption sought by Poland/Madej from this statutory time bar.[179] First of all, the Polish government was unsuccessful in evincing that its delay to pursue relief for Madej was imputable to duress, legal disability, or fraudulent concealment as specified by the Illinois civil procedure code.[180] Second, opposite to Madej's argument, the Illinois authorities did not deceptively withhold the consular information from Madej because the Consular Convention rights could be handily learned of from public documents anywhere. Third, the two-year filing deadline prescribed in that Illinois code[181] was not inharmonious with the Vienna Convention since Article 36(2) of the Convention manifestly laid out the treaty consular rights to "be exercised in conformity with the laws and regulations of the receiving [country]." Fourth and lastly, the call to vacate Madej's conviction and sentence was groundless in view of the appropriateness of jurisdiction conducted by the Illinois state trial court. On balance, the justices maintained that the *Madej/Poland* appeal instituted nearly 14 years after the entry of a trial court judgment went far beyond the legal filing period and thereby should be dismissed on this statutory basis.

The Eleventh Amendment

Federal judges regularly granted immunity to the states of Arizona and Virginia to the detriment of the sovereign prerogatives of Mexico, Paraguay, and Germany to opportunely offer legal aid to their convicted nationals in the United States. Although the lawsuits filed by these foreign governments named state justice and prison officials as defendants, judges who heard those cases pointed out that they were in reality directed against the states of Arizona and Virginia per se.[182] That judicial thinking was molded on the theory that it was these states that possessed the legitimate power to prosecute, sentence, and execute foreign nationals for capital crimes within their jurisdictions. And, on the basis of two underlying causes, the Eleventh Amendment became the backbone authority on which Arizona and Virginia relied to safely keep the complaints against them in check. First, the discontented countries litigated without obtaining their consent, in contravention of the constitutional language. Secondly, the circumstances described in those lawsuits did not dovetail the requirements of an *Ex parte Young* exception. The exception dictated that a state could be sued notwithstanding the provisions of the Eleventh Amendment, provided

that the remedy sought was prospective in nature and intended to correct an ongoing violation of federal law.[183]

More explicitly, in reference to *Ex parte Young*, this class of judges deemed it proper to decide that the charged departures from U.S. consular treaty commitments constituted unlawful acts performed in the past by the states, rather than illegal actions persistent or anticipated in the foreseeable future. In effect, the allegations that their death-sentenced citizens had in the past been repudiated the right to garner consular assistance were never rightful grounds for affected countries to launch lawsuits against the implicated states.[184] The agencies of Arizona and Virginia had already taken the steps to correct their earlier treaty omissions by providing consular notice and affording consular access to the prisoners. As a result, for example, the Ninth Circuit judges expounded that the violations of the bilateral and multilateral consular treaties alleged by the Mexican government did not equate with a category of acts that could be qualified as ongoing federal law violations.[185] Further, the legal attacks here did not give rise to any entitlement to prospective relief.[186] The contested conviction and sentence of Mexican national Ramon Martinez-Villareal were essentially ascribable to a fixed set of criminal factual findings already examined by the state court, not to any continual dynamic events that should be addressed in a prospective manner. Premised on all the grounds identified, the adjudging courts upheld that they lacked subject matter jurisdiction to review the challenges engendered by Mexico, Paraguay, and Germany and to repair the consular rights breaches committed by Arizona and Virginia.

Denial of a Temporary Stay Based on an ICJ Order

Disregarding the ICJ's exigent requests for suspension of the deaths of Angel Breard and later Water LaGrand, the U.S. Supreme Court in the cases of *Breard/Paraguay* and *Federal Republic of Germany* refused to intervene in the states' judicial process. In response to Germany's appeal seeking a temporary order halting Walter LaGrand's imminent execution in the Arizona gas chamber, the majority cast skepticism on its competence to consider the case brought against U.S. authorities based on the ICJ stay order.[187] The United States had never agreed to be sued by Germany; in that sense, it retained its integral sovereign right to determine whether to enforce this ICJ preliminary injunction within its territorial domain. Additionally, the justices noted that the purpose of the *Federal Republic of Germany* case was to defend the consular interests of a German national who was neither an ambassador nor consul as defined by Article III(2) of the U.S. Constitution. Hence, Germany was not in a position to meet the constitutional threshold for the U.S. Supreme Court to exercise its original jurisdiction over consular cases

and controversies under Article III. While not adverting to the legal force of the ICJ interim measure issued for the benefit of Breard, the high court implied that it lacked the authority or perhaps even the will to effectuate that measure. The authority resided with Virginia's governor to assess whether to permit an executive reprieve to Breard pending the World Court's substantive hearing on a consular gravamen submitted by the Paraguayan government.[188] (See Table 4-2 for the variety of adverse rationales discussed above)

Judgments Based on an International Law Rationale

Four prongs of measured concerns motivated a cluster of judges to call for retrospective remedies for foreigners sentenced to death absent their consulates' awareness: the need to supply strict due process protections, the principle of reciprocity, the binding force of the ICJ decision, and treaty compliance obligations. Particularly as regards the last prong, judges in this acceptance category reacted to consular treaty claims not very differently from many hostile judges. They all uniformly deemed the Convention rights under Article 36 to be legally binding under the Supremacy Clause.[189] Yet, departing from the latter who wound up overruling consular cases on discrete procedural grounds, the former strikingly betrayed a willingness to further furnish condemned foreign prisoners with the opportunity to rectify their convictions and sentences. The beneficial judicial outcomes stemming from the other three predicates are narrated below in sequence.

Due Process Consideration

By referring to the 1999 advisory opinion from the Inter-American Court as delineated in Chapter 3, dissenter Mary Ann G. McMorrow of the Illinois Supreme Court averred that convicted Polish national Gregory Madej be re-sentenced with the aid of his consulate, because the nature of capital punishment demanded a higher standard of due process.[190] In the *Issa* case, dissenter Evelyn L. Stratton from the Ohio Supreme Court significantly described the grave consequences of Ohio authorities' failure to apprise Jordanian Ahmad F. Issa of his consular rights. The state's consular negligence raised a catastrophic problem of "structural error, affecting 'the entire conduct of the trial from beginning to end as well as the framework within which the trial proceeds'"(citation omitted).[191] Moreover, to display the centrality of implementing the Article 36(1)(b) mechanism, consular notification was characterized as bearing a resemblance to the Sixth Amendment's constitutional guarantee that a criminal defendant must be advised of the right to retain a lawyer for his or her court defense.[192] Due to this consideration and others as indicated below, Justice Stratton called for a new trial as the

sole solution capable of removing the potential damage arising from Ohio's consular violations.

Equally noteworthy, the majority on the Oklahoma Court of Criminal Appeals, although declining to base relief on the ICJ's *LaGrand* decision, championed the same idea of due process when it sent *Valdez* back to the trial court for a fresh sentencing hearing.[193] In its decision, the Court found that the inattention of trial counsel to garner consular assistance for a Mexican national facing the death penalty materially encumbered his ability to adequately present favorable medical reports as mitigating evidence during the sentencing proceedings. In addition, the comprehensive submission of evidence regarding Valdez's childhood and other extenuating factors, which would likely have been developed with the help of the Mexican Consulate, might well have resulted in a lesser sentence for the murder for which Valdez was condemned to death. In the absence of that mitigating evidence, Oklahoma's highest court of criminal jurisdiction declared that it could not have confidence in the jury's decision subjecting Valdez to the punishment of death. Consequently, it instructed the activation of remanding procedures to compensate for all the trial injustices done to Valdez due to the lack of timely consular involvement, after which he was subsequently re-sentenced to life imprisonment.

Reciprocal Interests of Americans Abroad

An emphatic reference to protecting the consular interests of Americans overseas was another theme that emerged in the dissents of *Madej/Poland* and *Issa* as well as the *Rocha* concurrence.[194] The main gist of this judicial postulate was that, should the USA consecutively default on its consular responsibilities in contempt of the treaty concerns of other governments and their nationals, the enraged governments might one day take a retaliatory approach as a counterbalance. They would replicate the United States' own pattern of violations against U.S. citizens infringing on their domestic penal codes, leaving these Americans imprisoned abroad to encounter unknown circumstances devoid of consular knowledge and adequate procedural treatment. As another example, dissenting Justice Breyer in *Torres v. Mullin* raised the concern of "international implications" as one decisive motive for him to vote for the conferral of certiorari and suggested postponing merits deliberations until the ICJ filed a final decision on *Avena*.[195]

Table 4-2. Basis for dismissal of Vienna Convention claims by individuals/governments

Case by Chronological Order/Court[1]	Proced. Default	No Preju. and Speculation	Non-Constitu.	Last in Time	No Actionable Right	Federal Affairs No Reciprocity and Remedy	Statute of Limitations	*Res Judica.*	11th Am.	Denial of ICJ Stay
Faulder[2]										
U.S. District (Texas)		X								
5th Circuit		X								
Murphy[3]										
U.S. District (Virginia)	X	X								
4th Circuit	X	X	X							
Loza[4]										
Ohio State Trial		X			X					
Ohio Appellate			X							
Mexico[5]										
U.S. District (Arizona)									X	
9th Circuit									X	

Breard[6]										
U.S. District (Virginia)	X									
4th Circuit	X									
U.S. Supreme	X	X		X						X
Paraguay[7]										
U.S. District (Virginia)									X	
4th Circuit									X	
U.S. Supreme					X				X	X
LaGrand v. Stewart[8]										
9th Circuit	X									
Al-Mosawi[9]										
Oklahoma Criminal Appeals (court of last resort)		X								
Villafuerte[10]										
9th Circuit	X									
Kasi[11]										
Virginia Supreme		X			X					

Table 4-2, continued

Case by Chronological Order/Court	Proced. Default	No Preju. and Speculation	Non-Constitu.	Last in Time	No Actionable Right	Federal Affairs No Reciprocity and Remedy	Statute of Limitations	*Res Judica.*	11th Am.	Denial of ICJ Stay
Federal Republic of Germany[12]										
U.S. Supreme									X	X
Ibarra[13]										
Texas Criminal Appeals (court of last resort)	X									
Barrow[14]										
Delaware Supreme		X								
Rocha[15]										
Texas Criminal Appeals						X				
Flores[16]										
5th Circuit					X					
Reyes-Camarena[17]										
Oregon Supreme	X	X			X	X				
Madej/Poland[18]										
Illinois Supreme							X			
Torres v. Gibson[19]										

U.S. District (Oklahoma)	X	X								
Chanthadara[20]										
10th Circuit		X								
Issa[21]										
Ohio Supreme	X									
Valdez[22]										
Oklahoma Appeals	X(deny an ICJ decision)	X (Judge Lumpkin)						X (Judge Lump-kin)		
Bell[23]										
Virginia Supreme		X			X	X				
Ortiz[24]										
8th Circuit		X								
Prasertphong[25]										
Arizona Supreme						X				
Medellin[26]										
5th Circuit	X				X					
Plata[27]										
5th Circuit	X	X			X					

Table 4-2, continued

Notes for Table 4-2:

[1] The cases listed in Tables 4.2 and 4.3 should be regarded as representative rather than exhaustive. More case information can be obtained from Mark Warren, Director of Human Rights Research.

[2] Judges Paul N. Brown from the U.S. District Court for the Eastern District of Texas and Edith H. Jones, John M. Duhe, Jr., and Jacques L. Wiener, Jr. from the federal appellate court for the Fifth Circuit.

[3] Judges Richard L. Williams from the U.S. District Court for the Eastern District of Virginia and L. Michael Luttig, Paul V. Niemeyer, and M. Blane Michael from the U.S. Court of Appeals for the Fourth Circuit.

[4] Judges George H. Elliott from the Ohio Court of Common Pleas and Richard N. Koehler, William W. Young, and James E. Walsh from the Ohio Court of Appeals.

[5] Judges Stephen M. McNamee from the U.S. District Court for the District of Arizona and Thomas G. Nelson, Dorothy W. Nelson, and Edward Leavy from the federal appeals court for the Ninth Circuit.

[6] Judges Williams from the U.S. District Court for the Eastern District of Virginia; Clyde H. Hamilton, Karen J. Williams, and John D. Butzner, Jr. (concurrence) from the federal appeals court for the Fourth Circuit; and Justices Rehnquist, O'Connor, Scalia, Kennedy, Thomas, and Souter (concurrence) from the U.S. Supreme Court.

[7] Judges Williams from the U.S. District Court for the Eastern District of Virginia; James D. Phillips, Jr., H. Emory Widener, Jr., and Francis D. Murnaghan, Jr. from the U.S. Court of Appeals for the Fourth Circuit; and the same Supreme Court members as those in *Breard*.

[8] Judges Nelson and Procter Hug, Jr. from the U.S. Court of Appeals for the Ninth Circuit.

[9] The opinion of Judge Charles A. Johnson on the Oklahoma Criminal Appeals Court was concurred by Judges Charles S. Chapel, Reta M. Strubhar, Gary L. Lumpkin, and James F. Lane.

[10] Judges Betty B. Fletcher, Thomas, G. Nelson, and David R. Thompson from the federal appellate court for the Ninth Circuit.

[11] En banc Justices A. Christian Compton, Harry L. Carrico, Elizabeth B. Lacy, Leroy Rountree Hassell, Sr., Barbara Milano Keenan, Lawrence L. Koontz, Jr., and Cynthia D. Kinser from the Supreme Court of Virginia.

[12] The Supreme Court composition was identical to that in *Breard*, with Justice Ginsburg additionally joining the Souter concurrence.

[13] Judges that heard the case included Lawrence E. Meyers, Sharon Keller, Thomas B. Price, Paul Womack, Cheryl Johnson, Verla Sue Holland, Michael Keasler, Steve Mansfield, and Michael J. McCormick from the Court of Criminal Appeals of Texas.

[14] Justices E. Norman Veasey, Joseph T. Walsh, Randy J. Holland, Maurice A. Hartnett, and Carolyn Berger from the Supreme Court of Delaware.

[15] Judges Sharon Keller, Michael J. McCormick, Steve Mansfield, Paul Womack, and Michael Keasler from the Texas Court of Criminal Appeals.

[16] Judges Patrick E. Higginbotham, Fortunato P. Benavides, and Emilio M. Garza (concurrence) from the U.S. Court of Appeals for the Fifth Circuit.

[17] Justices Robert D. Durham, Wallace P. Carson, Jr., W. Michael Gillette, R. William Riggs, George Van Hoomissen, Ted Kulongoski, and Susan M. Lesson from the Supreme Court of Oregon.

[18] Justices S. Louis Rathje and Michael Bilandic (concurrence) from the Supreme Court of Illinois.

[19] A judge from the U.S. District Court for the Western District of Oklahoma.

[20] Judges Robert H. Henry, Stephanie K. Seymour, and Stephen H. Anderson from the federal appellate court for the Tenth Circuit.

[21] Justices Andrew Douglas, Thomas J. Moyer, Alice R. Resnick (concurrence), Francis E. Sweeney (concurrence), Deborah L. Cook (concurrence), and Paul E. Pfeifer (concurrence/dissent) from the Ohio Supreme Court.

[22] The procedural default position articulated by Judge Johnson on the Oklahoma Criminal Appeals Court was also supported by concurrers Chapel, Strubhar, and Steve Lile as well as concurrer/dissenter Lumpkin. Yet, in the end, Judge Johnson, backed by Judges Chapel, Strubhar, and Lile, remanded the *Valdez* case for re-sentencing on the grounds that Valdez was prejudiced by the failure of his trial counsel to seek and secure consular assistance, which would have resulted in the presentation to the jury of compelling mitigating evidence establishing that Valdez suffered from organic brain damage.

[23] En banc Justices Cynthia D. Kinser, Harry L. Carrico, Elizabeth B. Lacy, Leroy Rountree Hassell, Sr., Barbara Milano Keenan, Lawrence L. Koontz, Jr., and Donald W. Lemons from the Supreme Court of Virginia.

[24] Judges Richard S. Arnold, Roger L. Wollman, and James B. Loken from the U.S. Court of Appeals for the Eighth Circuit.

[25] Justice Michael D. Ryan and concurrers Charles E. Jones, Ruth V. McGregor, Rebecca White Berch from the Arizona Supreme Court. Designated Judge Cecil B. Patterson from the Arizona Court of Appeals also joined the concurrence. Justice Andrew D. Hurwitz recused himself.

[26] Judges Edith H. Jones, Fortunato P. Benavides, and Edith Brown Clement from the U.S. Court of Appeals for the Fifth Circuit.

[27] Judges E. Eugene Davis, Jacques L. Wiener, Jr., and Emilio M. Garza from the U.S. Court of Appeals for the Fifth Circuit.

The LaGrand Judgment by the ICJ

The 27 July 2001 judgment announced by the World Court in *LaGrand* caused some degree of reverberations in a handful of U.S. courts striving to defuse the issue of states' consular treaty breaches in capital appeals. In the *Issa* case, Judge Stratton assigned a weighty meaning and esteem to that judgment by quoting verbatim the crucial part of the ICJ admonitions against U.S. consular misconduct in her dissenting opinion. Unreservedly, she criticized the majority for turning its back on the manifest consular errors committed by Ohio law enforcement personnel to which the *LaGrand* Court soberly took exception on the grounds recounted in Chapter 3.[196]

On 24 September 2002, Judge David H. Coar from the U.S. District Court for the Northern District of Illinois delivered a similar statement admitting the pertinence of the World Court's *LaGrand* in the context of *Madej v. Schomig* (2002). In that pronouncement, Article 36(1)(b) of the Vienna Consular Convention was construed as conferring enforceable private rights, and the employment of procedural default by U.S. courts was unrelentingly impugned as a subterfuge to stymie the opportunity of judicial redress in violation of that treaty's Article 36(2).[197] To the extent that *LaGrand* addressed individual rights, Judge Coar considered, the international decision had regulatory force in the instant case.[198] While noting the limited precedential value of *Breard* on the matter of procedural default and its conflict with the ICJ decision, he elected to adopt its modus operandi for weighing the appropriateness of granting the habeas corpus petition. Thus, based on the *Breard* approach, condemned Polish inmate Gregory Madej was required to convincingly demonstrate that "the [consular] violation had a material effect on the outcome of the trial or sentencing proceeding" in order to gain relief.[199]

In that respect, Judge Coar determined that the breach of Madej's consular rights by Illinois authorities was unquestionable. Since the evidence of Madej's guilt seemed undoubted, the denial of access to timely consular services could only have had a potential influence on the severity of the sentence he had received. "Particularly in this case, where trial counsel failed completely to undertake any investigation of the client's life, character, and background in preparation for the sentencing phase, the participation of the [Polish] Consulate could possible have made a difference."[200] Judge Coar then effectively overturned the original negative decision by the Illinois Supreme Court that repudiated to accord a clear and affirmative right to relief under the consular treaty and precluded the intervention of Madej's own government by virtue of a two-year statute of limitations. Madej's death sentence was vacated on the account that he had not procured sufficient assistance of counsel at the penalty phase of his trial, as required under the Sixth Amendment.[201]

For reference purposes, all favorable judicial grounds in consular cases are sorted out in Table 4-3.

Qualitative/Quantitative Summary

The content analysis of consular cases indicates that judges at different levels of state and federal courts disproportionately invoked municipal legal rules in rejection of remedies for breaches of consular treaty responsibilities owed to condemned foreign nationals. In Table 4-4, the number of judges refusing to redress consular treaty infractions (82.35%) is nearly 5.60 times that of judges in favor (14.71%). Yet, the data drawn from Tables 4-1 and 4-4 demonstrates that there is no significant statistical difference in judicial behavior between juvenile and consular cases. This result belies the hypothesis set up in the beginning of the chapter: that judges are liable to employ U.S. law in the area of juvenile capital punishment but international law in consular cases. Specifically, in juvenile death penalty litigation, 22.73% of judges voted at least once for the international prohibition against the death sentencing of juvenile offenders while a lower number of judges (14.71%) countenanced the enforcement of the consular treaty in U.S. courts. When it comes to the "Never Accept" camp, the percentages of unfriendly judges dramatically climbed to 77.27% in juvenile and 82.35% in consular cases, denoting that the degree of judicial repugnance to international law arguments was not substantially divergent in either type of case. In fact, the statistics in Tables 4-1 and 4-4 show nothing but the consistent outcome that U.S. domestic jurisprudence had overwhelmingly affected judges' decision-making choices, regardless of whether juvenile or consular cases were decided.

Notwithstanding those observations, the legal-focused exploration of judicial behavior cannot fully illustrate why judges in consular cases were distinctively split into three camps of opinions, as shown in Table 4-4. Above all, it is worth noting that this division took place in a context where the U.S. government unconditionally ratified the Vienna Consular Convention and where the State Department reiteratively called for federal and state law enforcement to dutifully perform that international consular mandate. Besides not explaining the appearance of disparate court opinions on applicable legal principles in consular cases, another shortcoming of the legal model is its inability to further identify the root causes of why the climate of dualism steadily dominated the U.S. judiciary according to the statistical findings in Tables 4-1 and 4-4. In any event, taking a cue from the above analysis, we are led to believe that an element of judges' personal attitudes possibly intervened and contributed to the resulting decisions in juvenile and consular cases, which are unexplainable purely by means of the legalistic approach.

Table 4-3. Basis for acceptance of Vienna Convention claims by individuals/governments

Case by Chronological Order/Court	Comparable Constitutional Due Process Rights/Prejudice	Reciprocity	*LaGrand* by ICJ	U.S. Treaty Duties/the Supremacy Clause
Rocha[1]				
Texas Criminal Appeals (concurrence)		X		X
People v. Madej/Poland[2]				
Illinois Supreme Court (concurrence/dissent)	X	X		
Issa[3]				
Ohio Supreme Court (dissent)	X	X	X	X
Valdez[4]				
Oklahoma Criminal Appeals	X		(denied)	
Madej v. Schomig[5]				
U.S. District Court for the Northern District of Illinois			X	
Torres v. Mullin				
U.S. Supreme Court (dissents)		X *(Justice Breyer)*		X *(Justices Breyer and Stevens)*

[1] Concurrers Verla Sue Holland, Lawrence E. Meyers, Thomas B. Price, Cheryl Johnson from the Texas court of last resort with criminal appellate jurisdiction. Authoring the concurrence, Judge Holland took the view that Article 38.23 of the Texas Code of Criminal Procedure regarding the exclusionary rule could supply a mechanism to redress the Mexican appellant's consular violations claim, as opposed to the opinion held by the majority. Despite the recognition of that remedial channel in place, she concluded by averring that the appellant failed to substantiate a causal nexus between the consular infringements and his oral statements allegedly taken by Texas police officers without advising him of the consular treaty rights. The admission of those statements by the trial court as evidence hence was not disputable. Yet, Justice Holland stressed in a footnote that:

> Finding the lack of a causal connection in this case in no way lessens the importance of the terms of Article 36 of the Vienna Convention. Violations of the Vienna Convention could result in the exclusion of evidence under Art. 38.23. We urge all law officials to comply with the terms of the Vienna Convention and give foreign nationals the proper consulate notification.

Rocha v. State, 16 S.W.3d at pp. 23, 29-30 & n10 (Holland, J., concurring). While agreeing with Judge Holland's perception on the applicability of the Consular Convention, Judge Johnson filed a separate concurrence arguing that timely consular rights notification would not change the reality that the Mexican national had already been given his statutorily required warnings when making a confession to police officers, see ibid., at pp. 30-31.

[2] Justices Mary Ann G. McMorrow (concurrence/dissent), Moses W. Harrison II (dissent), and James D. Heiple (dissent) from the Illinois Supreme Court.

[3] Justice Evelyn L. Stratton from the Ohio Supreme Court.

[4] Judge Johnson and concurrers Chapel, Strubhar, and Lile from the Oklahoma Court of Criminal Appeals.

[5] Judge David H. Coar from the U.S. District Court for the Northern District of Illinois

Table 4-4. Judicial decision making with legal model explanations in 26 consular cases

Judges at Different Court Levels	Favor International Law at Least Once	Never Accept International Law	Unknown[a]
State Trial		1	
State Appellate		3	
State High Court	12	40	
U.S. District	1	4	
U.S. Appellate		29	3
U.S. Supreme Court	2	7	
Total	**15/102** (14.71%)	**84/102** (82.35%)	**3/102** (2.94%)

[a] The seven judges were in *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998) (Judge Pregerson); *Torres v. Mullin*, 317 F.3d 1145 (10th Cir. 2003) (Judges Kelly and Murphy) (Judge Robert H. Henry on the Tenth Circuit was classified in the "Never Accept" camp, given his negative vote in the case of *United States v. Chanthadara*). However, since consular treaty rights were not an issue contested in *Madej v. Briley*, 365 F.3d 568 (7th Cir. 2004), the votes of the sitting Judges Posner, Easterbrook, and Rovner would not be grouped into any of the categories (Favor, Never Accept, and Unknown) in our study.

CRITIQUE

A number of core issues call for special narration after the examination of judicial opinions and competing arguments submitted by human rights activists and government authorities.

Comments on Court Decisions in Juvenile Death Penalty Cases[202]

The Affinity of International Sources for Constitutional Reading

The first question bears on whether the argument that human rights treaties and foreign national policies were germane to the Eighth Amendment investigation, as contested in *Thompson*, *Stanford*, *Ex parte Pressley*, *Simmons/Roper*, and *Villarreal*, achieved full credence with the courts. As described in Chapter 3, at the time that the *Thompson* appeal was instituted, the global community had already arrived at an almost universal unanimity on a minimum age of 18 for capital punishment. Such a showing could be easily attested by looking at a rich array of international legal instruments as well as laws and practices of countries then pervasive across the world.[203] Further, seen through the lens of post-World War II international human rights jurisprudence, how the U.S. treats its own nationals is no longer in the sole domain of internal matters and must be constantly open to scrutiny under universally agreed-on standards. Those plain and simple reasons abundantly support a

conclusion that state officials and some adjudicators in the above-listed cases incorrectly invoked a pretext of cultural relativism (in terms of a parochial American vision of societal decency) to legitimize the U.S. aberration from the global mainstream against the juvenile death penalty.

The Force of Relevant Treaties as well as Customary and Peremptory International Law in the United States

In light of the enunciation of good faith performance of treaties in Article 26 of the 1969 Vienna Treaties Convention[204] and under international customary law, it admits of no doubt that the USA has incurred legal obligations to scrupulously effectuate the provisions of every treaty to which it becomes a party. Similarly, this compulsory compliance should reach to a system of treaty procedures governing reservation, derogation, suspension, denunciation, and termination. Even if the United States completed the stage of signing a treaty alone, that treaty still exerts legal power to regulate U.S. conduct domestically. In the eyes of Professor de la Vega,

> Once a state signs a treaty, that state agrees that it will try to follow that treaty. It agrees not to pass laws that contradict treaty provisions, although that treaty technically is not the law of the land until ratified.[205]

To be sure, the Fourth Geneva Convention is exclusively restricted to a wartime application. It might be argued that the Convention was inapposite in vindication of the lives of the condemned youngsters involved in the *Thompson* and *Stanford* cases. Yet, apart from customary international law, there were two other cardinal human rights treaties then signed but not yet approved by the Senate for ratification that would aptly come into play in this context: the ICCPR and the American Convention. Just as the International Law Group articulated earlier in this chapter, the scheme of capital punishment itself carried a character categorically irreparable to the status quo (i.e., a person's life). In that significant sense, the imposition of death sentences on the petitioners in *Thompson* and *Stanford* inevitably hobbled the treaty object and purpose as specified in Article 6 of the ICCPR and Article 4 of the American Convention.[206] The object and purpose was safeguarding the right to life generally and limiting the death penalty specifically, with abolition as a paramount goal for all contracting members to pursue and observe. Although a signatory to the U.N. Covenant and the American Convention, the U.S. government ought to act answerably by not inflicting the penalty of death on youths under the age of 18, in order to preserve the integrity of the original import of these two treaty stipulations. This edict of treaty adherence was entirely found in Article 18(a) of the Vienna Treaties Convention, which provides that:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.

Moreover, contrary to Nevada's argument in *Domingues* and *Servin*, as a non-persistent objector,[207] the United States was required to abide by the customary norm establishing 18 as the minimum threshold for death sentencing. A number of events competently establish the inability of the USA to openly and steadily submit its protest throughout the formation and evolution of this international customary rule. When the Fourth Geneva Convention came under review for ratification, none of the Senate members raised objections to the prohibition of the execution of juvenile offenders under Article 68(4). Further, the U.S. delegation registered no exception to the final version of Article 6 in the ICCPR during the 1957 session of the Third Committee of the General Assembly.[208] Rather, U.S. representatives to the U.N. Covenant deliberations abstained from voting on this draft clause because the Eisenhower Administration, troubled by the domestic fanaticism of the Bricker campaign, had held little political will to ratify the International Covenant. At the drafting conference of the American Convention, negotiators dispatched by the U.S. government once suggested removing the definitive age ceiling in Article 4(5) on the grounds that such a limited proscription would hardly reflect the international movement toward the complete abolition of the death penalty.[209] Without demur, the United States endorsed the ban on the juvenile death penalty in the 1984 U.N. Capital Safeguards and the 1985 U.N. Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).[210] More noticeably, a de facto suspension of carrying out capital sentences on juvenile offenders took place in the United States between 1964 and 1985.[211]

On balance, international law demands the United States to outlaw the juvenile death penalty domestically. "As law of the United States, international law is also the law of every state."[212] There was no leeway by which states such as Oklahoma and Nevada in *Thompson*, *Domingues*, and *Servin* could avert this international duty in the name of the Tenth Amendment's apportionment of otherwise unenumerated rights to the constituent states of the Union.[213] Just as Professor de la Vega and others advocated in *Domingues*, *Beasley/Beazley*, *Hain*, *Roper*, and *Dycus*, the foreclosure of capital punishment for juvenile crimes has today matured into a *jus cogens* norm that commits the USA to rooting out its long-standing juvenile death penalty system from within and without.[214] This proposition has recently struck a chord with the Inter-American Commission, which, as shown in Chapter 3, shifted its

previous murky posture on the age of majority to publicly champion the international peremptory ban on extending death sentences to ages below 18.

The Illegality of Senate Treaty Limitations

The Vienna Treaties Convention and national practice allow for the making of reservations to international human rights treaties.[215] Nonetheless, a couple of points effectively refute the contentions by state officials and U.S. courts in *Domingues*, *Beasley/Beazley*, *Ex parte Pressley*, *Ex parte Burgess*, *Wynn*, *Ex parte Carroll*, *Servin*, *Hain*, and *Villarreal* that the Senate reservation to Article 6(5) of the ICCPR served as a valid rule of decision for court adjudication.

The reservation is null and void without qualification because the right of condemned juveniles to claim the right to life in Article 6(5) is so fundamentally material that, even in situations of public emergency, treaty members are still ordered not to detract from it under Article 4(2) of the International Covenant.[216] What's more, the Senate reservation substantially checks the compelling objective set up in Article 6 for the protection of the individual's life in principle, with the employment of capital punishment in untypical and limited conditions. The reservation is thus legally nugatory under Article 19(c) of the Vienna Treaties Convention, which forbids national incorporation of reservations "incompatible with [treaty] object and purpose." This "object and purpose" maxim has gained affirmative support from the Inter-American Court in an advisory opinion regarding Guatemala's death penalty reservation to the American Convention. The Court elucidated that:

> [A] reservation which was designed to enable the State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it.[217]

Furthermore, the U.N. Human Rights Committee recommended criteria against which to judge whether a reservation appended by a member State was consistent with the object and purpose of the International Covenant. In its General Comment, the Human Rights Committee instructed that certain norms of customary international law found in the ICCPR such as the condemnation of children to death were not susceptible of national reservations.[218] By taking this view, the Committee tacitly confirmed that the reservation inserted by the USA to Article 6(5) was unsustainable in legal terms. The Senate could not legislate away this customary norm, whose substance was alterable by nothing other than a norm of the same property or a superseding peremptory norm.

More notably, during its review of the U.S. initial report in March 1995, the Human Rights Committee interpreted the U.S. reservations to Articles 6(5) and 7 of the ICCPR as inharmonious with the Covenant's object and purpose.[219] While the Committee stopped short of clearing up whether or not the entirety of the U.S. reservation to Article 6 was viable and independent of the remaining Covenant clauses, its 1994 General Comment may furnish meaningful guidance for this purpose. For the Committee, disputable reservations were separable and instantly lost their significance to the targeted Covenant prescriptions.[220] Acting as a functional apparatus entrusted to oversee members' periodic reports and inter-State complaints, the Committee doubtless has an intrinsic authority to determine the propriety of the U.S. reservation to Article 6(5).[221] Consequently, pursuant to the Committee's remark, the United States should responsively act in accordance with the Covenant provisions as a whole, including Article 6, without benefit of the reservation concerned. In the opinion of Professor Schabas, this Committee observation is reinforced by the fact that the USA indeed desired to assume all the obligations under the Covenant regardless of the resulting rescinding of the reservations it introduced.[222]

As to the non-self-executing declaration to the ICCPR, it was purportedly crafted by the Senate to ensure that "the Covenant will not create a private cause of action in U.S. courts."[223] Such a Senate declaration, however, can hardly overpower an international precept of good faith performance in the first instance. Doubtless, not every international human rights provision is readily operable in U.S. courts. Some of them may require taking additional supplementary measures for domestic implementation. For one thing, the Genocide and Torture Conventions call on States parties to further delineate acts of genocide and torture as offenses punishable under municipal codes.[224] Yet, as Professor de la Vega and other human rights activists explicated in cases such as *Domingues*, *Beasley/Beazley*, *Hain*, and *Roper*, Article 6(5) of the U.N. Covenant squarely satisfies two elements for a treaty to be administered of itself. First, private persons (i.e., juvenile offenders and pregnant women) are the sole subjects addressed by Article 6(5) for exemption from capital punishment. Secondly, Article 6(5) contains clear-cut prohibitory language indicating that: "Sentence of death shall not be imposed for crimes committed by persons below 18 years of age." It sanctions U.S. courts to enforce its mandate immediately without having to await any specific legislative action to empower its domestic legal force. Given that Article 6(5) is characteristically self-executing, the juvenile capital punishment systems in U.S. states must be directly subject to its governance to the exclusion of the Senate declaration or any other evading cloak such as procedural default.

Comments on Court Decisions in Consular Cases

The Fallacy of Procedurally Rejecting Consular Treaty Claims

The preamble to the Vienna Consular Convention provides that its principal effect is to foster an efficient exercise of a broad range of commercial, economic, civil, cultural, and scientific functions by consular posts abroad on behalf of their respective home countries. In view of Convention Articles 5(e) and 36, however, it is evident that consular functions also entail the right of the consulate to speak for the interests of its overseas nationals and those faced with capital charges in the host country.

Equally incontestable is that the terms of Article 36 dovetail self-executing requirements by unambiguously setting out early notification and assistance rights for consular officers and their nationals arrested on foreign soils. Correspondingly, receiving countries are enjoined to honor all duties necessary for the attainment of these purposes. The self-executing essence of the Consular Convention generally and Article 36 particularly is confirmed not only by human rights activists but also by the State Department and most courts in the United States.

The U.S. government espoused the Consular Convention unreservedly because the Convention designated a spectrum of customary law principles, including the right of a consul to visit an imprisoned citizen, that have dominated consular relations between countries since long before the turn of the twentieth century.[225] In its presentation of the Convention to the Senate Foreign Relations Committee for a ratification hearing, the State Department impliedly acknowledged that this international consular treaty did not need any legislative enactment for its internal execution.[226] On a number of occasions, the Department spoke of its grave concerns about the omission of foreign host governments to avail U.S. citizens on criminal charges of opportunities to access consular delegates in agreement with multilateral and bilateral consular treaties.[227] To counteract such treaty breaches, the Department has delivered elaborate consular guidelines to its foreign services personnel across the world, directing them to closely monitor whether the receiving countries securely accord consular rights to U.S. citizens in custody.

Domestically, two crucial federal regulations obligate Department of Justice staff and INS agents to give full effect to Article 36 of the Vienna Convention. The regulations are relevant in that context notwithstanding their formulation prior to the Vienna Convention taking effect. Moreover, state and local administrators and law enforcement officers such as governors, attorneys general, mayors, and police have periodically received advisory notices from the State Department reminding them to give heed to U.S. consular treaty duties in the course

of dealing with foreigners embroiled in criminal prosecutions. In short, the U.S. government makes it clear that the Convention rights as underwritten by Article 36 apply not merely to American citizens abroad but also to alien criminals taken into custody in every domestic jurisdiction.

Because the U.S. government has openly backed the domestic legal authority of the Consular Convention, human rights defenders started advocating the direct incorporation method in consular cases as opposed to the customary law argument and the defensive use of treaty sources that were invoked in juvenile cases. Although the strategy to offensively apply Convention norms mostly ended with procedural dismissals, they impelled many sitting judges to at least concede the inattention of U.S. states to live up to the consular standards in Article 36. Since those rights are verifiably self-executing and definitely accrue both to consulates and to individual detainees, judges in *Loza*, *Paraguay*, *Kasi*, *Flores*, *Reyes-Camarena*, *Bell*, *Medellin*, and *Plata* erred in asserting that the convicted foreigners and the Paraguayan government lacked actionable rights in the context of Article 36. Beyond their treaty force, the principles of consular advice and aid addressed in Article 36 have additionally been elevated to the rank of customary international law. Professor John B. Quigley with attorneys S. Adele Shank and Robert S. Frost offered a patent and insightful illustration of this point in the *Loza* amicus brief:

> The Vienna Convention merely put into treaty form the customary law regarding the treatment of foreign nationals who are arrested….Long before the Vienna Convention was drafted, the right of foreign nationals to contact their consul and of consular officers to meet with and assist their nationals was recognized in international law. The United States too has recognized this [as shown by, among many other instances, an instruction of its embassy to request Syria for granting consular access to detained Americans], stating that notification and right of consular access are "the standard of international practice of civilized nationals, whether or not they are parties to the Convention" (citation omitted).[228]

On that score, the stated consular rules should likewise command the United States as a matter of customary international law.

The significance of the regard that the USA must pay to consular responsibilities under Article 36 can best be understood from the words of defense attorneys[229] and consular commentators.[230] In their descriptions, consular notice and access represent international "Miranda rights" that are essential to the assurance of fair and impartial proceedings on the part of foreign defendants who are often unacquainted with U.S. culture and language and its adversarial legal system. To the same effect, as Chapter 3 discusses, the Inter-American Court and Commission read Article 36 to

embrace basic human rights that are indispensable for individual foreigners to obtain just treatment in courts of a host country. In fact, consular intervention is imperative for aliens prosecuted for capital crimes if only in the sense that consular officers may explain to them U.S. criminal procedural rights ahead of the commencement of court trials, in terms that a foreign detainee can understand and then act upon. Over and above this advisory function, consular representatives can usefully assist in locating witnesses and mitigation evidence available mostly in the defendant's country of origin, a material aid that may contribute to plea negotiations, outright acquittal, or the conferral of lesser penalties. In light of these potential legal benefits acquired only through consular involvement, it is difficult to assert that consular infractions by U.S. states do not generate any deleterious impact on the convictions and sentences of foreign nationals in the United States. Where a state impingement on Article 36 occurs, U.S. courts must take this procedural deficiency seriously and convene a hearing that in all likelihood would result in a suitable remedy.

Converse to the prevailing judicial views of no prejudice and procedural default, Article 36 enables individual alien criminals to claim consular information and contact rights in U.S. courts. Access to judicial review of those rights is not dependent on a demonstration of prejudice arising from states' treaty violations, nor should the condemned foreigners be required to make a prima facie showing of cause and prejudice for the default or establish actual innocence. Nor can state authorities legitimately use the concept of federalism in conjunction with procedural default as a shield to protect them from the reach of Article 36. Rather, Convention Articles 36(2) and 14 oblige the USA and its state units to literally bestow information and communication privileges on detained aliens and their consuls.[231] Importantly, the Inter-American Court has flatly rejected any attempt by OAS members, including the United States, to rid themselves of their consular treaty liabilities on the theory of a federal-state separation of power. By the same token, the rights installed in Article 36 cannot in any way be procedurally negated under the guise of such domestic procedural grounds as last in time or res judicata.

The Availability of U.S. Courts to Foreign Governments

As parties to the Vienna Convention and bilateral treaties, countries such as Mexico, Paraguay, and Germany are entitled through their consular posts to protect the life, liberty, and property of their nationals within the United States. In particular, based on reciprocal obligations contained in some bilateral consular treaties or, in the absence of such provisions, after procuring the assent of the foreign arrestees, detaining authorities must swiftly notify consular delegates of legal predicaments in which their nationals are entangled and to accord communication between them thereafter. The systematic pattern within the United States of overlooking

these treaty obligations has materially impaired the sovereign right of the aggrieved governments and concomitant competence of their consuls to run treaty-based functions. Given the self-executing power of consular clauses in multilateral and bilateral treaties and their separate importance to individual alien inmates and their home governments, it is legally justifiable for the governments concerned to maintain access to U.S. courts in defense of their own consular treaty rights. No procedural questions are perceptible that license the U.S. judiciary to strike down litigation of this kind.

(1) Standing.—In light of the injury illustrated above, offended countries have a real, rather than speculative, interest in the outcome of legal actions arising under the consular treaties. Moreover, the charged treaty wrongs are redressable because the relevant stipulations of consular treaties are self-executing and create public, sovereign rights directly operable in U.S. courts.[232] In this aspect, the Supreme Court majority and Virginia authorities in *Breard* mistakenly understood the consular treaty rights alleged by Paraguay for judicial enforcement as private ones. A further error committed was their declaration that the Consular Convention invested the Paraguayan government with no cause of action in U.S. courts at all.

Rather, discontented governments are eligible for various forms of reparation for the damage brought on by states' neglect of U.S. treaty pledges. The courts may direct responsible state authorities to terminate the misconduct, retry condemned foreigners, promulgate a guarantee of non-repetition and an apology, and compensate for the infliction of the death row phenomenon on these foreign prisoners.[233] In all, foreign governments have standing to press the USA and its states to comply with consular treaties in U.S. courts. Contrary to what most states argued in the studied cases, the litigating governments possessed the legal capacity to attack the reasonableness of state court judgments outside of habeas corpus proceedings. This was so because the reversal of the death sentences levied on their nationals equivalently constituted one of the requisites to mend the sovereign grievances at bar.

(2) Subject Matter Jurisdiction.—The underpinnings of the power of the U.S. bench to hear consular lawsuits entered by foreign governments are evincible in U.S. law. Simply put, a body of constitutional and statutory provisions and U.S. Supreme Court rulings has traditionally consigned to federal courts the examination of U.S. performance of its treaty duties.[234] At the same time, pursuant to considerations of comity, foreign sovereigns are empowered to pursue legal redress for U.S. treaty breaches. In cases that implicate the interests of consuls as representatives of the sending country arising out of the Vienna Convention and bilateral consular treaties, Article III(2) of the U.S. Constitution and 28 U.S.C. §§ 1251(b)(1) and 1331 form the foundation

for subject matter jurisdiction. Under those authorities, federal courts have express competence to inquire into controversies affecting "ambassadors, other public ministers, and consuls" and arising under "treaties."[235]

(a) The Invalidity of the Eleventh Amendment Bar.—Several rationales developed below challenge the employment of the Eleventh Amendment to prevent foreign governments from suing states. The pivotal issue here is whether the alleged unlawful acts against "federal law" are still ongoing and the relief sought is prospective. So long as U.S. courts have not enjoined the violating states to conform to consular treaties and remanded the capital decisions at issue for new hearings, consular treaties having the status of federal law are being persistently breached. Moreover, the injunction requested encompasses a prospective sense, in that the purpose of this relief is to block any state move to proceed with the contentious sentences before courts can actually order an appropriate remedy for the blemished criminal procedures. Likewise, the declaratory judgment simultaneously asked for in consular litigation by these countries is established on a future action by the states. The underlying postulate is that the court announcement of treaty rights to consular officers and condemned nationals is of legal significance in regulating states' subsequent conduct. In short, the *Ex parte Young* exception that makes state authorities liable for policy wrongdoings in some extraordinary circumstances rebuts the Eleventh Amendment's utility. It permits offended governments to seek injunctive and declaratory decisions against the misdeeds of state officers that would wield a genuine impact on the state itself.

Besides the reasons given, the U.S. constitutional scheme disproves the thesis of Eleventh Amendment immunity.[236] Article VI(2) of the Constitution incorporates an unqualified precept that treaty power extends to the level of the states and preempts discordant state laws. In antithesis, the Eleventh Amendment rule is conditional to the effect that a state is subject to civil accountability sought by foreign countries so long as state officials continue to violate rights under federal law. Given the unchallengeable superiority of treaties and their reach to states under Article VI(2) and the precedence of federally protected rights under the *Ex parte Young* formulation, Article VI(2) undoubtedly should command the application of the Eleventh Amendment. The security of consular treaty rights therefore overrides the constitutional protection designed to relieve a state and its administrators from being constantly sued for their improper policy-making decisions. Taken as a whole, it cannot be much clearer in the author's view that sitting judges and state authorities wrongly articulated the Eleventh Amendment immunity in *United Mexican States*, *Paraguay*, and *Federal Republic of Germany*.

(b) Justiciability.—The political question doctrine may serve as yet another pretense to hamper litigation by foreign governments. The determinant factor here is whether the pertinent provisions of consular treaties are self-executing. In the situation where the terms of a treaty are not directly enforceable by judges, the single vehicle violated countries can invoke is diplomatic methods.[237] Because consular provisions are already admitted to be self-executing, the overture of a political question bar is nothing short of baseless in U.S. courts.[238]

The consular treaty allegations made by foreign sovereigns are justiciable even through the angle of the six elements of *Baker v. Carr* that delineate the so-called "political question" on which the courts should not intrude.[239] By the strength of Article III(2) of the Constitution and 28 U.S.C. §§ 1251(b)(1) and 1331, federal courts, rather than the executive branch and Congress, are the precise organs equipped to hear a class of cases linked to consular interests and federal question concerns rested on U.S. treaties. Next, the guidelines for court review are "discoverable and manageable" in the following sense. The consular treaty standards at issue distinctly spell out the rights and duties between the sending country and the receiving country. The mechanism demands consular officers from the former be expeditiously apprised by the latter of the arrest or detention of their citizens and obtain full contact with them for the provision of legal assistance. Furthermore, in view of the assertive U.S. contemplation to carry out consular treaty rights abroad and domestically, the granting of injunctive and declaratory relief by U.S. courts does not involve "policy determination" at all. Again, this assuredness shared by the executive and legislative departments completely countervails the last three concerns in *Baker v. Carr* that U.S. courts may pose a confrontation or an embarrassment to the other branches should they award consular remedies to complaining foreign governments. In sum, raising the political question doctrine to render treaty rights claims made by the disaffected countries nonjusticiable, as contended by Arizona and Virginia authorities (*United Mexican States* and *Paraguay*) and the Ninth Circuit in dictum in *United Mexican States*, cannot stand in any legal sense.

The Power of Interim Measures and Merits Decisions of International Tribunals

Interim measures brought forth by the ICJ and other international tribunals to hold off the execution of foreign nationals pending merits review of their claims should have genuine legal sway within the United States. Monist advocates preach that decisions entered by international forums should be accorded high reverence by municipal courts just as if they were coming from a municipal court of last resort.[240] The predicates that undergird the direct force of international dispositions within domestic jurisdictions are confirmed by Article 94(1) of the U.N. Charter, Article 59 of the ICJ

Statute, and Article 94(2) of the ICJ Rules of Court. The Articles declare that the ICJ's judgment binds any U.N. member (e.g., the USA) whose difference with other member States has gone to the Court for adjudication. For this identical reason, the U.S. courts in cases such as *Rocha*, *Reyes-Camarena*, *Bell*, and *Prasertphong* must embrace the ICJ's furnished prescription in *LaGrand* and *Avena* to review and reconsider the convictions and sentences of the condemned foreigners as a way of repairing consular wrongs. Despite the paucity of language expressly demarcating the configurations of "the decision" or "the judgment" of the ICJ, those clauses should connote an obligation on the part of Charter members that are parties to a dispute to fulfill the Court's interim orders as well. Two reasons sustain this interpretation.[241]

Provisional measures of the World Court comprise an integral and inalienable part of its pending decision in consular litigation. The irredeemable harm resulting from the execution of foreign inmates whose consular rights have been infracted would make the Court's substantive disposition at a later stage meaningless to the protection of those individuals' rights under treaty. In addition, under Article 41(2) of the ICJ Statute, the Court bears a duty to report its recommended interim measures to the U.N. Security Council. This statutory notification element, in affiliation with Article 94(2) of the U.N. Charter, implicitly leads to the conclusion that the Security Council's Charter-based authority to enforce an ICJ final judgment enlarges to the matter of overseeing national conformity with the emergent call by the Court to pause the execution on a temporary basis.

Such an expansive reading squarely projects the standpoint of the Security Council. In a resolution, Council members warned Iran of the likelihood of triggering Chapter VII sanctions against it if Tehran continued refusing to release U.S. hostages in contempt of an ICJ interim edict.[242] In like manner, at the Security Council, the United States construed this urgent instruction from the World Court as obliging Iran to settle the hostage incident in absolute terms.[243] More noticeably, the ICJ plainly indicated the legal power of its issued provisional measures in two cases sued before it against U.S. military activities in Nicaragua and against Yugoslavia's campaign of genocide in Bosnia.[244] On top of that, the Court's decisions in *LaGrand (F.R.G. v. U.S.)* and *Avena and Other Mexican Nationals (Mexico v. United States of America)* that are particularized in Chapter 3 further enrich and establish its jurisprudence in this aspect. In a nutshell, in the binding opinion of the World Court, the international obligation of the United States to carry into full execution the ICJ's provisional measures arises from the specific provisions of the two treaties that it has ratified: Article 41 of the ICJ Statute and Article 94(1) of the U.N. Charter. An interim order pursuant to the ICJ Statute directly governs the USA and its constituent states as a matter of

international law. By no means is its force and effect on U.S. soil contingent on a gubernatorial consent or diplomatic discussions (*Paraguay)* or a sovereignty disclaimer from the United States (*Federal Republic of Germany*).

Akin to the function of the ICJ's interim orders, the Inter-American Commission, as now authorized by Article 25(1) of its Rules of Procedure, adopts precautionary measures asking the accused OAS member to preserve the integrity of the status quo while its final decisions on case merits are pending. An exigent request made by the Commission also provides a sound legal basis for the U.S. judiciary to enter reprieves on behalf of convicted death row foreigners who have petitioned the Commission for review of their consular rights claims, based on the United States' obligations under the OAS Charter.

There are already a number of precedents where the federal government sued the states over treaty infractions with success.[245] Rather than succumb to the federalism argument, the U.S. government could use these antecedent cases as paradigms by relying on federal courts to press its violating states into administering international stay instructions. Finally, as presented in Chapter 3, the United States has long been a party to the OAS Charter. Until 8 March 2005 it remained a loyal endorser of the Optional Protocol to the Vienna Consular Convention . Consequently, it goes without saying that the scope of decisions on juvenile and consular affairs issued by U.N. and Inter-American bodies delegated to supervise and ensure treaty compliance ought to extend throughout the USA without curtailment. Any domestic judicial pretexts such as cultural relativism and procedural default to avoid taking up treaty responsibilities should be barred utterly.

To sum up, regardless of the discrepant grounds resorted to by U.S. courts to reject juvenile death penalty and consular rights cases, the rationalizations for these dismissals can be largely subsumed into two core concepts: dualism and federalism. In early juvenile capital punishment cases, dualist judges articulated a cultural relativist notion to repudiate the value of customary law in furtherance of their understanding of the Eighth Amendment. In the years after the U.S. ratification of the ICCPR and before the *Roper* ruling, the Senate reservation to Article 6(5) became a convenient and oft-triggered weapon for judges to repulse condemned juveniles' treaty-based claim to the right to life and an exemption from capital punishment. More prominently, the notion of federalism recurrently returned and commanded the thinking of many judges dealing with capital cases. It is intriguing to note that judges overruling consular cases had virtually acknowledged the contested Vienna Convention to be self-executing and devoid of any Senate terms to dwarf its force within the domain of the United States. Yet, however much sympathy they displayed regarding the egregious intrusion of the states on aliens' consular safeguards, they in the end lamentably turned a blind eye to that conspicuous misconduct, irrespective of furious remonstrations by the community of other democratic societies.

CHAPTER 5:

Refugees 1: Asylum Norms and Enforcement

INTRODUCTION

The United States had traditionally depicted itself as a country of generosity willing to offer safe haven to the oppressed worldwide.[1] Indeed, its early refugee history strikingly featured this humanitarian concern and direction. As the numbers of immigrants altered U.S. demographical contours, this hospitable image quickly faded away. The reflection was that the U.S. government grew harsher in its refugee policy considerations.

In the years following the Chinese exclusion laws of the 1880s, anti-alien sentiments were on the rise because of lingering economic uncertainty and the racism that has tenaciously plagued U.S. internal politics. The attitude of opposition to immigration remained changeless well into the twentieth century. Beginning in 1917, Capitol Hill further translated that antagonistic current of opinion into a wave of federal restrictions. By using literacy tests and national origins quotas as tools, legislators effectively shut out a large number of undesirable refugees from places like Eastern and Southern Europe as well as the "Asiatic barred zone."[2] Even under such circumstances, persons who suffered religious persecution were welcome as an exception. However, the Jews in flight from Nazi Germany could not benefit from congressional leniency toward religious refugees. Rather, members of Congress echoed the prevalent domestic forces of isolationism and anti-Semitism by repeatedly voting down the access of those Jews to the United States. In the 1930s and throughout the years of World War II, the United States relentlessly shut its asylum door on hundreds of thousands of Jews, compelling their return to Nazi persecution and, in effect, causing many of them to die in concentration camps.[3]

It is only in the aftermath of the Holocaust that the United States has undertaken a radical transformation by softening its course of action on

refugee issues. Moving away from its prior isolationist posture, the USA instead has vigorously engaged in a great variety of refugee activities at the United Nations. It took part in the creation of *the Office of the United Nations High Commissioner for Refugees* (hereinafter UNHCR). In addition, the United States became a party to the 1967 Protocol relating to the Status of Refugees. Periodically, it serves on the UNHCR Executive Committee to advise the High Commissioner on refugee protection matters.[4] In most instances, it has remained the largest individual donor for a diverse array of overseas assistance programs to be administered by the UNHCR and other international agencies.[5] One of the U.S. goals in this regard is to provide needed emergent care to millions of refugees and conflict victims temporarily sheltered in neighboring countries, including the over 3.4 million Palestinians dislodged in the Middle East. At a domestic level, Congress committed itself to bringing refugee practice in line with international law by statutorily implementing the 1967 Refugee Protocol and the 1984 Torture Convention. More than two million refugees have been granted permanent resettlement since 1945, making the USA the most receptive country in the Western world.[6]

Despite its post-war modifications of restrictionism, the U.S. government is often influenced by divergent factors of domestic economic and security concerns as well as foreign policy choices when it comes to handling immigration. In one distinctive instance, international politics exercised overwhelming preponderance over U.S. decision making in the realm of refugee policy parallel to that responsible for the return of Jews to persecution.

Specifically, anti-Communist ideology soon emerged in the Cold War era as the centerpiece of U.S. foreign affairs, including policies pertaining to refugee treatment. To undermine Soviet leadership, the U.S. government encouraged the defection and departure of persons living behind the Iron Curtain. Normally, it would accord untrammeled entry privileges through various admission measures[7] to persons who were driven out by communist repression in countries like Hungary, Cuba, and later Nicaragua. However, not all Cuban asylum seekers were auspiciously greeted with such open arms by U.S. authorities. Among the 125,000 Marielitos (who left their homeland via the 1980 Mariel boatlift), some Cubans with criminal or mental records looked for political asylum in the United States only to find themselves outlawed from the benefits of that preferential scheme. Moreover, they stayed in open-ended incarceration without any prospect of release even after the Castro regime declined to take them back. Another band of Mariel Cubans underwent no better treatment; their paroles were later voided by immigration officers and they were placed in indefinite custody following convictions for driving under the influence or for other petty

or felonious offenses committed on U.S. soil. Overall, the USA nonetheless had elected to loosen immigration restrictions for communist-originated asylees and individuals from Middle Eastern countries as one of its strategies to address the volatile bipolar confrontation in the international arena.

In stark contrast, undocumented aliens who fled persecution from pro-U.S. authoritarian regimes in El Salvador, Guatemala, and Haiti did not fare well in their asylum applications. In fact, the U.S. government's treaty commitments to refugee protections in various municipal and bilateral laws lent nothing serviceable to their situation. Out of political and racial calculations,[8] the United States from the outset established an implausible assumption that those refugees were economic migrants purely escaping from homeland poverty. It indiscriminately dismissed their demands for parole and other types of asylum protection irrespective of their domestic dire circumstances, which had descended into full-scale political bloodbaths. Additionally, the Reagan Administration set out Coast Guard blockades against Haitian boat people by hurriedly repatriating them into the hands of a persecuting regime. In pursuit of Cold War priorities, the United States turned its back on the reality that human rights abuses by its right-wing allies might be far more horrendous and shocking than those occurring in totalitarian states.

Between World War II and 1980, an estimated 1.4 to 1.5 million refugees gained access to the United States,[9] but less than 2,000 came from non-communist countries in Latin American and Africa. Table 5-1 demonstrates additional evidence of Cold War factors swaying executive decisions on refugee entry. The data indicates that from 1985 to 1991 refugee admissions were substantially slanted toward communist-dominated areas in general and East Asia and the former Soviet Union in particular. In Latin America, no single migrant from Haiti won safe haven in the USA, as sharply opposed to the combined number of Cubans admitted during the same period. In effect, the statistics for the peak years of interdiction operations by the U.S. Coast Guard from 1981 to 1991 are revealing. During that period, about 24,600 Haitians were intercepted in international waters. In spite of that high number of Haitian refugees striving to disembark on U.S. shores, all but 28 were disavowed the means to file asylum claims in the United States.[10]

In response, the aggrieved Haitians and Mariel Cubans reiteratively submitted complaints to international bodies and U.S. courts. They lashed out at the U.S. government for disregarding several aspects of their constitutional, statutory, and international rights. In detention and return cases, the shared issues were a denial of U.S. constitutional status

Table 5-1. Refugees admitted to the U.S., by nationality, FY 1985-1991

	FY85	FY86	FY87	FY88	FY89	FY90	FY91
East Asia	**49,970**	**45,454**	**40,112**	**35,015**	**45,680**	**51,611**	**53,486**
Burmese	0	0	0	0	0	3	14
Chinese	0	0	0	0	5	52	4
Khmer	19,097	9,789	1,539	2,805	1,916	2,166	38
Lao: Highlanders	1944	3,668	8,307	10,388	8,476	5,207	6,369
Lao: Lowlanders	3472	9,201	7,257	4,168	3,956	3,564	2,881
Vietnamese[a]	25,457	22,796	23,009	17,654	31,327	40,619[b]	44,180
Other/unknown	0	0	0	0	0	0	0
Near East/S. Asia	**5,994**	**5,998**	**10,107**	**8,415**	**6,980**	**4,991**	**5,539**
Afghans	2,234	2,535	3,220	2,211	1,716	1,594	1,480
Iranians	3,492	3,148	6,681	6,167	5,147[b]	3,329	2,692
Iraqis	264	307	202	37	114	67	842
Libyans[d]	0	0	2	0	1	1	344
Other	4	8	2	0	2	0	1
USSR/E. Europe	**9,990**	**9,500**	**12,300**	**28,239**	**48,501**	**56,912**	**45,516**
Soviets/Former Soviets	640	787	3,694	20,421	39,553	50,716	38,661
Albanians	45	84	48	72	47	98	1,363
Bosnians	--	--	--	--	--	--	--
Bulgarians	130	173	114	140	111	332	585
Czechs	981	1,589	1,072	672	925	345	158
Hungarians	530	754	669	784	1,075	274	7
Poles	3,145	3,735	3,626	3,345	3,607	1,491	290
Romanians	4,513	2,373	3,075	2,801	3,182	3,650	4,452
Yugoslavs	6	4	2	4	1	6	0
Other	0	1	0	0	0	0	0

Source: Bureau of Population, Refugees, and Migration, U.S. Department of Justice; Compiled by the U.S. Committee for Refugees in *Refugee Reports* 19 (1998).

Africa	**1,953**	**1,315**	**1,994**	**1,588**	**1,922**	**3,494**	**4,424**
Angolans	75	3	40	13	18	59	21
Burundians	0	0	0	1	3	3	0
Chadians	0	0	0	0	0	1	0
Congolese/Zairians	12	4	7	10	18	79	73
Ethiopians	1,788	1,268	1,831	1,456	1,767	3,229	3,948
Liberians	0	0	0	0	0	3	1
Mozambicans	7	1	7	13	4	3	12
Namibians	12	5	3	3	0	0	0
Nigerians	0	0	0	0	0	0	0
Rwandans	0	0	1	0	0	0	2
Sierra Leoneans	0	0	0	0	0	0	0
Somalis	0	0	1	4	44	25	192
South Africans	29	12	70	42	20	34	19
Sudanese	0	0	0	0	0	7	24
Togolese	0	0	0	0	0	0	0
Ugandans	8	12	24	31	40	27	125
Other/unknown	22	10	10[c]	15	8	24	7
Latin America	**138**	**173**	**315**	**2,497**	**2,605**	**2,309**	**2,237**
Cubans	135	173	273	2,273[b]	2,271[b]	1,750[b]	2,144[b]
Haitians	0	0	0	0	0	0	0
Nicaraguans	3	0	36	209	323	532	87
Salvadorans	0	0	6	15	11	22	6
Other	0	0	0	0	0	5	0
Total	**68,045**	**62,440**	**64,828**	**75,754**	**105,688**	**119,317**	**111,022**

[a] Total combines Vietnamese arrivals from first-asylum camps and through the Orderly Departure Program.

[b] Private Sector Initiative admissions not included: FY88 - 733 Cubans; FY89 - 1,512 Cubans, 38 Iranians; FY90 - 3,003 Cubans, 6 Vietnamese; FY91 - 1,789 Cubans.

[c] Includes persons of unreported nationality: FY 86 - 4 persons.

[d] U.S. government statistics place Libyans within the Near East/South Asia region.

based on either the "entry fiction" doctrine or the non-extraterritoriality rule; discrimination on the ground of race and nationality; and inadequate or absent procedural safeguards. The "entry fiction" doctrine referred to situations where excludable or unadmitted aliens, despite being under immigration custody after detection at the U.S. border point of entry, were treated as if they were never physically present in the United States for the purpose of negating their constitutional due process rights. The rule of non-extraterritoriality adversely targeted a given category of refugees who were located on the high seas or housed in the U.S. naval base at Cuba's Guantanamo Bay. It held that the United States' constitutional and treaty commitments applied exclusively to those refugees that had already entered into U.S. territorial jurisdiction. Finally, the allegations unique to alien detainees and interdictees involved punitive detention and appalling confinement conditions at a maximum security prison for the former and refoulement along with a deprivation of opportunities to seek asylum for the latter.

Moreover, when a management turnaround came in 1994 to 1995 toward the Cuban refugee population, it propelled yet another round of litigation in the United States. In that episode, President Bill Clinton envisioned a renewed migration flood from Cuba as a Mariel-like crisis that might once again engender as disruptive a force in U.S. society as the one he witnessed during his 1980 gubernatorial election campaign in Arkansas. To forestall its recurrence, he at one time ordered immigration officers to lock up intercepted Cubans and Haitians at overseas facilities and at another summarily sent them back. All of these administrative actions rapidly evoked a reaction from a group of Cubans and Haitians interned at Guantanamo Bay.

In 1996, Congress responded to a soaring domestic atmosphere against illegal immigrants and terrorist operatives by pushing refugee policy still further distant from international law principles.[11] For the first time, asylum seekers arriving in the United States without proper travel documents would face mandatory INS custody under a new statute. The 2001 terrorist attacks on the USA resulted in an unprecedented level of retrograde changes in U.S. immigration practice. On the authority of a widened definition of "terrorist activity" and "engaging" in terrorism as set forth in the USA PATRIOT Act, decisions on asylum and refugee affairs became all the more cautious and constricted than they ever were before 11 September 2001.[12] In short, a mixture of factors, not simply concerns about civil rights and humanitarianism, has predominated throughout most of the U.S. immigration era in determining whether the United States would accommodate with compassion asylum seekers of discrete national origins.

TREATIES AND CUSTOMARY NORMS

Global Sources

The earliest international reference to non-refoulement appeared in the 1933 Convention Relating to the International Status of Refugees, which banned non-admittance at borders.[13] The Convention received a limited ratification,[14] as did another non-return accord that coped with human rights victims coming from Germany.[15] Only after the Nazi atrocities coupled with the post-war refugee crisis on the European continent did the international community seriously consider sponsoring a global legal framework for refugee protections.[16]

The Universal Declaration of Human Rights

The UDHR, though centering on general human rights issues, ushered in the beginning of the worldwide support for a list of basic rights accorded to refugees, whether in their native or host country or elsewhere. Article 6 of the Declaration provides that: "Everyone has the right to recognition everywhere as a person before the law." The juridical personality clause vitiates the use by a host country of an entry fiction and non-extraterritoriality in turning down the claims of excludable and high-seas asylees to domestic legal liberty and non-return guarantees.[17] Equally important, the 1948 U.N. document enables refugees to enjoy the full spectrum of Declaration rights without making distinctions of any kind, such as race, color, national origin, or status.[18] Under that mandate, all refugees are eligible for the benefits of the Declaration notwithstanding their nationality or immigration status. Alien detainees and interdictees possess the right to contest their detention before a court,[19] the right to proper prison conditions,[20] and the right to due process conferred in parole and status reviews.[21] Moreover, Article 3 of the UDHR defends refugees' life, liberty, and personal security in two meaningful ways. It forbids the infliction of indefinite imprisonment on undocumented aliens in the absence of legal justifications. Similarly, it challenges governmental intent to stop boat people en route to their asylum destination and subject them to the dangers of death and torture in the country of return.[22]

As with other human rights matters, refugee safeguards are often caught up in rival and hardly reconcilable debates between universal normative principles and territorial sovereignty. The right of an individual to assert asylum is no exception. During the drafting of Article 14(1) of the UDHR, the U.N. Human Rights Commission initially submitted a version favoring that "everyone has the right to seek and to be granted, in other countries, asylum from persecution."[23] Yet, government representatives at ensuing U.N. sessions voiced intense discontent for they thought the proposed clause would pose a

considerable intrusion on the privileges of sovereign states in the regulation of arriving refugees. As a result, a British suggestion to insert the term "to enjoy" eventually prevailed. In its current form, Article 14(1) invests an individual with little more than a right to seek and enjoy asylum. It leaves open the question of whether a receiving country is bound to bestow it. Since then, how to strike a balance between territorial sovereignty and a person's enjoyment of a durable asylum system has continued to spark a heated discussion among members of international and regional agencies.

The Fourth Geneva Convention

The essentiality of legal principles governing refugees is likewise manifest in humanitarian laws. While its primary end is to insulate innocent civilians from human rights abuses during international warfare, the Fourth Geneva Convention provides some useful sources to inform the refugee protection regime.

According to the Fourth Convention, belligerent parties must refrain from taking a protected person into custody unless national security or voluntary consent warrants otherwise.[24] Should the latter exceptions apply, the detaining power, however, needs to promptly transmit the case to its competent authorities for legality confirmation.[25] Additionally, review proceedings are required to persist regularly so long as that person remains in physical confinement for extraordinarily overriding purposes. Further, the civilians concerned may defend their personal integrity in the course of detention by invoking certain Convention provisions[26] to maintain their freedom from cruel and inhuman prison conditions.

Notably, Article 45 of the Fourth Convention prescribes a bar to refoulement comparable to the one typically found in peacetime refugee and human rights treaties.[27] It stringently forecloses arresting authorities from transferring a Convention civilian to face political or religious persecution in another country. At the same time, it underscores that the creation of a non-return mechanism is not intended to act as an obstacle to the treaty-based extradition of that person for ordinary criminal charges. Already, the community of sovereigns has recognized as part of customary international law an array of humanitarian prohibitions ranging from incarceration without due process to cruel and inhuman treatment as well as forced repatriation. Since countries in the exigencies of military conflict are obligated to observe those customary rules as minimum restrictions on their conduct, it needless to say that their refugee practice must be amenable to the foregoing legal oversight during times of peace.[28]

The Refugee Convention

Strictly speaking, the Refugee Convention represents the first global attempt to address the treatment of refugees. As an effort produced by major Western countries, the Convention has frequently come under attack from government leaders and academics for its insular and outdated formula. The critics accuse it of parochialism mainly from two points of view. One is its temporal ambit, in the sense that the 1951 Convention has effect solely in relation to persons who left their persecuting country prior to 1 January 1951.[29] The other is geographical. The Convention's exclusion provision gives the parties the option of delineating their treaty accountabilities in a more restrictive manner. In other words, countries may go on to make a declaration that their protective umbrellas reach out to no more than those persons in exodus from events transpiring in the European region.[30] The obvious Euro-centric approach to the safeguarding of individual refugees in the Convention was squarely consequent on the drafters' experience of the time. For the largely European deliberators, whose countries were still recovering from World War II and greatly in need of reconstruction and aid, it was difficult to support any decision to take in refugees from other regions. In their eyes, the foremost task was to assimilate a vast number of Europeans displaced by the war and the subsequent communist takeovers.[31]

To ease treaty structural rigidity, the negotiators allowed signatories to expand the basis for protection as they deemed necessary to contain refugees in their territory who did not qualify under the Convention's temporal terms.[32] It was this added recommendation in the Final Act that many countries rested on in the case of the refugee crisis arising between 1 January 1951 and 4 October 1967. As for the critique of anachronism, it flows from the perspective, among other things, that the 1951 Convention fails in its coverage to benefit forced migrants who are in many cases driven by violence void of a persecutory substance.[33]

Articles 3 and 42(1) of the Refugee Convention secure without reservation that all treaty refugees come equitably under the Convention's reach regardless of their differing race, religion, or country of origin. Yet, the Convention provides no clue as to whether a host country is able to exempt itself from Article 3's force during a state of armed clash or other fatal threats to national security. With specific regard to Article 31(1), the Convention calls on all parties not to punitively confine refugees because they had not yet set foot in the host country at the juncture of their being detected. The non-penalty certification nonetheless hinges on refugees presenting themselves without delay before the host authorities and a showing of good cause for the resulting illegal entry.[34] Further, the mechanism is subject to another

constraining element. It activates to the extent that persons "com[e] directly from *a territory* where their life or freedom was threatened."

The phrase "a territory," worded by the Convention drafters to replace "country of origin," denotes two meanings—refugees' native countries and the place where they made a transit stop before their final journey to the receiving country.[35] In the latter situation, Article 31(1) applies so long as a fear of persecution accounts for individuals' ongoing flight from that third country. It is, however, unclear whether Article 31(1) stands when mere rejections of admission by the transit country are responsible for refugees' ensuing pursuit of sanctuary elsewhere. Arguably, the persons concerned may be dependent on "good cause" under Article 31(1) to uphold their freedom from custody. In that event, judgment on the validity of the good cause argument falls plainly within the discretion of the receiving country.

In spite of its non-punitive fiat, the Refugee Convention, akin to general human rights treaties, gives an imprimatur to a restriction of liberty without court confirmation in certain scenarios. Article 9 states that, "in time of war or other grave and exceptional circumstances," a refuge country may provisionally commit a given asylee to prison for the sake of its own national security until the stage of status and justification investigations is finalized. Even in a time of peace, the 1951 Convention concedes the feasibility of imposing movement limitations on a victim fleeing from persecution. Article 31(2) emphatically spells out (with little suggestion of court proceedings) that contracting parties may encroach on the freedom of unlawfully present refugees whenever a reason of necessity arises. For example, a receiving country may put an illicit asylee under its full control throughout the course of identity checking or resettlement arrangement in a third country. Such a national action is not without constraints. Especially in view of the procedural safeguards laid down in the Refugee Convention (for legally resident refugees)[36] and major international human rights instruments as referenced in Table 5-2, refugee imprisonment motivated by "necessity" in peacetime should on all terms be susceptible to court hearings and time circumscriptions.[37] The Executive Committee of the UNHCR has routinely demanded countries to formulate "fair and expeditious procedures" and "judicial or administrative review" as an integral refugee treatment system for the purpose of fundamentally eliminating the potential for prolonged, abusive detention.[38]

The last Convention device for treaty refugees is non-refoulement under Article 33(1). The Convention intent in instituting this temporary asylum measure is to save bona fide individual refugees from being summarily expelled and once again exposed to imminent human rights abuses in their homeland or elsewhere. Any persons who measure up to refugee parameters under Article 1 immediately become the beneficiaries

of Article 33(1). Divergent wordings of "well-founded fear of being persecuted" and "his life or freedom would be threatened" are severally constructed in Convention Articles 1(A)(2) and 33(1). Yet, delegates participating in the drafting conference did not imply anything that would distinguish the standards of proof for refugee recognition from those for non-return relief. All individuals are capable of garnering non-refoulement guarantees in refugee capacities where they cross an international border and build prima facie cases of persecution.[39] The alleged persecutions in the country of return must be based on their "race, religion, nationality, membership of a particular social group or political opinion." To highlight the vitality of the refugee definition and the non-refoulement duty in the global refugee regime, the Convention's Article 42(1) further precludes member States from making any reservations to abridge the power of those principles in domestic jurisdictions.

Under Articles 1(F) and 33(2) of the Refugee Convention, asylees may provoke removals from refugee eligibility and its collateral protection from repatriation. Such a condition occurs whenever their culpability for any heinous criminal acts executed in the course of flight or within a host country exceeds the imperatives to honor their international entitlements. The activities under international prohibition encompass (1) "a crime against peace, a war crime, or a crime against humanity;" (2) "a serious non-political crime" performed outside a sheltering country; (3) any wrongful act that would undercut "the purposes and principles" of the U.N.; and (4) "a particularly serious crime" judicially decided in a sheltering country as "a danger to the community of that country."

With inconclusive perceptions of Article 33(1)'s "return (refouler),"[40] negotiating representatives to the Convention conference nonetheless did not set to clarifying its real import. From its literal language, Article 33(1) places no restriction on the location where refugees are found to set off a non-return guarantee. The geographical reference, if any is relevant to Article 33(1), is mapped out in Convention Article 1(A)(2), which designates being outside an asylee's country of origin or residence as one of the elements to be satisfied as a refugee. To be sure, the paramount agenda of Article 33(1) is to assure the life and physical security of persons in desperate want of safe haven from persecution. The non-return arrangement is purposeful inasmuch as it extends to all individual refugees without regard to where they were originally spotted, be it on the high seas or at a country's land border, port of entry, or airport.[41] The concept of extraterritoriality surrounding Article 33(1) is fairly congruous with the posture of the UNHCR and the Inter-American Commission, both of which on different occasions publicly ran counter to U.S. return operations in support of Haitian migrants at sea.[42]

Table 5-2. Relevant international/regional clauses in detention and return cases

	Detention/Return				Detention		Return	
Instruments	**juridical person**	**non-bias**	**due process and equality before law**	**right to life, liberty and security**	**barring arbitrary and punitive detention**	**barring cruel prison conditions**	**non-refoulement**	**asylum**
Global								
UDHR of 1948	6	2, 7, 10	7, 8, 10	3	9	5		14(1) (enjoy)
4th Geneva Convention of 1949			43		42, 79 exception: 42, 79	3(1)(a), 37, 85	45 exception: 45	
1951 Refugee Convention		3 [NR] & [part ND][1]			31(1) exception: 9, 31(2)		33(1)[NR] exception: 1(F), 33(2) [NR]	
1967 Protocol		ibid.			ibid.		ibid.	
ICCPR of 1966	16 [ND]	2(1) [part ND],[2] 26	9(4), 14, 26	6(1) [NR via reading] & [ND] exception: 6(2), 9(1)	9(1) [NR via reading] exception: 9(1)	7 [NR via reading] & [ND], 10(1)	7 [NR & ND] (reading)	
1967 Declaration							3(1) exception: 3(2)	

The failed draft convention of 1977							3(1) exception: 3(2)	
Torture Convention of 1984						16(1) [NR&ND][3]	3(1) [ND via 2(2)]	
Child Rights Convention of 1989		2(1) [NR & part ND][4]	12(2), 37(d)	6(1) [NR & ND][5]	37(b) exception: 37(b)	37(a) [NR & ND],[6] 37(c)	22(1) [NR & ND][7]	
Regional[8]								
European– European Convention of 1950		14	5(2)(3)(4), 6(1)(3), 13	2(1)[ND], 5(1)	5(1) exception: 5(1)	3[ND]	3[ND] (reading)	
American– American Declaration of 1948	XVII	II	II, XVIII, XXV, XXVI	I	XXV exception: XXV	XXV, XXVI		XXVII (obtain)
American Convention of 1969	3[ND]	1 [part ND],[9] 24	7(4)(5)(6), 8, 24, 25 [part ND][10]	4(1)[ND], 7(1)	7(2)(3) exception: 7(2)	5(2) [ND]	22(8) (derogable but see n8)	22(7) (obtain)
Cartagena Declaration of 1984							III(5) (*jus cogens*)	

Table 5-2, continued

	Detention/Return				Detention		Return	
Instruments	**juridical person**	**non-bias**	**due process and equality before law**	**right to life, liberty and security**	**barring arbitrary and punitive detention**	**barring cruel prison conditions**	**non-refoulement**	**asylum**
African– OAU Refugee Convention of 1969		IV [NR & part ND][11]					II(3) [NR][12] & [ND] exception: 1(4)(f) & (g) & (5) (war crimes and others)	II(1) (obtain)
Africa Charter of 1981	5	2, 3, 19	3, 7(1)	4, 6	6 exception: 6	5		12(3) (obtain)

[NR]: a non-reserved norm at the time of treaty ratification.
[ND]: non-derogable in times of official public dangers.

1. The Refugee Convention makes no reference to whether or not Article 3 is suspendable. Via a supplementary reading of Article 4(1) of the ICCPR, however, it becomes apparent that Article 3 bars a derogation from disparity grounded on race and religion although not on nationality.
2. Refer back to Table 3-1.
3. Ibid.
4. NR relies on U.N. refugee treaties, and the partial prohibition against a derogation germinates from the ICCPR, see Article 41(b) of the Child Rights Convention.
5. NR operates according to the Human Rights Committee's comment, and ND does so on the ICCPR, see Article 41(b) of the Child Rights Convention.
6. Ibid.

7. While the 1989 Convention contains no provision on non-refoulement, it may be claimed as implicit in light of U.N. refugee treaties, the Torture Convention, the ICCPR, and even the 1967 Declaration, in reference to Articles 22(1) and 41(b) of the Child Rights Convention.
8. Parties to the European and American Conventions can only make derogations that are compatible with their other obligations under international law; see European Convention, art. 15(1); American Convention, art. 27(1) (also adding a restrictive non-bias rule).
9. Refer back to Table 3-1.
10. Ibid.
11. It is unclear whether Article IV is reservable and derogable. Yet, since Article VIII(2) proclaims the OAU Refugee Convention to be complementary to the U.N. Refugee Convention, Article IV should be construed in accord with its corresponding U.N. provision if it does not purport to the contrary.
12. NR follows the U.N. Refugee Convention in light of Article VIII(2) of the OAU refugee treaty (implying a supplemental document). Unlike its comparable U.N. clause, Article II(3) speaks of no exemption from its force. Despite that, the OAU treaty in its refugee definition embodies an analogous preclusion of war criminals and others from non-return safeguards.

The Refugee Protocol

As Cold War impact and intense decolonization forced a mounting number of persons away from their home countries, it rapidly became apparent that the limited definition of the 1951 Convention could no longer fit well in this context. The Refugee Protocol of 1967 was created to fill this void as a result. By obliterating both time and geographic confinements, the Protocol generously opens the door for all post-war refugees everywhere to contend the right to receive treaty benefits.[43] Under the Protocol, certain parties may continue interpreting treaty refugees as exclusively European, if they attached exclusion declarations during the Convention years. Essentially, the 1967 treaty faithfully incorporates the Convention content by converting into its own mandates the entire block of Convention Articles 2–34, including those stipulations connected with detention and return issues.[44] Like its companion 1951 treaty, the 1967 Protocol supplies neither a mandatory nor an optional right of asylum to refugees at all, rendering their needs for permanent resettlement in other countries wholly unattended yet again. For some commentators, both U.N. refugee treaties leave much to be desired. As the vestiges of times past, they cannot cope effectively with the complexity of modern refugee problems.

The ICCPR

The second U.N. human rights instrument associated with refugee protection is the ICCPR. The 1966 International Covenant, save for being silent about the mechanism of asylum, draws up a range of accessible safeguards for refugees that closely resemble those in the Universal Declaration. Notably, Covenant Article 7 (banning torture or cruel, inhuman or degrading treatment), although embracing no provision on non-refoulement, was construed by the Human Rights Committee to have amplified utility in this regard.[45] Elsewhere, the Committee pointed out that certain norms of the ICCPR embodying the essence of international customary law should not be susceptible of parties' reservations.[46] It was illegitimate for ratifiers to gut or modify a long list of quintessential clauses enshrined in the U.N. Covenant. Among those enumerated by the Committee were prerogatives such as freedom from arbitrary detention; the right to due process of law specified under Article 14; and the rights to be immune from cruel treatment as well as from unlawful deprivation of life. This final set of rights, by the Committee's understanding, registered a relatively higher rank in the customary legal hierarchy because Covenant Article 4(2) disallowed derogation from them even in a time of pressing public dangers.

Still, the Covenant informatively clarifies the vagueness of whether Article 3 of the Refugee Convention is derogable.[47] Article 2(1) of the

Covenant asks treaty members to effectuate Covenant rights "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Covenant Article 4(1) expressly overrules derogations entered by sovereign parties that "involve discrimination solely on the ground of race, color, sex, language, religion or social origin." Overall, Article 4(1) narrows down a general prohibited list in Article 2(1) by regarding certain types of disparity—for example, differentiation based on nationality—as legally acceptable during public emergency. To prevent parties' dismissal of the Covenant rights at random, the last sentence of Article 4(1) enunciates a crucial guideline governing the permissibility of derogations. It states that declaring countries should make suspension decisions pursuant to "their other obligations under international law." Given the peremptory nature of the ban on racial discrimination as already depicted in Chapter 3, the countries concerned are forbidden from prejudicially stripping a particular alien migrant group of pertinent Covenant safeguards in light of its members' nationality that is in actuality traceable to their racial characteristics.[48]

The U.N. Declaration on Territorial Asylum

As early as 1957, U.N. members had embarked on the development of the Declaration on Territorial Asylum[49] after their fruitless bid to introduce in the ICCPR proposals the right of the individual to obtain asylum.[50] While engaging in the elaboration of Article 14 of the UDHR, the negotiators throughout the process manifested little desire to add any legal duties for asylum approval.[51] Rather, they opted to restate the existing assented principle of the right of a sovereign to decide on asylum as the lowest common objective in the 1967 Declaration. Underlying their conservative position was the viewpoint that the timing was premature for all members to come to consensus on asylum mandates. On the other hand, they propitiously cleared away the possibility of national misrepresentation about the compass of Article 33(1) in the Refugee Convention by proclaiming rejection at the frontier as one mode of refoulement in breach of international law.[52] The Declaration nonetheless provides that a country may at certain points default on its non-return promises in the name of domestic security or immigration concerns.[53]

The Convention on Territorial Asylum Draft

Similarly, the abortive Convention on Territorial Asylum,[54] drafted by the Committee of the Whole prior to the 1977 United Nations Conference on Territorial Asylum, sustained the orthodox sovereign idea of territorial supremacy over the individual's prerogative to assert asylum.[55] It assigned a meaning to non-refoulement identical to that

earlier endorsed by the 1967 Declaration after some delegates were assured that the administration of non-rejection at the border would not impinge on their internally established regime to control aliens' entry.[56]

The 1967 and 1977 instruments differ in some nuances. The 1977 draft formally models on a number of regional resolutions[57] by framing in its non-refoulement provision of Article 3(1) the phrase "measures such as rejection at the frontier, return or expulsion, which would compel [a refugee] to…return to…persecution." In doing so, it goes beyond the intended purport of Article 33(1) of the 1951 Refugee Convention.[58] Glaringly, all evasive measures pursued by countries to eject fleeing victims are at odds with the authentic spirit of non-refoulement and should be barred. An example would be exacting consent to be returned through the threat of detention, as is often practiced by the United States.[59]

The Torture Convention

The international jurisprudence on ascertaining refugees' fundamental legal rights advanced one step forward when U.N. members in 1984 struck an agreement with a specialized treaty aimed at addressing official torture and other cruel acts. Since Article 16(1) of the Torture Convention helpfully combats the death row phenomenon, it may well be used to prevent the indefinite imprisonment of alien immigrants in a harsh federal penitentiary because of their criminal pedigrees or mental histories in their native countries.[60] Again, as elucidated in Chapter 3, parties wielded no leeway to freely neglect Article 16(1)'s edict under color of public emergency or by entering reservations.

As with Article 33(1) of the Refugee Convention and its Protocol, Article 3(1) of the Torture Convention entails a normative debarment against repatriation in a forcible manner. A distinction arises between Articles 33(1) and Article 3(1) regarding their protective reach.[61] The subject of Article 33(1) is confined to persons who escaped persecution on the grounds stated in the refugee treaties. Yet, any person in danger of being subjected to torture is qualified to raise Article 3(1) claims. In other words, applicants under Article 3(1) need not demonstrate that they would be tortured on account of race, religion, nationality, membership of a particular social group, or political opinion. Any corroboration of the likelihood of facing torture in the future is sufficient to establish a solid case for Article 3(1)'s application. Additionally, the purview of Article 3's force is much wider, in that its enforcement is absolute when viewed in tandem with Article 2(2).[62] The parties may not in any case invoke reasons such as national security to reduce their non-refoulement duty owed to refugees.

On the other hand, the mechanism in Article 3(1) is more circumscribed in three significant respects. The charged wrongdoing in

Article 3(1) is limited to an act of torture, which constitutes one of various types of persecution under Article 33(1).[63] A person in peril of cruel and other inhuman infliction not amounting to torture is not eligible for Article 3(1)'s benefits.[64] In addition, the commission of torture referenced in Article 3(1) must be official to the effect that the alleged act of torture stems from a public official or a surrogate's behavior in the form of instigation, consent, or acquiescence. Article 3's proscribed conduct (torture) is necessarily prospective in character while Article 33(1)'s persecution (including torture) may have taken place in the past as well. Moreover, Article 3(1) is potentially weak in enforcement due to its receptivity to a treaty reservation. Despite their individually differing coverage, the refugee treaties and the Torture Convention to some extent converge in application. They jointly bring under a non-return protector those persons who might endure official torture in the future for the five persecution causes, assuming that they pose no security threat nor commit egregious crimes in the first instance.

The Convention on the Rights of the Child

Lastly, the Convention on the Rights of the Child in its general terms speaks for the benefits of all children, including child refugees, on an impartial basis.[65] It adverts to the right of children to be relieved of unlawful or arbitrary incarceration. No detention of children shall be made other than "in conformity with the law" as well as "as a measure of last resort and for the shortest appropriate period of time."[66] Further, the 1989 Convention enables minors to be heard adequately in any proceedings affecting their welfare or custody.[67] As a matter of course, they may attack government improprieties for treating or punishing them in a cruel or inhuman manner.[68]

In Article 22(1), the child rights treaty specifically underlines minors in need of sanctuary from persecution as candidates suitable for other kinds of international safeguards. For instance, they can rightfully demand under the Universal Declaration and ICCPR to be recognized as a person before the law. Pursuant to the Child Rights Convention, some international norms found elsewhere are given priority for employment on the grounds that they are more conducive to the facilitation and realization of children's well-being.[69] Within this legal backdrop, refugee youths may therefore bring forward the right to non-refoulement that is neither reservable nor derogable, based on U.N. refugee treaties, the ICCPR, and the Torture Convention. The rationale that always considers treaty applicability in the best interests of children helps to illustrate why U.N. refugee treaties and the ICCPR should always enjoy controlling force regarding their prohibitions against a national reservation and derogation from the right to equality; the right to life, liberty, and security; and the freedom from cruel prison conditions.

Regional Sources

Regional human rights mechanisms meet their separate refugee challenges with some degree of flexibility, introducing a magnified refugee definition and a ban against refoulement-like measures in their own bodies of law. In the Americas and Africa, member countries have taken a momentous step by pronouncing the right to afford asylum to fleeing victims, although on the condition that the applicants must satisfy the terms referred to by a host country's laws and international agreements. Despite the disparities in content between U.N. and regional sources, in many cases the latter intimately mirrors the former framework in building refugee protection regimes.

The European Convention

In the European system, treaties with discrete components ranging from extradition[70] and suppression of terrorism[71] to human rights constitute main derivations of law in the management of the continent's non-return reach. The human rights convention in particular was made operable through an extended construction by the European Commission of Human Rights. In the Commission's opinion, Article 3 of the European Convention, notwithstanding its lack of a definite non-return provision, calls for treaty parties in deportation proceedings to take into advisement whether individual asylees would encounter torture or inhuman or degrading situations on return.[72] Additionally, the Committee of Ministers of the Council of Europe presented its insights concerning the doctrine of non-return via two important resolutions.[73] In its 1967 statement, the Committee persuaded the Council members not to resort to any measures, including a refusal of admission at the frontier, against individual persons who pose no security risk but purport to secure relief from involuntary repatriation.[74] In 1984, the Committee reiterated the Commission's prior opinion in anticipation of affirming for members' practical application the licit relationship of non-refoulement to European Convention Article 3.[75] Since Article 3 admits of no derogation, it should analogously hold so in its broadened use in return cases.

The American Convention on Human Rights

Like its European counterpart, the Inter-American non-return regime is informed by a diverse array of regional instruments.[76] Peculiarly, the American Convention in Article 22(8) aims at dealing with all individuals whose "right to life or personal freedom is in danger of being violated" by reason of their "race, nationality, religion, social status, and political opinions." By its terms "in no case," Article 22(8), dissimilar to other commensurable U.N. and OAU provisions, renounces surrendering any type of persecuted asylum seekers, including criminal offenders, to

the country of return.[77] Yet, in some respects, the power of Article 22(8) is constrained by the admissibility of a derogation.[78] States parties may announce a hiatus on non-refoulement so long as their national security or independence is endangered by such huge menaces as ongoing mass refugee influxes or armed hostilities. As with the ICCPR and partially with the European Convention, the American Convention, however, overrides any derogation to the precept of non-refoulement under certain circumstances.[79] In that sense, the ability of the declaring country to thwart Article 22(8)'s non-return provision is not without bounds if it fails to put into practice its other international obligations and the Convention's limited non-discrimination in the first place.

The Cartagena Declaration

Developed after consulting the refugee treaty of the Organization of African Unity (OAU) (now called the African Union) as well as local experiences, the 1984 Cartagena Declaration on Refugees[80] contributes to the hemisphere's refugee legal system in two meaningful fashions. Its Article III(3) widens the U.N. treaty targets to further cover persons in flight from "generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances which have seriously disturbed public order." Besides prohibiting rejection at frontiers, it is vital to note that the Cartagena Declaration stands as the only single instrument in the world so far that upgrades the non-refoulement rule to the echelon of *jus cogens*.

The OAU Refugee Convention

In Africa, the 1969 OAU Refugee Convention[81] is the operative treaty. A number of traits explain why the OAU Convention is comparatively unique when assessed against U.N. and other regional treaties. It is the leading multilateral pact that categorizes a cluster of root causes other than fear of persecution[82] as additional constituents for non-refoulement eligibility in the region's refugee safeguarding structure. The vast notion of refugees in the African scheme necessitates treaty sponsors to conduct for the purposes of refugee identification an entirely neutral inquiry into disastrous situations that continue to run rampant in the country of flight. In marked opposition to the U.N. test of a well-founded fear of persecution, the African criterion is far more ready to grapple with the interests of large-scale refugee populations since it may give status recognition on a collective basis without having to await individualized screening procedures.[83] Moreover, the OAU Refugee Convention is distinctive in that it takes a pioneering step by unequivocally forbidding rejection at borders and refoulement-like actions.[84] Remarkably, the Convention precedes other equivalent accords by enjoining States parties to sanction non-return redress at all times, including critical national

crises.[85] In view of some of the U.N.-designated injustices of an infamous and inexcusable nature such as crimes against humanity, the OAU refugee treaty goes on to maintain uncompromisingly the exclusion of those evil perpetrators from non-refoulement benefits.[86]

Customary Norms

The canon of non-refoulement is recognized throughout the world. During the inter-war period (1919–1939), the community of territorial States had liberally furnished accommodations to considerable numbers of refugees in exodus from Russia, Spain, Germany, and the Ottoman Empire. Today, 141 countries have unconditionally committed their adherence to Article 33(1) of the U.N. refugee treaties. In spite of unsettled disagreements over the precise scope of non-refoulement, almost every U.N. treaty member across the globe has played host to some segment of asylum seekers as a humanitarian response.[87] In light of general and consistent national practice emanating from a sense of legal accountability, the principle of non-refoulement has assuredly attained the power of customary international law.[88] There are other normative prohibitions to which countries at large feel bound due to their taking on *jus cogens* or customary law properties. Among them, the ban on racial discrimination represents the former while proscriptions against defective or unjust court procedures, cruel and inhuman conditions, and arbitrary detention[89] fall into the latter category.

In summary, because of sovereignty concerns, international law has yet to vouchsafe the right of the individual to claim asylum in a refuge country. At least, it is internationally barred for a host country to have alien migrants limitlessly confined or compulsorily repatriated without full and equitable review proceedings. Plausibly enough, the entitlement to juridical personality must be regarded as one of the overriding customary requisites to secure due treatment for refugees. After all, the right itself forms the foundation on which the ability of a person to access due process is built. There is no way for a receiving country to survive customary international law scrutiny if it inexorably places asylum seekers in harsh, inhuman prison conditions and treats them in a manner apart from that applied to general population inmates. It is a well-settled rule that the prohibition of racial profiling and invidious discrimination categorically binds the community of all nations as a matter of *jus cogens*. Nothing can change its legal standing in the international system until another new law in the same hierarchical order takes shape and appears to supplant it. In international jurisprudence, however, a nation may legitimately repudiate the power of the above customary principles through its long-standing and concerted protestation against their normative genesis and growth.

INTERNATIONAL REMEDIES

Along with the U.N. and Inter-American Commissions on Human Rights, two other apparatuses have treaty-based jurisdiction to hear refugees' grievances against the United States. Pursuant to the Statute of the UNHCR (paragraph 8(a)) and Article II of the Refugee Protocol, the UNHCR shall from time to time see that States parties honestly carry out their treaty obligations due refugees.[90] On that principle, human rights activists can elect to utilize the Office as a pressure forum to influence U.S. policy direction in refugees' favor, particularly through its annual report to the ECOSOC and the U.N. General Assembly. Further, human rights activists may, in synergy with aggrieved countries, plead with the ICJ for justice since the USA, by unlimitedly ratifying Article IV of the Refugee Protocol, is bound to accept the Court's competence over Protocol-related disputes.

Numerous complaints have been lodged in recent years with the U.N. and Inter-American Human Rights Commissions. The complaints accused the United States of prominently detaining and returning Haitians and Cubans on a discriminatory basis or without due process of law, as compared to the treatment of other nationalities in the same situation as those refugees. Unfortunately, all cases but two aborted at the nascent stage of the Commissions' processes because of their inability to fulfill the requirement for exhausting U.S. domestic legal recourses ahead of looking to the Commissions for remedies.[91]

The first refugee petition that persuaded the IACHR to hear its claims and achieved a joyful outcome was *Haitian Center for Human Rights et al. v. United States* (1997). The case was brought subsequent to repeated staunch rebuffs by U.S. courts to their requested intervention in executive operations of refoulement on the high seas, actions clashing with international refugee safeguards protecting intercepted Haitians.[92] On 1 October 1990, the Center for Human Rights and Constitutional Law commenced its drawn-out petition before the Inter-American Commission on behalf of many individual victims and interested organizational entities located in the USA and Haiti.[93] Incipiently, the Center looked for precautionary measures from the Commission in the hopes of opportunely hedging off the continued implementation of interdiction and return by U.S. administrators before the case moved to substantive proceedings. In defense of the petitioners, the Center advocated rights of non-return and asylum on the basis of the American Declaration, U.N. refugee treaties, and customary international law. On 12 March 1993, the Commission issued precautionary measures requesting that the United States urgently review its Haitian interdiction and return policies. Following efforts in vain to reconcile the differences between the two sides through the routine approach of a friendly settlement, the IACHR entered into its merits deliberations.

In deciding on the relevance of Article XXVII of the American Declaration as put forth by the Center for Human Rights, the IACHR first pointed to the need to dovetail the Declaration's two "cumulative" criteria in order to rightfully activate asylum application.[94] What Declaration Article XXVII stipulated was that everyone enjoyed the right to "seek and receive asylum in foreign territory," but that right had to be synchronically "in accordance with the laws of each [asylum] country and with international agreements." For the Commissioners, the second parameter of "international agreements" could be traceable to two core U.N. treaties: the Refugee Convention and its Protocol.[95] Article 33(1) of the Refugee Convention was especially instructive in this context, given that the provision constructed a precondition of non-refoulement to enable refugees' protection claims to be later competently heard and verified by a receiving country. In contradiction to the U.S. Supreme Court decision in *Sale v. Haitian Centers Council*,[96] the Commissioners collectively argued (consistently with the UNHCR's view) that Article 33(1) of the Refugee Convention should be read extraterritorially for the purpose of not repatriating Haitian interdictees to their persecutors.[97]

Considering the other element of "the laws of each [asylum] country," the IACHR continued by making several observations. In spite of the *Sale* issuance narrowly demarcating the confines of Article 33(1), a number of executive pronouncements structured by President Ronald Reagan and his successors emphatically signaled the U.S. intent to greet Haitians at sea with "the right to seek and receive asylum."[98] Even if *Sale* was justifiable as a matter of U.S. law, according to the petitioners' reply brief, not all Haitian boat people seeking to avoid abuses in their homeland were bound for the United States. In this regard, the Commission particularly found that some Latin American countries had a humanitarian history of endowing Haitian refugees with admissions into their territories for asylum.[99] It was obvious that the interdiction program executed by U.S. authorities had the negative effect of prohibiting the Haitians from gaining entry into those asylum countries pursuant to their own laws.

On the authority of the IACHR's construction, the interdiction program erected by U.S. administrations to hold a mass Haitian exodus in check was internationally untenable in several respects. The system was antipathetic to the asylum provision in Article XXVII of the American Declaration because it halted from reaching safe haven the desperate Haitians en route to neighboring countries other than the United States. In addition, discriminatory U.S. operations at sea neglected a number of their other fundamental rights under the Declaration. By interdicting and driving Haitian migrants back to persecution against their will, the United States concomitantly facilitated the repression process of Haiti's military regime such that it materially

intruded on the refugees' right to life, liberty, and personal security (Article I).[100] The high-seas program further conflicted with the Haitians' rights to equality before the law (Article II) and access to the courts (Article XVIII).[101] The program was found to be illegal in those senses because it prejudicially singled out the Haitians for enforcement and divested them of refugee status hearings, in antithesis to the U.S. management of refugees originating from countries other than Haiti. In conclusion, the Commission formally recommended that the U.S. government compensate the Haitian victims for all wrongs it had caused in connection with its refoulement schema performed in international waters.

Another refugee case brought to the IACHR's attention was *Rafael Ferrer-Mazorra et al. v. United States*[102] (2001). The central issue of the controversy raised by refugee advocates surrounded remedying the liberty and due process violations for some 335 Mariel Cubans who had been dispersed and housed in ten detention facilities across the United States for a protracted period of time. The petition was an extension of the fight in *Garcia-Mir v. Meese*[103] (1986) previously defeated in U.S. courts. Its original submission to the Inter-American Commission dated as far back as 10 April 1987. Dedicated to this petition on behalf of the Marielitos was a team of six human rights representatives: the American Civil Liberties Association; the Atlanta Legal Aid Society; Covington and Burlington, Washington, D.C.; the International Human Rights Law Group;[104] the Lawyers Committee for Human Rights; and Southern Minnesota Regional Legal Services.

Acting on pro-refugee activists' allegations of continual confinement by the United States of the Cuban petitioners absent formal charges or judicial verification, the IACHR critiqued a line of blatant misdeeds committed by U.S. authorities from the perspective of the American Declaration. The Commissioners held the U.S. government to be accountable for violations of Declaration Articles I and XXV (the right to liberty and freedom from arbitrary detention). First, the Immigration and Naturalization Act (INA) on which the United States depended to deal with Mariel Cubans expressly set up "a presumption of detention" governing the appearance of excludable aliens. The stipulation of 8 U.S.C. § 1182(d)(5)(A) empowered the Attorney General with unfettered discretion to indiscriminately withhold physical liberty from excludable aliens pending their removals or parole inquiries.[105] The lawfulness of this immigration detention regime was entrenched further by U.S. jurisprudence in the sphere of refugees.

The doctrine of entry fiction treated that class of foreigners in a way as if they had never set foot on U.S. soil for the purpose of disaffirming their constitutional rights. Moreover, U.S. courts delimited the mode of detention that the Marielitos had long suffered to be characteristically

administrative, as distinguished from that normally received by the prisoner population in U.S. jurisdiction. Altogether, the array of described legal prescriptions placed the Cuban petitioners in a limbo of open-ended imprisonment without court endorsement and absent constitutional protections generally conferred upon U.S. citizens and alien individuals not classed as excludable. In the IACHR's consideration, the immigration rules applied to the Cuban detainees thereby not only negated their Declaration right to liberty as distinctly laid out in Article I. The rules additionally violated their Article XXV-based guarantee not to be curtailed of liberty arbitrarily.

Next, as with the U.S. domestic laws referred to above, the procedural mechanism that practically guided executive decisions on whether to release the Marielitos into parole status was pointed out by the IACHR as roundly arbitrary, in defiance of Article XXV. A couple of investigations pivotally led the Inter-American Commission to come up with such a negative position against the United States. In the opinion of the Commission, the standards for discharging the Cubans from U.S. immigration custody were loaded with obscure and discretionary wordings.[106] These provisions often inclined the administrators to make incongruous parole choices and left the Cuban applicants unable to "fairly and effectively" defend to their advantage. Under the Commissioners' fire came the phrases "emergent reasons" and "strictly in the public interest" in the INA.[107] So did the language of "'presently a non-violent' person," "likely to remain non-violent," and "not likely to pose a threat to the community following his release" in the Status Review Plan and its successor Cuban Review Plan.

As well, the nearly uncharted discretionary power authorized to a field enforcement executive pursuant to other regulations[108] turned out to be another target attacked by the IACHR.[109] Besides the said procedural ills, other elements in the parole review mechanism were equally disapproved of by the Inter-American Commissioners. These included: the placing of the burden of proof on the Marielitos to warrant their physical freedom from incarceration;[110] the lack of periodic hearings to supervise the persistent detentions at bar;[111] and the failure to have the U.S. judiciary fully decide the legality of those detention circumstances.[112]

Beyond identifying the U.S. violations of Articles I and XXV, the IACHR offered a final line of analytical interpretation indicating other Declaration errors on the part of the U.S. government. Unlike those groups of non-excludable foreigners gaining a cordial welcome in U.S. territory, the petitioners were mercilessly thrown into prisons indefinitely, resigning their freedom to the capricious and irregular decisions of a set of immigration officers. Such discrepant decision-making processes were attributed to nothing but their ill-fated status of

being excludable. In this connection, the administrative restriction of the Marielitos' physical movement was neither "reasonable" nor "proportionate" as understood by the Inter-American Commission.[113]

The restriction was baseless on the grounds that, unlike what U.S. immigration officials had argued, admission of the petitioners' right to liberty would not make it necessary to rashly set every petitioner free or incite waves of refugee influxes at U.S. borders. Moreover, persistently locking up the Cubans in prisons was glaringly disproportionate in terms of their identity as excludables. The prison time they served was either equivalent to or went far beyond the penalties typically meted out for severe criminal offenses in the U.S. justice system.[114] In fact, the entire legal and procedural schema to administer the releasability of the Marielitos was laden with arbitrariness and deficient in adequate post-detention reviews. The Cubans in executive custody were legally wronged, punishable in the perception of U.S. agencies simply because of the drastic measures they took to reach the USA in pursuit of sanctuary. For all of these reasons, the Commission further declared the United States to be in default of Declaration Articles II (equality before the law), XVII (recognition of juridical personality), and XVIII (right to a fair trial).

In addition to the Inter-American Commission, the UNHCR was also used by human rights activists for shaping and gathering campaign momentum to affect the outcome of refugee litigation in U.S. court. For example, the Center for Human Rights made an appeal to the UNHCR with an eye to neutralizing the power of the *Sale* precedent.[115] In a reply statement, the Office positively recited its long-established position of countenancing the extraterritorial reach of Convention Article 33(1). It publicly condemned the U.S. Supreme Court's *Sale* disposition and portrayed it as "a setback to modern international refugee law."[116]

To conclude, the filing of complaints for the benefit of Haitian interdictees and Cuban detainees scored rewarding payoffs at the Inter-American Commission and the UNHCR. In spite of those accomplishments, however, human rights activists continue to encounter what all cases on the international level would ordinarily experience: a poor degree of effective enforcement and a tardy countermeasure response from international tribunals. Indeed, there was no ensuing pragmatic action taken by the UNHCR to stop the U.S. high-seas interdiction program after the Office's protest announcement was made. Even on the heels of the Inter-American Commission's decisions, U.S. political elites either made no answer[117] or tepidly responded that the United States had little inclination to comply with the Commission's suggestion and pay the damages awarded to Haitian petitioners.[118] Further, the Commission's declarations came out belatedly, after many years had elapsed since the adjudication of *Sale* and *Garcia-Mir* by the

U.S. courts. By that time, the two courts rulings that respectively validated the executive institutions of interdiction and detention against Haitian and Cuban asylees had already brought calamitous legal fallout on succeeding cases raised in the domestic courts.

U.S. RATIFICATION AND STATUTORY IMPLEMENTATION

Statutory Sources

In the United States, municipal and international sources of laws, including Senate treaty qualifications and judicially self-erected doctrines, are closely intertwined in determining the outcome of court challenges to government detention and return programs. Three types of statutory measures worked on behalf of the refugee populations from Haiti and Cuba. The measures embraced a parole from detention pending status regulation, a withholding of deportation and return to persecution, and an asylum remedy against removal. Besides those general provisions, Cuban migrants in particular may benefit from the Cuban Adjustment Act of 1966.[119]

Prior to the Refugee Act of 1980,[120] the controlling rules on refugee matters primarily stemmed from the Immigration and Naturalization Act (INA) of 1952 and its amendments.[121] Neither an asylum mechanism nor a comprehensive refugee definition was then encompassed in U.S. law. Rather, the former found its enforcement under administrative regulations,[122] while the latter varied depending on different forms of admission procedures.[123] By and large, the pre-1980 INA was discriminatory and ideological in orientation despite reform attempts propelled by human rights activists.[124]

As early as 1952, Congress mapped out a parole arrangement to complement normal admission programs in specific refugee laws. Through that approach, some aliens unfit for narrow refugee identity were able to access the United States temporarily if their entry was in keeping with emergent reasons or public interests as determined by the Attorney General.[125] On the other hand, refugees in deportation (rather than exclusion) proceedings might rest on a discretionary withholding provision to secure from the Attorney General the guarantee of not being returned to "physical persecution."[126] In either case, the alien applicants were entitled to retain counsel on their own for defense purposes, a privilege identically available in current removal (i.e., exclusion and deportation) processes.[127] Beginning in 1952, there is a statutory six-month constraint regulating administrative custody of deportable aliens pending the completion of deportation tasks by the Immigration and Naturalization Service (INS).[128] Yet, no equivalent provisions are in existence to address the like situations of the excludable Marielitos.

In 1965, two underlying sentiments created an amassed vital impetus for revamping the withholding device so as to be more in harmony with international law. One was from the executive department and the other from the legislative. Over the course of 13 years, administrations from Harry S. Truman to Lyndon B. Johnson had incessantly grumbled over the limited value of the "physical persecution" standard in the foreign policy arena.[129] Added to the executive eagerness to magnify the terms for refugee recognition was growing support among lawmakers for employing the 1951 Refugee Convention domestically.[130] Such a favorable congressional atmosphere toward incorporation of international refugee law was especially noteworthy because it came under circumstances in which the United States had yet to become a signatory to that treaty at all. Based on these two leading political impulses at the time, Capitol Hill renewed statutory grounds for withholding to include being in danger of persecution on account of race, religion, or political opinion, moving the U.S. domestic refugee regime a step closer to globally agreed-on principles.[131]

Further, Congress in 1966 passed a piece of legislation as part of its Cold War package to counterweigh Fidel Castro's power grip on Cuba. Under the Cuban Adjustment Act, asylum seekers from Cuba are automatically accorded permanent resident status insofar as they gain admission or parole after 1 January 1959 and remain in the United States for at least two years. As more and more Haitian refugees were kept outside U.S. borders in the 1970s and 1980s, discrimination charges against this preferential law became a frequent theme of debate in U.S. courts.

In the years subsequent to the passage of the INA, a rival pull was exerted between the executive and legislative branches with each wishing to take the lead in conducting refugee policy-making processes. Most often, executive decision makers expanded on parole authority to shelter communist-driven refugees en masse, in the absence of prior congressional consent and in conflict with statutory implied intent to foresee the use of parole otherwise.[132] At the same time, the administrators exploited expedient strategies such as a "clear probability" barrier and hasty examinations to frustrate withholding and asylum claims lodged by certain groups of refugees.[133] These refugees were rejected purely because their admissions aroused little Cold War interest in the minds of U.S. political leaders. To counterbalance the abuse of parole, members of Congress from the early 1970s set out a series of hearings on statutory reforms. Their agenda was to reconstruct a new legal regime that could bring executive practices back on the right track of congressional oversight and in alignment with U.S. treaty obligations. In 1978, Representative Elizabeth Holtzman successfully initiated an amendment to deprive Nazi war criminals of the chance to qualify for

non-refoulement benefits.[134] Irrespective of that legislative improvement, not until 1980 did Congress make an effective breakthrough in closing the long-standing gap between U.S. and international refugee laws.

Under the Refugee Act, a uniform and objective treaty standard replaces the traditional dominance of ideological and geographical elements in refugee status checking.[135] All Protocol refugees stand on an equal footing to enjoy statutory safeguards of parole, withholding, and asylum without regard to their race, religion, nationality, and social or political affiliation.[136] As human rights organizations propounded, the fresh amendment augments the perimeter outside the U.N. treaty by additionally regarding displaced persons as "refugees" entitled to claim analogous treatment.[137] By adopting this wide-ranging notion, legislators expected that the administration would possess a degree of flexibility sufficient to deal with prisoners of conscience throughout the world. There is an exception to this norm. Any alien who participated in persecution prohibited under U.N. refugee treaties, directly or indirectly, would by no means fit the meaning of a refugee in the 1980 Act. On the drafters' reading, this preclusion clause was squarely synonymous with treaty refusal of refugee eligibility to those who "committed a crime against peace, a war crime, or a crime against humanity."[138]

As in the old statute, the Attorney General's discretion in the Refugee Act is retained to release "any alien applying for admission" conditionally and temporarily into U.S. territory.[139] To ward off a repeat of the past executive manipulation of parole to accept massive refugees pursuant to foreign affairs incentives, three heterogeneous approaches are installed to rule out that general discretion clause in some situations. Specifically, the modified parole prescription reinstates the granting of parole relief on a case-by-case basis.[140] By means of an ordinary asylum process, the 1980 Act encourages administrators to admit individual refugees who are already present within U.S. territory or at its border threshold.[141] Along with that individualized review system, the Act orchestrates a blanket admission mechanism allowing a batch of overseas refugees to settle on U.S. soil.[142] Such group determinations made annually by the Attorney General, however, must be conditioned by numerical ceilings and geographical designations imposed by the President after consultation with Congress. By regulating refugee admission this way, the Refugee Act enables INS officials to turn to the new refugee quota system for foreign policy promotions.

Alongside the refugee definition, Congress translated advocacy groups' testimony into two other critical provisions linked to withholding and asylum procedures in the Refugee Act.[143] To begin with, the withholding revision closely tracks the language of Article 33(1) under the U.N. Refugee Convention by saying that:

> The Attorney General *shall not deport or return any alien* (other than an alien described [as a Nazi]) to a country if…such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[144]

The 1980 amendment departs from its predecessor in several points. The withholding function shifts from being discretionary into obligatory in nature. Aside from those grounds already set in 1965, refugees may invoke persecution founded on nationality and social group to defend themselves against refoulement. By removing from its original version the words "within the United States" that immediately followed "any alien," the statutory adjustment negated adverse court decisions in a manner that conceded the legality of alien migrants' raising withholding claims in exclusion proceedings.[145] Concurrently, it put the withholding mechanism into operation in concert with the letter and spirit of Convention Article 33(1). In other words, the condition triggering the withholding regime is entirely based on a personal definition rather than on geographical location.[146] It does not matter any longer whether a foreign asylee is within U.S. borders or at point of entry or at sea. Insofar as that person falls under the definition of a refugee, he or she has a capacity to procure protections from forcible repatriation. Further, the scope of prohibited criminal activities in the withholding clause stretches beyond the 1978 ban on Nazi offenses.[147] A number of U.N. exclusions are codified as a result: treaty-charted persecution, a particularly serious crime confirmed by competent courts and believed by the United States to be jeopardizing the safety of its community, a gross nonpolitical crime perpetrated abroad, and a national security risk. Unlike an asylum program, the withholding provision does not permit the extension of that benefit to an alien's immediate family.[148]

Second, alien migrants for the first time have a statutorily endowed opportunity[149] to file asylum claims with immigration agencies in hearings separate from the processes of deportation and exclusion after they physically show up in the USA or at its land borders, seaports, or airports. To do away with the politicized essence of executive practice in asylum adjudication, the Attorney General is charged with a mandate to look into asylum cases based on statutory refugee definition.[150] Except for the exclusion of (Nazi) persecutors from refugee eligibility,[151] the Refugee Act is textually silent on other criminal grounds on which a refugee is barred from asylum relief.[152] Nor does it refer to procedural safeguards such as a right to attorney in asylum proceedings.[153] Asylum protections, even after being rendered at the Attorney General's discretion, do not categorically warrant the right of a refugee to stay indefinitely in the United States. The Attorney General may choose to abrogate asylum standing whenever changed circumstances arise in

preference for that refugee's return. The final point that merits mention about the Refugee Act is its rewriting of the Cuban Adjustment Act by narrowing the required admission and parole length to a mere one year before Cuban migrants are given permanent residence.[154]

With increasing concerns over criminal immigrants, Congress in 1990 set about introducing mandatory exceptions to asylum relief into law. The standard strictly strips alien convicts with drug-related or violent criminal backgrounds of the ability to apply for asylum in immigration proceedings.[155] On top of that, the Immigration Act of 1990 equates these aggravated drug-related or violent felonies with "particular serious crimes" in the withholding Article, though not going so far as to necessitate the causality between "a particular serious crime" and "a danger to the community."[156] By setting forth this way following the UNHCR's advice,[157] the Act purports not to establish an absolute disclaimer of non-refoulement for aggravated foreign felons. Still, the Act widens the content of the 1978 Holtzman Amendment to insert an act of genocide as one of the statutory criminal grounds for the INS to brush aside withholding claims.[158]

In the mid-1990s, a resurgence of domestic outcries against illicit entrants and terrorist subversives[159] again pushed U.S. refugee law into another round of legislative scrutiny and metamorphosis. The outgrowth was the creation of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). One of the new features in the IIRIRA is its intent to moot negative court opinions in serial lawsuits pressed by Chinese litigants who allegedly had been coerced by the Chinese government into compliance with a birth control agenda.[160] To achieve that end, the 1996 amendment particularizes the term of political refugee as entailing a category of persons in exodus from forced abortion, involuntary sterilization, or any other kinds of injustice arising from a failure to undergo or support such a project.[161]

Concerning the parole scheme, the IIRIRA alters the 1980 words to read "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[162] Most importantly, the detention of alien arrivals without identification is no longer within the province of INS regulatory provisions. Under the IIRIRA's "expedited removal" process,[163] asylum officers will need first to bring into custody those foreign applicants[164] for asylum and withholding until an early stage of a "credible fear of persecution" screening test is completed. In effect, even assuming that bona fide refugees have passed the prescribed initial interviews and entered normal asylum and withholding processes in immigration court, they are still unlikely to be discharged on parole since INS reviewers have an option not to do so.[165]

With the speedy removal system crafted by the IIRIRA, there are now three patterns of seeking withholding (and asylum) in the United

States.[166] Besides that, the term "restriction on removal" is used under the IIRIRA to substitute for "withholding."[167] In spite of those amendments, alien arrivals are vulnerable to being returned far more easily than in the past because they lack adequate procedural safeguards during the course of hastened "secondary inspections" and "credible fear" interviews.[168] Once over, a "particular serious crime" exception to the non-refoulement umbrella is re-formulated in terms of aggravated felonies punishable by at least a five-year prison term. By adding given types of non-violent crimes to the 1990 list of aggravated felonies, the IIRIRA clause is in a position to compulsorily cast out scores of lawbreaking refugees without balancing the persecution they fear against the culpability of their wrongs.[169] Terrorist refugees[170] are also removable regardless of their compelling justifications for the commission of violent acts such as taking up arms against a brutal despotic regime.[171] Aside from the above statutory refoulement, the Attorney General may discretionarily turn away refugee offenders outside the category of aggravated felons.

In like manner, the prospect for individual aliens to obtain asylum grants in the United States has been detrimentally affected by the enforcement of wide exclusions[172] and rushed removal. The last barrier to qualifying for asylum is that alien applicants are required to meet a one-year time limit except where changed or extraordinary circumstances otherwise dictate.[173] There is nonetheless one notable improvement addressed in the asylum amendment. The IIRIRA codified one of the 1990 INS regulations implementing the Refugee Act, obligating the Attorney General to apprise alien claimants of their right to representation in asylum procedures accompanied with the names of accessible pro bono attorneys.[174] Consequently, affirmative asylum petitioners today have a statutory basis to ask for legal services, just as other defensive asylum seekers can do so in the context of removal (deportation and exclusion) proceedings.

The 9/11 terrorism onslaughts brought still another new turn in the U.S. immigration law toward toughening refugee treatment, through possible INS misapplication of some renewed terrorism-related clauses. As a counter-terror measure, the USA PATRIOT Act places at the forefront of its agenda forestalling the smuggling of foreigners into the USA to undertake disruptive sabotage against U.S. security interests. Prior to 9/11, the IIRIRA considered "terrorist activity" to embody hijacking, hostage taking, assassination, or the use of any weapons of mass destruction or "explosive or firearm…to endanger, directly or indirectly, the safety of one or more individuals, or to cause substantial damage to property."[175] If an individual's alleged crimes were merely "a threat, attempt, or conspiracy" of the aforementioned conduct, the acts

nevertheless sufficed to dismiss his or her request for asylum or withholding of removal.

The post-9/11 era has witnessed a definition of "terrorist activity" made more sweeping in its reach. Now, the PATRIOT Act recognizes the employment of "any weapon or dangerous device" for the purpose of personal endangerment and property damage as an additional legitimate ground for setting off an INS denial of sanctuary.[176] As a matter of fact, indistinct wordings like those leave a lot of room for likely misuse and enlarged interpretations throughout immigration screening processes. Other amended stipulations, for instance, "material support" for terrorist organizations as well as certification and detention of "suspected terrorists"[177] may potentially contribute greatly to a practice in violation of international refugee and human rights law.[178]

In particular, the Attorney General is authorized to suspend non-U.S. citizens' relief from removal at any time and commit them to custody inasmuch as they are identified as "suspected terrorists."[179] The "suspected terrorists" can be held uncharged for up to seven days from the start of these detentions[180] and for "additional periods of up to six months" on two conditions: first, that the arrestees are proven unlikely to be successfully removed from U.S. soil "in the reasonably foreseeable future," and, second, that their releases would place the United States under threat to "[its] national security…or the safety of the community or any person."[181] The limitation on lengthy confinement and the call for periodic review every six months by the Attorney General does not comparably benefit persons whose asylum claims are already approved[182] because under statutory terms they are ascribed to a class of immigrants non-removable from the U.S. domain. This means that, once certified as "suspected terrorists," they can be relentlessly subjected to imprisonment for uncertain durations until they voluntarily forfeit their asylum holding and consent to deportation back to their native lands.

Corresponding Treaty Legislation[183]

The United States subscribed to the Refugee Protocol on 1 November 1968 without expressing any intent to pare down the force of Article 31 domestically, let alone Articles 1, 3, and 33 whose character the Convention delineates as mandatory during peacetime. In 1980, Congress passed the Refugee Act to formally carry the Protocol into effect after its decades-long charges of INS refugee practices as being contrary to U.S. treaty obligations.

Antithetically, since its ratification, U.S. political leaders have declared that the Torture Convention cannot operate of itself without the aid of future implementing legislation. Not until 1998 did they give internal effect to the non-refoulement regime under Article 3 of the Convention.[184] On that domestic legal fiat, the enforcement of the

Torture Convention in U.S. jurisdiction, however, yields to various kinds of Senate qualifications. Of relevance to non-refoulement management are two understanding clauses attached to Convention Articles 1 and 3. Specifically, an asylee needs to submit a threshold of evidence that he or she is "more likely than not" (i.e., a clear probability) at risk of official torture in order to meet Article 3's "substantial grounds for believing…[a] danger of being subjected to torture." To fit Article 1's definition of an act of torture brought about "with the…acquiescence of a public official or other person acting in an official capacity," if applicable, an asylum seeker has to first substantiate that this individual in complicity had a "prior awareness" of the conspiracy for the alleged perpetration of torture and subsequently omitted his or her duty to preempt its occurrence.

In some respects, the laws executing the Torture Convention empower alien migrants with more generous protections than the Refugee Act and its later amendments. Other than limitations on torture, the former allows overseers of the INS, now called the Bureau of U.S. Citizenship and Immigration Services (USCIS), to defer the removal from the United States of criminal refugees otherwise denied non-refoulement by the latter. However, the legislation implementing the Torture Convention makes it viable solely for challenging prospective actions that would violate its terms.

Executive Orders

The U.S. President has (implicit) constitutionally and statutorily derived authority[185] to adjust an immigration program whenever the entry of any aliens into the United States implicates national sovereign interests. It was within this legal context that President Reagan and his successors issued an array of executive orders in grappling with refugee matters during the 1980s and 1990s.

Weeks after the passage of the Refugee Act, it became obvious that the statutory framework in place could not meet the challenge arising from sudden mass flows of refugees from Cuba and Haiti. At the urging of refugee advocates, President Carter then designed a special Cuban-Haitian entrant plan to expediently parole a large number of refugees from INS incarceration.[186] In contrast, with the support of Capitol Hill lawmakers, thousands of criminals and mental patients released from Cuba together with other Marielitos who later had their parole status revoked remained in immigration confinement. Following this refugee crisis, President Reagan acted to temper domestic fears of future refugee inundation by reviving the operation in May 1981 of the United States' traditional detention system, which had long been abandoned ever since the 1954 closing of Ellis Island.[187] The executive detention was

particularly directed at Haitian boat people because of Cold War considerations and other discriminatory factors.

Meanwhile, the interdiction institution in international waters built by various Presidents had won congressional support for appropriations.[188] Four phases of involuntary repatriation were unfolded accordingly. The first lasted throughout the Reagan years and into much of George Bush's presidency. Immigration agencies during this period rested their interdiction activities principally on President Reagan's two edicts: Proclamation 4865[189] and Executive Order 12324.[190] Nonetheless, the orders instructed them at the same time to perform the tasks in accordance with the Protocol's non-return criterion. In practice, procedural and time deficiencies pervaded the entire course of status interviews. From the outset of the high-seas blocking on 21 October 1981 until its brief suspension as a humane response to Haiti's military coup of September 1991, almost all Haitians on board Coast Guard vessels had been perfunctorily grouped as economic migrants and were disavowed their ongoing pursuit of asylum in the United States.[191]

After a short-lived hiatus, President Bush restored the interception on 18 November 1991. For a while, the administration introduced somewhat marginal procedures for refugee identification, leading to approximately one third of Haitian detainees at Guantanamo going to the USA for further asylum applications.[192]

The third stage emerged when President Bush on 23 May 1992 backed out of the already poor procedures via the Kennebunkport Order (Executive Order 12807)[193] in a bid to stem the continual refugee outpouring from Haiti. On that presidential direction, the Coast Guard would summarily repatriate all Haitians captured on the high seas without any process to verify their asylum needs. The immediate return policy continued in force even though then-exiled Haitian leader Jean-Bertrand Aristide sent a notification letter to President Clinton on 4 April 1994 couching his wish to terminate the interdiction agreement between the two countries.[194]

Finally, President Clinton waged an attitudinal swerving against Cuban refugees by means of a series of executive directives. At one time, the administration established a Guantanamo detention scheme in reaction to the August 1994 Cuban exodus. The move abruptly broke a long-term U.S. posture of readily presuming Cuban asylees to be political refugees and treating their migration to the United States hospitably. At another time, President Clinton simply ordered the quickening of return against Cuban (and Haitian) interdictees. Even under the latter circumstances, responsible INS officials, however, assured human rights advocates that their high-seas operations would be consistent with the non-refoulement principle and due process requirements.[195]

Relevant INS Regulations

Likewise, INS guidelines for imposing interdiction at sea[196] manifestly conceded the vitality of actualizing U.S. treaty commitments in this regard. As for Haitian and Cuban detainees, two regulatory rules were notably related to their physical well-being during this same period of time.

Haitian Refugees

Beginning in May 1981, the INS renewed a rigid parole approach exclusively on President Reagan's orders. Parole refusals took place as a rule even when Haitian refugees posed no security or absconding risk in the United States. The absence of a formal rule-making process as specified by the Administrative Procedure Act[197] quickly raised questions regarding the legality of INS jailing of around 1,800 Haitians, in *Louis v. Nelson*.[198] On that account, the Attorney General was enjoined to follow the *Louis* court's decision by publishing the intended policy change in the Federal Register and acquiring comments from interested parties such as the UNHCR. Despite strong opposition from human rights activists as violating international refugee law, the Attorney General on 19 October 1982 promulgated INS detention practices into regulations.[199]

Cuban Refugees

In addition to constitutional due process protections, the Cuban Review Plan[200] set forth by the Department of Justice represented yet another procedural safeguard in U.S. law accorded to Mariel Cubans. Specifically, the Attorney General in July 1981 developed a Status Review Plan and Procedure with a set of enhanced screening methods aimed at ensuring due process for the Cubans held behind bars.[201] The federal courts' dispositions in *Rodriguez-Fernandez v. Wilkinson* and *Soroa-Gonzales v. Civiletti*[202] were key factors driving this shift in review formulas. The Review Plan to re-examine parole eligibility resulted in the freeing of 1,305 Mariel Cubans from imprisonment.[203] However, it was soon discontinued when the USA and Cuba struck an agreement on 14 December 1984 to return 2,746 named excludable Cubans.[204] Still, further INS procedural improvement followed a succession of uprisings staged by aggrieved Cuban detainees in resistance to the State Department's 20 November 1987 announcement to resume the prior repatriation deal with Cuba. At the present time, pursuant to the newly devised Cuban Review Plan, immigration authorities must reopen parole cases each year, determining whether the Marielitos in INS custody measure up with the stipulations for release into the United States.

Bilateral Treaties/Agreements with Haiti and Cuba

Two bilateral treaties were helpful in governing U.S. treatment of Haitian and Cuban refugees seized at sea. In an effort to hinder the massive flight of refugees from Haiti, the Reagan Administration concluded an interdiction accord with the repressive Duvalier regime on 23 September 1981. In the affirmative, the administration ascertained the responsibilities of the United States to honor the non-refoulement norm by enunciating that:

> Having regard to…the international obligations mandated in the Protocol Relating to the Status of Refugees…the United States Government confirms with the Government of the Republic of Haiti in its understanding of the following points….It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.[205]

Similarly, the Clinton Administration pledged to implement the non-refoulement principle in a joint statement re-signed with Castro Cuba on 1 May 1995. The agreement was to lay the ground for a future return of all Cuban asylum seekers located at sea to Cuba, given that the earlier Guantanamo detention system proved to be expensive in its enforcement and elicited a torrent of protests from the international community. The agreement, however, demanded that "all actions taken be consistent with the parties' international obligations."[206] In a response letter to Human Rights Watch about President Clinton's new course of action, Doris Meissner, Commissioner of the INS, elucidated the quoted paragraph a step further by indicating that the authorities would venerate the non-return precept in conducting high-seas repatriations.[207]

Summary

International and domestic elements alike have done their part in shaping refugee law in the United States. In the early Cold War era, U.S. refugee law was profoundly affected by foreign affairs as evidenced by individualized legislative programs and conditional entry status designed to receive fleeing persons rooted up by communist takeovers in their homelands. Once U.N. human rights and refugee instruments were espoused by the United States, the domestic legal regime could no longer detach itself from the influences of international standards lobbied for by many pro-refugee activists. Paradigms of this kind were the incorporation by the executive and legislative branches of the neutral refugee definition, non-refoulement, and asylum into an array of municipal and bilateral provisions. Today, the definition of refugees under U.S. law is even broader than that drawn up in the U.N. treaties.

On the other hand, since the 1990s, domestic refugee law has undergone dramatic changes because of public concerns over job displacement, national security, terrorism threats, and perceived abuses of the asylum system. By setting up expedited removal and far-flung exclusions, the current INA, in violation of international refugee law, not only locks undocumented aliens behind bars as a deterrent, punitive measure. The Act also makes it considerably easier for bona fide alien asylum seekers, and not just those who are convicted criminals or suspected terrorists, to be negated refugee protections.

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CHAPTER 6:

Refugees 2: Detention and Return Litigation in U.S. Courts

THE LEGAL MODEL AND FUNCTIONALISM APPLIED

When the U.S. government endorsed Article 33(1) of the Refugee Convention by adopting the Refugee Protocol, it did so unconditionally.[1] To bring domestic immigration enforcement into conformity with the international non-return standard, Congress decided to write the language into the Refugee Act after prolonged concerns over the failures of the responsible agencies to realize that treaty expectation. By incorporating the Protocol formula into the same documents on which the interdiction program built its legitimacy, administrations from Presidents Reagan to Clinton coherently proclaimed their resolve to address refugee boat people in international waters pursuant to U.S. treaty liabilities.

By contrast, the U.S. recantation from its pledges to Protocol Article 31(1) followed the refugee exodus from Haiti and Cuba in early 1980. The resurrected detention policy reached its peak when President Clinton repealed traditional leniency toward general Cuban migrants by instructing to house all future interdictees at overseas camps until they chose either return to Cuba or resettlement elsewhere. Unlike its international treaty promise in the non-return domain, the executive department has since the 1980s delivered a series of hostile directives and regulations to uphold its refugee detention practice. Overall, executive decrees and legislative laws have steadily shored up the international non-refoulement norm while administrative orders reiteratively repudiated foreign asylum seekers the right to freedom from arbitrary and lengthy incarceration. Assuming the legal model is valid in understanding judges' voting behavior in the refugee area, then U.S. judges should accord greater esteem to international refugee law in return cases than in detention cases. Again, this legal model supposition

is tested through the process of qualitative and quantitative approaches, as exercised in Chapter 4.

DETENTION CASES

In habeas corpus and injunction proceedings, refugee advocates, including Arthur C. Helton, fought against a multiplicity of procedural and substantive obstacles that government officials erected to sustain their power in refugee parole decisions. Every now and then, the government brought forward the entry fiction thesis to countervail the assertion of constitutional due process rights by Haitian asylees who were unable to cross the border before detection by INS officers. On other occasions, the government responded to international legal challenges from confined Haitians and Cubans by arguing the political question doctrine, a lack of standing, no factual showing of prejudice, the non-self-executing treaty postulate, and the *Paquete Habana* maxim.

To controvert these repellant positions advanced by the administrations, representing attorneys with amicus support presented a variety of collective claims before U.S. judges. They contended that the concept of equal protection contained in the Fifth Amendment sternly outlawed the repudiation by the INS to extend constitutional due process protection to excludable aliens just because they had yet to enter U.S. territory.[2] Equally important, the Amendment also renounced the invidious INS regime of systematically locking away persecuted Haitian asylees because of their race and nationality. Further, all refugees placed in INS exclusion processes, regardless of their nationalities, had an unprejudiced opportunity to maintain substantive due process safeguards under the Fifth and Sixth Amendments. In that connection, it was thereby untenable for INS agents to invoke indefinite confinement as a method against unreturned Cuban detainees to substitute for futile executive efforts to deport them.[3] Similarly, the immigration authorities were constitutionally barred from resorting to punitive administrative custody to serve the purpose of thwarting the Haitian refugee population flooding into the USA. Along with these applicable constitutional clauses, the First and Eighth Amendments entitled those Haitians and Cubans in INS detention to legally attack their situation of being denied association with lawyers of their choice and of being indeterminately placed in harsh, degrading prison conditions.

Moreover, pro-refugee activists stated that the Refugee Protocol and customary law were informative either as a rule of decision or as an interpretive tool to foster the ability of the courts to clear up the detention issue. In actions speaking for Haitian refugee inmates, they emphatically pointed out the need of INS reviewers in parole cases to employ the precept of equal treatment under Article 3 of the Refugee Protocol. In

addition, human rights defenders called for the release of the Marielitos from immigration custody based on the principle of customary international liberty. In particular, the victory in *Rodriguez-Fernandez v. Wilkinson* (1981) sent a highly exciting signal to pro-refugee advocates about the promising invocation of customary law to make arguments in U.S. courts. For that reason, the human rights community routinely cited the Tenth Circuit judgment in *Rodriguez-Fernandez* to repulse the inhospitable *Paquete Habana* rationale: that customary law which had been accepted as such by the United States was assertable to the limited extent that there was a want of controlling domestic law or court decisions or treaty provisions in place.

Beyond the cases taken to the courts, Arthur C. Helton stressed at a congressional hearing that Haitian immigrants had a collective right to be free from discriminatory jailing by INS screeners.[4] Acting on behalf of the Lawyers Committee for Human Rights, he spared no effort to make Haitians' grievances heard and addressed at the U.N. Human Rights Commission. A frustrating defeat nevertheless came on procedural grounds, for not first exhausting domestic legal remedies.[5] As reviewed in Chapter 5, the refusal of U.S. judges in *Garcia-Mir v. Meese* to deal with the ordeals of the unconvicted Mariel Cubans held in INS custody had evoked a group of human rights activists to expand their legal battle to the Inter-American Commission. Their action not only led the hemispheric body to conduct on-site visits to the local facilities in the United States where many Marielitos were confined for a number of years.[6] It also secured an advantageous declaration against the USA for its selective use of the protracted detention machinery against the physical liberty of discrete classes of excludable Cubans.

Returning to the theme of legal actions in U.S. courts, it was not uncommon to see judges take up judicial conservatism in decisions on executive detention cases. In balancing the litigants' rival interests in the management of foreign excludables, U.S. judges almost always leaned toward the governmental position. In most instances, the entry fiction doctrine was relied upon to dismiss constitutional claims. Further, in order to set aside international rights of action, judges laid out a number of hurdles to warrant their negative decisions against refugee defenders: conditional support of international law when pressed by human rights activists or in the absence of constitutional stipulations; a presumption of fairness because the Cuban petitioner would otherwise had been incarcerated in a Cuban prison for his commission of criminal offenses before disembarking on U.S. shores; the non-self-executing treaty rule; narrow treaty construction; insufficient evidence; and the *Paquete Habana* predicate.

Judgments Based on a Municipal Law Rationale

The first obstacle faced in detention litigation was a conditional acceptance assumption. In *Soroa-Gonzales v. Civiletti* (1981), Judge Marvin H. Shoob sitting on the U.S. District Court for the Northern District of Georgia declined the suggestion of human rights attorneys that he construe municipal parole principles with the aid of customary international law. On the basis of an infraction of domestic law provisions,[7] however, the Cuban habeas petitioner, Genaro Soroa-Gonzales, finally regained his lost freedom from INS custody. If asked to do so by human rights lawyers, Judge Shoob added, he would have perceived an INS order to place the petitioner under continued confinement as equivalent to arbitrariness in breach of Article 9 of the UDHR, Article 9(1) of the ICCPR, and Article 7(3) of the American Convention.[8]

In *Fernandez-Roque v. Smith*[9] (1983), Judge Shoob again restricted the application of international legal effect to certain rare circumstances. In his view, the U.S. Constitution already afforded abundant due process of law to guide INS examiners in the course of parole inquiries. There was no need to advert to international law in this context so long as the Mariel petitioners could repair the harms they had been subjected to after fleeing to the United States by recourse to constitutional protections.[10]

Another factor put forward by judges to rationalize a deviation from international refugee standards was an imprisonment postulation. Structuring a sole dissent in *Rodriguez-Fernandez*, Tenth Circuit Judge Robert H. McWilliams invented an implausible logic opposite to the majority judgment.[11] Had he not come to the USA, Pedro Rodriguez-Fernandez would have been held in a Cuban prison for his perpetration of a crime associated with moral turpitude prior to joining the "Freedom Flotilla" with other Marielitos. Founded on that undeniable fact, Judge McWilliams saw it as quite fair for the Attorney General to rule against his parole request and put him behind bars pending efforts to deport.

The third hindrance surfaced when judges mingled the non-self-executing proposition with a narrow treaty reading or depended entirely on the latter to preclude international safeguards for detained refugees. One of those instances was the Second Circuit opinion in *Bertrand v. Sava*[12] (1982). Following its comment that the local district director committed no constitutional violation in rejecting paroles,[13] the *Bertrand* majority went on to state its views concerning the relationship between the Refugee Act and the Protocol.

By enacting the 1980 Act, Congress purported to keep immigration laws in line with the Protocol's refugee definition and non-refoulement.[14] Beyond those particularized bounds, the lawmakers implied no additional effort to alter or amplify the remaining status quo. In that sense, it was clear that the Protocol did not take on self-executing

authority. The Refugee Act was at most intended to implement no more than Protocol Article 33(1) alone. Consequentially, it was unsound for the Haitians in this instant case to seek relief from the punitive and discriminatory detention by the INS based on Protocol Articles 3 and 31(1). In brief, the Second Circuit throughout its deliberations gave statutory import very great weight in delimiting the Protocol's domestic effect. While explaining the trial court's line of investigation differently from the *Bertrand* majority, Judge Lyle A. Kearse concurred by overruling the petitioners' treaty arguments.[15]

Another example is the *Jean* case disposed of by federal Judge Eugene P. Spellmen of the Southern District Court of Florida. The decision was structured on a validity thesis, coupled with Judge Spellmen's own grasp of Senate statements on treaty force.[16] During the Reagan years, Judge Spellmen began, the stripping of refugees' freedom became fairly commonplace in the conduct of immigration policy, in order to contain refugee populations streaming into the United States. This reinstated detention system, however, was not purposely leveled at Haitian immigrants for its employment. Nor did INS officials bring elements of race and nationality into parole considerations to the detriment of Haitians' exercising their equality rights as set forth in the U.S. Constitution and the Protocol. Secondly, the incarceration had not acquired a penal character. Rather, it operated purely for the purpose of preventing the mass exit of refugees from stretching national resources and overloading the capacity to accommodate them. Due to the detention operations, the executive processing of asylum petitions sped up substantially and prolonged delays were avoided. Judge Spellmen determined that the INS actions at bar were performed consistently with President Reagan's orders and did not indicate the existence of any violation of Protocol Articles 3 and 31(1).

As with the *Bertrand* Court, Judge Spellmen consulted the Senate ratification history for extracting pertinent sources in support of his outlook on treaty power. On his understanding, Congress at the time of the treaty adoption did not contemplate the Protocol to be used so expansively as to eviscerate the substance of all existing immigration laws. In fact, Protocol Article 31 was exactly one of those treaty provisions whose viability the lawmakers had yet to acknowledge. The Haitian migrants were ineligible to pursue the awarding of habeas corpus under Article 31(1), to the extent that the detentions in question were traceable to domestic mandates.[17] For Judge Spellmen, municipal law prevailed, whether or not it ran afoul of international law.

The fourth legal hurdle embraced was a judicial disavowal of the very existence of the customary international law system or a heavy reliance on the *Paquete Habana* precept that ranked customary law as the least potent and lowest-ranking element in the echelon of treaties and

municipal law. The ruling announced by the Eleventh Circuit in *Jean* stands as an example of the denial of customary law per se. Resting on the ground of lack of evidence, the Circuit majority[18] overrode the fervent pleas of refugee activists seeking the release of a group of Haitian detainees pursuant to international customary jurisprudence.[19] In light of U.S. laws and the attribute of sovereignty in immigration matters, the *Jean* Court instead averred that the representative bodies of the U.S. government had the authority to decide whatever course of action they deemed appropriate to regulate the exclusion or admission of aliens.[20]

Specifically talking of the problem of parole, the majority elaborated this plenary doctrine on which to sidestep the wielding of judicial review. The decision on whether to parole or jail an excludable alien constituted an integral and inalienable part of an admission proceeding and fell firmly outside the province of the judiciary. Parole signified an act of extraordinary sovereign largess and was designed to give excludable asylees temporary access to the USA pending meticulous status investigations. For that matter, Congress had statutorily equipped the Attorney General with far-ranging powers to apply personal judgment in this regard. It was perfectly legal for the Attorney General to consider race and nationality in parole examinations without having to call forth charges of abuse of the process.[21] Within this exclusion background, the Haitian litigants were unsuited to claim the constitutional status necessary to remedy their circumstances. Nor could they look to international law for this end. The plenary power rationalization upheld by the *Jean* majority garnered endorsement from both groups of partially dissenting and partially concurring judges.[22]

Besides the *Jean* case, *Garcia-Mir* offers another opportunity to make sense of the fourth limit standing in the way of detention litigation. First, Judge Shoob found himself completely bound by the appellate court holdings in *Jean* and *Fernandez-Roque* conceiving constitutional law as having nothing to do with excludable aliens. On that principle, he immediately discarded his earlier stance of treating the excludables as constitutional persons before the court.[23] Additionally, the *Paquete Habana* theorem occupied significant value in Judge Shoob's mind, allowing him to reverse his previous restrictive recognition of international law in *Soroa-Gonzales* and *Fernandez-Roque*. In doing so, he not only reduced the potentiality of implementing customary law to a remote possibility, but also established adverse case law in *Garcia-Mir* that was subsequently invoked by other judges apathetic to the harrowing plight of Cuban detainees.

Notwithstanding his awareness of the liberty norm in international law,[24] Judge Shoob proclaimed that international customary law was actionable in U.S. court where "there is no treaty and no controlling executive or legislative act or judicial decision."[25] Given the wide

mandate statutorily conferred in the parole domain, the Attorney General's detention determinations should invariably surmount customary law as controlling executive acts.[26] More importantly, the federal government might renege on its international refugee obligations at will, any time that domestic concerns drove it to do so. In Judge Shoob's eyes, the ultimate power to settle the detention issue squarely resided with the political branches themselves.

On appeal to the Eleventh Circuit, both the *Paquete Habana* approach and judicial submissiveness again predominated in the majority's reasoning.[27] Simply put, the *Garcia-Mir* Court concluded that the first category of Cubans were subject to a controlling legislative enactment. Even after the failed repatriation to Cuba, they still could not raise any customary law claims in challenge to their indefinite detention by the INS based on their mental health and criminal records. Following the analysis of the *Garcia-Mir* trial court and the Court's prior decision in *Jean* as a matter of controlling executive acts and judicial opinions, the majority likewise rebuffed the call by the second group of petitioners to recover their parole standing pursuant to customary jurisprudence.

The *Garcia-Mir* ruling had a far-reaching clout on kindred cases that arose thereafter: *Barrios v. Thornburgh*[28] (1990), *Alvarez-Mendez v. Stock*[29] (1991), *Gisbert v. United States Attorney Gen.*[30] (1993), and *Barrera-Echavarria v. Rison*[31] (1995). In all four cases, adjudicating judges looked for any possible causes, including the entry fiction doctrine, to certify their repulsion of constitutional assertions. Moreover, in deference to government parole decisions, they quoted *Garcia-Mir* as a credible mainstay to strike down the habeas petitions applied by the Mariel inmates based on customary international law and *Rodriguez-Fernandez*.

Thus, four types of judicial justification were used to construct unfavorable outcomes against international refugee litigation. The Second Circuit in *Bertrand* and Judge Spellmen in *Jean* admitted no authority of the Protocol stipulations, except where an express reference was appreciable in the Refugee Act. Irrespective of their knowledge of internationally-governed liberty rights, judges in *Garcia-Mir*, *Barrios*, *Alvarez-Mendez*, *Gisbert*, and *Barrera-Echavarria* ultimately went on to disclaim judicial activism by following the *Paquete Habana* formula. Notably, none of the judges in detention cases responded to the overtures of the executive authorities to brush aside international law contentions on grounds of the political question doctrine, a lack of standing, or no showing of prejudice in procedural errors.

Judgments Based on an International Law Rationale

Human rights defenders via amicus submissions successfully discoursed with trial and circuit court judges in *Rodriguez-Fernandez* about

international rights application.[32] In principle, liberal judges devised three major ways to back up international law in detention litigation.

The absence of municipal norms to speak for the rights of excludable detainees led federal Judge Richard D. Rogers of the Kansas District Court to employ customary international law as a rule of decision in *Rodriguez-Fernandez*. In that case, Judge Rogers observed that the presumption of entry long shaped by the U.S. Supreme Court deprived unadmitted aliens of a proper protective place in the constitutional context.[33] In addition, no statutory or regulatory provisions had ever prescribed a period beyond which immigration reviewers were enjoined to parole excludable aliens until the conclusion of deportation proceedings.[34] Finding no municipal law from which to derive support, Judge Rogers, by reference to amicus arguments, then turned to customary law as recourse to benefit Rodriguez-Fernandez.

Premised on the customary principle of liberty in international law, Judge Rogers set about ascertaining whether the lengthy imprisonment of Mariel Cubans constituted one form of prohibited arbitrary acts.[35] By this line of reasoning, he implicitly capitalized on another international equality concept to first concede that Rodriguez-Fernandez, despite his excludability, enjoyed the treatment constitutionally accorded to admitted aliens, including the right to be recognized as a "person" before the court.[36] For Judge Rogers, the duration of detention for undocumented asylum seekers was necessarily constrained by a reasonable timetable. After that time had elapsed, any divestment of personal liberty by the INS absent rightful causes would amount to an act of arbitrariness strictly barred by international law. Hence, Judge Rogers ordered INS authorities to instantly halt the prolongation of Rodriguez-Fernandez's custody in sync with the liberty standard under customary international law.

Next, the Tenth Circuit majority[37] in *Rodriguez-Fernandez* approached customary international law chiefly out of legal inadequacy in U.S. jurisprudence. Here, the oft-cited entry fiction doctrine in exclusion cases was given the same relevance as elsewhere.[38] In spite of countenancing that dwarfed constitutional meaning, the majority enunciated the INS detention in question to be at variance with the spirit of due process principles enshrined in the Constitution.[39] Without court validation, the INS had arbitrarily translated a statutorily sanctioned function of immigration custody intended to accelerate exclusion proceedings into a mode of executive punishment, contrary to the liberty interests of undeportable asylees like Rodriguez-Fernandez.

Further, the majority identified that certain legislative and judicial mandates might be manifestly beneficial to Rodriguez-Fernandez's release from incarceration. There was a statutory clause demanding that the use of custody by immigration agencies to facilitate the deportation

of resident aliens be subject to a maximum six-month time limit. In addition, according to the federal Supreme Court, the granting of parole should be the rule, not an exception, in the realm of exclusion.[40] Taken collectively, it seemed apparent that municipal sources of law outlawed INS officials from inflicting open-ended imprisonment on the Marielitos awaiting reinstated deportations. Acting distinctly from Judge Rogers, the Circuit majority understood domestic laws in a manner favorable to Rodriguez-Fernandez's parole. Although not resorting to customary law as a controlling rule, the Tenth Circuit made use of that law as an instrument to assist in clarifying the notion of fairness in municipal law by consulting the filed amicus briefs.[41]

Lastly, a statutory incorporation of international refugee norms galvanized federal Judge Robert L. Carter on the New York Southern District Court to issue a judgment to the advantage of a good many excludable Haitians.[42] In *Bertrand*, Judge Carter bowed to the entry fiction doctrine as much as other judges did in the preceding detention cases.[43] Through a careful examination of relevant factual evidence, he nevertheless arrived at a conclusive finding unveiling the inability of the local INS director to apply racially neutral criteria in scrutinizing Haitians' parole qualifications, as U.S. laws required.

To defuse other executive arguments against international law claims, Judge Carter proceeded to expound his reasons for entertaining that Protocol Articles 3 and 31(1) were internally enforceable.[44] His underlying causes included: the statutory sponsorship for comporting U.S. refugee management with international law; and a judicially remediable trait discovered in those treaty rights. In the construct of Judge Carter's decision, the Refugee Act superseded the Protocol where friction between the two arose. Considering their affiliation with INS regulations, however, both laws enjoyed a higher hierarchical status in refugee jurisprudence. Under this theorem, it followed that INS district officials were also obligated to make parole choices in concert with international treaty edicts. Unlike the judges in *Rodriguez-Fernandez*, Judge Carter did not act amenably to U.N. refugee norms until confirming the existence of treaty commitments by Congress.

In summary, international law was referenced on occasions where applicable domestic law was devoid or insufficient or where a statutory purport in support of treaty norms was obviously discernible. As with some opposition judges, each judge in the current category shared a common thread that excludable aliens technically lacked any constitutional entitlement to liberty under the thesis of entry fiction. Further, resembling the rejectionist camp (the Second Circuit majority in *Bertrand* and Judge Spellmen in *Jean*), Judge Carter in *Bertrand* assented that the Protocol ought to operate within the purview of existing

immigration laws. Nonetheless, he ultimately deemed Protocol Articles 3 and 31(1) to be directly maintainable in U.S. courts.

Qualitative/Quantitative Summary

A qualitative dissection in conjunction with the legal model brings some preliminary observations to light. In the 10 cases selected for study, international refugee law mattered for just two federal district court judges (*Rodriguez-Fernandez* and *Bertrand*) and one circuit majority (*Rodriguez-Fernandez*). Conversely, in the course of court review, a plenary power postulation in the guise of diversified municipal premises dictated the rejection of international law by five judges on separate federal trial courts as well as by 10 varying lineups of judges on federal appeals courts. Table 6-1 portrays the differing impact of municipal and international legal principles on individual judges' detention decisions.

Table 6-1. Judicial decision making with legal model explanations in 10 detention cases

Judges at Different Court Levels	Favor International Law at Least Once	Never Accept International Law	Unknown[a]
U.S. District	2	5	1
U.S. Appellate	2	30	2
U.S. Supreme Court	0	0	9
Total	**4/51** (7.84%)	**35/51** (68.63%)	**12/51** (23.53%)

[a] The 12 votes in the "Unknown" category are from: *Jean v. Nelson*, 472 U.S. 846 (1985) (without mentioning international claims brought forward by human rights activists, nine justices on the U.S. Supreme Court held that the parole issue should be adjudged in light of statutory and regulatory laws rather than the U.S. Constitution); *Fernandez-Roque v. Smith*, 734 F.2d 576 (11th Cir. 1984) (Judge Jones was counted into the "Unknown" category, but Judges Henderson and Hatchett were ascribed to the "Never Accept" camp because of their unfavorable votes cast in the *Jean* case); *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (federal trial Judge David V. Kenyon and Ninth Circuit dissenting Judge Harry Pregerson).

Of the 51 judges, 35 (68.63%) were receptive to nothing other than municipal laws, while a marginal number of four (7.84%) availed themselves of international liberty and equality norms. This legally driven exploration creates the initial impression that municipal law affected judges' decisional preferences far more deeply than did international law. In reality, the legalistic approach gave no clear picture regarding why a small handful of judges always voted for international law while a great majority did otherwise.

As explicated in Chapter 4, assuming that the legal model stood, judges should have upheld the rule in unison, be it international or

municipal, for court disposition. Contradictory statements in judicial holdings would not possibly have come about. The content analysis, alongside Table 6-1, nevertheless tells us a roundly discrepant story. In spite of the explicit ban on arbitrary indeterminate custody in international law, the liberty of excludable refugees was still not favored by judges. Moreover, a portion of U.S. legal provisions on which judges based their voting for or against detention cases were far from definitive in their terms. None of those refugee laws anticipated the Attorney General exercising parole authority in a punitive and disparate manner. Nor did they draw a patent proscription against prolonged incarceration in exclusion cases. As well, the U.S. Constitution made no mention of whether or not judges could employ the so-called entry fiction and judicial restraint doctrines in the immigration domain. Further, it was often not difficult for judges to adduce a body of precedents boosting their respective diverging views on the matter of parole.

Regardless of the germane U.S. laws that lacked precision in their prescriptions, judges remained in a fairly comfortable position to construe them in a way favorable or unfavorable to the international legal allegations made by Haitian and Cuban detainees. It made sense therefore that components other than objective law principles must have intervened in the making of judicial decisions. In short, the foregoing discoveries have utterly eroded the validity and reliability of the legal model in illustrating detention case outcomes. To predict judicial voting behavior more accurately, future analysis needs to move beyond the legal-centered paradigm and tap other likely explanatory factors such as judges' attitudes for the reasons much the same as those depicted in Chapter 4.

RETURN CASES

In U.S. courts, refugee attorneys, along with the UNHCR and other amicus groups, sought declaratory and injunctive remedies against the executive branch's policy of forcibly repatriating intercepted Haitians and Cubans to face persecution. In court battles, various derivations of international and municipal law[45] were used to argue for the right of interdictees to non-refoulement, asylum seeking, and status screening that respected due process and equal treatment.[46] To counter unfriendly court dispositions in return cases, human rights advocates markedly invented a number of ingenious legal approaches.

In reaction to the denial of standing in *Gracey*,[47] attorneys subsequently recruited some of the interdicted Haitians and Cubans to challenge government refoulement in the capacity of plaintiffs. Beyond that, they revised their complaints in a more specific way that purported to disprove the holding of abstract injury allegations passed by the

District of Columbia Circuit in the *Gracey* case. The holding stated that the individual appellants, two members of the Haitian Refugee Center (HRC), did not satisfy one of the constitutional Article III requirements for standing (i.e., injury in fact). Instead of identifying any given Haitian asylees they wish to associate with for the provision of legal assistance, they contended a "generalized and unspecific" injury they had suffered under the executive interdiction policy by arguing that the policy undermined their opportunity to interact with "some number of a class of unidentified 'Haitians' seeking to enter 'the United States.'"[48] Trying to forestall a setback of this kind from occurring again, human rights activists responded with a countermeasure. The amended pleadings included the names of individual refugees from a group of Haitians interdicted on the high seas, with whom human rights NGOs such as the HRC were unable to communicate and associate because of the faulted return program. Moreover, refugee attorneys in *Christopher* attempted to circumvent the *Sale* precedent by moving their tactical arguments away from a high-seas proposition to a Guantanamo focus. Based on that renewed conception, the proffer was advanced before the Eleventh Circuit that the non-return norm extended extraterritorially to the U.S. naval base at Guantanamo, since the USA had exclusive jurisdiction and control over it pursuant to a concluded lease treaty with Cuba.[49]

More remarkably still, human rights activists speaking for the *McNary/Sale* case[50] skillfully pursued a series of tactics based on calculations that varied according to the level of the court. In the beginning, the Lowenstein Human Rights Clinic at Yale Law School, under the supervision of Professor Harold H. Koh and attorney Michael Ratner, believed that federal trial courts with competence over cities with large immigrant populations would be more sympathetic to interdicted Haitians than those seated in densely Caucasian-populated areas.[51] On that consideration, the U.S. District Court for the Eastern District of New York was selected as an ideal locus for mounting initial legal attacks. At the second level, the Yale Law Clinic then took its case to a higher court with a view to engendering divided opinions between the Second Circuit in *McNary* and the Eleventh Circuit in *Baker*.[52] Pressing a split between the circuits was seen as holding out hope that the U.S. Supreme Court would ultimately be compelled to hear and finalize the bitter return controversy in consistency with international law.

At the third stage, after the Supreme Court took up its submitted certiorari petition, the Law Clinic called on the Court to protract review proceedings until after the November 1992 presidential election.[53] On dissimilar occasions, Democratic presidential candidate Bill Clinton had repeatedly applauded the Second Circuit for taking a stance that flew in the face of President Bush's inexorable summary return of Haitian refugees to human rights abuses at home. In the Clinic's sanguine

estimation, the *Sale* case had a great potential of becoming moot once Clinton won the race and made good on his campaign speeches. The Lowenstein Clinic's efforts to seek international law justice for the Haitian interdictees, however, did not stop here.

In fact, like many other refugee defenders, the Yale Law Clinic exploited every possible out-of-court channel to build up the gathering momentum for propelling immigration authorities into compliance with non-refoulement. For instance, shortly after the election, an overture to ameliorate the treatment of the intercepted Haitians was constructed by the Clinic and legal counsel nationwide and delivered to the incoming administration.[54] Once President Clinton was sworn in, his Administration became a frequent target for lobbying by the Clinic to have his promised electoral words transformed into concrete action. Together with other interested advocates, the Lowenstein Clinic adopted other techniques more like those typically applied in detention cases. It made appearances before congressional hearings,[55] the media,[56] and the Inter-American Commission to vocalize international human rights on behalf of high-seas asylum seekers. Notwithstanding all those expended endeavors, human rights activists did not propitiously stir up any appreciably tangible changes in government actions at sea. In court challenges, they frequently found that a majority of judges overwhelmingly championed the government's arguments for the application of the non-self-executing treaty rule, non-extraterritoriality, the nonjusticiable political question rationale, and a lack of standing.[57] More detailed accounts are presented in turn for the legal model inquiry.

Judgments Based on a Municipal Law Rationale

In this first category, the grounds of non-self-execution and non-extraterritoriality (one form of a narrow treaty reading) were regularly cited by courts to refrain from issuing orders to stay the repatriation of high-seas refugees in return cases. In *Gracey*, Judge Charles R. Richey on the U.S. District Court for the District of Columbia dismissed the injustice filed by the HRC and two of its members under, among others, the Refugee Protocol, the 1980 Act, and the U.S. Constitution.[58] Despite varying causes of action lodged by the Center and the two individuals, Judge Richey throughout the court procedures rested his deliberations entirely on the logic of high seas status, which treated the category of Haitian refugees caught in international waters as beyond the protections of U.S. laws and the U.N. Refugee Protocol.

The question of the Protocol's enforceability was specially addressed, with Judge Richey ruling that the refugee treaty was not self-operative in light of Protocol Article III's provision (information on national legislation) and the *Bertrand* case law. By introducing a counterpart provision under the Refugee Act, Congress nevertheless

permitted Protocol Article 33(1) to be domestically effective. Yet, nothing in the 1980 Act was meant to have the non-return mechanism implemented extraterritorially. Judge Richey, like most judges in detention cases, comprehended the Protocol in the sense of how the legislature statutorily demarcated its internal governance. In the final analysis, Judge Richey set aside the Center's additional claim based on the UDHR, stating that the Declaration could not grant Haitian asylees a treaty right of asylum actionable in U.S. courts.

On appeal to the District of Columbia Circuit, concurrer/dissenter Harry T. Edwards brought up some different rationales for affirming the trial court's dismissal. First, Judge Edwards considered it too intricate to determine whether aliens were excludable and enjoyed constitutional rights. This issue always involved a fine distinction of immigration status between discrete classes of aliens in U.S. laws.[59] It would be more suitable to emulate the U.S. Supreme Court in *Jean* by pronouncing that it was needless to make an adjudication in the constitutional context. Alongside engaging in the same analysis that Judge Richey espoused for treaty illumination, Judge Edwards looked beyond to the negotiating history of the Refugee Convention as a source to support his conclusion of non-extraterritoriality for Protocol Article 33.[60]

Judge Edwards argued that the term "return" in Protocol Article 33(1) was to be associated with unlawfully present refugees as opposed to those already legally admitted to U.S. territory. Article 33(1) was not intended to cover high-seas migrants who had unfortunately not yet completed their journey by landing in the United States. Avoiding the question of the self-executing nature of Article 33(1), Judge Edwards went on to assert that the Article never created extraterritorial duties to bind the United States in its high-seas interdiction enterprise. That the devastating political situation Haitian refugees were striving to flee had become a daily fabric of life in Haiti did arouse Judge Edwards' special attention in a final comment. However, a conservative posture of judicial abdication ineluctably surfaced after all as Judge Edwards set forth that:

> This case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy.[61]

In the *Baker* case, the majority judges on an Eleventh Circuit panel (Gerald B. Tjoflat and Emmett R. Cox) entered a non-extraterritoriality decision without a reasoned analysis.[62] In *McNary*, federal trial Judge Sterling Johnson, Jr. from the Eastern District of New York deciphered the Refugee Protocol to the same effect.[63] Further, the non-self-executing doctrine crafted by his superior court in *Bertrand* was employed to form

the basis for overriding Protocol Article 33(1). There was no gainsaying that Judge Johnson took compassion on those Haitians picked up on the high seas, berating the U.S. government as nothing less than hypocritical for judging the return practices of its own and other countries with double standards. Despite that pity flowing between the lines of his words, Judge Johnson immediately deflected his judicial role from supplying any measure of redress to the concerned Haitians. Instead, he proclaimed, only by virtue of an implementing law or a court holding to vacate the settled *Bertrand* mandate could Article 33(1) possibly be given effect in international waters. In this light, it seemed no longer problematic for Judge Johnson to effectuate Article 33(1) extraterritorially so long as he was first able to detect municipal sources supportive of the Protocol's domestic force.

At the Second Circuit, dissenting Judge John M. Walker, Jr. in *McNary* examined the merits of the non-return claims after positing that collateral estoppel was irrelevant in the instant case, a position also upheld by the Circuit majority in its opinion. As with Judge Edwards in *Gracey*, Judge Walker read a non-extraterritoriality import into the text and legislative history of the Refugee Protocol and the 1980 Act in an effort to fit his plenary power standpoint.[64] For him, the executive actions at sea deserved the highest regard from the bench because it constituted one type of presidential authority wieldable in reaction to foreign political crises.

Authoring for the *Sale* majority in an 8-1 vote, Justice Stevens struck down the Haitians' complaint predicated on the Refugee Act and the U.N. Protocol via a spurious, convoluted legislative construction. Although taking a laudable view that a broader treaty prescription on refugee treatment, if any, trumped the 1980 statute under the Supremacy Clause,[65] he quickly averred that this was not the case in the context of return issues. Neither the text nor negotiating history of the Refugee Convention connoted the extraterritorial reach of an international non-refoulement clause.

Two facets of Article 33's text were prominently suggested as underpinning Justice Stevens' rationalization. If the treaty drafters wanted Article 33(1) to be implemented beyond a sheltering country's territorial sea, it would unavoidably invite a rather nonsensical explanation of the gist of Article 33(2). In that situation, "[d]angerous aliens on the high seas would be entitled to the benefits of 33(1), while those residing in the country that sought to expel them would not."[66] Moreover, just as concurrer/dissenter Edwards accurately interpreted in *Gracey*, the phrases "expel or return ("refouler")" in Article 33(1) were never designated to bear any extraterritorial implications.[67] The word "expel" squared with the meaning of "deport" and applied to those aliens in deportation or expulsion proceedings who were already admitted into

and resident in a refuge country. In addition, "return ("refouler")" referred to a category of excludable aliens who had yet to cross the threshold of that country's frontier upon being spotted. Assuredly, employing any compulsive means to eject asylum seekers to face persecution back at home would materially detract from the spirit of Article 33. Justice Stevens added that, absent express empowerment by the drafters, Protocol Article 33(1) could not on any terms subject its member parties to performing "uncontemplated extraterritorial obligations."[68]

Drawing further guidance from the Convention's preparatory discussions, Justice Stevens noted that negotiators to the drafting conference largely took no exception to the Swiss elucidation of the terms in Article 28, now codified as Article 33. Save for his understanding of "expel" and "return" as being all but identical to the effect ascribed by Justice Stevens, the Swiss delegate additionally reiterated his country's position in objection to enlarging the power of Article 28 to any prospective case of mass refugee exoduses.[69] Taking the Swiss account as a true value to solidify his non-extraterritoriality conviction, Justice Stevens declared Article 33(1) to be of limited relevance, since its safeguards did not broaden to Haitian refugees located on the high seas.

Pursuant to 8 U.S.C. § 1182(f), Justice Stevens confirmed the lawfulness of presidential power to enforce a high-seas program on Haitian boat people in international waters.[70] By adducing Judge Edwards' pliant words as a concluding argument, Justice Stevens suggested that Haitian interdictees, including those later interned at Cuba's Guantanamo, should search for other workable avenues to neutralize their current sorry conditions. The opinion was supported by Chief Justice Rehnquist and Justices White, O'Connor, Scalia, Kennedy, Souter, and Thomas.

The unshakeable reliance on the principles of non-extraterritoriality and judicial reticence erected by *Gracey*, *Baker*, and *McNary/Sale* had a persistent sway over Eleventh Circuit judges (Phyllis A. Kravitch, Stanley F. Birch, Jr., and Edward E. Carnes) in *Cuban American Bar Association v. Christopher*[71] (1995). It went beyond controversy in the *Christopher* case that the Refugee Act's procedure for stalling deportation of aliens likely to be abused in their homelands exactly addressed the domestic implementation of Protocol Article 33(1).[72] Irrespective of the explicit statutory edict that it conceded, the *Christopher* majority maintained an absence of competent sources to substantiate that legislators wished the devised non-return mechanism to be administered outside of U.S. jurisdiction. Nor did the base lease pact enabling the presence of U.S. troops at Guantanamo imply any bid to transfer sovereignty from Cuba to the United States. It could not be valid

to say that the U.S. government in any way possessed territorial jurisdiction over its rented military installation in Cuba. Far from owing treaty or statutory obligations to Cuban and Haitian detainees, the United States had on balance ample justifications for continuing its naval blockade and overseas internment under these circumstances.

Similarly, the Eleventh Circuit dismissed the application of constitutional due process and equal protection safeguards on grounds of non-extraterritoriality.[73] Another predicate backing constitutional preclusion was the lack of a discernable executive order requiring a contrary course of action at the time that the USA formulated its policy of returning high-seas asylum seekers.[74] By quoting Judge Edwards' deferential words as vindication, the *Christopher* majority signaled that the political branches were far more capable of resolving the return problem raised in the migrants' appeal.[75]

Next, judges yielded procedurally to the separation of powers principle in two apologetic ways. In *Gracey*, Judge Robert H. Bork from the District of Columbia Circuit nullified the ability of appellants the HRC and its two members to represent Haitian interdictees at large under international and U.S. laws. The essential factors driving Judge Bork to rebuff conferral of standing were constitutional and prudential.

After presuming the HRC had lawfully alleged a prima facie case of sufficient injury, Judge Bork discussed at length the causation requisite of the standing doctrine under Article III of the Constitution (i.e., traceability and redressability). Based on separation of powers considerations, he found it crucial to map out a new prescription for the causation analysis so as not to exceed the proper limits of judicial review duties and rashly construe administrative matters as disobedient of the law.[76] In other words, to prevail, the HRC and its two members needed to demonstrate that the law or government action at issue was in fact contrived to deter their entering into a counseling and associational relationship with Haitian refugees at sea.[77] For Judge Bork, however, the wrongs allegedly committed by the federal government in preventing the appellants from rendering legal services to Haitian migrants hardly involved any constitutional or statutory infringements at all. Neither was this action directly imputable to the interception program itself. Rather, the impairments suffered by the Center and its members arose unintentionally amid the executive branch's high-seas activities. In the opinion of Judge Bork, the injuries the appellants contested and the capacity of a remedial injunction they sought were speculative at most since they were all grounded on the independent action of third parties not before the Court (i.e., the Haitian interdictees).

Judge Bork additionally remarked that the Center and its members defaulted two of the prudential terms (i.e., third-party standing and zone of interests) when challenging under, among others, the Constitution, the

Refugee Act, the Protocol, UDHR, and the U.S.-Haitian interdiction agreement. The appellants lacked third-party standing in that none of the laws allegedly violated gave them a right to speak for intercepted Haitians in the fields of due process, non-return, and asylum.[78] Even if the Center and its members had a constitutional cause of action, they were all the same ineligible for third-party standing. In Judge Bork's mindset, no Haitians' rights were truly invaded since the executive department did not deliberately truncate their procedural commitment while conducting its high-seas operations. To recognize third-party standing in these circumstances, he explained, would dangerously thrust the Court into functioning against the tripartite structure of government originally orchestrated by the constitutional Framers to stymie possible future abuses of power.

Since the appellants had not successfully established third-party standing, Judge Bork deemed it unnecessary to appraise whether the Haitians' legal rights came within the zone of interests to be secured by the laws under which the interdiction program was questioned.[79] Instead, the rights of the Center and its members were reviewed for the zone of interests test. In this regard, Judge Bork found that no statutory intent or provision ever spoke of a right of advocacy groups and its members to enter into legal communication with refugees.[80] Given that the HRC and its members counted on the Refugee Act and the INA to stake out the Fifth Amendment's due process of law, their claims to constitutionally grounded interests were null and void as a result.

Lastly, Judge Bork confuted the Protocol zone of interests in two specific manners.[81] Provided that the Protocol was self-executing in itself, there was no legitimacy in interpreting its Article 33(1) to entail the rights of lawyering and association for the Center and its members. Even if it were supposed that the Protocol was partially given effect via the 1980 Refugee Act, the above negative conclusion regarding the offering of legal discourse under the Act, however, was adequate to countervail their claims to exercise benefits stemming from the Protocol. Out of his faith in judicial restraint, Judge Bork voted against hearing the *Gracey* case under the lack-of-standing doctrine. His procedural disclaimer acquired another supporting vote from associate Judge James L. Buckley, who individually published a concurrence calling for the need to analyze the constitutional Article III causation for standing based on U.S. Supreme Court precedent.[82]

The second procedural element handicapping return litigation was the postulate of a political question. Particularly issuing an abbreviated opinion, Justice Thomas in *Baker* divulged his own reason for disavowing a certiorari petition lodged by HRC and Haitian interdictees. In favor of judicial abstention, he plainly pointed out that the dispute

over refoulement must be assigned to a political settlement since the judiciary was functionally circumscribed to the sphere of legal inquiry.[83]

To conclude, deferential judges undertook a farfetched construction to turn down international protections of high-seas refugees from refoulement, in spite of a corresponding mechanism set up in the Refugee Act. The non-extraterritoriality rule was likewise applied in most instances where judges openly rejected rights of action based on constitutional and statutory laws. While human rights activists made customary law arguments against forced repatriation, judges often made little mention of their views on this matter. In addition to invoking those grounds to void the substance of international law contentions, judges in return cases advanced the doctrines of a lack of standing and a political question to procedurally impede the legal challenges in return cases.

Judgments Based on an International Law Rationale

Judges consulted numerous sources to put forth opinions or dicta in returnees' favor. They included treaty text, treaty object and purpose, the drafting histories of the Refugee Protocol and the 1980 Act, and the views of the UNHCR.

In the *Baker* case, the government's procedural defenses of a lack of standing and a political question were orderly overcome by a set of injunction standards weighed by the U.S. District Court for the Southern District of Florida. Typically, the process leading up to the granting of injunctive relief embodied four core constituents to be studied: a substantial likelihood of prevailing on the merits of claims; irreparable injury to plaintiffs; precedence of plaintiffs' suffered injury; and service to the public interest.

Starting with the first element, sitting Judge C. Clyde Atkins found that the HRC was entitled to litigate *Baker* as a plaintiff for grounds identifiable from constitutional and prudential dimensions. The constitutional Article III case-or-controversy requirements for court recognition of standing on the Center's part were fully met concerning injury in fact, traceability, and redressability.[84] Owing to the alleged breaches of norms on free association and non-refoulement, the Center was unable to meaningfully develop access channels to embark on dialogue with a group of disaffected Haitian interdictees it specifically aimed for. To a substantial likelihood, therefore, the HRC's organizational purpose to furnish legal assistance to the named Haitians had been severely crippled, traceable to the alleged unlawful acts committed by the USA, and swiftly remediable by the strength of court issuance of an injunction order.

Further, the two-fold prudential conditions of third-party standing and zone of interests disputed by the U.S. government were addressed in

turn. In Judge Atkins' opinion, since the HRC's associational capabilities could possibly be hamstrung to a tremendous extent for the reasons mentioned, the Center infallibly had its own right to legally challenge the United States and its responsible authorities. Pursuant to the doctrine of *jus tertii* standing, Judge Atkins added, the Center was in an appropriate position to assert the guarantees of legal representation and non-refoulement even for the welfare of Haitian political refugees as third parties. This was so because the Haitians seized on the high seas were subjected to "sufficient injury-in-fact" in the form of coercive repatriation, incommunicado detention, and faulty screening interviews. In addition, the HRC could "reasonably be expected to properly frame the issues and to advocate the interdictees' interests zealously."[85] On top of the *jus tertii* rule, the maintenance of third-party standing by the HRC was equally licit on another basic premise. Judge Atkins discovered that a correlative nexus existed between the presumed injustices severally put on the HRC and those Haitians stopped by the U.S. Coast Guard.[86] The HRC's attempt to offer counseling and solicit organizational members would directly bear the brunt of the administrative prejudice because of the wrongs that the Haitian asylees claimed to have suffered throughout the blocking of their passage in international waters.

Turning to the question of zone of interests, Judge Atkins noted that the function of NGOs like the HRC was patently acknowledged during congressional hearings as crucially important in the assistance of refugee resettlement and in the drafting of the Refugee Act.[87] In that connection, the HRC's putatively harmed interests without a doubt fell within the zone of interests underwritten by domestic and U.N. refugee laws as well as the First Amendment. As with the HRC, individual Haitian parties had shown a substantial likelihood of advancing standing successfully in the upcoming merits proceedings since they for now at least met the constitutional definition of standing to sue under Article III. Prudentially, the Haitians as interdiction victims were entitled to assail U.S. misconduct in their own right. It was understood that their allegations fit securely within the zone of interests addressed by the Refugee Protocol.

Rebutting the political question proffer by the executive branch to explain away its high-seas refoulement policy, Judge Atkins principally looked to the *Baker v. Carr* criteria for an answer.[88] On his understanding, the HRC and the interdicted Haitians had already narrowly boiled down their focus for court deliberation to procedural screening blunders rather than to the interception system itself. The complaint they brought was completely non-pertinent to matters of immigration and foreign relations whose arrangements had classically been entrusted to other coordinate government branches. Nor did it require the court to disparage or tamper with political determinations as to the handling of a mass refugee influx from Haiti. "Judicially

discoverable and manageable standards" were properly in place as well. Related legal rules and judges' expertise on law interpretation and application spoke amply to the court's ability to independently work out the issues contested by the litigants in *Haitian Refugee Center v. Baker*. In any event, Judge Atkins felt sufficient confidence to override the political question pretext by pronouncing justiciable the claims filed by the HRC and the interdicted Haitians pursuant to refugee law of municipal and international origins.

Soon after validating federal court jurisdiction in *Baker*, Judge Atkins progressed to probe the enforceability and reliability of the plaintiffs' causes pressed before the court. Above all, the discussion methodically delved into the effect and scope of Protocol Article 33(1).[89] Essential evidence to dispose of the executive's non-self-executing defense was emanated from lawmakers' statements, apposite court opinions, and even the text of Article 33(1) itself. Moreover, the Office of the U.N. High Commissioner's letter and some administrative codes of interdiction came into play and were elicited to belie the non-extraterritoriality interpretation rendered in *Gracey*. Taken as a whole, Judge Atkins concluded by implying that the Protocol-based cause was substantially likely to succeed in later court investigation of the case merits.[90] Such a positive outcome was peculiarly conspicuous when compared with Judge Atkins' negative outlooks on the value of U.S. laws in the *Baker* context, including President Reagan's Executive Order 12324 and attendant INS enforcement guidelines.[91]

Evaluating the second element of irreparable harm, Judge Atkins continued taking a position favorable to the plaintiffs. Absent injunctive relief to promptly stay the INS error-fraught practices in refugee screening and return, the interdictees would be hastily driven in droves to the hands of Haiti's military oppressors and encounter "the most irreparable type of injuries."[92] In turn, those detriments would immensely undercut the HRC's First Amendment prerogative in exercising association and lawyering with its potential clients.

Regarding the third prong, defendants the United States and its government officials called into question the gravity of the damage undergone by the HRC and the Haitian interdictees in antithesis to the harm that would result from executing the requested injunction. In their opinion, an expedient replacement of summary return with Guantanamo detention to cope with captured Haitians at sea would divert vast resources in terms of money and vessels originally appropriated to perform other critical missions. It might also run the risk of aggravating tense relations with Cuba. Balancing against that governmental account, Judge Atkins nonetheless opted for proclaiming an injunction decree in order to rapidly mitigate the ongoing prejudices levied on the plaintiffs. Two rationales dominated his deliberation.[93] First, an injunction served

little more than as an alternative mechanism that would cease to function as soon as the Court decided the essence of the questions at bar or the defendants altered its current course of action by incorporating adequate interview procedures to ensure non-refoulement enforcement. Additionally, the threats of injury to the plaintiffs in terms of liberty and life deprivations far overshadowed the financial loss and other negative impact the defendants professed if an injunction was indeed imposed.

When addressing the fourth element for an injunction (the question of service or disservice to the public interest), Judge Atkins offered his final reason for necessitating redress for Haitian boat people. The American public had a profound stake in compelling its government to honor refugee treaty responsibilities; this concern was especially sobering given that the flight of Haitians in *Baker* had an intimate bearing on fostering the cause of democracy in the Western Hemisphere.

At the appellate level, Eleventh Circuit dissenter Hatchett gave full approval to Judge Atkins' treaty perspective.[94] One more time, Judge Atkins in the *Christopher* case entered injunction orders in favor of high-seas Cubans and Haitians interned at Guantanamo camps.[95] Here, Judge Atkins instilled a unique notion distinguishable from his *Baker* rationalization into the process of examining the existence of "a substantial likelihood of success." In his view, the 1903 military lease was clearly indicative of a jurisdiction transfer from the part of Cuba to the United States. Apparently, the refugees in *Christopher*, unlike those in *Baker* and *McNary/Sale*, were practically under the effective custody of the United States. As a matter of course, it was warrantable for them to maintain access to counsel and non-refoulement based on U.S. laws and on the Protocol.

In *McNary*, Judge George C. Pratt from the Second Circuit supported the coverage of Article 33(1) to international waters.[96] Perceiving the question of treaty character as basically academic, Judge Pratt admitted the power of Article 33(1) domestically due to the passage of the Refugee Act. On the authority of the Vienna Treaties Convention, the Protocol text and its object and purpose were carefully looked into. The result was Judge Pratt's verification that all refugees were entitled to benefit from the Protocol's non-return protections regardless of where they were initially discovered. In spite of his responsiveness to that Article 33(1) power, Judge Pratt ultimately rested his injunction declaration fully on the 1980 Act. In his view, the Act already embodied a comparable provision capable of dealing with Haitians' return situation aptly. Judge Jon O. Newman concurred with Judge Pratt, with some comments added on the collective estoppel issue.[97]

When the *McNary/Sale* case was fought to the Supreme Court, it scored only one favorable vote. Judge Pratt's approach to treaty analysis found agreement with dissenting Justice Blackmun. By seeing Article

33(1) as self-executing and applying it, combined with the 1980 Act, as a rule of decision, Justice Blackmun strikingly embraced utterly heterogeneous horizons of international law beyond those of Judge Pratt.[98]

On average, judges upholding extraterritoriality were convinced that it was redundant to acquire a legislative imprimatur for Article 33(1)'s implementation in international waters. Two judges in this category, however, granted returnees the enjoyments of Article 33(1) because of a statutory reference, a posture commonly assumed by judges in the unfavorable camp. They were constantly agreeable to regarding that Protocol provision in a favorable fashion that criticized the government practice of taking wrongful actions against swarms of vulnerable high-seas refugees, risking their lives aboard unseaworthy ships in flight from human rights outrages in their homeland.

Qualitative/Quantitative Summary

Let us now take a quick look at four of the examined return cases. The treaty non-refoulement standard predominated twice in the federal trial courts (*Baker* and *Christopher*), three times at the circuit court level (*Baker* and *McNary*), and once at the federal high court (*Sale*). On the other hand, the primacy of U.S. laws was pivotal in persuading most judges to vote against the interdictees captured at sea.

The two classes of voting preferences in Table 6-2 reveal that judges in return cases were roughly 3.80 to 1 against international refugee law. A review of Tables 6-1 and 6-2 in tandem nonetheless does not afford any validation of the research hypothesis that U.S. judges in return cases were more susceptible to the influence of international law than those in detention cases. While the two tables exhibit quite a discrete pattern of judicial decisions in detention and return cases (7.84% versus 20.83% in the "Favor" groups and 68.63% versus 79.17% in the "Never Accept" groups), the high number of "Unknown" judges in detention cases (23.53%) renders those contrasting statistical results largely inconclusive and unreliable. Judging from the figures in Tables 6-1 and 6-2, however, we can at least infer with confidence that U.S. judges were prone to dismiss international law claims in detention and return litigation.

The same should be said of Table 6-3. Drawing a parallel between two sets of data garnered from Table 6-3 discloses that "Never Accept" judges both in cases involving the death penalty (80.00%) and refugees (76.12%) were tremendously impervious to international law, with a margin of 3.88 per cent between the two groups. Further, minor variations occur in these two classes of cases between judges who favored international law at least once (18.06% in capital and 13.43% in refugee cases). However, with judges in the "Unknown" category registering 1.94 per cent in death penalty but 10.45% in refugee cases,

those numerical differences in the "Favor" and "Never Accept" camps become questionable predictors in confirming which type of case would win over more judges to taking the side of human rights activists. The sure thing we can identify here is that adjudicators were in a significant proportion against international law protections of death row inmates and refugees.

Table 6-2. Judicial decision making with legal model explanations in four return cases

Judges at Different Court Levels	Favor International Law at Least Once	Never Accept International Law
U.S. District	1	2
U.S. Appellate	3	9
U.S. Supreme Court	1	8
Total	**5/24** (20.83%)	**19/24** (79.17%)

Table 6-3. A comparison between death penalty and refugee cases

Judges in Classes of Cases	Favor International Law at Least Once	Never Accept International Law	Unknown
Death Penalty	28/155 (18.06%)	124/155 (80.00%)	3/155 (1.94%)
Refugee	9/67 (13.43%)	51/67 (76.12%)	7/67 (10.45%)

Again, a number of underlying causes rejected the value of the legal model in unmasking judicial voting behavior in the context of return litigation. If judges' decision making in return cases was purely dictated by the rule of law alone, all judges hearing the cases should have coherently enforced the universal non-return principle in international waters without divergence. There was no absence of such telling evidence from international or municipal authorities implying this line of interpretation. More often than not, however, judges who convincingly espoused the doctrine of plenary power were prepared to structure whatever reasons they wanted to overrule injunction relief requested by asylum seekers on the high seas. In addition, despite the fact that a refugee statute stayed silent on whether the executive non-return agenda was to be given effect outside of U.S. jurisdiction, participating judges of all legal persuasions were still able to construe legislative intent in a way that wholly buttressed their disparate positions. From the viewpoints characterized above and in Chapter 4, it becomes more marked than ever that the legal-focused scheme can no longer be taken as reasonably

illuminating the existence of divisive court opinions found in death penalty and refugee cases.

OTHER TYPES OF DETENTION CASES

U.S. courts declined to consider international human rights law in a number of legal actions launched by human rights activists in the interest of detained alien abductees. Typical of the abduction cases are *United States v. Quesada*[99] (1975), *United States ex rel. Lujan v. Gengler*[100] (1975), *United States v. Alvarez-Machain*[101] (1992), and *United States v. Ballesteros*[102] (1995). Sitting in final judgment on those cases, federal judges uniformly held executive overseas abductions to be permissible. As such, they completely neglected the U.S. duties as required by international law to venerate the territorial integrity of the asylum countries from which the alleged foreign drug dealers or torturers and murderers were involuntarily taken away via an array of U.S.-devised tactical ruses. Moreover, these aliens kidnapped and brought to the USA for trial were divested of a set of fundamental procedural safeguards accorded to general criminal defendants by many multilateral human rights instruments and tribunal holdings. The safeguards violated here were as varied as the right not to be subjected to arbitrary incarceration and physical abuse; the right to be informed of the content of the accusation; the right to procure consular assistance on arrest; and the right to expeditiously receive judicial review of the detention.[103]

On the contrary, several other analogous cases call for further narration due to their positive decisional weightiness. In *United States v. Toscanino*[104] (1974), a Uruguayan drug dealer was forcibly abducted by Brazilian police officers with the tacit consent of U.S. federal agents, in a bid to bring him to account in the United States. The Second Circuit panel that heard the case took the international norm regarding the inviolability of territorial sovereignty[105] into its constitutional Fourth Amendment deliberations on the exclusionary rule and due process of law.[106] In this manner, the federal court of appeals refused to prosecute the alien criminal illegitimately taken into U.S. custody from abroad. The explicatory reason behind the Circuit's holding might be rooted in an undisputed factual basis: that an act of torture was committed by the abductors during the course of the wrongful kidnapping.[107]

Most recently, the U.S. Supreme Court published two landmark cases clarifying lower courts' unresolved rifts intimately linked to a string of U.S. counteractions executed in the wake of the 9/11 terror occurrences. *Rasul v. Bush*[108] (2004) focused on the tenability of claiming court jurisdiction to legally regulate the detention of apprehended alien terrorism suspects at the Guantanamo Bay naval base. The other case was *Hamdi v. Rumsfeld*[109] (2004) that addressed the

question of the applicability of constitutional due process safeguards to Yaser Esam Hamdi, an alleged enemy combatant who is also a U.S. citizen (referred to as a citizen enemy combatant).

In the *Rasul* case, Justice Stevens authored a majority opinion championing the position that Guantanamo comes under the authority of the U.S. domestic courts, with four full votes from Justices O'Connor, Souter, Ginsburg, and Breyer and a concurrence from Justice Kennedy. A number of elements were gauged to quash the United States' argument that the 1950 Supreme Court precedent of *Johnson v. Eisentrager*[110] exerted continuing authority to detrimentally determine the fates of habeas corpus applications filed by 14 foreign detainees in *Rasul*. According to Justice Stevens' analysis, the two cases were not contextually compatible.

Unlike the tried and convicted German war criminals in *Eisentrager* who definitely fit the international definition of enemy aliens, the petitioners in *Rasul* were citizens of Australia and Kuwait, nations sustaining amicable official ties with the United States. They professedly denied their part in mounting any form of aggression against the USA. Neither proper judicial hearings nor other due procedural guarantees had been afforded to them for the more than two years since they were picked up from the battlefield in Afghanistan and brought to makeshift prison facilities at Guantanamo Bay. Moreover, Justice Stevens detected, the federal government wielded substantive governance over Guantanamo, in which the petitioners were curtailed of their personal liberty without any notice of what charges were being fashioned against them.[111] In essence, the *Eisentrager* case roundly differed from the *Rasul* case on another salient point. The former was meaningful only to a constitutional habeas investigation while one of the keynote debates in the latter revolved around statutory habeas claims arising from 28 U.S.C. § 2241.[112]

By affirming a jurisdictional extension to Guantanamo and the applicability of habeas status for the petitioners jailed there, Justice Stevens made clear that:

> By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base….[T]here is little reason to think that Congress intended the geographical coverage of [the habeas statute (28 U.S.C. § 2241)] to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.[113]

In the closing paragraphs, the *Rasul* majority led by Justice Stevens acknowledged the petitioners' other statutory entitlements to litigate

under 28 U.S.C. §§ 1331 (the general federal question statute) and 1350 (the ATCA).[114] That the U.S. justice system had traditionally been accessible to non-resident foreigners was the underlying element driving this consideration. Especially clear about the ATCA, the majority stated that the law licensed any alien tort victims to bring forward grievances before federal judges based on "the law of nations or a treaty of the United States."[115] Its employment was independent of the petitioners' military custody status in the present case.

In *Hamdi*, the government defended its position with a catch-all separation of powers rubric, calling for "a heavily circumscribed [judicial] role" in abstaining from adjudicating individual detention cases in today's pressing national security conditions.[116] U.S. courts, the government contested, should be limited to reviewing nothing other than the issue of a broader administrative detention system run in the context of the post-9/11 global counter-terrorism era. Predicated on a line of measured reasoning, Justice O'Connor, on behalf of the plurality,[117] nonetheless dismissed this executive position with firmness.

The plurality statement started by exploring the legality of Hamdi's executive detention per se and then went on to discuss what process was owed to Hamdi to the extent that his detention was unchallengeable in the legislative sense. Specifically, Justice O'Connor first discerned that the placing of Hamdi in prison as a citizen enemy belligerent by the Bush Administration had a valid legal foundation in the Authorization for Use of Military Force (AUMF)[118] passed one week after the 9/11 attacks. Irrespective of that legislative resolution empowering presidential use of force in these extraordinary circumstances, the executive's curtailment of individual freedom was not without limitations.

By international law of war standards,[119] persons classed as prisoner of war (POW) status holders were entitled to be speedily released and repatriated by a sovereign captor the moment a state of armed hostilities in which they were once actively involved came to a complete halt. In some scenarios, POWs might be kept even longer in detention for crimes they perpetrated after the closure of warfare. However, any determinations to defer the release of POWs to their home countries must be made in exceptional cases and verified by a competent and independently instituted court in the capturing country. At any rate, Justice O'Connor continued, locking away POWs for indeterminate periods was internationally barred and should be prevented in all circumstances. So long as U.S. military action in Afghanistan was proven to be still in progress against terrorist remnants, she nevertheless believed that Hamdi's custody would fall within the use of "necessary and appropriate forces" as authorized to the president by the 2001 AUMF.[120]

Despite the legitimacy attached to the internment of enemy warriors, Justice O'Connor said, "a state of war [was] not a blank check for the President when it [came] to the rights of the Nation's citizens."[121] Absent congressional suspension of habeas corpus privileges in cases of rebellion or invasion pursuant to Article I(9) of the Constitution, petitioner Hamdi was entitled to attack his own military detention under 28 U.S.C. § 2241.[122] On this statutory habeas basis, he was legally anticipated to, at a minimum, have opportunities to submit before "an impartial adjudicator" pertinent factual evidence in rebuttal of every governmental charge made against him.[123] Equally important, a judicial assurance of due process application to a situation of this sort outweighed any concerns of separation of powers and global terrorist threats advanced by the government to get around judicial oversight.[124]

Without due process of law secured for U.S. citizen Hamdi, who allegedly joined enemy combatants on the Afghan battlefield, Justice O'Connor visualized the ghastly consequences subsequent to the breaking of that final constitutional bulwark would bring on the general American public as a matter of time. In days to come, it was in all likelihood to see the government arbitrarily intrude upon its people's basic personal freedom long safeguarded by the U.S. Constitution in the easy subterfuge of various national security reasons. She soberly maintained that:

> [A]n unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat [to U.S. national security]….[W]e reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law.[125]

CRITIQUE

The study of detention and return cases raises a number of legal issues that are methodically examined as follows: the domestic enforceability of the Refugee Protocol, the *Paquete Habana* rationalization, the reach of Protocol Article 33(1), and court procedural barriers.

The first question that arises is the legal force of the refugee treaty within the United States. A set of grounds delineated subsequently leads to the conclusion that Articles 3, 31(1), and 33(1) in the Refugee Protocol do not couch legislative implementation as a must for their municipal effectiveness. By their express terms, these provisions are aimed at vitiating particularized misdeeds (discriminatory and punitive detention as well as refoulement) on the part of States parties and accordingly granting corresponding entitlements to individual treaty refugees. Their self-executing substance has obtained solid recognition from the United States' political branches as well.

During Senate deliberation on the Refugee Protocol, President Johnson's Administration appealed to climactic phrases such as "a comprehensive Bill of Rights," "humanitarian rights," and "rights for refugees" in its submitted statements.[126] The purport of those statements was to depict the Protocol as a treaty with assertable substantive rights designed to benefit asylum seekers as a whole. The administration additionally underscored that the United States did not plan to amend existing immigration laws on the Protocol's adoption regardless of some divergent aspects perceivable between the two. Instead, it convinced senators that INS regulations would work flexibly to "implement" those Protocol prescriptions not statutorily contained. The legislative history relating to the 1980 Act further ascertained the direct power of the Protocol when members of Congress remarked that the statute was not to impose new international refugee standards in U.S. jurisdiction.[127] The tenor of the Refugee Act was to revamp incoherent domestic refugee laws and instruct immigration authorities to carry out the Protocol edicts in a more faithful manner.

Beyond their self-operative essence, Articles 3, 31(1), and 33(1) represent common precepts of humanity conceded as having customary force by the world community, including various overseeing forums on international and regional planes. Undoubtedly, treaty stipulations of this fashion should have direct regulatory authority domestically and supersede U.S. laws in the event of any inconsistency. There was no ground for judges in detention and return cases[128] to declare that only through the Refugee Act could the Protocol provisions be (partially or fully) actionable in U.S. courts and that the U.N. refugee treaty could never alter or enlarge the text of immigration laws for implementation.

In addition to misrepresenting the power of the Protocol by means of statutory clauses, Judge Richey in *Gracey* saw Protocol Article III as importing a non-self-executing notion about Article 33(1). By its terms, Article III does not touch on the self-executing issue in the least. It spells out that treaty parties shall deposit with the U.N. Secretary General "the laws and regulations which they *may* adopt" for the aim of treaty application. Arguably, the Protocol's domestic implementation clause bears two explanations. It may merely address the question of formal treaty ratification to some parties whose municipal legal systems call on a particular transformation process before setting the treaty in motion domestically.[129] Alternatively, "the laws and regulations" in Article III may refer to situations where the need for national legislation is certain as to those non-self-executing provisions.[130]

Moreover, antithetical to Judge Richey's interpretation, the paucity of procedures devised for refugee identification does not affect the self-operative character of Article 33(1). In the opinion of the UNHCR, the vesting of the Protocol's protections need not hinge on a formal

authentication of refugee status by a receiving country.[131] The existence of objective conditions (flight from country of origin for a set of stated reasons) will suffice to activate Article 33(1) for the good of vulnerable refugees.

Lastly, Judge Spellmen's validity thesis in support of the continual INS disclaimer of parole petitions by Haitian migrants in *Jean* was glaringly problematic. So were other analyzed cases showing considerable judicial impassivity toward the open-ended imprisonment that some groups of Mariel Cubans had complained of for years. Specifically, the use of immigration detention has to be subject to certain constraints in international law.[132] Admittedly, government representatives sent to draft the Refugee Convention did enter into serious discussions with regard to the permissibility of placing behind bars unlawfully present refugees like excludable Haitians and Cubans in order to facilitate identity confirmation.[133] But the Convention delegates apparently had a more exacting scheme in mind. Beyond the few days required for a status inquiry, ongoing incarceration was sustainable to the limited extent that competent courts (Article 31(2)) or States parties (Article 9) had solidly certified the existence of necessary and exceptional scenarios. A close anatomy of Convention Article 32 vindicates this interpretive direction, because the Article designates not only national security and public order grounds but also due process guarantees as essentials for expelling a legally resident refugee from a host country.

As already demonstrated in Chapter 5, an array of core human rights treaties and customary international law alike accord a material weight to due process of law in defending individual liberty interests against arbitrary intrusion by national governments. A reiterated emphasis on the value of due process and on the employment of detention as an exception also appeared at the deliberating sessions of the international and regional apparatuses. For instance, the U.N. Human Rights Committee, the ECHR, the IACHR, and the UNHCR concurrently confuted the acts of member States to justify their refugee detention practice by recourse to domestic laws.[134] Above all, the Human Rights Committee offered insightful illumination in this aspect by pointing out that:

> '[A]rbitrary' is not synonymous with 'illegal' and...the former signifies more than the latter. It seems clear that, while an illegal arrest or detention is almost always arbitrary, an arrest or detention which is in accordance with law may nevertheless be arbitrary. The Committee, therefore,…had adopted the following definition: an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person.[135]

In *Rafael Ferrer-Mazorra* as set out in Chapter 5, the IACHR had on international law grounds strongly opposed the United States resorting to its purportedly lawful executive regulations to incarcerate the Cuban refugees, obviously far in excess of a reasonable time restriction. The Commissioners furnished minute details in their published opinion by condemning the U.S. wrongs for applying far-ranging immigration custody to the unreturned Marielitos. Moreover, this misconduct was perceived as falling under the generic meaning of arbitrary detention, unyieldingly inhibited by the American Declaration. Even the U.S. Supreme Court turned against administrative detention decisions, soberly querying the appropriateness of consigning foreign nationals, be they removable migrants or POWs, to prison for a protracted stretch of years without due judicial proceedings.[136]

Plainly, the INS exercise of parole denials against undocumented Haitians and some Mariel Cubans, though pursuant to President Reagan's order or the INA, openly flouted individual liberty rights recognized as fundamentally inviolable by the world community. These detentions infringed international law because they had gone on indeterminately in the absence of judicial endorsement. Employing detention for deterrence purposes, despite its executive feature, constituted one form of punishment squarely proscribed by Article 31(1).[137] It also failed to meet the necessary or exceptional criteria under Articles 31(2) and 9, since the imprisoned asylees from Haiti and Cuba were neither a security nor absconding risk to warrant incarceration.

As one of the refoulement-like acts, the use of custody by the INS to particularly check the Haitian refugee flow into the United States marked yet another infraction of Protocol Article 33(1).[138] More often than not, the INS kept the Haitians in prison conditions so terrible and inhuman that it in the end compelled them to voluntarily return to persecution. In short, Judge Spellmen implausibly built his opinion in *Jean* on a presidential directive, which in itself had already defied U.S. treaty vows not to punitively confine refugees solely in consequence of their illicit entry or presence. The same logic described above refuted and dispelled the imprisonment assumption or the *Paquete Habana* fiat constructed and favored by a set of inhospitable judges acting to the disadvantage of Cuban parole applicants.

Next, it is unconvincing in several respects for adjudicators to withhold paroles from the Mariel Cubans on the ground of the *Paquete Habana* axiom. To begin with, the U.S. government is duty bound to observe the customary norm against arbitrary detention because it has never raised any voice of dissent during the formation and evolution of that norm. Two cases in point swiftly appear—one being the lawsuit before the ICJ over the Iranian hostage incident and the other the enactment of foreign assistance laws.[139] On these distinct occasions, the

United States unreservedly castigated unwarranted liberty deprivations committed by countries as one of the most flagrant offenses that could hardly withstand scrutiny through the lens of international law. As exhibited in Chapter 5, some relevant international provisions encompassing a range of refugee safeguards were even approved of by the political branches without setting any constraining terms. Further, executive officials had ardently engaged in preparatory activities with a view to bringing into being a U.N. Working Group on Arbitrary Detention.[140] For all of these reasons, the United States was not entitled to dissociate itself from that customary bar unless a new rule taking on a customary law or *jus cogens* attribute, not an executive or legislative act, otherwise works to the opposite.[141]

Where fundamental rights and freedoms arise, the international human rights regime additionally demands that the USA modify its conduct of foreign relations.[142] The international customary ban against procedurally mistaken imprisonment bears a resemblance to municipal due process of law. Much like the Fifth Amendment, the canon carries unique significance in the securing of individual personal liberty from sovereigns' wrongful interference. It is a conception shared among a great many countries, including the United States, and introduced into major international instruments.[143] In the Human Rights Committee's commentary, the prohibition against arbitrary confinement was of essential importance in the human rights sphere, though derogable in the ICCPR.[144] This prohibition formed one of those customary norms that States parties in any case should refrain from diminishing the force of in domestic jurisdictions. To similar effect, other U.N. bodies, such as the Working Group on Arbitrary Detention and the UNHCR deemed the principle to be vital in guarding the physical freedom of refugees. On that consideration, they pleaded with host countries for not disregarding the necessity of limiting the use of detention both to a reasonable duration and to certain compelling circumstances in accordance with the law.[145]

As one of the basic inherent human rights, this customary procedural affirmation reaches to every individual alien regardless of their nationality or immigration status in the United States. Assuredly, it excludes the application of the *Paquete Habana* maxim in U.S. courts to disaffirm the force of customary law. Further, premised on this tenuous maxim, adjudicating judges were unable to make their dispositions so sufficiently cogent as to obviate customary law contentions raised by pro-refugee activists in *Garcia-Mir*, *Alvarez-Mendez*, *Gisbert*, and *Barrera-Echavarria*. Not only is the maxim per se ambiguous and unsettled, but it has constantly spurred a great debate among scholars as to the accurate significance of "controlling executive or legislative act."[146] Resting on this unclear phrase stated in the *Paquete Habana* case

as a rule of decision strictly disclosed how inadvisable judges were in subordinating the effect of customary law to the political branches' refugee detention system.

Third, the theme under examination concerns the legal compass of Protocol Article 33(1). In spite of divided opinions around the term "return ('refouler')" in Article 33(1), sources drawn from international and municipal origins nevertheless have heightened the claim that its coverage is not delimited geographically. A simple comparison of Article 33(1) with other Protocol provisions corroborates the rightness of this thesis. It is shown that those provisions other than Article 33(1) set forth refugees' physical appearance or residence in a host country as a sine qua non for the conferral of a string of concomitant rights, duties, and benefits.[147] Additionally, international organs have argued in concert that Article 33(1)'s proscription on return governs beyond a country's territorial jurisdiction. In amicus briefs filed with U.S. courts, the UNHCR submitted that:

> The principle of non-refoulement applies irrespective of whether the persons whom the principle is intended to protect are within or outside a state's territorial jurisdiction. The obligation of non-refoulement arises wherever the government acts.[148]

Likewise, the Inter-American Commission decided against the provincial perception of Article 33(1) held by the Supreme Court in the *Sale* case.[149] It noted that the U.S. high-seas blocking program functioned at variance with the Protocol's non-refoulement dictate. So, too, did the program default Article XXVII of the American Declaration, for it simultaneously hindered Haitian migrants from seeking asylum elsewhere. Even the United States had pledged to commit itself to the extraterritoriality principle by formally writing it into a body of presidential orders, INS guidelines, official statements, and U.S.-Haitian and-Cuban bilateral accords. Far from being amenable to limitations on the places where refugees are detected or on the number of asylees who have escaped from their homelands, Article 33(1) rests its protector exclusively on the nexus between individual refugees and a country of refuge. It comes into play the very moment persons fearful of persecution for treaty-specified reasons have departed from their homelands and are taken into the custody of a receiving country.

In the studied return cases, the circumstances of political migrants in exodus from Haiti and Cuba precisely met these conditions. They were eligible for the rights invested in Article 33(1). The question of whether they had entered into U.S. territorial jurisdiction was entirely not a concern in this context. It was illogical to relate the legal status of international waters and Guantanamo to the non-refoulement right (*Gracey*, *Baker*, *McNary/Sale*, and *Christopher*). Turning Article 33(1)'s

qualification on the ability of fleeing refugees to set foot in a host country would undermine the highest objective enshrined in the Protocol: to at the very least ensure fundamental rights and freedoms for defenseless refugees in exigent need of international assistance.[150] As the minimum standard of protection mandatorily due refugees, Protocol Article 33(1) debarred judges from undertaking a restrictive, meandering treaty reading (i.e., non-extraterritoriality) in deference to the executive branch's high-seas operations. Here, a brief reminder is in order regarding the standing of the U.S. naval post stationed at Cuba's Guantanamo Bay. In the recent case of *Rasul v. Bush* referenced earlier, the Supreme Court construed the pertinent lease treaties between the two countries as expressly giving the United States authority to enforce "complete jurisdiction and control," yet without sovereign conveyance, over that military zone.[151] Based on this *Rasul* holding, the Eleventh Circuit decision in *Christopher* to renounce extension of its jurisdiction to Guantanamo should be voided as a result.

Further, the law of customary international jurisprudence illustrated in Chapter 5 has an instrumental role in resolving the return issue, notwithstanding judges' silence on its relevance throughout court review. A number of grounds converged to argue that the United States could not dodge its customary obligation not to conduct refoulement against refugees at sea. The Refugee Protocol was endorsed without any showing by the USA of a tendency to truncate the effect of Protocol Article 33(1). By passing the 1980 Act, the government reaffirmed its determination to bring domestic immigration practice in sync with Article 33(1). It promised to apply the norm extraterritorially when issuing a series of official announcements and bilateral pacts in justification of its high-seas refugee arrangement. On several occasions, the United States joined with the UNHCR in censuring Southeast Asian countries and Britain for violating Article 33(1) by their relentless refusal to provide harbor to boat people in flight from Laos and Vietnam.[152] As a member of the UNHCR Executive Committee, the United States consented to numerous opinions brought forth by the Committee denoting the extraterritorial application of Article 33(1).[153] Furthermore, by espousing an OAS resolution intended to actualize the Cartagena Declaration of 1984, U.S. administrative officials virtually admitted, among other things, that the non-return principle extended outside of a host country's jurisdiction as a *jus cogens* norm.[154]

In short, the USA has long valued the fulfillment of non-refoulement as crucial to itself and to other countries wherever its implementation is required, including on the high seas. At no time had the government ever engendered a single sign of remonstration against the norm and its all-embracing coverage. Consequently, the customary norm against return commits it not to deliver into the hands of persecutors a stream of

refugees caught in international waters or detained at Guantanamo. The need of the U.S. government honoring customary international norms on which it has persistently agreed also finds full support in domestic legal authorities. As the Restatement (Third) to the Foreign Relations Law of the United States declares for the benefit of domestic judges, "[t]he United States is bound by the international customary law of human rights."[155] Moreover, it has been a well-known doctrine of statutory construction for over two centuries that federal law must not be interpreted in a way that would conflict with customary law if any other construction is fairly possible.[156]

Beyond the three topics with regard to treaty power in the United States, the *Paquete Habana* rationale, and the reach of Protocol Article 33(1), the final critique concentrates on examining the validity of procedural doctrines crafted by judges to stave off refugee litigation. The criteria to establish standing and a political question are not recited here, since Chapter 4 has treated the issue rather exhaustively. Briefly put, as opposed to the government's lack-of-standing argument, the Haitian and Cuban litigants were the real party in interest. This was because court challenges, if preponderating, would eventually bring back their physical freedom lost to immigration authorities and foreclose their originally ordained return to face human rights abuses. They had, in fact, competently satisfied the constitutional "cases" or "controversies" requirement of Article III, by demonstrating a material and evincible injury, traceability, and redressability. Their claims to enjoy liberty and non-refoulement therefore had doubtless fallen securely within the Protocol's zone of interests.

On the other hand, counseling groups like the HRC had the ability to contest the executive interception scheme in their own right and on behalf of those high-seas refugees who personally could not lodge their grievances and enter appearances in U.S. courts. The organizational parties had undergone a degree of actual harm in that, by operating forced repatriation, the government had impaired their First Amendment rights to association with their refugee clients and, as far as their individual members went, to act as lawyers for those refugees. Prospective injunctive relief would definitely have removed the alleged damage in a rapid manner.

Prudentially, the plaintiff organizations also properly asserted the interdictees' legal rights. There was a special relationship between them and the third-party refugees, since hearing the former's complaint would touch on the non-return interests of the latter. In addition, legislators' remarks concerning the Refugee Protocol and the 1980 Act included frequent references to the role of advocacy groups in assisting refugee problems.[157] Hence, it was incontrovertible to maintain that the First Amendment cause of action filed by the group parties to the litigation

was closely interwoven with the purpose and thus zone of interests of the Protocol. By this analysis, the refugee interest groups indeed had standing in their organizational capacities. Despite the factual situations being identical, judges came to differing conclusions on whether the HRC and its members might represent themselves and high-seas interdictees in return challenges. Manifestly, the key to such widely varying outcomes had less to do with how substantive organizational impairments might be proven in connection with government return actions. Rather, it was contingent on how judges themselves envisaged the due role of the courts in the separation of powers system.[158] Without a doubt, advocacy groups, as compared with individual alien asylees, had possessed far more expertise and financial resources to address themselves to the often protracted court battles against government wrongdoing. The lack-of-standing doctrine relied on by restraint judges (Bork and Buckley in *Gracey*) thereby effectively thwarted the opportunity of these liberal NGOs to seek justice for a group of wretched and helpless refugees, intercepted at sea on their way to finding sanctuary in the United States or elsewhere.

As for the justiciability test, the self-executing nature of Articles 31(1) and 33(1) easily nullified the government's political question proffer made to exclude judicial review in detention and return cases. A breakdown based on the six factors in the case of *Baker v. Carr* provides substantial support for this result as well. Nowhere was there any constitutional edict for the plenary power thesis in the fields of detention and return. On the contrary, federal courts had the legitimate power to remedy Protocol-related breaches under Article III of the Constitution and 28 U.S.C. §§ 2241 and 1331 (habeas corpus and federal question clauses). Further, the courts might germinate such treaty jurisdiction from the Administrative Procedure Act (APA) (5 U.S.C. §702).[159] To be more specific, the Supremacy Clause rendered the United States bound by Articles 31(1) and 33(1) as a matter of federal law. Within this context, the aggrieved Haitians and Cubans might assert a right of action under the APA for injunctive and declaratory relief since they suffered a legal wrong due to the frustration by federal agencies of those treaty provisions.

In addition, it was never a difficult task to follow the Protocol standards in elucidating for adjudication the notions of liberty and non-refoulement. True, the Refugee Convention and its Protocol said nothing about arbitrariness and refugee screening procedures. In return cases, however, the objectively-perceived conditions of calamities rampant in a refugee's homeland normally would be enough to trigger the operation of a non-refoulement system. In the alternative, at least the suggestions of the 1979 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, notably teeming with the Office's

aggregated experience and national practice, might provide informative guidelines for this purpose. Equally momentous, a body of related international opinions could help calibrate whether INS parole dismissals, although pursuant to executive directives, stood to reason. Moreover, the fact that executive and legislative authorities on a number of occasions had categorically countenanced due process and non-refoulement norms cleared the way for judicial investigation into the realms of parole and return. It eliminated concerns over the possibility of clashing with the remaining four elements of *Baker v. Carr* (policy determinations, lack of due respect, a deviation from political decisions already made, and political embarrassment). Lastly, the government was misleading by arguing no showing of prejudice in *Garcia-Mir*, since the procedural deficiencies at bar had demonstrably caused a grave harm to the physical liberty of Cuban detainees.

Overall, domestic courts ordinarily endorsed the Supreme Court's plenary power doctrine[160] in the refugee domain. Unfavorable judges, however, did not depend on an all-inclusive plenary title to strike down international refugee standards. Rather, two subdivided procedural and substantive approaches stood out.

Some judges advocated a political solution by looking to procedural barricades such as the political question doctrine and a lack of standing to abstain from hearing the merits of international claims. Others elected to review executive practices in the areas of detention and return, but ended up invoking a range of doctrinal grounds in support of the position of the political branches on refugee treatment. The non-self-executing postulate or the narrow treaty construction in many instances offered a handy pretense to discard complaints founded on the Refugee Protocol and other applicable treaties. Besides the foregoing impediments variously laid out in U.S. courts to disprove treaty law, it was not atypical for judges to aver a dearth of telling evidence or to rely on the *Paquete Habana* language to override customary international claims brought forward by refugees administratively confined in U.S. prisons.

Since mandatory detention under the IIRIRA remains in full force, it is a matter of time before domestic courts apply the last-in-time rule against the international prohibition on punitive confinement of refugees. The doctrine is also likely to control in negative decisions on returns, where judges consider that the statutory withholding (now called removal) system is not intended to grant extraterritorial application and takes precedence over Article 33(1) of the 1967 Refugee Protocol. All of these detention and return criteria have become all the more stringent with the advent of the USA PATRIOT Act, which allows INS (now USCIS) officials to screen out potentially genuine treaty refugees based on the undefined penumbras of its terrorism provisions.

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Conclusion

In the current Westphalian system where the genesis of a global central government lies far beyond our prediction, municipal courts likely will continue to assume a preeminent role in steering the world toward the idea of global justice. As the principal domestic legal arbiters installed with enforcement authority, they are in a better position to facilitate the pace of internalization through decision making based on or informed by universal human rights standards. Meanwhile, the contribution of transnational civic NGOs and individual activists to this wave of legal globalization should not be underestimated. In particular, the arrival of the electronic information era has brought some revolutionary campaigning reforms to the human rights movement. Thanks to advanced communication techniques, message transmission and resource mobilization between human rights advocates can be sped up and diffused on a far-flung scale across the globe. Indeed, the momentum that human rights defenders are now capable of generating toward the goal of globalization is far more potent than in the early post-war years, when individual rights matters drew on urgent worldwide concerns and were codified into the U.N. Charter and the Universal Declaration .

This book employed Professor Almond's functional framework to describe how human rights activists made use of distinct international fora and domestic courts in an effort to make U.S. death penalty and refugee policies comply with international law. Among the cases specifically surveyed (juvenile capital punishment, consular default, prolonged detention, and refoulement), consular litigation strikingly displays an exemplary illustration of how global civic advocacy for human rights took shape and proliferated into full blossom. Campaigners from different countries transcended the orthodox conception of national territorial bounds and united with each other in the course of debunking and righting the U.S. omissions of consular treaty-accorded benefits to death-sentenced foreigners. Besides a functional depiction of legal/political/social activities connected with those four key issues, the legalistic model is further introduced in the midst of proceeding with policy making/implementation/adjudication in U.S. courts. The gist of this design is to ascertain whether simple neutral laws represented the

single most important elements responsible for judges' voting outcomes. In the final analysis, from a functional angle, this study gauges to what extent NGOs and individual activists came off satisfactorily in engaging U.S. judges and other individuals in the global justice process through the strength of death penalty and refugee litigation.

THE LEGAL MODEL

Overview of Qualitative Findings

The Death Penalty Cases

In the arena of the death penalty, the ideas of dualism and federalism conspicuously penetrated the thinking of U.S. judges averse to international law, in stark opposition to pure incorporation embraced by monist judges or indirect incorporation adopted by reconciling dualist judges. Prior to the ratification of the ICCPR by the United States, dualist judges conventionally responded to human rights activists' customary law arguments by articulating the pertinence of cultural relativism. Pursuant to that postulation, Americans' vision of societal decency, rather than foreign practice, was the sole legitimate indicator to measure the constitutionality of states' policy in executing juvenile offenders. This outlook was unreservedly projected in the opinions of the *Thompson* dissenters and the *Stanford* majority. In challenge to the *Thompson* and *Stanford* cases, human rights activists regularly invoked the *Roach and Pinkerton* ruling entered by the Inter-American Commission (finding a regional *jus cogens* norm against the execution of child offenders). Yet, their arguments structured on the hemispheric human rights mechanism's decision barely stirred any discussion among Supreme Court justices, including those willingly upholding the utility of foreign sources for a constitutional reading. In the post-ICCPR approval and pre-*Roper* decision era, the Senate reservation to Covenant Article 6(5) quickly became an oft-quoted basis for adjudicators to overrule a sequence of appeals made to exempt convicted persons aged 16 or 17 from capital punishment. Classified in this category are the principal opinions in *Domingues*, *Beasley/Beazley*, *Ex parte Pressley*, *Ex parte Burgess*, *Wynn*, *Ex parte Carroll*, *Servin*, *Hain*, and *Villarreal*. At the same time, the procedural default rule emerged in *Beasley/Beazley* as one of the underlying grounds for federal trial and appellate judges to disclaim the application of the ICCPR. In addition to backing the Senate reservation, the three-judge panel from the Tenth Circuit rested its dismissal of the ICCPR claim in *Hain v. Gibson* on the Senate's non-self-executing treaty declaration. Further, the panel rebuffed the binding force of a *jus cogens* norm in rectifying U.S. policy on the juvenile death

penalty, instructing that only the other coordinate branches had the authority to decide its enforceability within the United States. The *Dycus* Court likewise disallowed a claim based on the ICCPR and *jus cogens*.

In disregard of the Senate reservation and, implicitly, the non-self-executing declaration to the U.N. Covenant, two dissenters from the Nevada Supreme Court (Justices Charles E. Springer and Robert E. Rose) affirmatively argued for the value of Article 6(5) to vacate Nevada's death sentence against Michael Domingues. Concurring with the *Servin* majority that reversed the death sentence of 16-year-old Robert Paul Servin on evidential and mitigating grounds, Justice Rose declined to confute the authority of the Senate reservation over ICCPR Article 6(5). Rather, scholarly opinions and international practice against the juvenile death penalty compelled him to accept the governance of customary international law. In some sense, a pervasive outcry against the juvenile death penalty by the contemporary global community resulted in dissenting Justice Stevens' suggestion that *Patterson* be licensed a rehearing on the merits. More significantly still, the atmosphere of global opinion, among other factors, ultimately prodded justices in *Simmons/Roper* to commute Simmons' death sentence to life without parole and to end the longstanding institution of the juvenile death penalty.

Turning to consular rights petitions, there was a general indication by a number of judges that the disputed clauses of the Vienna Convention were self-executing. However, this consensus nowhere lent itself to warranting the awarding of remedies to foreign citizens confined on death row absent proper consular rights advice. Rather, under the doctrine of federalism, hostile judges derivatively crafted a spectrum of procedural reasons such as procedural default, lack of prejudice, the last-in-time rule, and sovereign or state immunity to preclude relief founded on consular treaties and the ICJ's provisional or substantive decisions. On several occasions, judges with dualist convictions regarded the consular treaty rights at bar to be inoperable in U.S. courts (*Loza*, *Paraguay*, *Kasi*, *Flores*, *Reyes-Camarena*, *Bell*, *Medellin*, and *Plata*). In essence, the synopsis of the controversy in consular cases implicated procedural defects that originated from states' neglect to swiftly apprise alien arrestees of their consular access and notification rights through law enforcement personnel. This same factual situation clarifies why the federalist notion of revering states' rights in the management of criminal justice oftentimes left consular wrongs untouched, regardless of the clear realization by most courts that consular treaty causes are actionable in U.S. courts. Contrastingly, amicable judges as shown in Chapter 4 soberly took issue with the viability of federalism and dualism in the context of consular rights disputes. Due process, prejudice, reciprocity, the ICJ's *LaGrand* judgment, and treaty duties under the Supremacy

Clause individually or collectively served as chief components stimulating their election to retrospectively amend the unfair trials inflicted on aliens receiving death sentences without knowledge of their consular treaty rights.

The Refugee Cases

Alongside dualism, the plenary power theory periodically surfaced to command the construction of numerous judges during deliberations on detention and return actions pressed by Haitian and Cuban migrants in flight from their domestic oppressors. Based on that theory, the regulation of immigration affairs was deemed totally inappropriate for judicial review. As such, the destinies of those asylum seekers to gain safe haven on U.S. soil must be resigned to political determinations of the executive branch and Congress. In detention litigation, Judge Carter in *Bertrand* (approaching monism) and the Second Circuit majority in *Bertrand* and Judge Spellmen in *Jean* (dualism) did share a joint viewpoint on treaty power. They contended that the contours of the Refugee Protocol in U.S. jurisprudence needed to be mapped out according to nothing else but statutory intent. The two camps nevertheless widely differed from each other in their final judgments on the validity of Protocol Articles 3 and 31(1) to address the INS infliction of racially discriminatory punitive confinement on excludable Haitians. In grappling with the liberty interests of imprisoned Cuban refugees, trial and circuit judges in *Rodriguez-Fernandez* patently supported customary international law as a rule of decision or as a source to foster constitutional understanding. On the contrary, the *Paquete Habana* language, initially adduced by Judge Shoob to override *Garcia-Mir*, routinely acted as an axiomatic principle for many other courts to sanction incarcerating certain categories of the Mariel Cubans indefinitely, to the exclusion of customary legal governance.

In return cases, a great proportion of judges registered full cognizance of a statutory reference to Article 33(1) of the Refugee Protocol. In spite of that appreciation, they took no exception to the executive refoulement program against a host of Haitian and Cuban asylees blocked at sea or housed at the Guantanamo camps. Here, non-extraterritoriality was the backbone principle behind their adverse judgments. In two other instances, judges simply brushed aside the Protocol-based arguments on the procedural grounds of a lack of standing (circuit Judge Bork and concurrer Buckley in *Gracey*) and the political question doctrine (Justice Thomas in *Baker*). In comparison, a minority of activist judges looked to essentially the same legal authority as that used by the submissive judges as interpretive guidelines. In the end, a salient discrepancy happened between the two groups, with the activist judges insisting on the self-executing force of Article 33(1) and

its extraterritorial coverage to asylum seekers picked up by the Coast Guard in international waters.

Summary

Not every reviewing judge assented to the legality of the Senate reservation truncating the right to life of child offenders under ICCPR Article 6(5). Pivotally, some serviceable votes cast in detention and return cases were ascribable to the congressional assimilation of refugee treaty protections into the Refugee Act (district Judge Carter in *Bertrand* and circuit Judges Pratt and Newman in *McNary/Sale*). But in a number of return cases, this assimilationist attitude did not provide a panoramic view of the decision-making preferences of several other judges. Rather, these judges appeared more amenable to parsing Protocol Article 33(1) extraterritorially from a monist perspective, although the drafting history of the 1980 Act remained one of the vital parameters in their methodological investigations. On rare occasions, the opinions of academics and amici regarding a national practical trend toward abolitionism and the proscription of customary international law against juvenile capital punishment effectively prompted judges to uphold the discontinuation of the juvenile death sentences at bar (*Thompson* plurality, *Stanford* dissent, *Servin* concurrence, and *Simmons/Roper* majority). So too was the case in *Rodriguez-Fernandez*, which set a Marielito free from protracted imprisonment through reference to the customary precept prohibiting arbitrary detention. Despite a poor record of judicial sensitivity to international tribunal opinions in the USA, the World Court's decision in *LaGrand* exerted some measure of influence on the voting choices of two judges in consular cases (a dissenter in *Issa* and District Judge Coar in *Madej*).

In antithesis, a wide judicial recognition of the consular information standard as self-executing did not categorically lead to rulings that were sympathetic to foreign death inmates in consular rights appeals. Moreover, regulatory and statutory incorporations of consular and non-return treaty provisions and international customary prescriptions served little purpose in scoring the victories eagerly pursued by human rights litigators. Instead, unfriendly judges were usually capable of utilizing diverse justifications to hamstring the carrying out of these international norms. As presented in Chapter 2, the refusal by the U.S. bench to exercise ATCA-based jurisdiction was almost certain whenever executive officials intervened in the form of a statement of interest, an advisory letter, or an amicus brief. The same held true in *Breard/Paraguay,* where the Solicitor General's opinion critically catalyzed the Supreme Court to endorse the prerogative of Virginia to determine whether or not to stay the execution pending the final ICJ judgment. Analogously, the Solicitor General's statement in *Domingues*

resulted in a dismissal by the federal high court without looking into the legitimacy of the Senate reservation to Covenant Article 6(5).

Largely, not all reviewing judges paid attention to customary or peremptory law claims raised by human rights activists in legal challenges against capital punishment and refugee treatment. The articulation of the force of the customary law or *jus cogens* in *Domingues*, *Beasley/Beazley*, *Servin*, *Hain*, and *Dycus* contributed to three courts ruling on these issues. Two repudiated *jus cogens* (the *Hain* majority from the Tenth Circuit and en banc justices of the Mississippi Supreme Court in *Dycus*) and one resulted in a favorable response to international customary law in the concurrence (Justice Rose from the Nevada Supreme Court in *Servin*). No U.S. judges spoke of the applicability of customary or peremptory principles in consular and return cases. In several instances, judges that examined detention cases struck down the power of customary law under cultural relativism or the *Paquete Habana* formula. Notwithstanding refugee treatment being inextricably associated with the formulation of U.S. foreign policy, the vast majority of judges did not immediately reject detention and return cases on procedural grounds. They proceeded to consider cases on the merits, but the results were disproportionately lopsided toward the administrative political attitude. In effect, procedural encumbrances erected by judges have occurred far more constantly in consular cases, and this result may be attributable to the concept of federalism reigning in U.S. courts.

Overview of Quantitative Findings

The data elicited from Tables 4.1 and 4.4 subverted the hypothesis set up in Chapter 4 that judges on the U.S. bench are susceptible to domestic law in the area of juvenile death sentencing, but to international law in the area of the right to consular information. Instead, it demonstrates that there was no significant distinction between judicial voting preferences in these two categories of cases. A large number of judges that heard juvenile and consular petitions were antipathetic to the employment of international law. Further, the figures in Tables 6.1 to 6.3 provide little to verify the rightness of the assumptions that judges ordinarily think more of international refugee law in return cases than in detention cases and that international law is likely to be more influential in refugee litigation than in the context of condemned prisoners. This is so because the number of "Unknown" judges in Tables 6.1 and 6.3 could potentially change the statistical outcomes derived from those tables. In spite of telling us nothing about the types of cases that most readily obtained international law-based judgments or their comparative litigation advantages, the statistics in Tables 6.1 to 6.3 at least reveal that U.S. judges had a high tendency to find no merit in international normative

criteria. It had nothing to do with whether they took up detention/return cases or death penalty/refugee cases.

The Irrelevance of the Legal Model

At first blush, the legal model seems to account competently for the success and failure of capital punishment and refugee actions in the United States, since judges' opinions cannot actually deviate from the perimeter of municipal or international jurisprudence. In fact, the preceding legalistic probe helps identify a series of doctrinal rationales on which judges depended to accept or reject international human rights law. By means of statistical computation, this legal study also plainly presents the ratio of pro and con judges coping with selected death penalty and refugee cases.

Yet, unlike what Judge Robert H. Bork anticipates in *the Tempting of America*, a careful evaluation of court rulings in death penalty and refugee spheres unmasks a new and unintended reality. There are indications that judges' attitudes, rather than a body of neutral laws, to a great likelihood constitute contributing factors in bringing about the wins or losses in international human rights litigation. As canvassed in Chapters 4 and 6, the legal paradigm is out of place in search of case outcomes because it is unable to untangle the conundrum of why judges were so often split in dealing with the disposition of capital punishment and refugee questions. For instance, in *Valdez v. Oklahoma* (2002), judges sitting on the Oklahoma Court of Criminal Appeals were wrangling over whether to order a new sentencing hearing for a death-sentenced Mexican national. On some points, such as that the claim based on the ICJ decision in *LaGrand* was procedurally defaulted, they were indeed in complete agreement. Yet, the majority after all decided beneficially to Valdez on a prejudice finding which in its view overcame the default while, in addition to finding a procedural default with the majority, the partially dissenting judge both invoked the doctrine of *res judicata* and applied a more stringent prejudice test in order to vote against resentencing.

Besides its inability to delineate the difference of court opinions on capital punishment and refugee issues, the legal-centered analysis fails to delve into the root causes that are essentially accountable for the research results in this work: (1) U.S. judges were no less responsive to international law in juvenile death penalty cases than in consular cases; and (2) municipal jurisprudence overwhelmingly impacted the decision-making processes in all four types of cases investigated in this book—death penalty (juvenile and consular) and refugees (detention and return).

FUNCTIONALISM

The statistics in Table 6-3 unveil that human rights activists have thus far not reaped a substantial payoff in leading the U.S. judiciary into the globalization enterprise: fully three-quarters or more of adjudicators strenuously withstood international law claims in capital and refugee cases. However, based on the functional hypothesis constructed in Chapter 4, this book presumes that, by gradually educating judges through human rights litigation about the application of international law, NGOs and individual advocates may hope in the long run to undercut the mainstream forces of unilateralism and dualism in the United States.

The Findings

Predicated on case review and the data in Appendix I and Tables 4.1, 4.4, and 6.1 to 6.3, this study attempts to appraise the extent to which human rights advocates working in the death penalty and refugee litigation movement were able to engross the U.S. bench in the vision of global justice and enlist other like-minded activists. Through the research methods recounted in Chapter 4, two forms of legal and social integration advanced by human rights campaigners were respectively evaluated in the process of Almond's functional activities: socialization and policy making/implementation/adjudication (legal) and recruitment and articulation/aggregation (social). Notably, in the modern world, it is no longer possible to define the concept of social integration purely in consonance with U.S. territorial confines. Rather, integration of that kind usually takes on some transnational import. Group and individual advocates are now far more prone to make common cause with one another across national borders in their campaigning operations, owing to the advances of technological communication and the soaring global awareness of individual rights protections.

Legal Integration

Socialization—After a more than two-decades-long drive to secure the well-being of condemned youths and foreign nationals as well as Haitian and Cuban refugees, human rights fighters have not won over a considerable number of U.S. judges to accede to their espoused international legal positions. As indicated in Table 6.3, in juvenile and consular cases, slightly less than one-sixth of judges (28/155) ruled at least once in favor of international law in response to advocacy by human rights defenders in U.S. courts. Among those designated into this category, an indirect approach to international law was supported by 13 justices: Stevens, Brennan, Marshall, and Blackmun (*Thompson* plurality and *Stanford* dissent); Stevens, Ginsberg, and Breyer (*Patterson* dissent); Stith and concurrers White, Wolff, and Teitelman (*Simmons*); and

Breyer, Ginsberg, Kennedy, Souter, and Stevens as well as dissenter O'Connor (*Roper*). In addition, 17 reviewing judges and justices, including Springer and Rose (*Domingues* dissents), Rose (*Servin* concurrence), and dissenters Breyer and Stevens in the consular case of *Torres v. Mullin*, opined that the ICCPR or customary international law or the Vienna Consular Convention were directly enforceable in U.S. courts without the need of legislative implementing acts.

In Table 6.3, 67 judges passed judgments on the controversial refugee issues challenged by human rights activists, but roughly one-seventh of them (9/67) acted answerably to international standards prohibiting arbitrary detention and refoulement. Four judges embraced a pure direct incorporation approach to international law (Rogers in *Rodriguez-Fernandez*, Atkins and Eleventh Circuit dissenter Hatchett in *Baker*, Atkins in *Christopher*, and Supreme Court dissenter Blackmun in *Sale*). Two relied on international law as an ancillary instrument to aid in constitutional construction (Logan and Doyle in *Rodriguez-Fernandez*). Along the socialization continuum, Carter (*Bertrand*) and Pratt and concurrer Newman (*McNary*) are placed in between these two groupings, given that they upheld the self-executing power of the Refugee Protocol only after discovering the existence of a legislative imprimatur in the Refugee Act.

Briefly, 17 U.S. judges and justices perceived international law as having a readily binding effect in capital cases without condition, while three judges and one justice took that position in refugee cases. In total, 18.06% of judges (28/155) backed international death penalty and consular criteria and 13.43% (9/67) international refugee law. In these two sets of findings, the judicial integration into legal globalization promoted by human rights litigators appeared to have no significant success in the realms of the death penalty and refugees, given that over 76% of adjudicators in those two realms spurned the relevance of international law to case considerations.

Policy Making/Implementation/Adjudication—Let us take another look at Table 6-3. Judges who at least once consented to international capital punishment and consular rights principles accounted for 18.06% (28/155) of all participating judges, while those voting to the contrary comprised 80.00% (124/155). In refugee litigation, 13.43% (9/67) of sitting judges approved of international legal contentions put forward by Haitian and Cuban migrants, but 76.12% (51/67) did not. In these two categories of legal actions, belief in judicial restraint wielded preponderant force over judges' ultimate decision-making behavior.

Social Integration

Recruitment—As Appendix I describes, human rights activists prominently enlarged the range of their collaborators in their anti-death

penalty and pro-consular and refugee rights campaigns from the 1980s to the present. Beginning in 1986, in the *Roach* petition to the U.S. courts, there were three attorneys seeking to implement the precautionary measures issued by the Inter-American Commission. Further, two representing attorneys and three amici NGOs (counseled by 13 activists) immersed themselves in the defense task in the 1988 *Thompson* case by arguing customary law enforcement. Once more, in 1989, nearly the same composites from the *Thompson* team in *Stanford* renewed their attack on the state practice of juvenile death sentencing at the federal Supreme Court. The reverberations from a line of appeals in *Furman*, *Gregg*, *Roach*, *Thompson*, and *Stanford*[1] nonetheless have slowly spread in the human rights community. Not until 1998 did the *Domingues* appeal bring international capital punishment standards back to the attention of the courthouse, in challenge of states' entrenched juvenile capital schemes.[2] The juvenile death penalty became one of the few coordinated litmus tests inaugurated by human rights activists pursuant to the ICCPR and a peremptory rule of customary law, following U.S. ratification of the Covenant on 2 April 1992.[3] Afterward, the same international norms were recurrently resorted to on a defensive or offensive basis. The unceasing assimilation and expansion of fresh ranks of local or cross-boarder rights advocates continued throughout a train of cases from *Beasley/Beazley*, *Ex parte Pressley*, *Ex parte Burgess*, *Wynn*, *Ex parte Carroll*, *Servin*, *Hain*, *Patterson*, *In re Kevin Nigel Stanford*, *Villarreal*, *Simmons/Roper*, *Williams* to *Dycus*, all brought between 1999 and 1 March 2005 when the entirety of the state juvenile death penalty mechanism was declared unconstitutional by the U.S. Supreme Court.

Transnational civic involvement was particularly conspicuous in the consular rights movement. Its development exhibits how a few original case trailblazers eventually generated formidable influence by marshalling an international network of NGOs and individual supporters to vocalize the consular interests of death-sentenced foreigners and their home countries in U.S. courts. At the time that the *Faulder* appeal was filed with the federal courts in 1992/1993,[4] defense attorney Sandra L. Babcock and amicus counsel for Canada (Marjorie A. Meyers) were virtually the only advocates pioneering challenges to consular treaty transgressions in the courtroom. Yet, due to the untiring efforts by legal originators like Sandra L. Babcock, Robert F. Brooks, William H. Wright, and AI coordinator Mark Warren to publicize cases and organize synergy with other advocacy groups and activists, this type of consular rights defense has gradually been transformed into today's fully-developed global concern. The gathering campaign momentum even incited the submission of a number of noted cases in regional and international forums by harmed foreign governments and individual prisoners, challenging the violation of their consular treaty rights. In

addition to *Faulder*, some 25 other kindred appeals[5] were instituted in U.S. capital cases related to foreign nationals sentenced to death absent consular rights notification, with more than 200 activists acting in the roles of defense attorneys, amicus supporters, or out-of-court lobbyists to reinforce these consular undertakings.

In the refugee field, from 1980 until 1995, 10 cases were entered against the U.S. executive's purportedly illicit detention system directed at undocumented Haitians and Marielitos with mental illness or criminal pedigrees. At the outset, no more than three defense attorneys and four amicus NGOs (counseled by eight activists) were committed to the *Rodriguez-Fernandez* litigation. As time went on, an additional 27 lead attorneys in combination with at least six amicus NGOs and one law school clinic became involved over the course of other nine detention cases. Regarding return litigation, *Gracey* opened the chapter for human rights activists to begin disputing the lawfulness in U.S. courts of the administrations' high-seas interdiction program. Two representing lawyers and one NGO (three activists) as well as two amicus NGOs (four activists), alongside the amicus UNHCR, worked on behalf of *Gracey*. The driving force to query the involuntary return of intercepted political migrants hit its all-time high when the *McNary/Sale* case was fought all the way to the U.S. Supreme Court during 1992/1993. Throughout that legal battle, three defense lawyers and three NGOs (five representatives) as well as one law school clinic, together with the amicus UNHCR and roughly 32 amicus NGOs with numerous activist members and cooperating lawyers, stood up in unison for the treaty-based rights of Haitian boat people not to face refoulement into the blood-stained hands of their persecutors.

Of the cases reviewed in this book, a conservative estimate of hundreds lawyers and amicus NGOs, coupled with still more individual activists and law school professors, urged U.S. judges to redress juvenile or consular grievances in accordance with universally accepted rules. Further, a company of 17 Nobel Peace Laureates and in excess of 60 foreign countries as amici or party plaintiffs joined the rank and file of pro-rights crusaders, lambasting the U.S. government for its reiterative violations of international law in juvenile and consular domains. And yet, all of these enumerated figures do not incorporate the unknown numbers of other activists who equally deserve their share of credit for being devoted to an array of non-litigation jobs indispensable to campaign promotion and success. For example, this set of zealous activists might expend their full efforts at fundraising, staging demonstrations, or lobbying political elites in domestic agencies or beyond. The same account applies with equal force to the refugee detention and return cases surveyed in this work, where not fewer than 50 chief attorneys and 36 amicus NGOs litigated from international

jurisprudential perspectives. Taken altogether, there can be little doubt that over time human rights activists have shown remarkable mobilizing capabilities in the process of fostering the value of international death penalty and refugee criteria for use in U.S. court decisions.

Articulation/Aggregation—Besides *In re Kevin Nigel Stanford* and *Williams v. Texas*, human rights defenders on 15 occasions from 1986 to 2005 strove through litigation to relieve American youngsters from confinement on death row in the United States. On the consular rights issue, appeals lodged for condemned foreigners swelled to several dozens within the span of 1996 to 2004. Likewise, in order to assail the ill-treatment by the INS of asylum seekers from Haiti and Cuba, human rights activists converted their fervent protests into a series of legal briefs and amicus statements submitted to U.S. courts. Ten detention and four return cases were engendered between 1980 and 1995. In all, the launching of these capital and refugee cases, accompanied with plenty of briefings by amici, is emblematic of human rights activists' unswerving endeavors over the past 24 years to speak for the implementation of international law to be taken earnestly by the U.S. bench with a strong and united voice.

Summary

While not without their weaknesses and limitations, the testing schemas based on a limited number of studied cases provide us with a rough overview of the performance of human rights activists in the advocacy of international justice. In the more than two decades since the first capital appeals and refugee actions examined in this book were waged in U.S. courts and elsewhere, rights advocates have not propitiously integrated many dualist American judges into a bourgeoning globalized legal system. Presently, it is difficult to make a credible forecast about the long-term effect of their litigation mission in U.S. courts. The indication that judges' attitudes are the prime factor in the outcomes of international human rights litigation, however, offers a heartening sign that the power of dualism in U.S. courts may be progressively toned down by means of education from one generation to another.

SUGGESTED STRATEGIES AND FUTURE RESEARCH

The cautionary tale of the League of Nations clearly illustrates that the functioning of any international organizational institution is doomed in the absence of the energetic participation of major powers like the United States. This theorem equally addresses the case of the global justice system currently propelled by human rights activists. As the principal domestic law enforcer, the American judiciary would shoulder an enormous burden in thrusting the United States into this legal

globalization movement. Yet, given that the concept of dualism has been predominant in U.S. courts, the prospective fate of the emerging global legal regime is thereby intimately contingent on whether or not human rights activists are able to fulfill their mission to effectively ingrain support of international jurisprudence in the U.S. judiciary. Learning how to successfully cultivate a culture of monism in the United States is of profound significance in another positive sense, since it could then frequently and usefully enlighten other advocates in Third World countries to follow that example in bettering their own domestic human rights records.

Given the penchant of most U.S. judges to exclude the power of international law and the prospect of Senate non-self-executing declarations annexed to several core rights treaties to further foment this dualist mood, it seems inadvisable for now to preach a pure incorporation approach to the problem. Insisting on direct incorporation of international human rights standards is bound to create some daunting obstacles to litigation. U.S. judges typically embedded in dualist environments and complacent of constitutional rights guarantees usually dismiss the monist formula of attaching enforceable significance to international law domestically. Repeated efforts by human rights activists to achieve direct incorporation would inevitably result in generating deleterious precedents to hamper future litigation, or would simply agitate hostile judges into dismissing the legal actions on the ground of frivolous claims.

By skillfully invoking treaties on a defensive basis rather than as cause of action (as has been proposed by, among others, Professors Connie de la Vega and Jordan J. Paust), human rights vindicators can diminish the likelihood of encountering court reliance on Senate declarations to overrule international claims.[6] On top of that, this minimum permissible court strategy of using international law to complement domestic law interpretation enables advocates to socialize not merely monist judges but also dualists who are ready to come to terms with the monist posture when handling cases of rights violations. So long as the latter eclectically look for international standards to assist with their case deliberations, human rights advocates are moving the American bench a step closer to consolidation with the legal globalization process.

Another court strategy calling for particular attention from human rights advocates is the explanatory content of litigation briefs and amicus statements. It admits of no doubt that briefs filed by human rights activists have the power of expeditiously channeling international legal knowledge to domestic judges, as already shown in cases like *Thompson* and *Rodriguez-Fernandez*. Consequently, just as Professor John B. Quigley advances in his seminal law review article on human rights

defenses,[7] it is essential to elaborate on, for example, applicable treaty rules and their drafting histories and construction guidelines at the greatest permissible length in court pleadings, in order to impart international law information to judges in a more productive manner.

One situation, however, is an exception to the subsidiary incorporation canon normally favored by human rights scholars such as Gordon A. Christenson, Richard B. Lillich, and Howard B. Tolley, Jr.[8] Where Congress has codified treaty or customary norms in municipal laws or federal agencies have done so in regulations, as in the instances of the Vienna Consular Convention and the Refugee Protocol, human rights activists are in a much better position to fruitfully raise the self-executing treaty doctrine in court.

The recent case of *Sosa v. Alvarez-Machain* characterized in Chapter 2 illustrates the gravity of the legislative and executive influences on the federal Supreme Court's consideration of the utility of international law in U.S. courts. Simply put, the passage of the ATCA in 1789 by the First Congress compelled the *Sosa* Court to affirmatively acknowledge the authority of the *Filartiga* decree proclaimed by the Second Circuit and its progeny of hospitable tort rulings based on human rights claims. Further, in light of the express statutory language in the ATCA sanctioning the suing of foreign tortfeasers by victimized aliens, the Court signified that it had no intention to bar the civil actions pouring into U.S. courts pursuant to "the law of nations or a treaty." Regardless of that unmitigated blessing bestowed by the *Sosa* majority, solemn concerns with regard to the potential intrusion of ATCA lawsuits upon the execution of political power in the foreign relations arena surfaced over and over in the lines of the majority's holding. The prescription Justice Souter as the majority author laid out to forestall this perceived possible dilemma was an exercise of judicial wariness in determining whether to hold accused individuals to new forms of tort liabilities. All of these signs from the *Sosa* opinion concur to make us believe that the extension of socialization to the political departments of the United States government should form another top priority to which it would be worthwhile for advocates to divert a segment of their campaign resources and dedication to the objective of globalization in the sphere of human rights. More Strikingly still, under the principle of *stare decisis*, the *Roper* decision banning the juvenile death penalty instantly brought the lower courts into line with the global climate of abolitionism. The case roundly exemplifies how weighty it is to prevail on higher-level adjudicators to champion the domestic effectiveness of international law.

Beyond socialization in courtrooms through case submissions, out-of-court instruments such as symposiums are commensurably capable of connecting incumbent judges and the next generation of would-be judges and lawyers with the globalization movement. Also helpful are seminars,

school curriculums, and law students' practice clinics that make those prospective legal professionals grow alert to and conversant with international human rights law and its real-world employment before embarking on their careers. In the cases of *Domingues*, *Simmons/Roper*, *McNary/Sales*, and *Christopher* challenged in U.S. courts, together with several other complaints presented in the Inter-American system, law professors took full advantage of those opportunities to imbue students of school clinics with the concept of safeguarding rights in homogeneity with universal death penalty and refugee norms. Through the strength of such clinical training, the mission to globalize justice has incrementally been relayed from the first generation of activists like de la Vega, Hoffman, Koh, Lockwood, Quigley, and Wilson to another generation of law students, the very people who will comprise the practicing attorneys and prosecutors—and adjudicating judges—in the future United States.

Equally consequential are the tools of international complaint mechanisms and foreign governmental attitudes, which may in the long run be of great avail in increasing the degree of leverage that domestic globalization advocacy exerts with U.S. adjudicators. While traditionally not taken much into account by the U.S. government, the two recent ICJ decisions on consular rights nonetheless have generated some resonance at home. In a sense, this vector of impact and pressure, despite its modest level at present, serves as one feasible starter for igniting the globalization process from within the U.S. judiciary and other responsible government authorities.

One case is the *LaGrand* judgment, on which dissenter Stratton (*Issa*) and Judge Coar (*Madej*) rested to cast serious doubt upon the lack of workable remedies for U.S. violations of the treaty right of death row aliens to gain access to their consulates for legal assistance prior to trial. The other is the *Avena* lawsuit litigated by the government of Mexico in behalf of 52 Mexican citizens sentenced to death on criminal charges in the United States. The *Avena* decision constituted one of the major factors motivating Oklahoma Governor Brad Henry to spare Mexican Osbaldo Torres from execution. In a statement announcing clemency for Torres, the Governor divulged that State Department officials had asked him to effectuate U.S. treaty responsibilities based on the Vienna Consular Convention , while also asserting that the World Court's *Avena* judgment has controlling status in U.S. courts.[9] Even President Bush issued a memorandum requiring state courts to abide by the *Avena* judgment in 51 cases involving consular breaches of Mexicans awaiting execution across the United States.

Moreover, the Oklahoma Court of Criminal Appeals ordered an evidentiary hearing to assess the prejudice caused by the violation of Osbaldo Torres's consular rights, in response to a procedurally defaulted appeal predicated almost exclusively on the binding legal force of the

Avena decision. Indeed, as these words are being written, the U.S. Supreme Court has just agreed to hear the appeal of yet another death-sentenced Mexican national, in a case[10] which will focus utterly on the domestic judicial enforceability of the *Avena* Judgment. Without question, none of these momentous developments would have taken place had it not been for the vigorous actions taken by Mexico to defend the consular rights of its citizens abroad.

Foreign government remonstrations marked another type of empowerment, by accelerating the velocity of U.S. engagement in juridical globalization. As narrated in Chapter 4, a cascade of assorted forms of intervention by European regional organs and by other democracies contributed to some noticeable payoffs in the rectification of U.S. juvenile death sentencing and consular misconduct. Recently, the U.S. Supreme Court case of *Rasul v. Bush* furnished an additional paradigm to comprehend the possible role of foreign sovereign opinion in holding sway over U.S. judicial behavior. Reaching its climax in the wake of the exposé of the Abu Ghraib prison abuses, the amassed outrage from countries worldwide toward the inhuman treatment by the United States of the Guantanamo detainees arguably resulted to some degree in the Court's favorable pronouncement in *Rasul*.[11] As the majority writer, Justice Stevens admitted the reach of court competence to the United States' overseas base at Guantanamo, where the so-called "unlawful combatants" had been rounded up and housed for years in a limbo beyond legal oversight. Not only did Justice Stevens hand down an outcome heterogeneous to the question he had addressed more than 10 years ago in *Sale,* authorizing the refoulement of Haitian asylum seekers detained at the very same military camp. In addition, the language of the decision flew squarely in the face of the Bush Administration, which had intractably denied the extraterritorial authority of U.S. judges to review administrative custody determinations in the *Rasul* case.

Despite the limited number of cases examined in this study, the research findings nevertheless provide a line of direction for future exploration. The anatomy in Chapters 4 and 6 discloses that the legal model is irrelevant to understanding judges' decision making in capital and refugee cases. Since this research detects a tendency of U.S. judges in many instances to be deferential to executive interventions or legislative intent, it would seem difficult to wholly eliminate political factors from judicial decisional choices. Nonetheless, researchers should ideally begin by tapping judges' attitudes in terms of their ideologies and value preferences that may practically affect case outcomes in U.S. courts. These judicial attitudes are measurable by a string of variables such as party affiliation, gender, race, individual formative experiences (e.g., socioeconomic background or exposure to foreign cultures), and

educational immersion (i.e., taking international law courses or practicing in student clinics at law school).

The basic premise behind this proffer is that U.S. judges have enjoyed great leeway in entertaining cases without being categorically subject to the influence of other coordinate branches of government. After all, it is they who have the final say in deciding international claims favorably or unfavorably, regardless of how fiercely outside political attempts may be mounted to beset their voting processes. In particular, applying the elements of foreign cultural exposure and international legal education to appraise judges' attitudes may represent valuable indexes for human rights activists to reorient their current socialization activities with the U.S. bench. To cement the legitimacy of the observations made in this book in reference to death penalty and refugee cases, further research is required to conduct an analysis of unpublished court opinions on capital punishment as well as a group of asylum cases decided by immigration judges or by the Board of Immigration Appeals. Moreover, given that U.S. judges customarily make decisions structured on international trade law, it would be absorbing to explore whether this same group of judges is more inclined to support international human rights law in cases brought by human rights activists.

In the decades-long quest for legal globalization, monist activists have yet to significantly transition dualist U.S. judges into subscribing to international standards in human rights litigation. The landscape of judicial dualism in the United States nonetheless is not necessarily enduring and unalterable. This sanguine projection rests on the theory that human attitude is far from a static faculty. It ameliorates and changes in the process of time through all manner of meaningful socialization. For human rights defenders, the education of U.S. judges about international human rights law can be approached from two directions. Integrating sitting adjudicators globally will continue to depend on bringing meticulously prepared international law claims in U.S. courts, with the marshalling of pressure from executive and legislative institutions and international society as ancillary instruments to boost the efficacy of litigation. Additionally, through dedicated curricular programs of international legal training, law students in the United States who aspire to become attorneys, prosecutors, and judges may over the course of time become the dynamic force to infuse and mold a monist sentiment in the future U.S. judiciary.

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Endnotes

Introduction

1. Rome Statute of the International Criminal Court, concluded 17 July 1998, entry into force July 1, 2002 arts. 1, 17, 18, U.N. Doc. A/CONF. 183/9 [hereinafter Rome Statute].
2. For instance, see Thomas M. Franck and Gregory H. Fox, "Introduction: Transnational Judicial Synergy," in *International Law Decisions in National Courts*, eds. idem (New York: Transnational Publishers, Inc., 1996), pp. 1-11; Anne-Marie Slaughter, "A Typology of Transjudicial Communication," ibid., pp. 37- 69; Mary L. Volcansek, "Supranational Courts in a Political Context," in *Law Above Nations: Supranational Courts and the Legalization of Politics*, ed. idem (Gainesville, Florida: University Press of Florida, 1997), pp. 1-18.
3. Douglass Cassel, "Universal Jurisdiction: Myths, Realities, and Prospects–Empowering United States Courts to Hear Crimes within the Jurisdiction of the International Criminal Court," *New England Law Review* 35 (2001): pp. 424, 455 & nn11-22 (providing a list of countries employing universal criminal jurisdiction to pursue international offenders—Australia, Belgium, Canada, Denmark, France, Germany, Israel, Italy, the Netherlands, Spain, Switzerland, and the United Kingdom).
4. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entry into force 26 June 1987, U.N. GA. Res. 39/46 Annex, 39 U.N. GAOR, Supp. (No. 51) 197, U.N. Doc. E/CN.4/1984/72, Annex (1984), reprinted in 23 *I.L.M.* 1027 (1984) [hereinafter Torture Convention].
5. Naomi Roht-Arriaza, "Universal Jurisdiction: Myths, Realities, and Prospects – the Pinochet Precedent and Universal Jurisdiction," *New England Law Review* 35 (2001): pp. 311-313.
6. However, see Human Rights Watch, *Argentine Confronts Past on Coup Anniversary*, 24 March 2004, at <http://hrw.org/english/docs/2004/03/24/argent8213.htm> (visited 14 February 2005) (indicating that a great many Argentine lawmakers voted in August 2003 to void the amnesty laws designed to pardon a cohort of

evildoers in the military establishment for their human rights crimes during the "dirty war").

7. Adopted 26 June 1945, entry into force 24 October 1945, 59 Stat. 1031, T.S. No. 993, 1976 Y.B.U.N. 1043.
8. 10 December 1948, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR].
9. 217 P.2d 481 (Cal. Dist. Ct. App. 1950), reh'g denied, 218 P.2d 595 (1950), aff'd on other grounds, 38 Cal. 2d 718, 720-738 (1952).
10. Richard B. Lillich, "The Proper Role of Domestic Courts in the International Legal Order," *Virginia Journal of International Law* 11 (1970): pp. 37-47; idem, "The Role of Domestic Courts in Promoting International Human Rights Norms," *New York Law School Law Review* 14 (1978): pp. 153-177.
11. Adopted by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, 30 August 1955, U.N.Doc. A/CONF/6/1, Annex I, A (1956), approved by the U.N. Economic and Social Council, 1 June 1957, E.S.C. Res. 663 (XXIV) C, 24 U.N. ESCOR, Supp. (No. 1) 11, U.N.Doc. E/3048 (1957), amended on 13 May 1977, E.S.C. Res. 2076, 62 U.N. ESCOR, Supp. (No. 1) 35, U.N. Doc. E/5988 (1977).
12. 630 F.2d 876 (2d Cir. 1980).
13. 654 F.2d 1382 (10th Cir. 1981), aff'g on other grounds Fernandez v. Wilkinson, 505 F.Supp. 787 (D. Kan. 1980).
14. 480 U.S. 421 (1987).
15. 487 U.S. 815 (1988).
16. Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs* (Princeton, New Jersey: Princeton University Press, 1992), pp. 97-106; Hari M. Osofsky, "Domesticating International Criminal Law: Bringing Human Rights Violators to Justice," *Yale Law Journal* 107 (1997): pp. 198-199.
17. 28 U.S.C. §§ 1330, 1602-1611.
18. Jeffrey Rabkin, "Universal Justice: The Role of Federal Courts in International Civil Litigation," *Columbia Law Review* 95 (1995): pp. 2139-2140 (stating that federal courts invoked universal civil and criminal jurisdiction over pirates in early U.S. history).
19. Mark S. Zaid, "Universal Jurisdiction: Myths, Realities, and Prospects: Will or Should the United States Ever Prosecute War Criminals?: A Need for Greater Expansion in the Areas of Both Criminal and Civil Liability," *New England Law Review* 35 (2001): pp. 456-457 (citing war crimes cases tried by U.S. military courts soon after the conclusion of World War II).
20. For example, United States v. Busic, 592 F.2d 13, 20 (2d Cir. 1978); United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991); United States v. Rezaq, 908 F.Supp. 6, 7-8 (D.D.C. 1995); United States v. Yousef, 927 F.Supp. 673, 680-681 (S.D.N.Y. 1996); see also Osofsky, "Domesticating International Criminal Law," pp. 199-201 & nn47, 66, 68.
21. Rome Statute, arts. 5(1)(d) & (2), 121, 123 (indicating that the crime of aggression is to be defined seven years after the Statute takes effect).

22. Rome Statute, art. 12.
23. Ibid., art. 17.
24. Chimene Keitner, "Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)," *UCLA Journal of International Law and Foreign Affairs* 6 (2001): pp. 221-222, 238-264.
25. 22 U.S.C. §§ 7421-7432 (2003). The Act is an amendment to the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States.
26. Anna Willard, "House Votes to Halt Some Foreign Aid over Court," *Reuters*, 15 July 2004.
27. In the recent past, U.S. repugnance of the ICC was also roundly reflected in U.N. Security Council resolution 1422/1487, approved by Council members in July 2002 and extended in June 2003 after U.S. threats to veto the renewal of all U.N. peacekeeping missions dispatched across the globe. The instrument required a renewal every twelve months. Its purpose was to exempt from ICC authority any U.N. troops contributed from non-States parties to the Rome Statute, such as the United States. On 23 June 2004, the Bush Administration, after learning that it would not be able to garner enough supporting votes from the Security Council, finally withdrew its plan to extend the life of the resolution for another year. Relevant treatment is available in Warren Hoge, "The Reach of War: War Crimes—U.S. Drops Plan to Exempt G.I.'s from U.N. Court," *New York Times*, 24 June 2004.
28. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001). For full information about the PATRIOT Act and its impact, visit the American Civil Liberties Union's website, at <http:// www.aclu.org> (visited 19 May 2004).
29. International Covenant on Civil and Political Rights, arts 7, 14, opened for signature 16 December 1966, entry into force 23 March 1976, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967), reprinted in 6 *I.L.M.* 368 (1967) [hereinafter ICCPR]; Torture Convention, arts 1, 2, 4, 10-13, 16.
30. ICCPR, art. 4 (allowing the dilution of some Covenant rights and freedoms, other than those stipulated in Articles 6, 7, 8(1) & (2), 11, 15, 16, and 18, in a time of public emergency that demonstrably threatens the life of a nation).
31. Convention relative to the Treatment of Prisoners, concluded 12 August 1949, entry into force 21 October 1950, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].
32. Inter-American Commission on Human Rights, Detainees in Guantanamo Bay, Cuba (precautionary measures on 13 March 2002), at <http://www.ccr-ny.org/v2/legal/september_11th> (visited 26 February 2004); Additional Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba (15 July 2002), ibid. (arguing that the Commission's interim request at issue has no binding force on the USA). For a recent positive Supreme Court ruling on the status of Guantanamo, see Rasul v. Bush, 124 S. Ct. 2686 (2004) in Chapter 6.

33. A. LeRoy Bennett, *International Organizations: Principles and Issues*, 6th ed. (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1995), pp. 28, 41.
34. Volcansek, "Supranational Courts in a Political Context," p. 16; John F. Stack, Jr., "Human Rights in the Inter-American System: The Struggle for Emerging Legitimacy?" in *Law Above Nations: Supranational Courts and the Legalization of Politics*, ed. Mary L. Volcansek (Gainesville, Florida: University Press of Florida, 1997), p. 105.
35. Relevant information is accessible at <http:www.iccnow.org> (visited 27 February 2004).
36. *The Princeton Principles on Universal Jurisdiction* (Princeton, New Jersey: Program in Law and Public Affairs, Princeton University, 2001).
37. This standard list of criteria for the legal model has been modified by the author to include sources of international law, for the purpose of conducting research in this book. For an overview of the original theory, see Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), pp. 2, 3-6, 143-160 (suggesting a few prescriptions for a philosophy of "original understanding" in constitutional interpretations); Jeffrey A. Segal and Harold J. Spaeth, "Models of Decision Making," in *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993), pp. 33-53 (defining the elements of objective legal criteria).
38. For an explanation of the three models of judicial behavior, consult Thomas R. Hensley, Christopher E. Smith, and Joyce A. Baugh, *The Changing Supreme Court: Constitutional Rights and Liberties* (Minneapolis: West Publishing, 1997), pp. 14-19.
39. For further reference, see Jeffrey A. Segal, "Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981" *American Political Science Review* 78 (1983): pp. 891-892, 899-900 (providing empirical proof of the utility of the legal model in surveying Supreme Court justices' decisional outcomes); Tracy E. George and Lee Epstein, "On the Nature of Supreme Court Decision Making," *American Political Science Review* 86 (1992): pp. 323, 331-334 (demonstrating the value of synthesizing legal and extralegal factors in grasping the decision making of the Supreme Court in death penalty cases); Lee Epstein and Joseph F. Kobylka, *The Supreme Court and Legal Change* (Chapel Hill: University of North Carolina Press, 1992), pp. 6-8, 307-311 (arguing that legal arguments raised by civil rights attorneys and NGOs have generated the most influential impact on the Supreme Court's voting changes in capital punishment and abortion cases).
40. Gabriel A. Almond and G. Bingham Powell, Jr., "System Process, and Policy," in *Comparative Politics Today: A World View*, 6th ed. (New York: HarperCollins Publishers Inc., 1996), pp. 35-152. For pioneering works based on Almond's functionalism to depict the activities of inter-governmental organizations (IGOs) and NGOs, see Michael Hass, "A Functional Approach to International Organization," *Journal of Politics* 27

(1965): pp. 498-517; Howard B. Tolley, Jr., *The International Commission of Jurists: Global Advocates for Human Rights* (Philadelphia: University of Pennsylvania Press, 1994).

Chapter 1:

1. Jack Donnelly, *International Human Rights* (Boulder, Colorado: Westview Press, Inc. 1993), pp. 13-14, 47-50, 73, 75, 77-78, 83, 92-97, 124-125, 159-169; David P. Forsythe, *Human Rights in International Relations* (Cambridge, United Kingdom: University Press, 2000), pp. 20, 34, 36, 43-46, 67, 69, 78, 103, 119, 125, 143, 163-190, 223-224.
2. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted 12 August 1949, entry into force 21 October 1950, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, ibid., 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Third Geneva Convention; Convention relative to the Protection of Civilian Persons in Time of War, ibid., 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].
3. Protocol Additional I to the 1949 Geneva Conventions and relating to The Protection of Victims of International Armed Conflict, adopted 8 June 1977, entry into force 7 December 1978, 1125 U.N.T.S. 609 [hereinafter Protocol Additional I to the Geneva Conventions]; Protocol Additional II to the 1949 Geneva Conventions and relating to The Protection of Victims of Non-International Armed Conflicts, ibid., 1125 U.N.T.S. 609 [hereinafter Protocol Additional II to the Geneva Conventions].
4. Optional Protocol to the International Covenant on Civil and Political Rights, adopted 16 December 1966, entry into force 23 March 1976, 999 U.N.T.S. 302; Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at Abolition of the Death Penalty, opened for signature 15 December 1989, entry into force 11 July 1991, 1642 U.N.T.S. 414 [hereinafter Second Optional Protocol to the ICCPR].
5. Adopted 16 December 1966, entry into force 3 January 1976, 993 U.N.T.S. 3.
6. Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, entry into force 12 January 1951, 78 U.N.T.S. 277 [hereinafter Genocide Convention].
7. Convention relating to the Status of Refugees, adopted 28 July 1951, entry into force 22 April 1954, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; Protocol relating to the Status of Refugees, adopted 31 January 1967, entry into force on 4 October 1967, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].
8. Vienna Convention on Consular Relations, adopted 24 April 1963, entry into force 19 March 1967, 596 U.N.T.S. 261 [hereinafter Vienna Consular Convention].

9. International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, entry into force 4 January 1969, 660 U.N.T.S. 195 [hereinafter Racial Convention].
10. International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 November 1973, entry into force 18 July 1976, 1015 U.N.T.S. 243.
11. For example, see Convention on the Political Rights of Women, adopted 20 December 1952, entry into force 7 July 1954, 193 U.N.T.S. 135; Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 December 1979, entry into force 3 September 1981, 1249 U.N.T.S. 513; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted 6 October 1999, entry into force 22 December 2000, U.N.G.A. Res. 54/4, U.N. GAOR, 54th sess., Annex, U.N. Doc. A/RES/54/4 (15 October 1999).
12. Torture Convention; Optional Protocol to the Convention against Torture, adopted 18 December 2002, U.N.G.A. Res. 57/199, reprinted in 42 *I.L.M.* 26 (2003).
13. Convention on the Rights of the Child, adopted 20 November 1989, entry into force 2 September 1990, 1577 U.N.T.S. 3 [hereinafter Child Rights Convention]; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted 25 May 2000, U.N.G.A. Res. 263, U.N. GAOR, 54th sess., annex I, U.N. Doc. A/54/263 (2000), entry into force 12 February 2002; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted 25 May 2000, ibid., annex II, ibid., entry into force 18 January 2002.
14. For example, European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, entry into force 3 September 1953, Euop. T.S. No. 5, 213 U.N.T.S. 222 [hereinafter European Convention]; American Convention on Human Rights, adopted 22 November 1969, entry into force on 18 July 1978, O.A.S. Treaty Ser. No. 36, O.A.S. Off Rec. OEA/Ser. L/V/II.23 doc. 21 rev. 6 (1979), reprinted in 9 *I.L.M.* 673 (1970) [hereinafter American Convention]; African Charter on Human and Peoples' Rights, adopted 27 June 1981, entry into force 21 October 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 *I.L.M.* 58 (1982) [hereinafter African Charter].
15. Josef L. Kunz, "The 'Vienna School' and International Law," *New York University Law Quarterly Review* 11 (1934): pp. 396-404, 413-414; Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (New York: Russell & Russell, Inc., 1961), pp. 363, 367-368, 370-373; Joseph G. Starke, *Introduction to International Law*, 9th ed. (London: Butterworth & Co. Ltd., 1984), pp. 71-73.
16. A controversy has arisen over what constitutes the most basic norm of international law. See Kunz, "The 'Vienna School' and International Law," p. 404 (arguing fundamental general principles recognized by civilized nations as the most basic unit); Kelsen, *General Theory of Law and State*,

pp. 369-370 (custom developed by acts of nations); Starke, *Introduction to International Law*, pp. 71-73 (a supranational constitutional law governing both municipal and international legal orders).

17. Question of the Greco-Bulgarian Communities, 1930-1931 Seventh Annual Report of the Permanent Court of International Justice, Ser. E, no. 7, at pp. 253-254.
18. Applicability of the Obligation to Arbitrate Under section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C. J. Rep. 12, para. 57.
19. As examples, see the International Convention against the Taking of Hostages, concluded 18 December 1979, entry into force 4 June 1983, 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, concluded 14 December 1973, entry into force 20 February 1977, 1035 U.N.T.S. 167; Vienna Convention on Diplomatic Relations, concluded 18 April 1961, entry into force 24 April 1964, 500 U.N.T.S. 95.
20. Mary E. O'Connell, "The Prospects for Enforcing Monetary Judgments of the International Court of Justice," *Virginia Journal of International Law* 30 (1990): p. 916; Sarita Ordonez and David Reilly, "Effect of the Jurisprudence of the International Court of Justice on National Courts," in *International Law Decisions in National Courts*, eds. Thomas M. Franck and Gregory H. Fox (New York: Transnational Publishers, Inc. 1996), pp. 346 n61, 368.
21. All countries in the list have constitutionally made the European Convention of Human Rights directly applicable in their domestic courts. The Convention is part of the federal constitution in Austria. In the Benelux countries, domestic legislation is always subordinate to the Convention. Switzerland, Spain, and France are also moving in that direction. See Gabriel M. Wilner, "The Status and Future of the Customary International Law of Human Rights: Reflections on Regional Human Rights Law," *Georgia Journal of International and Comparative Law* 25 (1995): pp. 413-414.
22. H. Triepel and D. Anzilotti are the leading authorities on the theorem of positivist dualism, see Starke, *Introduction to International Law*, p. 69.
23. Some dualists even advance that international treaties are the only source of international law because international custom is a "tacit" treaty, which has no legal binding effect on nations not participating in the creation of customary rules, see Kelsen, *General Theory of Law and State*, pp. 351-353.
24. J. S. Watson, "Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law," *University of Illinois Law Forum* (1979): pp. 620-626, 634-635, 640-641.
25. L. Oppenheim asserts that individuals like aliens or ambassadors are not directly regulated by international law. Rather, international law demands that nations grant certain rights to them by virtue of further enactment of municipal laws. The rights the said individuals enjoy purely flow from municipal sources as a result. In some atypical cases, however, Oppenheim

admits that individuals such as pirates and the members of belligerent armed forces are subject to duties and rights directly imposed by international law. Lassa Oppenheim, *International Law: A Treatise*, 8th ed., ed. H. Lauterpacht (New York: Longmans, Green and Co., 1955), pp. 19-22, 37-38, 50, 636-639.

26. Oppenheim, ibid., p. 45; Mark W. Janis, *An Introduction to International Law*, 2d ed. (Boston: Little, Brown & Company, 1993), p. 84; Ian Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1995), p. 35.
27. 470 F.2d 461 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973).
28. Diggs v. Schultz, 470 F.2d at pp. 465-467. The Schultz case, however, was set aside on the theory of a nonjusticiable political question.
29. 859 F.2d 929 (D.C. Cir. 1988).
30. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1986 I.C.J. Rep. 101 [hereinafter Nicaragua v. United States].
31. Nicaragua v. Reagan, 859 F.2d at pp. 936-937, 939.
32. Oppenheim, *International Law*, pp. 37-38, 637.
33. Nicaragua v. Reagan, 859 F.2d at p. 937.
34. "Human Rights Bill Receives Royal Assent," *Home Office Press Release*, 9 November 1998.
35. Germany, Italy, and Finland have introduced the European Convention into their respective legislation with the last-in-time rule applied. The Scandinavian countries have yet to imbue the Convention into their domestic law in pursuant to their constitutional fiats. See Wilner, "The Status and Future of the Customary International Law of Human Rights," p. 414.
36. Nicaragua v. Reagan, 859 F.2d at pp. 938-939.
37. Louis Henkin, *Foreign Affairs and the U.S. Constitution*, 2d ed. (Oxford: Clarendon Press, 1996), pp. 198-199, 201; Carlos M. Vazquez, "The Four Doctrines of Self-Executing Treaties," *American Journal of International Law* 89 (1995): pp. 696, 698-700, 708.
38. Howard B. Tolley, "The Domestic Applicability of International Treaties in the United States," *Lawyer of the Americas* 15 (1983): p. 72; Henkin, *Foreign Affairs and the U.S. Constitution*, pp. 173, 175-176, 237.
39. Henkin, ibid., pp. 185-186, 237; Frank Newman and David Weissbrodt, *International Human Rights: Law, Policy, and Process*, 2d ed. (Cincinnati, Ohio: Anderson Publishing Co., 1996), p. 22.
40. 27 U.S. (2 Pet.) 253, 314-315 (1829).
41. 32 U.S. (7 Pet.) 51, 87-88 (1833).
42. Janis, *An Introduction to International Law*, p. 87.
43. 502 F.2d 90 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975).
44. People of Saipan ex rel. Guerrero v. United States Department of Interior, 502 F.2d at p. 97.
45. 761 F.2d 370, 373 (7th Cir. 1985) ("whether a treaty is self-executing is an issue for judicial interpretation...and courts consider several factors in

discerning the intent of the parties to the agreement: (1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private rights of action; and (6) the capability of the judiciary to resolve the dispute").

46. In re Alien Children Education Litigation, 501 F.Supp. 544, 590 (S.D. Tex. 1980) (The language "the Member States will exert the greatest effort…to ensure the effective exercise of the right to education" in Article 47 [sic] of the OAS Charter did not import a mandatory rule binding in U.S. court), aff'd unreported mem., (5th Cir. 1981), aff'd on other grounds sub nom. Plyler v. Doe, 457 U.S. 202 (1982); American Baptist Churches v. Meese, 712 F.Supp. 756, 769-770 (N. D. Cal. 1989) (the words "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" under Article 1 of the Fourth Geneva Convention were too vague to be enforceable); Sei Fujii v. State, 38 Cal. 2d at p. 722 (Articles 55 and 56 of the U.N. Charter declare no more than the general purposes and objectives of the U.N. and do not obligate member countries to follow); Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-703 (1878) (a treaty never requires legislative or executive action when it carries negative terms such as "certain acts shall not be done" or "certain limitations or restrictions shall not be disregarded or exceeded"). More treatment can be found in American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, § 111 Reporters' Notes 5, pp. 53-56 (1987) [hereinafter Restatement (Third)]; Thomas M. McDonnell, "Defensively Invoking Treaties in American Courts: Jurisdictional Challenges under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents," *William & Mary Law Review* 37 (1996): pp. 1422-1428.
47. See, e.g., Edwards v. Carter, 580 F.2d 1055, 1058 (D.C. Cir. 1978) (declaring war, raising tax, and appropriating money cannot be accomplished by self-executing treaty since Congress has absolute authority in those areas), cert. denied, 436 U.S. 907 (1978); Haitian Refugee Center v. Gracey, 600 F.Supp. at p. 1406 (the executive foreign policy interdicting Haitian asylum seekers in international waters led sitting judges to rule the Refugee Protocol to be non-self-executing). Further narration is in American Law Institute, *Restatement (Third)*, § 111 Comment i and Reporters' Notes 6, pp. 47-48, 56-57.
48. 57 U.S. (16 How.) 635, 657 (1853).
49. 78 U.S. (11 Wall.) 616, 620-621 (1870).
50. 133 U.S. 258, 267 (1890).
51. 354 U.S. 1, 16-17, 77 (1957) (plurality opinion) (Military dependents who committed crimes on U.S. overseas bases were entitled to the constitutional right to a civilian jury trial and other related Bill of Rights provisions, to the exclusion of the application of the presidential executive agreements

concluded with Great Britain and Japan that required the USA to court-martial the offending spouses).

52. 124 U.S. 190 (1888).
53. Whitney v. Robertson, 124 U.S. at p. 194. Other similar statements are in The Cherokee Tobacco, 78 U.S. (11 Wall.) at p. 621 (Internal Revenue Act enacted later by Congress to impose taxes on liquor and tobacco over the Cherokee Indian nation preempted a prior treaty allowing tax exemptions); Edye v. Robertson (the Head Money Cases), 112 U.S. 580, 596-599 (1884) (1882 statute levying a head tax on foreign passengers arriving in U.S. ports prevailed over earlier friendship treaties between the United States and foreign countries prohibiting discrimination against their nationals); Chae Chan Ping v. United States (the Chinese Exclusion Case), 130 U.S. 581, 600-602 (1889) (1888 law forbidding the Chinese with U.S.-issued certificates to re-enter the USA superseded earlier treaties between the United States and China concerning emigration to the USA).
54. 3 U.S. (3 Dall.) 199, 236-237 (1796) (treaty promising the fulfillment of debts owed by Virginian citizens to British creditors voided a Virginia statute that canceled those debts).
55. 252 U.S. 416, 434 (1920) (Missouri law claiming title to migratory birds was subordinate to the U.S.-U.K. Migratory Bird Treaty Act of 1918 and its implementing legislation constructed for the purpose of prohibiting the killing, capturing, and selling of migratory birds).
56. 265 U.S. 332, 341 (1924) (treaty provision establishing the rule of reciprocal equality between Japanese and U.S. citizens could not be repealed by municipal ordinances or state laws banning the issuance of pawnbroker licenses to aliens).
57. 331 U.S. 503, 508 (1947) (treaty clause managing the inheritance of real estate located in the United States by German nationals living in or outside U.S. territory trumped a California law allowing aliens not residing within the USA to receive an inheritance only on condition that their home country granted reciprocal rights to U.S. citizens).
58. Thomas Buergenthal, *International Human Rights in a Nutshell* (St. Paul, Minn.: West Publishing Co., 1988), pp. 215, 221-230.
59. 332 U.S. 633 (1948).
60. Oyama v. California, 332 U.S. at pp. 649-650 (Black, J., concurring), 673 (Murphy, J., concurring). See also Bert B. Lockwood, "The United Nations Charter and United States Civil Rights Litigation: 1946-1955," *Iowa Law Review* 69 (1984): pp. 917, 919-920.
61. The Court extended its examination to Article 17 of the UDHR concerning the right to own property, Sei Fujii v. State, 217 P.2d at pp. 487-488.
62. Ibid., 38 Cal. 2d at pp. 720-738.
63. Natalie H. Kaufman and David Whiteman, "Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment," *Human Rights Quarterly* 10 (1988): pp. 316-317; Buergenthal, *International Human Rights in a Nutshell*, p. 217.

64. Kaufman and Whiteman, ibid., pp. 313-315, 318-329; Jo L. Southard, "Human Rights Provisions of the U.N. Charter: The History in U.S. Courts," *ILSA Journal of International & Comparative Law* 1 (1995): pp. 49-52.
65. Differing versions of the Bricker Amendment were introduced between 1952 and 1957. The goals of the Amendment were (1) to make all international agreements non-self-executing; (2) to reverse the decision of Missouri v. Holland, 252 U.S. 416 (1920), which was viewed by senators as encroaching on states' rights through treaty-making power by the federal government and as invalidating the Supreme Court decision in Geofroy v. Riggs, 133 U.S. 266 (1889) upholding the primacy of the U.S. Constitution over treaties; and (3) to subject international agreements to the constitutional restraints on the powers of the federal government. See Kaufman and Whiteman, ibid., pp. 312-318; Buergenthal, *International Human Rights in a Nutshell*, pp. 218, 221-226; Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," *American Journal of International Law* 89 (1995): pp. 348-350.
66. The three human rights treaties were the Supplementary Convention on the Abolition of Slavery and the Slave Trade, the Convention on the Abolition of Forced Labor, and the Convention on the Political Rights of Women.
67. Natalie H. Kaufman, *Human Rights Treaties and the Senate: A History of Opposition* (Chapel Hill: University of North Carolina Press, 1990), p. 120 & n1.
68. Adopted 7 September 1956, entry into force 30 April 1957, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3.
69. Richard B. Lillich and Hurst Hannum, *International Human Rights: Problems of Law, Policy, and Process*, 3d ed. (Boston: Little, Brown & Company, 1995), pp. 245-246.
70. Buergenthal, *International Human Rights in a Nutshell*, pp. 228-229; Stefan A. Riesenfeld and Frederick M. Abbott, "The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties," *Chicago-Kent Law Review* 67 (1991): pp. 577, 622.
71. Kaufman and Whiteman, "Opposition to Human Rights Treaties in the United States Senate," pp. 329-335; Henkin, "U.S. Ratification of Human Rights Conventions," pp. 341, 349.
72. The power of making reservations or other conditions by the Senate is not plainly defined in the U.S. Constitution. In spite of lacking a clear-cut constitutional precept, this Senate authority has not been seriously challenged judicially. In Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1869), the Supreme Court recognized the Senate power to amend or modify a bilateral treaty pending its consent through reservations. Yet, in Fourteen Diamond Rings v. United States, 183 U.S. 176, 178-182 (1901), a Senate resolution attempting to transform a treaty after the exchange of instruments of treaty ratification was held to be invalid. For Professor Louis Henkin, the Senate power to insert treaty qualifications arises from its express constitutional power to advise and consent to the making of treaties. And, reservations are null and void if they are "incompatible with the object and

purpose of the treaty" according to Article 19 of the Vienna Convention on the Law of Treaties and § 313 Comment c of the Restatement (Third). For relevant details, see Riesenfeld and Abbott, "The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties," pp. 589-591; Henkin, *Foreign Affairs and U.S. Constitution*, pp. 180-181, 449 n23, 458 n49.

73. The United States unconditionally ratified the U.N. Charter and the Convention on the Political Rights of Women. As indicated in Chapter 2 of this work, however, most U.S. courts have regarded the Charter's human rights provisions as being non-self-executing.
74. The Genocide Convention took effect in the United States after President Ronald Reagan federalized the crime of genocide by signing implementing legislation into law on 4 November 1988, known as the Genocide Convention Implementation Act (i.e., the Proxmire Act—18 U.S.C. §§ 1091-1093). For reference, see Riesenfeld and Abbott, "The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties," pp. 623, 627.
75. Phillip R. Trimble, "A Revisionist View of Customary International Law," *UCLA Law Review* 33 (1986): p. 676; David F. Klein, "A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts," *Yale Journal of International Law* 13 (1988): p. 335.
76. 175 U.S. 677, 700 (1900).
77. Henkin, *Foreign Affairs and U.S. Constitution*, pp. 232-245.
78. All scholars, including Louis Henkin, come to consensus that customary international law is second to the U.S. Constitution. There arises a difference of scholarly opinions over the status of customary international law in contrast to a "controlling" public act of the U.S. government. Jack M. Goldklang, Phillip R. Trimble, and Harold G. Maier understand the phrase "[a] controlling executive or legislative act" as implying that customary law is maintainable in U.S. courts only if a relevant executive or legislative act is not in place. Unlike international treaties, customary law is federal common law and inferior to acts of Congress or controlling executive acts. On the other hand, Henkin rebuts the above school's arguments regarding common law and the primacy of acts of Congress over customary international law. From Henkin's perspective, customary law is not tantamount to federal common law. The former belongs to the law of an international political system progressed over time based on the general practice of countries. The latter is developed through judicial decisions of U.S. federal courts. Treaties and customary law both should enjoy equal effect in the international realm. For this reason, parallel to treaties, customary law vis-à-vis U.S. municipal law should be determined by a principle predicated on U.S. dualist practice on international law (i.e., the last-in-time rule). See discussion exchanges in Jack M. Goldklang, "Back on Board the Paquete Habana: Resolving the Conflict between Statutes and Customary International Law," *Virginia Journal of International Law* 25 (1984): pp. 145-146; Trimble, "A Revisionist View of Customary

International Law," pp. 723-731; Harold G. Maier, "The Authoritative Sources of Customary International Law in the United States," *Michigan Journal of International Law* 10 (1989): pp. 461-463, 473-479; Louis Henkin, "The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny," *Harvard Law Review* 100 (1987): pp. 872-878.

79. Skiriotes v. Florida, 313 U.S. 69, 72-73 (1941); First Nat'l City Bank v. Banco Para El Comercio, 462 U.S. 611, 622-623 (1983); see Henkin, ibid., p. 873.
80. 376 U.S. 398 (1964).
81. Banco Nacional De Cuba v. Sabbatino, 376 U.S. at pp. 425-426 (deciding that the act of state doctrine was federal law and binding on state courts); see Henkin, *Foreign Affairs and U.S. Constitution*, pp. 137-140, 238; Jules Lobel, "The Limits of Constitutional Power: Conflicts between Foreign Policy and International Law," *Virginia Law Review* 71 (1985): p. 1072 n4; Janis, *An Introduction to International Law*, pp. 101-102.
82. Lobel, ibid., pp. 1072, 1109 n202; Trimble, "A Revisionist View of Customary International Law," p. 684; Eric G. Reeves, "United States v. Javino: Reconsidering the Relationship of Customary International Law to Domestic Law," *Washington & Lee Law Review* 50 (1993): pp. 877-878, 887, 891.

Chapter 2

1. Under Article 53 of the 1969 Vienna Convention on the Law of Treaties, a *jus cogens* norm is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."
2. 488 U.S. 428 (1989).
3. Argentine Republic v. Amerada Hess Shipping Corp. 488 U.S. at pp. 433-439.
4. See, e.g., Von Dardel v. USSR, 736 F.Supp. 1 (D.D.C. 1990); Saudi Arabia v. Nelson, 507 U.S. 349 (1993).
5. Richard B. Lillich "The United States Constitution and International Human Rights Law," *Harvard Human Rights Journal* 3 (1990): pp. 74-75; Harry A. Blackmun, "The Supreme Court and the Law of Nations," *Yale Law Journal* 104 (1994): pp. 43-45.
6. Lockwood, "The United Nations Charter and United States Civil Rights Litigation," pp. 917-948.
7. See, e.g., Bob-lo Excursion Co. v. Michigan, 333 U.S. 28 (1948); Henderson v. United States, 339 U.S. 816 (1950); Rochin v. California, 342 U.S. 165 (1952); Barrows v. Jackson, 346 U.S. 249 (1953).
8. 265 U.S. 332 (1924) (U.S.-Japanese treaty reciprocating equal employment rights for the benefit of citizens between the two countries took precedence

over ordinance passed by city of Seattle limiting the issuance of pawnbroker licenses to U.S. citizens only).

9. 332 U.S. at pp. 649-650 (Black, J., concurring), 673 (Murphy, J., concurring).
10. The Oyama decision written by Chief Justice Fred M. Vinson merely stated that "the Alien Land Law…deprived Fred Oyama of the equal protection of California's laws and of his privileges as an American citizen." For reference, see Oyama v. California, 332 U.S. at pp. 640, 646-647.
11. Lockwood, "The United Nations Charter and United States Civil Rights Litigation," pp. 922-923.
12. 185 Or. 579 (1949).
13. Namba v. McCourt, 185 Or. at p. 604.
14. Sei Fujii v. State, 217 P.2d at pp. 487-488.
15. Ibid., 38 Cal. 2d at pp. 720-738.
16. See, e.g., Vlissidis v. Anadell, 262 F.2d 398 (7th Cir. 1959); Camacho v. Rogers, 199 F.Supp. 155 (S.D.N.Y. 1961); Diggs v. Dent, 14 I.L.M. 797 (D.D.C. 1975), aff'd sub nom. Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976); Frolova v. U.S.S.R., 761 F.2d 370 (7th Cir. 1985).
17. See Morton Stavis, Doris Peterson, Andre M. Surena, and Peter Weiss, "Standing to Sue: Diggs v. Secretary of Treasury and Union Carbide Corporation," *National Lawyers Guild Practitioner* 30 (1973): pp. 103-105.
18. Diggs v. Shultz, 470 F.2d at pp. 465-467.
19. Frank C. Newman and Kathryn J. Burke, "Diggs v. Richardson: International Human Rights in US Courts," *National Lawyers Guild Practitioner* 34 (1977): p. 53.
20. Diggs v. Richardson, 555 F.2d passim.
21. 294 F.Supp. 515 (D. Mass. 1968).
22. 288 F.Supp. 957 (D.P.R. 1968).
23. 283 F.Supp. 336 (D. Md. 1968).
24. 403 F.2d 71 (10th Cir. 1968).
25. 406 F.2d 456 (5th Cir. 1969), cert. denied, 395 U.S. 982 (1969).
26. 415 F.2d 1308 (6th Cir. 1969), cert. denied, 397 U.S. 997 (1970).
27. Howard B. Tolley Jr., "Interest Group Litigation to Enforce Human Rights," *Political Science Quarterly* 105 (1990/91): p. 621.
28. Treaties cited for court consideration were the Treaty of London and Nuremberg Judgments; the Kellog-Briand Pact; the 1899 and 1907 Hague Conventions Respecting the Laws and Customs of Wars on Land; the 1949 Geneva Conventions; the 1922 Washington Treaty; and Articles 2(4) and 33(1) of the U.N. Charter. Relevant information is available in Louis Henkin, "Viet-Nam in the Courts of the United States: 'Political Question,'" *American Journal of International Law* 63 (1969): p. 288; Lillich, "The Proper Role of Domestic Courts in the International Legal Order," pp. 38-47; Tolley, "Interest Group Litigation to Enforce Human Rights," p. 621.
29. United States v. Valentine, 288 F.Supp. at pp. 984, 986-987; United States v. Berrigan, 283 F.Supp. at pp. 341-342 (defendants had no standing to query the legality of U.S. involvement in the Vietnam war given that they

had not been called to serve in the armed forces); United States v. Owens, 415 F.2d at pp. 1310-1313, 1316.

30. United States v. Sisson, 294 F.Supp. at pp. 517-519; United States v. Berrigan, 283 F.Supp. at p. 342; Cooper v. United States, 403 F.2d at p. 74 (judicial branch was not empowered to weigh "the legality or wisdom of the executive branch in sending troops abroad"); Simmons v. United States, 406 F.2d at p. 460.
31. No. 3530-77 (Superior Court of Schenectady County, N.Y. 1977), summarized in 1 *ILA Practitioner's Notebook* 5 (15 October 1977).
32. Richard B. Lillich and Frank C. Newman, *International Human Rights: Problems of Law and Policy* (Boston: Little, Brown and Company, 1979), pp. 120-121.
33. 67 N.J. 496 (1975).
34. 520 F.2d 392 (2d Cir. 1975).
35. 408 F.Supp. 869 (M.D. Pa. 1976).
36. Avant v. Clifford, 67 N.J. at p. 512; Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d at p. 396; Jordan v. Arnold, 408 F.Supp. at p. 874.
37. 625 P.2d 123 (1981).
38. Sterling v. Cupp, 625 P.2d at p. 131 n21 (1981). To assist with the parsing of the Oregon Constitution, Judge Linde had recourse to a range of international law sources: Article 5 of the UDHR, Articles 7 and 10 of the ICCPR, Article 3 of the European Convention, Article 5(2) of the American Convention, and the U.N. Standard Minimum Rules.
39. Richard B. Bilder, "Integrating International Human Rights Law into Domestic Law—U.S. Experience," *Houston Journal of International Law* 4 (1981): pp. 8, 10; Frank C. Newman et al., "Symposium on International Human Rights Law in State Courts," *The International Lawyer* 18 (1984): p. 65.
40. 507 F.Supp. 1177 (D. Conn. 1980), aff'd in part and modified in part, 651 F.2d 96 (2d Cir. 1981).
41. Judge Cabranes at trial also looked to Articles 55, 56, and 62(2) of the U.N. Charter, Article 5 of the UDHR, and Article 7 of the ICCPR to inform a constitutional interpretation. Lareau v. Manson, 507 F.Supp. at pp. 1188-1189, 1193 n18.
42. Lareau v. Manson, 651 F.2d at pp. 106-107.
43. Jiri Toman, "Quasi-Legal Standards and Guidelines for Protecting Human Rights of Detained Persons," in *Guide to International Human Rights Practice*, ed. Hurst Hannum (Philadelphia: University of Pennsylvania Press, 1984), pp. 207-208; Newman, et al., "Symposium on International Human Rights Law in State Courts," p. 65.
44. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Thompson v. Oklahoma, 487 U.S. 815 (1988).
45. However, see infra n57 for an example of using the ATCA to challenge law enforcement misconduct within U.S. jurisdiction.

46. Harold H. Koh, "Transnational Public Law Litigation," *Yale Law Journal* 100 (1991): pp. 2347 & n11, 2368, 2371; Tom Lininger, "Recent Development: Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts," *Harvard Human Rights Journal* 7 (1994): p. 178; Beth Stephens and Michael Ratner, *International Human Rights Litigation in U.S. Courts* (New York: Transnational Publishers, Inc., 1996), pp. 5, 233-238.
47. It reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."
48. "Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in Filartiga v. Pena-Irala," *International Legal Materials* 19 (1980): pp. 585-610.
49. Filartiga v. Pena-Irala, 630 F.2d at pp. 880-887 & n4, 890.
50. Ibid., at pp. 878-880 and 885-886. The U.S. District Court dismissed the Filartiga case for lack of subject matter jurisdiction by narrowly reading the term "the law of nations" in 28 U.S.C. § 1350 as the law that did not encompass a country's treatment of its own citizens.
51. Ibid., at p. 889; Filartiga v. Pena-Irala, 577 F.Supp. 860, 862 (E.D.N.Y. 1984).
52. Ibid., 577 F.Supp. at p. 862.
53. Farooq Hassan, "Panacea or Mirage? Domestic Enforcement of International Human Rights Law," *Houston Journal of International Law* 4 (1981): pp. 17-38; Lillich and Hannum, *International Human Rights*, pp. 156-160.
54. The amici were Amnesty International-USA, the International League for Human Rights, and the Lawyers Committee for Human Rights (represented by David S. Weissbrodt and Donald L. Doernberg); and the International Human Rights Law Group and the Council on Hemispheric Affairs and the Washington Office on Latin America (represented by Allan Abbot Tuttle and Steven M. Schneebaum).
55. Hassan, "Panacea or Mirage," p. 15; Richard P. Claude, "The Case of Joelito Filartiga in the Court," in *Human Rights in the World Community: Issues and Action*, 2d ed., eds. Richard P. Claude and Burns H. Weston (Philadelphia: University of Pennsylvania Press, 1992), p. 333.
56. Michael Bazyler, "Litigating the International Law of Human Rights: A 'How to' Approach," *Whittier Law Review* 7 (1985): p. 373; Tolley, "Interest Group Litigation to Enforce Human Rights," p. 630.
57. The TVPA contains several limitations that are not provided in the ATCA: the exhaustion of local remedies of the place where the tort occurred; a ten-year statute of limitations on claims; a restriction of jurisdiction to individual defendants who committed torture and extrajudicial killing under authority or under color of law of a foreign country; and a cause of action only for tortious acts of torture and extrajudicial killing. However, the ATCA and TVPA are not confined to suits against foreign officials; see, e.g., Greenham Women against Cruise Missiles v. Reagan, 591 F.Supp. 1332 (S.D.N.Y. 1984) (tort claims under the ATCA against President

Ronald Reagan and U.S. government officials for the deployment of cruise missiles at the U.S. military base in London), aff'd, 755 F.2d 34 (2d Cir. 1985); Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998) (ATCA suit against the City of Los Angeles and its police officers for the alleged arbitrary arrest and detention of Jose Gonzalez Martinez). Further treatment is available in Stephens and Ratner, *International Human Rights Litigation in U.S. Courts*, pp. 22-23, 95, 97-99, 104-108.

58. The TVPA does not specifically mention whether U.S. citizens may file tort cases. However, see 137 Cong. Rec. S1369-01, S1378 (daily ed. 31 Jan. 1991) (statement of Senator Arlen Specter) where Senator Specter clarified this point when proposing the Act.
59. H.R. Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86 (elucidating that the codification of Filartiga through the TVPA was necessary in light of skepticism expressed by Judge Robert H. Bork's concurring opinion in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984); and that the ATCA should remain intact to allow suits for tortious acts other than torture and summary execution); S. Rep. No. 249, 102d Cong., 1st Sess. at p. 8 (1991) (arguing that the act of state doctrine was not applicable to acts covered by the TVPA).
60. For other cases unexamined in this chapter, visit the Center for Justice and Accountability's website, at <http://www.cja.org/> (visited 23 February 2005).
61. For instance, the legal counsel in Kadic v. Karadzic comprised: the CCR (Jennifer Green, Jules Lobel, Matthew J. Chachere, Michael Ratner, and Peter Weiss); International Women's Human Rights Law Clinic at CUNY Law School (Celina Romany and Rhonda Copelon); the International League of Human Rights (Judith Levin); the Allard K. Lowenstein International Human Rights Clinic at Yale Law School (Harold H. Koh); and Catharine A. Mackinnon at University of Michigan Law School.
62. To name only a few, amici providers in Kadic v. Karadzic were: Frederick M. Abbott et al. (Karen Honeycut at Vladeck, Waldman, Elias & Engelhard, New York); Alliances-an African Women's Network (Women Refugee Project at Harvard Law School); Human Rights Watch (Joan Fitzpatrick, Joanne Mariner, Juan E. Mendez, Paul L. Hoffman, and Ralph G. Steinhardt); and the International Human Rights Law Group et al. (Stephen M. Schneebaum).
63. 70 F.3d 232 (2d Cir. 1995), rev'g Doe v. Karadzic, 866 F.Supp. 734 (S.D.N.Y. 1994).
64. Kadic v. Karadzic, 70 F.3d at pp 239-243.
65. Ibid., at p. 244.
66. Ibid., at pp. 244-245 (discussing four criteria for statehood—a defined territory, a permanent population, a governing polity, and a capacity to engage in formal relations with other countries).
67. Ibid., at p. 245.

68. Ibid., at p. 250 (stating that the U.S. State Department in a statement of interest manifestly disclaimed Karadzic's enjoyment of any exemption from suit despite his presence in the United States as an invitee of the U.N.).
69. Neither the political question postulate nor the act of state doctrine was ruled relevant here. Further, by declining to construe the Headquarters Agreement beyond its express terms, the Second Circuit overrode Karadzic' claim of immunity as a U.N. guest. See ibid., at pp. 249-250, 247-248.
70. 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. 1996).
71. Mushikiwabo v. Barayagwiza, 1996 U.S. Dist. LEXIS at p. 4414n1 (depending on the general federal question jurisdiction statute (28 U.S.C. §1331) to sanction two Rwandan-Americans to sue under the TVPA).
72. 169 F.Supp. 2d 259 (S.D.N.Y. 2001).
73. Tachiona v. Mugabe, 169 F.Supp. 2d at pp. 314-316. With the State Department's suggestion of immunity, however, the U.S. District Court found a want of jurisdiction over ZANU-PF's high-level leaders—Zimbabwe's President (Robert Gabriel Mugabe) and Foreign Minister (Stan Mudenge), ibid., at pp. 267-303.
74. Ibid., at pp. 310-313.
75. 157 F.Supp. 2d 1345 (S.D. Fla. 2001).
76. 198 F.Supp. 2d 1322 (N.D. Ga. 2002).
77. Estate of Cabello v. Fernandez-Larios, 157 F.Supp. 2d at pp. 1354-1358 (alongside the ATCA, the court's subject matter jurisdiction might well derive from 28 U.S.C. § 1331, in light of which the TVPA-based claims brought up by the plaintiffs "arose under" the laws of the United States and the plaintiffs as the decedent's legal representative or relatives had standing to sue); Mehinovic v. Vuckovic, 198 F.Supp. 2d at p. 1343.
78. Estate of Cabello v. Fernandez-Larios, 157 F.Supp. 2d at pp. 1358-1361; Mehinovic v. Vuckovic, 198 F.Supp. 2d at pp. 1344-1349. The Mehinovic Court additionally admitted the commission of "arbitrary detention" by the defendant soldier as contrary to customary law, ibid., pp. 1349-1350. See also Barrueto v. Fernandez-Larios, 205 F.Supp. 2d 1325 (S.D. Fla. 2002) (allowing Zita Cabello Barrueto as the legal representative of the Estate of Winston Cabello to sue under, among other things, a torture claim).
79. Extracted sources of reference were Charter of the International Military Tribunal at Nuremberg (IMT), 8 August 1945, 82 U.N.T.S. 280; Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute]; Rome Statute; and some relevant judgments from the IMT an the ICTY; details in Estate of Cabello v. Fernandez-Larios, 157 F.Supp. 2d at pp. 1360-1361 and Mehinovic v. Vuckovic, 198 F.Supp. 2d at pp. 1350-1356.
80. Prosecutor v. Tadic, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995; see Mehinovic v. Vuckovic, 198 F.Supp. 2d at p. 1351n39.

81. Prosecutor v. Tadic, Case No. IT-94-1 (Appeals Chamber), Judgment, 15 July 1999, pp. 170-171; Prosecutor v. Delalic, Case No. IT-96-21 (Appeals Chamber), Judgment, 20 February 2001, pp. 6-50.
82. Pertinent treaty provisions entailed in First Geneva Convention, art. 50; Second Geneva Convention, art. 51; Third Geneva Convention, art. 130; Fourth Geneva Convention, art. 147; ICTY Statute, art.2; see Mehinovic v. Vuckovic, 198 F.Supp. 2d at pp. 1351-1352 & nn38-39.
83. Mehinovic v. Vuckovic, ibid., at pp. 1352-1354. Judge Shoob also observed that the evolved international jurisprudence did not require an armed conflict to be international in order to qualify for the application of "crimes against humanity," see ibid., at p. 1353n45.
84. Ibid., at p. 1356.
85. 672 F.Supp. 1531 (N.D. Cal. 1987) (granting jurisdiction to hear the plaintiffs' ATCA claims in light of torture, prolonged arbitrary detention, and summary execution committed by soldiers under General Carlos Guillermo Suarez-Mason's command), recons. granted in part & denied in part, 694 F.Supp. 707 (N.D. Cal. 1988) (asserting court authority over a claim for disappearance but not a claim for "cruel, inhuman and degrading treatment").
86. 978 F.2d 493 (9th Cir. 1992), cert. denied, 508 U.S. 972 (1993) (regarding acts of official torture ordered by Philippine President Ferdinand Marcos' daughter, Imee Marcos-Manotoc, in her capacity of a military intelligence chief as contravening a *jus cogens* rule and triggering the ATCA jurisdiction).
87. 25 F.3d 1467 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995) (torture administered by President Marcos' military intelligence officials was so impeachable as to set in motion the ATCA jurisdiction).
88. 812 F.Supp. 207 (S.D. Fla. 1992) (suit was actionable under the ATCA in challenge to arbitrary detention, torture, and cruel, inhuman or degrading treatment of Haitian dissidents by Haitian solders under the direction and control of General Prosper Avril).
89. No. CV-92-12255-PBS, 1994 WL 827111 (D. Mass. 26 Oct. 1994) (ATCA and the TVPA were applicable to the case of military personnel extrajudicially killing a young man pursuant to the order of Indonesian General, Sintong Panjaitan, to suppress a peaceful funeral march in East Timor).
90. 886 F.Supp. 162 (D. Mass. 1995) (allowing Guatemalans and a U.S. citizen to litigate based on the ATCA and the TVPA for being subjected to torture, arbitrary detention, summary execution, disappearance, and cruel, inhuman and degrading treatment by the Guatemalan military forces under the instruction of Guatemala's former Minister of Defense, Hector Gramajo).
91. 72 F.3d 844 (11th Cir. 1996), cert. denied, 519 U.S. 830 (1996) (repudiating Kelbessa Negewo's defense of a nonjusticiable political question and awarding compensatory damages to human rights victims in accordance with the ATCA and the TVPA, for their suffering of torture and cruel,

inhuman, or degrading treatment supervised by Negewo as an Ethiopian local military leader).

92. Paul v. Avril, 812 F.Supp. at pp. 210-212 (rejecting the attempt of General Avril to rely on the FSIA to escape liability, on the ground that the government of Haiti had already relinquished all immunity conferred on him).
93. In re Estate of Marcos Human Rights Litigation (Trajano v. Marcos), 978 F.2d at pp. 496-500, 503; Hilao v. Marcos, 25 F.3d at pp. 1475-1476 (declining the claim of sovereign immunity grounded on the FSIA because Marcos' commission of torture, execution, and disappearance were acts squarely outside of his authority as President); Xuncax v. Gramajo, 886 F.Supp. at pp. 176-192.
94. Forti v. Suarez-Mason, 672 F.Supp. at pp. 1537-1546; Hilao v. Marcos, 25 F.3d at p. 1471 (invalidating the act-of-state doctrine given that the wrongs at issue were banned by Philippine law and did not constitute the public official acts of a Philippine sovereign); Paul v. Avril, 812 F.Supp. at p. 212.
95. 963 F.Supp. 880 (C.D. Cal. 1997).
96. 176 F.R.D. 329 (C.D. Cal. 1997).
97. The attorneys and amici were: Paul L. Hoffman from Schonbrun, De Simone, Seplow, Harris & Hoffman LLP; Anne Richardson, Dan Stormer, and Cornelia Dai from Hadsell & Stormer, Inc.; Judith Brown Chomsky; Julie Shapiro; Dilan Esper from Stein & Flugge, LLP; Christopher E. Krafchak and Kenderton S. Lynch III from Krafchak & Associates; Hilary Cohen, Martin J. D'Urso, and Nadia Ezzelarab from Kohn, Swift & Graf, P.C.; Christobal Bonifaz and John C. Bonifaz from Law Offices of Christobal Bonifaz; EarthRights International (Katie Redford, Tyler Giannini, and Richard Herz); the CCR (Jennifer Green); the International Labor Rights & Education Fund (Terry Collingsworth and Natacha Thys); and the National Center for Immigration Rights.
98. In addition to the Doe family, the plaintiffs included the Federation of Trade Unions of Burma (FTUB), the exiled Burmese government called the National Coalition Government of the Union of Burma (NCGUB), and members associated with these two organizations. The NCGUB nonetheless was held to lack standing. This same ground applied to the FTUB, provided that it intended to sue as a representative of its members. See National Coalition Gov't of the Union of Burma v. Unocal, 176 F.R.D. at pp. 334, 338-340, 360.
99. Doe v. Unocal, 963 F.Supp. at pp. 885-888 (investing sovereign immunity in the Burmese military junta (SLORC) and its national owned company (MOGE) under the FSIA because the Burmese victims failed to prove the relevance of a commercial activity exception clause in this context).
100. Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon—an Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations," *Berkeley Journal of International Law* 20 (2002): pp. 102-103, 130-149.

101. However, Judge Paez granted Total's motion to dismiss for lack of personal jurisdiction, see Doe v. Unocal, 27 F.Supp. 1174 (C.D. Cal. 1998), aff'd, 248 F.3d 915 (2001).
102. Doe v. Unocal, 963 F.Supp. at pp. 889-892; National Coalition Gov't of the Union of Burma, 176 F.D.R. at pp. 344-349. But see ibid., 176 F.R.D. at pp. 345, 355-357 (alleged expropriation of the property by the Burma junta constituted an act of state and could not be addressed under the ATCA).
103. Doe v. Unocal, 110 F.Supp. 2d 1294, 1304, 1307 (C.D. Cal. 2000).
104. Ibid., at p. 1308.
105. Ibid., at pp. 1309-1310.
106. Ibid., at pp. 1306-1307.
107. Doe v. Unocal, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002).
108. Judge Harry Pregerson, joined by Judge A. Wallace Tashima and concurred by Judge Stephen Reinhardt, resorted to an "aiding and abetting" theory to affirm Unocal's liability for forced labor, murder, and rape. The theory demanded establishing evidence of "knowing practical assistance, encouragement, or moral support which ha[d] a substantial effect on the perpetration of the crime" as preconditions to laying legal accountabilities on defendants like Unocal. However, finding want of proof, Judge Pregerson turned away the plaintiffs' claim on torture; see Doe v. Unocal, 2002 U.S. App. LEXIS at pp. 19298-19346.
109. Doe v. Unocal, 2003 U.S. App. LEXIS 2716 (9th Cir. 2003).
110. Doe v. Unocal, Nos. BC 237 980 and BC 237 679 (Superior Court of Los Angeles County, Cal. 10 June 2002 & 14 September 2004), accessible at <http://www.earthrights.org/unocal/index.shtml> (visited 15 September 2004).
111. 124 S. Ct. 2739 (2004).
112. Paul Chavez, "Unocal Settles Rights Cases in Myanmar," *Associated Press*, 14 December 2004.
113. For further information, visit EarthRights International's website, at <http://www.earthrights.org/unocal/index.shtml> (visited 28 April 2004).
114. For leading publications, see Michael J. Bazyler, "Nuremberg in America: Litigating the Holocaust in United States Courts," *University of Richmond Law Review* 34 (2000): pp. 265-271; idem, "The Holocaust Restitution Movement in Comparative Perspective," *Berkeley Journal of International Law* 20 (2002): pp. 11-14, 22-32, 37-44; Ramasastry, "Corporate Complicity," pp. 119-130.
115. Cal. Civ. Proc. Code § 354.6 (1999).
116. Through a statement of interest and amicus briefs in opposition to lawsuits brought by World War II slave laborers against Japanese MNCs, the Bush Administration has successfully had the 1999 California law ruled to be unconstitutional. See In re World War II Era Japanese Forced Labor Litigation, 164 F.Supp. 2d 1160 (N.D. Cal. 2001), aff'd sub nom. Deutsch v. Turner, 317 F.3d 1005 (9th Cir. 2003), cert. denied, 2003 U.S. LEXIS 5626 (2003), and cert. denied, 2003 U.S. LEXIS 5628 (2003); Mitsubishi Materials Corp. v. Superior Court, 113 Cal. App. 4th 55 (4th Dist. 2003);

Taiheiyo Cement Corp. v. Superior Court, 117 Cal. App. 4th 380 (2d Dist. 2004). Besides arguing the fallacy of the ATCA claims in dozens of actions charging modern MNC misdeeds, including the Doe case, U.S. executive officials actively plunged into an anti-ATCA crusade in Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004), in which the United States and agents of the Drug Enforcement Administration (DEA) were named as defendants.

117. 488 F.Supp. 665 (D.D.C. 1980).
118. 642 F.Supp. 297 (N.D. Cal. 1986), rev'd, 892 F.2d 1419 (9th Cir. 1989), cert. denied, 497 U.S. 1058 (1990).
119. In both the Letelier and the Liu cases, U.S. courts also upheld that the murder in dispute was not a discretionary function under the FSIA (28 U.S.C. § 1605(a)(5)(A)) and denied sovereign immunity to Chile and ROC. For further reference, see Letelier v. Republic of Chile, 488 F.Supp. at pp. 668 and 673; Liu v. Republic of China, 892 F.2d at p. 1431.
120. Liu v. Republic of China, ibid., p. 1433 (citing Article 1 of the OAS Convention on Terrorism and Article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons as proof to corroborate international censure against an act of murder).
121. Letelier v. Republic of Chile, 488 F.Supp. at p. 674; Liu v. Republic of China, 892 F.2d at p. 1434.
122. Liu v. Republic of China, ibid., pp. 1433-1434.
123. Ibid., pp. 1423-1424, 1434.
124. 965 F.2d 699 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993).
125. However, the Ninth Circuit disapproved of the argument by Professor Michael J. Bazyler and amicus Anti-Defamation League of B'Nai B'Rith that the default on a peremptory bar to torture should essentially exclude Argentina from exercising a prerogative of sovereign immunity, Siderman De Blake v. Republic of Argentina, 965 F.2d at pp. 714-720. As for the Sidermans' claim of military expropriation of their assets in Argentina, the Court admitted the potential applicability of the exceptions to the FSIA for commercial activity and international takings, ibid., pp. 708-713.
126. Ibid., pp. 703, 722.
127. Pub. L. No. 104-132, § 221, 110 Stat. 1214.
128. Flatow v. Islamic Republic of Iran, 999 F.Supp. 1, 13-14 (D.D.C. 1998).
129. See infra nn183-190.
130. The modified FSIA article (28 U.S.C. § 1605(a)(7)) provides: "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case...(7) in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources...for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."
131. Pub. L. No. 104-208 § 589, codified at 28 U.S.C. § 1605 note, which states: "An official, employee, or agent of a foreign state designated as a state

sponsor of terrorism…while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [28 U.S.C. § 1605(a)(7)] for money damages which may include economic damages, solatium, pain, suffering, and punitive damages if the acts were among those described in [§ 1605(a)(7)]."

132. In light of § 1606 of the FSIA, which forecloses the imposition of a punitive judgment upon a foreign violating state, most U.S. courts construed the Flatow Amendment as giving U.S. terrorism victims and family members permission to recover only compensatory awards from that state. See, e.g., Smith v. Islamic Emirate of Afghanistan, 262 F.Supp. 2d at pp. 227-228; Kilburn v. Republic of Iran, 277 F.Supp. 2d 24, 26, 36-44 (D.D.C. 2003). Passed by Congress on 28 October 2000, the Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, enables victims to secure a partial payment of court judgments from terrorist defendants' assets located and frozen by the U.S. government; see Cathy B. Thomas, "Osama Will Pay: This Time in Cash," *Time*, 22 October 2001.
133. Surette v. Islamic Republic of Iran, 231 F.Supp. 2d 260 (D.D.C. 2002) is a case in point.
134. According to section 1603(b), an "agency or instrumentality" of a foreign state refers to "any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political division thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third party." For an argument supporting the negation of FSIA immunity to individual defendants who acted beyond the scope of their authority, see Lininger, "Recent Development," pp. 186-188; David J. Bederman, "Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation," *Georgia Journal of International and Comparative Law* 25 (1995): pp. 259-262. But see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15-16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6614, where the House report, without reference to individual officials, enumerated several examples of state-owned corporate defendants in the areas of trade, mining, transportation, and steel who could secure FSIA immunity protection; American Law Institute, *Restatement (Third)*, § 452, pp. 399-401 (omitting individuals from the lists of defendants who enjoy sovereign immunity under the FSIA).
135. Congress expressly indicated the retroactivity of 28 U.S.C. § 1605(a)(7) by stating that: "The amendments made by this subtitle shall apply to any cause of action arising before, on or after the date of the enactment of this Act," Pub. L. No. 104-132, § 221(c).

136. 996 F.Supp. 1239 (S.D. Fla. 1997) (firing of rockets at unarmed civilian planes and the murdering of the pilots in international airspace over the Florida Straits by the Republic of Cuba and its Cuban Air Force).
137. 999 F.Supp. 1 (D.D.C. 1998) (wrongful homicide of an American student during her travel in Gaza as a result of a suicidal bombing masterminded by Palestine Islamic Jihad with substantial material backup from Iran and its officials).
138. 18 F.Supp. 2d 62 (D.D.C. 1998) (kidnapping, confinement, and torture of three U.S. citizens in Beirut by members of Hizbollah sponsored, financed, and controlled by Iran).
139. All cases in this group were related to a series of grim terrorist events wreaked by Hizbollah on Americans during their stay in Beirut, Lebanon in the 1980s. See Anderson v. Islamic Republic of Iran, 90 F.Supp. 2d 107 (D.D.C. 2000) (an American journalist as a victim); Higgins v. Islamic Republic of Iran, 2000 U.S. Dist. LEXIS 22173 (D.D.C. 2000) (an American marine corps colonel); Sutherland v. Islamic Republic of Iran, 151 F.Supp. 2d 27 (D.D.C. 2001) (an American professor); Jenco v. Islamic Republic of Iran, 154 F.Supp. 2d 27 (D.D.C. 2001), aff'd sub nom. Bettis v. Islamic Republic of Iran, 315 F.3d 325 (D.C. Cir. 2003) (an American priest); Polhill v. Islamic Republic of Iran, 2001 U.S. Dist. LEXIS 15322 (D.D.C. 2001) (an American professor); Wagner v. Islamic Republic of Iran, 172 F.Supp. 2d 128 (D.D.C. 2001) (an American navy officer); Stethem v. Islamic Republic of Iran, 201 F.Supp. 2d 78 (D.D.C. 2002) (a group of U.S. military officers on board a hijacked plane and the remaining survivors, later confined and tortured in Beirut); Turner v. Islamic Republic of Iran, 2002 U.S. Dist. LEXIS 26730 (D.D.C. 2002) (an American professor); Surette v. Islamic Republic of Iran, 231 F.Supp. 2d 260 (D.D.C. 2002) (a high-ranking CIA agent); Cronin v. Islamic Republic of Iran, 238 F.Supp. 2d 222 (D.D.C. 2002) (an American graduate student); Kerr v. Islamic Republic of Iran, 245 F.Supp. 2d 59 (D.D.C. 2003) (an American professor); Peterson v. Islamic Republic of Iran, 264 F.Supp. 2d 46 (D.D.C. 2003) (241 American servicemen killed in a barracks blast); Steen v. Islamic Republic of Iran, 2003 U.S. Dist. LEXIS 12108 (D.D.C. 2003) (an American professor); Kilburn v. Republic of Iran, 277 F.Supp. 2d 24 (D.D.C. 2003) (an American librarian and instructor); Tracy v. Islamic Republic of Iran, 2003 U.S. Dist. LEXIS 15844 (D.D.C. 2003) (a U.S. salesman); Regier v. Islamic Republic of Iran, 281 F.Supp. 2d 87 (D.D.C. 2003) (an American professor).
140. 995 F.Supp. 325 (E.D.N.Y. 1998), aff'd in part and dismissed in part, 162 F.3d 748 (2d Cir. 1998), cert. denied, 527 U.S. 1003 (1999) (the bombing of Pan Am Flight 103 by Libyan agents in Lockerbie, Scotland, in December 1988 that caused the wrongful death of numerous U.S. nationals).
141. 97 F.Supp. 2d 38 (D.D.C. 2000) (suit arising out of the abduction, false imprisonment, and torture of several U.S. nationals by the Saddam Hussein regime to, among other things, extract concessions from the United States

and the United Nations on raising the economic sanctions levied on Iraq since 6 August 1990).

142. 172 F.Supp. 2d 1 (D.D.C. 2000) (deaths of two American citizens as a result of a suicide bombing carried out by Hamas in Jerusalem, Israel).
143. Mousa v. Islamic Republic of Iran, 238 F.Supp. 2d 1 (D.D.C. 2001) (injury of an American caused by Hamas' bombing attack); Weinstein v. Islamic Republic of Iran, 184 F.Supp. 2d 13 (D.D.C. 2002) (deaths of two Americans for the same reason).
144. 124 F.Supp. 2d 97 (D.D.C. 2000) (a former Iranian professor and political dissident assassinated in Paris).
145. 262 F.Supp. 2d 217 (S.D.N.Y. 2003) (litigating against Afghanistan, the Taliban, Al Qaeda, Osama bin Laden, and Saddam Hussein and Iraq on behalf of two Americans killed in the 9/11 terrorist attacks on the United States).
146. 271 F.Supp. 2d 179 (D.D.C. 2003) (tormenting of American POWs by the Iraqi government during the first Gulf War of 17 January to early March 1991).
147. See, e.g., Alejandre v. Republic of Cuba, 996 F.Supp at pp. 1247-1249; Flatow v. Islamic Republic of Iran, 999 F.Supp. at pp. 16-19; Anderson v. Islamic Republic of Iran, 90 F.Supp. 2d at pp. 112-114; Smith v. Islamic Emirate of Afghanistan, 262 F.Supp. 2d at pp. 226-232 (ruling that only claims against Iraq, rather than Saddam Hussein, were legitimate under §§ 1605(a)(7) and 1605 note because the Iraqi President was entitled to treatment of absolute immunity). However, cf., Acree v. Republic of Iraq, 271 F.Supp. 2d at pp. 215-224 (deciding against Iraq, its Intelligence Service, and Hussein).
148. However, see Daliberti v. Republic of Iraq, 97 F.Supp. 2d at pp. 46-48 & n5 (dismissing the plaintiffs' complaints based on the FSIA exceptions for commercial activity and an implied wavier on the grounds that the concerned arrest and incarceration were nothing but one form of sovereign power to be justifiably exerted by Hussein's regime–an analogous analysis created by a predecessor case in Saudi Arabia v. Nelson, 507 U.S. 349, 362-363 (1993); that the torture and hostage-taking at bar had no bearing on commercial activity; and that nothing in the evidence presented was competent to establish a waiver exception).
149. Flatow v. Islamic Republic of Iran, 999 F.Supp. at pp. 24-25; Daliberti v. Republic of Iraq, 97 F.Supp. 2d at p. 55.
150. 517 F.Supp. 542 (D.D.C. 1981), aff'd per curiam, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).
151. Counsel for the plaintiffs were Michael S. Marcus, Oren R. Lewis, Jr., and William E. Donnelly at Lewis, Wilson, Lewis & Jones, Alexandria, Virginia.
152. Tel-Oren v. Libyan Arab Republic, 517 F.Supp. at pp. 545-549. The U.S. District Court found the ATCA inapplicable by reason that the plaintiffs were incapable of proving the connection of the claimed torts to the PLO and other Arab organizations and that some of them were U.S. citizens.

Further, the ATCA was envisaged as merely a jurisdictional statute nowhere vesting enforceable rights in U.S. courts to allow the grant of judicial relief. Beside those rationales, the court indicated that the FSIA could not serve as a basis for jurisdiction over Libya and PLO et al. for two reasons. The statute per se required the injury or death at issue to occur within the United States. Moreover, the subject of the FSIA was confined solely to foreign states, without enlarging its legal effect to non-state actors. In the final analysis, the court added that neither international treaties nor the law of nations advanced by the plaintiffs triggered federal question jurisdiction under 28 U.S.C. § 1331.

153. Tel-Oren v. Libyan Arab Republic, 726 F.2d at pp. 776-798 (Edwards, J., concurring).
154. Ibid., at pp. 813-816 (Bork, J., concurring).
155. Ibid., at pp. 808-823 (Bork, J., concurring).
156. Ibid., at pp. 823-827 (Robb, J., concurring).
157. Brief of the United States as Amicus Curiae in Tel-Oren v. Libyan Arab Republic in *International Legal Materials* 24 (1985): p. 432; Bazyler, "Litigating the International Law of Human Rights," p. 737; Tolley, "Interest Group Litigation to Enforce Human Rights," p. 630.
158. 257 F.Supp. 2d 115 (D.D.C. 2003).
159. 2003 U.S. Dist. LEXIS 19266 (D.D.C. 2003).
160. 364 F.3d 1196 (10th Cir. 2004).
161. Because the defendant FIS had become defunct since February 1992 owing to debarment by the Algerian government, the U.S. District Court for the District of Columbia focused entirely on addressing the allegations revolving around Haddam's role as an accomplice to the FIS-committed atrocities. Further, see Doe v. Islamic Salvation Front, 257 F.Supp. 2d at pp. 119-120 (concluding that an Algerian women NGO did not have associational standing in the instant case because substantiation of the challenged injuries suffered by an individual member would likely be needed in the latter stage in order to determine the size of money damages if the accusation against Haddam was indeed proved credible).
162. Ibid., at pp. 120-123 (pointing to a deficiency of any evidential connection between Haddam and the evildoings identified by the plaintiffs).
163. Goldstein v. United States, 2003 U.S. Dist. LEXIS at pp. 19271-19272, 19280-19281 (maintaining that the United States was free from suit unless Congress expressly instructed to the contrary).
164. Hoang Van Tu v. Koster, 364 F.3d at p. 1199 (articulating that the present complaint submitted on 12 October 2000 to address the 16 March 1968 happenings far exceeded the ten-year statute of limitations requirement analogously applied to the ATCA).
165. 124 S. Ct. 2739 (2004).
166. Participating as legal counsel for Alvarez-Machain were: the ACLU Foundation of Southern California, Los Angeles, California (Alan Castillo, Dilan Esper, Erwin Chemerinsky, Joan Fitzpatrick, Mark D. Rosenbaum, Michael Morrison, Ralph G. Steinhardt, Ranjana Natarajan, Robin S. Toma,

and Steven R. Shapiro); Alan Rubin, Epstein, Adelson & Rubin, Los Angeles; Arturo Carrillo, the International Human Rights Clinic, George Washington University Law School; the Center for Constitutional Rights and Constitutional Law, Los Angeles (Peter Schey); Douglas E. Mirell, Rachel Shujman, Tiffany J. Zwicker, and W. Allan Edmiston from Los Angeles; Ralph G. Steinhardt, George Washington University Law School; and Thomas Nanney, Morrison & Hecker, Kansas City, Missouri. Amici curiae supporters were: Americas Watch (Charles D. Siegal, Mark A. Merva, Stephen M. Kristovich, Munger, Tolles & Olson, Los Angeles; Ellen L. Lutz and Nora E. Dwyer, Los Angeles; and Kenneth Roth, New York); Career Foreign Service Diplomats (Douglass W. Cassel, Center for International Human Rights, Northwestern University School of Law, Chicago, Illinois; and Thomas E. Bisho, Holland & Knight, LLP, Jacksonville, Florida); the Center for Justice and Accountability, National Consortium of Torture Treatment Programs, and Individual ATCA Plaintiffs (Jennifer Green and Peter Weiss, Center for Constitutional Rights, New York, New York; Laurel E. Fletcher, International Human Rights Law Clinic, University of California School of Law, Berkeley; and Sandra Coliver, Center for Justice and Accountability, San Francisco); Corporate Social Responsibility (Natacha Thys and Terrence P. Collingsworth, International Labor Rights Fund, Washington, D.C.); International Human Rights Organizations and Religious Organizations (Beth Stephens, Rutgers-Camden Law School; and Deena R. Hurwitz, International Human Rights Law Clinic, University of Virginia Law School); International Jurists (Harold Hongju Koh, Allard K. Lowenstein International Human Rights Clinic, New Haven, Connecticut; John M. Townsend and William R. Stein, Hughes Hubbard & Reed, LLP, N. W., Washington, D.C.; Sif Thorgeirsson, New Haven); International Women's Human Rights Law Clinic, City University of New York School of Law (Andrew Fields and Rhonda Copelon); National and Foreign Legal Scholars (David S. Weissbrodt, University of Minnesota Law School, Minneapolis, Minnesota; and William J. Aceves, California Western School of Law, San Diego, California); the Presbyterian Church of Sudan and Clifton Kirkpatrick as Stated Clerk of the General Assembly of the Presbyterian Church (USA) (Carey R. D'Avino and Stephen A. Whinston, Berger & Montague, P.C., Philadelphia, Pennsylvania; and Lawrence Kill and Linda Gerstel, Anderson Kill & Olick, P.C., New York, New York); Surviving Family Members of the Victims of the September 11, 2001 Terrorist Attacks (Penny M. Venetis, Rutgers Constitutional Litigation Clinic, Newark, New Jersey); the United Mexican States (Bruno A. Ristau, Ristau & Abbell, N.W. Washington, D.C.; and Luis Miguel Diaz, Ministry of Foreign Affairs, Mexico); and the World Jewish Congress and the American Jewish Committee (Agnieszka M. Fryszman and Michael D. Hausfeld, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, D.C.; Bill Lann Lee, Caryn Becker, Chimene I. Keitner, David W. Marcus, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco; Jean Geoppinger, Paul De Marco, and Stanley M. Chesley, Waite,

Schneider, Bayless & Chesley, Cincinnati, Ohio; and Morris A. Ratner, Lieff, Cabraser, Heimann & Bernstin, LLP, New York).

167. 504 U.S. 655 (1992); see Chapter 6 for further discussion.
168. The suit was also leveled at the United States and agents of the DEA as defendants on the basis of the Federal Tort Claims Act, 28 U.S.C. § 1346 (2004).
169. Sosa v. Alvarez-Machain, 124 S. Ct. at p. 2754.
170. Ibid., at p. 2755.
171. Ibid., at p. 2756.
172. Joining justices were John P. Stevens, Sandra D. O'Connor, Anthony M. Kennedy, Ruth B. Ginsburg, and Stephen G. Breyer, with two sets of justices filing concurrences specifically on the ATCA claim (Antonin Scalia, William H. Rehnquist, and Clarence Thomas; and Breyer).
173. Sosa v. Alvarez-Machain, 124 S. Ct. at p. 2762.
174. Ibid., at p. 2763.
175. Ibid., at pp. 2761, 2764-2765.
176. Ibid., at p. 2761.
177. Ibid., at pp. 2761-2762.
178. Ibid., at p. 2766.
179. Ibid., at p. 2766 n21.
180. Ibid., at p. 2767.
181. Ibid., at p. 2768.
182. Ibid., at p. 2769.
183. 722 F.2d 582 (9th Cir. 1983), cert. denied, 469 U.S. 880 (1984).
184. 729 F.2d 835 (D.C. Cir. 1984), cert. denied, 469 U.S. 881 (1984).
185. 617 F.Supp. 311 (D.D.C. 1985).
186. 736 F.Supp. 1 (D.D.C. 1990).
187. 1992 U.S. Dist. LEXIS 4233 (D.D.C. 1992).
188. 507 U.S. 349 (1993).
189. 26 F.3d 1166 (D.C. Cir. 1994), cert. denied, 513 U.S. 1121 (1995).
190. 30 F.3d 164 (D.C. Cir. 1994), cert. denied, 513 U.S. 1078 (1995).
191. 886 F.Supp. 306 (E.D.N.Y. 1995), aff'd, 101 F.3d 239 (2d Cir. 1996), cert. denied, 117 S. Ct. 1569 (1997).
192. 172 F.Supp. 2d 52 (D.D.C. 2001), aff'd, 332 F.3d 679 (D.C. Cir. 2003).
193. 195 F.Supp. 2d 140 (D.D.C. 2002), aff'd, 333 F.3d 228 (D.C. Cir. 2003).
194. For instance, participating litigators included: (1) Abraham D. Sofaer, Anthony D'Amato, Leonard Garment, Paul Schott Stevens, and William R. Stein; amicus Human Rights Watch (Ellen Lutz, Jeffrey L. Braun, and Kenneth Roth); and amici the International Human Rights Law Group et al. (Andrew L. Sandler, Douglas G. Robinson, Harold H. Koh, Janelle M. Diller, Julia E. Sullivan, Michael Ratner, and Steven M. Schneebaum) (Nelson); and (2) Elizabeth Haines Cronise and Michael David Hausfeld, at Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, D.C.; Johnnie L. Cochran, Jr., New York, NY; and amici David A. Handzo, Kelly Askin, Michael Tigar, and Richard Heideman (Hwang Geum Joo).

195. In the cases of Von Dardel, Denegri, Nelson, Smith, and Hwang Geum Joo, the U.S. courts adduced Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) to underlie their disapproval of the ATCA force.
196. McKeel v. Islamic Republic of Iran, 722 F.2d at pp. 585-589 (striking down a lawsuit constructed on a FSIA exception for noncommercial torts (28 U.S.C. § 1605(a)(5)) against Iran for damages arising from the hostage-taking of Americans during the period of 1979 and 1981, given that the event did not happen within the territorial jurisdiction of the USA); Persinger v. Islamic Republic of Iran, 729 F.2d at pp. 837-843 (same); Ledgerwood v. State of Iran, 617 F.Supp. at pp. 314-315 (same); Von Dardel v. U.S.S.R., 736 F.Supp. at pp. 2, 14-24; Denegri v. Republic of Chile, 1992 U.S. Dist. LEXIS at pp. 4239-4244; Saudi Arabia v. Nelson, 507 U.S. at pp. 358-363; Princz v. Federal Republic of Germany, 26 F.3d at pp. 1171-1174; Cicippio v. Islamic Republic of Iran, 30 F.3d at pp. 166-169; Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d at pp. 242-246. See also Hwang Gem Joo v. Japan, 332 F.3d at pp. 681-686 (dismissing the litigation initiated by fifteen former "comfort women" from China, Taiwan, South Korea, and the Philippines by averring that the commercial activity exception did not retroactively apply to sexual atrocities inflicted on the appellants prior to 19 May 1952, a watershed date at which the practice of absolute sovereign immunity in the USA was shifted to a restrictive one); Roeder v. Islamic Republic of Iran, 333 F.3d at pp. 234-239 (specifying that the power of the FSIA immunity exception for state-sponsored terrorism was overcome by the Algiers Accords of 19 January 1980, which foreclosed any suit against Iran arising out of the hostage incident).
197. Scholars have taken the view that a foreign country guilty of *jus cogens* violations should be disqualified from acquiring an immunity shield by way of a FSIA implied waiver exception provision. Additionally, Congress has proposed to strip immunity from countries that perpetrated acts of torture, extrajudicial killing, and genocide against U.S. citizens. For more details, see Bazyler, "Litigating the International Law of Human Rights," pp. 732-734; Mathias Reimann, "A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany," *Michigan Journal of International Law* 16 (1995): pp. 415-416..
198. Von Dardel v. USSR, 736 F.Supp. at p. 2.
199. Edward D. Re, "Human Rights, Domestic Courts, and Effective Remedies," *St. John's Law Review* 67 (1993): pp. 588, 590.
200. Hwang Geum Joo v. Japan, 332 F.3d at pp. 683-685.
201. McKeel v. Islamic Republic of Iran, 722 F.Supp. at p. 585 & n1; Persinger v. Islamic Republic of Iran, 729 F.2d at p. 837; Ledgerwood v. State of Iran, 617 F.Supp. at p. 312; Roeder v. Islamic Republic of Iran, 333 F.3d at pp. 231, 233 & n1.
202. 844 F.Supp. 128 (E.D.N.Y. 1994).
203. Lafontant v. Aristide, 844 F.Supp. at pp. 129, 131, 134-135, 137-138.

204. 558 F.Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984).
205. 568 F.Supp. 596 (D.D.C. 1983), aff'd, 770 F.2d 202 (D.C. Cir. 1985).
206. 702 F.Supp. 319 (D.D.C. 1988), aff'd in part and rev'd in part on other grounds, 886 F.2d 438 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990).
207. Crockett v. Reagan, 558 F.Supp. at pp. 896, 898-902 (probe into the legality of U.S. military activities in El Salvador was a nonjusticiable political question and better managed by Congress because the court lacked the resources and expertise to undertake such an investigation); Greenham Women against Cruise Missiles v. Reagan, 591 F.Supp. at pp. 1335-1339 (a political question); Sanchez-Espinoza v. Reagan, 568 F.Supp. at pp. 598-602 (sitting in judgment on the question of U.S. military and economic assistance in Nicaragua would impinge upon the powers of the political branches in carrying out foreign policy and national security); Nicaragua v. Reagan, 859 F.2d at pp. 935-940 (last-in-time and non-self-executing doctrines); Saltany v. Reagan, 702 F.Supp. at pp. 320-322 (invoking the doctrines of the act of state, head-of-state immunity, sovereign immunity, presidential immunity, and official immunity to dismiss the charges against the U.K., Prime Minister Margaret H. Thatcher, the United States, President Reagan, and U.S. officials for the bombardment of Libya).
208. Nicaragua v. Reagan, 859 F.2d at pp. 934, 938.

Chapter 3

1. William A. Schabas, "Symposium on the Future of International Human Rights: International Law and Abolition of the Death Penalty," *Washington & Lee Law Review* 55 (1998): pp. 797, 802, 808, 832-834.
2. Idem, *The Abolition of the Death Penalty in International Law*, 2d ed. (Cambridge: Cambridge University Press, 1997), pp. 13, 25, 30-40, 42-45, 265, 267, 272-273, 298; Warren Allmand et al., "Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law?" *Fordham Law Review* 67 (1999): pp. 2810-2811.
3. For example, banning capital sentences upon juveniles under the age of 18, pregnant women, and mothers of young children is enshrined in Fourth Geneva Convention, art. 68(4); Protocol Additional I to the Geneva Conventions, arts. 76(3), 77(5); Protocol Additional II to the Geneva Conventions, art. 6(4). For the provision of due process, refer to Geneva Conventions, common art. 3; Third Geneva Convention, arts. 82, 84, 86, 87, 99, 100-107; Fourth Geneva Convention, art. 75.
4. Schabas, *The Abolition of the Death Penalty in International Law*, pp. 194, 196, 201-202.
5. Ibid., pp. 67-73.
6. ICCPR, art. 6(6).
7. General Comment, No. 24 (52), § 8 at p. 3, see Schabas, *The Abolition of the Death Penalty in International Law*, pp. 81-90.

8. Schabas, ibid., pp. 147-148, 219, 261.
9. Ibid., pp. 161-163.
10. Draft resolution VII: Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, U.N. Doc. E/1984/16, U.N. Doc. E/AC.57/1984/18. The resolution was later endorsed by both the Economic and Social Council (ECOSOC) and the General Assembly without a vote as well as by the Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, see E.S.C. Res. 1984/50, adopted without a vote; G.A. Res. 39/118, U.N. Doc. A/PV.101, § 79, without a vote; U.N. Doc. A/CONF.121/22/Rev.1, pp. 83-84, 131-132.
11. 492 U.S. 302 (1989) (holding that the death sentencing of prisoners with mental retardation did not contradict the Eighth Amendment's ban on cruel and unusual punishment, so long as sentencers were allowed to consider retardation as a mitigating factor).
12. Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1989/64, adopted without a vote. The Implementation of the Safeguards was further approved by the Second (Social) Committee of the General Assembly, see U.N. Doc. E/1989/91, § 36. For details, see William A. Schabas, "International Norms on Execution of the Insane and the Mentally Retarded," *Criminal Law Forum* 4 (1993): pp. 107-110.
13. ECOSOC also sponsored the Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1996/15, see Schabas, "Symposium on Future of International Human Rights," p. 822.
14. Schabas, *The Abolition of the Death Penalty in International Law*, pp. 148, 167-168.
15. Ibid., pp. 171-176.
16. Ibid., pp. 178-180.
17. Ibid., p. 181.
18. ICTY Statute, art. 24(1); ICTR Statute, art. 23(1); Rome Statute, art. 77.
19. Question of the Death Penalty, Comm. on Hum. Rts. Resolutions 1997/12, 1998/8, 1999/61, 2000/65, 2001/68, 2002/77, 2003/67.
20. Luke T. Lee, *Vienna Convention on Consular Relations* (the Netherlands: A. W. Sijthoff-Leyden/Rule of Law Press-Durham N.C., 1966), pp. 109-114; Gregory D. Gisvold, "Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities," *Minnesota Law Review* 78 (1994): pp. 783-785.
21. Gay J. McDougall, "Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination," *Howard Law Journal* 40 (1997): pp. 585-586; Robin H. Gise, "Rethinking McClesky v. Kemp: How U.S. Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination Provides a Remedy for Claims of Racial Disparity in Death Penalty Cases," *Fordham International Law Journal* 22 (1999): pp. 2273, 2277, 2289-2292, 2299 n202, 2302-2323. Other comparable international

and regional legal provisions are found in UDHR, arts., 2, 7, 10; ICCPR, arts., 2(1), 26; European Convention, art. 14; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (30 March-2 May 1948), Bogota, O.A.S. Off. Rec. OEA/Ser. L/V/1.4 Rev. (1965), art. II [hereinafter American Declaration]; American Convention, arts. 1, 24.

22. An example would be the Baldus study of racial factors in capital sentencing patterns unsuccessfully presented in McClesky v. Kemp, 481 U.S. 279 (1987).
23. William A. Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts* (Boston: Northeastern University Press, 1996), pp. 4, 8-9, 28-42; idem, *The Abolition of the Death Penalty in International Law*, pp. 19, 126-146, 229-238.
24. Ng v. Canada (No. 469/1991), 15 *H.R.L.J.* 149 (1994), §§ 16.3-16.5 (the Human Rights Committee found that the use of the gas chamber in California was cruel and inhuman).
25. Pratt and Morgan v. Jamaica (Nos. 210/1986, 225/1987), U.N. Doc. A/44/40, 11 *H.R.L.J.* 150, § 13.7 (indicating that a delay in notifying the prisoner of a stay of execution constituted cruel and inhuman treatment).
26. Soering v. United Kingdom, 7 July 1989, Series A, Vol. 161, 11 E.H.R.R. 439, at pp. 463-464.
27. Ibid.
28. General Comment, No. 24 (52), § 8 at p. 3 (deciding that the prohibition on torture or other cruel treatment is not liable to a reservation); ICCPR, art. 4(2) (stating that no derogation from the ban on torture and other cruel treatment is allowed).
29. For instance, ICCPR, art. 4(2) (concerning non-derogation to the norm forbidding the juvenile death penalty). See also Schabas, *The Abolition of the Death Penalty in International Law*, pp. 87, 183-184, 334 (supporting the Human Rights Committee's statement that to limit the power of Article 37(a) via a reservation would amount to scaling down on the object and purpose of the Child Rights Convention).
30. Schabas, ibid., pp. 220, 228-229.
31. Ibid., pp. 220, 225-229.
32. Third Geneva Convention, arts 100, 101; Fourth Geneva Convention, arts. 68, 74(2), 75; Geneva Conventions, common art. 3; Protocol Additional I to the Geneva Conventions, arts. 76(3), 77(5); Protocol Additional II to the Geneva Conventions, art. 6(4), quoted by Schabas, ibid., pp. 229n55, 348-351, 355-356.
33. Schabas, ibid., pp. 232-236.
34. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, adopted 28 April 1983, entry into force 1 March 1985, Europ. T.S. No. 114.
35. Second Optional Protocol to the ICCPR, art. 2(1).
36. Protocol No. 6, art. 2.

37. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in All Circumstances, opened for signature 3 May 2002, entry into force 1 July 2003, Europ. T.S. No. 187.
38. Schabas, *The Abolition of the Death Penalty in International Law*, pp. 14, 221, 256, 259-260.
39. Buergenthal, *International Human Rights in a Nutshell*, pp. 127, 129-143. See also Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of 14 July 1989, Inter-Am. Ct. Hum. Rts., Ser. A, No. 10 (indicating that the American Declaration is "a source of international obligation related to the Charter of the [OAS]"), in Mark E. Wojcik, "Using International Human Rights Law to Advance Queer Rights: A Case Study for the American Declaration of the Rights and Duties of Man," *Ohio State Law Journal* 55 (1994): pp. 652-656.
40. Schabas, *The Abolition of the Death Penalty in International Law*, pp. 289-290.
41. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), § 61, Advisory Opinion OC-3/83 of 8 September 1983, Series B No.3, in Schabas, ibid., pp. 282-283.
42. Adopted 8 June 1990, entered into force on 6 October 1993, O.A.S.T.S. No. 73.
43. Schabas, *The Abolition of the Death Penalty in International Law*, pp. 280, 290.
44. OAU Doc. CAB/LEG/24.9/49, adopted in July 1990, entry into force 29 November 1999.
45. Arab Charter of Human Rights, adopted on 15 September 1994, reprinted in 18 *H.R.L.J.* 151 (1997).
46. Amnesty International, *Middle East and North Africa Region Re-drafting the Arab Charter on Human Rights: Building for a Better Future*, AI Index: MDE 01/002/2004 (11 March 2004).
47. See the defining elements of customary international law in Statute of the International Court of Justice, art. 38(1)(b); American Law Institute, *Restatement (Third)*, § 102(2), Comment b, c, Reporters' Notes 2, 5, pp. 24-25, 30-32, 33-34; Connie de la Vega and Jennifer Brown, "Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?" *University of San Francisco Law Review* 32 (1998): pp. 756-757.
48. Visit the Death Penalty Information Center's website, at <http://www.deathpenaltyinfo.org/article.php?scid=27&did=203> (visited 10 March 2005)..
49. As of 9 June 2004, there were 192 parties to the Child Rights Convention; full information regarding ratification status is accessible, at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm> (visited 23 July 2004).
50. Roach and Pinkerton v. United States, Case 9.647, Inter-Am. C.H.R. 147, OEA/Ser.L../V./II.71, Doc. 9 rev. 1 (1987), 8 *H.R.L.J.* 345 [hereinafter Roach and Pinkerton]; General Comment, No. 24 (52), § 8, U.N. GAOR,

Hum. Rts. Comm., 52d Sess., 1382d mtg. 3, at p. 2, U.N. Doc. ICCPR/C/21/Rev.1/Add.6 (November 1994), 15 *H.R.L.J.* 464. For discussion, see Schabas, *The Abolition of the Death Penalty in International Law*, pp. 87-88, 269, 305-306.

51. Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Comments of the Human Rights Committee, United States–Initial Report, U.N. Doc. ICCPR/C/79/Add.50 (1995), § 14, derived from Schabas, ibid., pp. 89, 305.
52. For instance, de la Vega and Brown (1998), "Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?" pp. 759-762.
53. General Comment, No. 24 (52), § 8 (due process guarantees and prohibition of torture and cruel treatment are non-reservable customary norms). A similar account can be found in American Law Institute, *Restatement (Third)*, § 702, Comment g, and Reporters' Notes 5, pp. 161, 164, 169-171 (torture or other cruel, inhuman, or degrading treatment or punishment is customarily prohibited in international law).
54. Nicaragua v. United States, 1986 ICJ Reports 14, §§ 218, 255, 292(9) (declaring common Article 3 to be customary law).
55. Schabas, *The Death Penalty As Cruel Treatment and Torture*, pp. 5, 30, 33-34, 43.
56. Renowned campaigners included Thomas Clarkson, William Wilberforce, and the Anti-Slavery Societies.
57. Ethan A. Nadelmann, "Global Prohibition Regimes: The Evolution of Norms in International Society," *International Organization* 44 (1990): pp. 491-498.
58. Slavery Convention, adopted 25 September 1926, entry into force 9 March 1927, 60 L.N.T.S. 253. The power of the Convention was extended into the post-World War II era with the U.N. formally backing the substance of the Convention in 1953 and 1956. See Protocol Amending the Slavery Convention, G.A. Res. 794, U.N. GAOR, 8th Sess., Supp. No. 17, at 50, U.N. Doc. A/2630 (1953); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted September 1956, entry into force 30 April 1957, 266 U.N.T.S. 3. For more comprehensive narration regarding the League of Nation's endeavors to combat slave trading and slavery, see Renee Colette Redman, "Beyond the United States: The League of Nations and the Right to be Free from Enslavement—the First Human Right to be Recognized as Customary International Law," *Chicago-Kent Law Review* 70 (1994): pp. 759-799.
59. Paul G. Lauren, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination* (Boulder: Westview Press, Inc., 1988), pp. 111-118.
60. U.N. Charter, arts 1(3), 55, 56.
61. American Law Institute, *Restatement (Third)*, § 702, Comment j, Reporters' Notes 7, pp. 161, 165, 172-173.
62. The first Optional Protocol to the ICCPR permits the submission of individual communications to the U.N. Human Rights Committee

addressing violations by countries that have simultaneously accepted the International Covenant and its Optional Protocol. However, the United States never signed the first Optional Protocol. In like manner, although the USA ratified the Torture Convention and the Racial Convention in 1994, it has yet to submit any declaration indicating its desire to recognize the power of both Committees to receive individual complaints against it.

63. E.S.C. Res. 1503, U.N. ESCOR, 48th Sess., Supp. No. 1A, at 8, U.N. Doc. E/4832/Add. 1 (1970).
64. See the Special Rapporteur's website, at <http://www.unhchr.ch/html/menu2/7/b/execut/exe_mand.htm> (visited 14 February 2005).
65. Letter from Robert F. Brooks, Esq., to Bacre Waly Ndiaye, United Nations Special Rapporteur on Summary and Arbitrary Executions (17 June 1997) (on file with the author) [hereinafter Brooks' Letter to Ndiaye].
66. Electronic Mail from Mark Warren, U.S. Death Penalty Coordinator of Amnesty International Canada (18 January 2000) [hereinafter Warren Mail].
67. According to Articles 19 and 20 of its 1979 Statute, the Inter-American Commission assumes a dual role in the Inter-American system: one as an organ of the American Convention (a discretionary treaty open to ratification only by OAS members) and another as that of the Organization of American States (OAS), whose generally applicable human rights standards are enshrined in the American Declaration. The final outcome of private petitions dealt with by the IACHR varies depending on whether the petitions are brought against OAS countries contracting to the American Convention or against OAS countries not parties to the Convention.
68. The Rules of Procedure of the Inter-American Commission on Human Rights were approved in December 2000. The Rules took the place of the 8 April 1980 Regulations and went into effect on 1 May 2001. Article 25(1) of the Rules of Procedure spells out that: "In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons."
69. The American Convention does not refer to any action that the OAS General Assembly may take to neutralize national non-compliance with an Inter-American Court decision. As a political body, the OAS General Assembly, however, may adopt political action to bring the concerned country in line with the Court's judgment. Lillich and Hannum, *International Human Rights*, p. 787.
70. David Weissbrodt, "Execution of Juvenile Offenders by the United States Violates International Human Rights Law," *American University Journal of International Law & Policy* 3 (1988): pp. 340-341, 352.
71. Roach and Pinkerton, para. 56.
72. Ibid., para. 60.
73. 487 U.S. 815 (1988).

74. Case 10.031, Resolution 23/89, Inter-Am. C.H.R. 62, 64, 66, OEA/Ser.L./V./II.77, Doc. 7 rev. 1 (1990).
75. 481 U.S. 279 (1987).
76. Case 11.139, Report 57/96, Inter-Am. C.H.R., OEA/Ser.L./V./II.98, Doc. 6 rev. (1998).
77. The brief produced by the International Human Rights Clinic was additionally supported by Steven W. Hawkins of the Legal Defense Fund's Capital Punishment Project in New York and Professor Bartram S. Brown of Chicago-Kent College of Law.
78. Petition Alleging Violations of the Human Rights of Joseph Stanley Faulder by the United States of America and the State of Texas, to the Honorable Members of the Inter-American Commission on Human Rights, Organization of American States (24 May 1999) (on file with the author).
79. Case 12.285, Report 62/02, Inter-Am. C.H.R., OEA/Ser.L./V./II.117, Doc. 1 rev. 1 (2003) [hereinafter Domingues at the IACHR] (involving a juvenile committing crimes at the age of 16).
80. Case 12.240, Report 100/03, Inter-Am. C.H.R. (2004) [hereinafter Thomas] (17 years of age).
81. Case 11.193, Report 97/03, Inter-Am. C.H.R. (2004) [hereinafter Graham] (17 years of age).
82. Case 12.412, Report 101/03, Inter-Am. C.H.R. (2004) [hereinafter Beazley at the IACHR] (17 years old).
83. Referred to by the Commission as one of the indications that a bar to inflicting the penalty of death on youngsters had assumed the status of *jus cogens* was a body of multilateral treaties: Child Rights Convention, ICCPR, American Convention, Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Protocol No. 6 to the European Convention, and Fourth Geneva Convention.
84. Domingues at the IACHR, paras. 43, 49-85, 105-109.
85. Ibid., paras. 86-87; Graham, paras. 52-55; Thomas, paras. 40-43; Beazley at the IACHR, paras. 48-50. Articles XVIII and XXVI of the American Declaration regarding fair trial and due process standards provided additional bases on which the Graham ruling was handed down by the Commission; see paras. 42-49.
86. Case 12.243, Report 52/01, Inter-Am. C.H.R., OEA/Ser.L./V./II.111, Doc. 20 rev. (2001) [hereinafter Garza].
87. Human rights defenders for Juan Raul Garza were Gregory Weirciock, an attorney in Houston, Texas; Hugh Southey, a barrister with Tooks Chambers in London, United Kingdom; John B. Quigley, professor of International Law at Ohio State University; Mark Norman, Solicitor of the Supreme Court of England and Wales; Michael Mansfield, QC, from the Human Rights Committee of the Bar of England and Wales; and William A. Schabas, then professor of International Human Rights Law at the University of Quebec at Montreal.
88. Garza, paras. 90, 92.
89. Ibid., para. 91.

90. Ibid., paras. 33, 103-111.
91. Ramón Martinez Villareal v. United States, Case 11.753, Report 52/02, Inter-Am. C.H.R., OEA/Ser.L./V./II.117, Doc. 1 rev. 1 (2003) [hereinafter Villareal].
92. Cesar Fierro v. United States, Case 11.331, Report 99/03, Inter-Am. C.H.R. (2004) [hereinafter Fierro].
93. 126 F.3d 1220 (9th Cir. 1997), cert. denied, 1998 U.S. LEXIS 2563.
94. Villareal, paras. 59-62, 97; Fierro, para. 37.
95. The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Inter-Am. Court H.R., Advisory Opinion OC-16/99 of 1 October 1999 [hereinafter the OC-16/99 Advisory Opinion from the Inter-American Court]; LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (27 June) [hereinafter the LaGrand case at the ICJ].
96. Villareal, paras. 63-87; Fierro, paras. 39-41.
97. Graham, paras. 33-34; Thomas, paras. 44-46; Beazley, paras. 51-53; Garza, paras. 117-118.
98. Calvin Burdine v. United States, Petition 11.423, Inter-Am. C.H.R. (a case raising the death row phenomenon); Abu-Ali Abdur' Rahman (formerly James Jones) v. United States, Petition 136.02, Inter-Am. C.H.R. (raising fair trial concerns); Tracy Lee Housel v. United States, Petition 129/2002, Inter-Am. C.H.R. (death row phenomenon and defective proceedings); John Elliott v. United States, Petition P28/03, Inter-Am. C.H.R. (death row phenomenon).
99. Carlos Santana v. United States, Petition No. 11.130, Inter-Am. C.H.R.; Roberto Moreno Ramos v. United States, Petition P4446/02, Inter-Am. C.H.R.
100. On 9 December 1997, Mexico submitted a request to the Inter-American Court for an advisory opinion under Article 64(1) of the American Convention, see Richard J. Wilson, "The Inter-American Human Rights System: Principal Activities in 1997 and Related Developments," 1998 *ACLU International Civil Liberties Report* 19.
101. The group was made up of: Amnesty International (Richard Wilson and Hugo Adrian Relva); CMPDDH (Mariclaire Acosta); Death Penalty Focus of California; Human Rights Watch/Americas and CEJIL (Jose Miguel Vivanco, Viviana Krsticevic, Marcela Matamoros, and Ariel Dulitzky); the International Human Rights Institute of DePaul University College of Law (Douglas Cassel); Irineo Tristan Montoya (Bonnie Lee Goldstein); Jose Trinidad Loza (Laurence E. Komp, Luz Lopez-Ortiz, and Gregory W. Meyers); and the Minnesota Advocates for Human Rights (Sandra L. Babcock and Margaret Pfeiffer). Others acting in individual capacities were John B. Quigley, Mark J. Kadish, and Hector Gros Espiell.
102. 81 F.3d 515 (5th Cir. 1996), cert. denied, 519 U.S. 995 (1996).
103. Findings of Law and Fact (Butler County Court of Common Pleas, 24 September 1996, Elliott, J.), aff'd, 1997 Ohio App. LEXIS 4574 (Ohio Ct. App.).

104. Memorandum opinion (E.D. Va., 26 July 1996, William, J.), aff'd, 116 F.3d 97 (4th Cir. 1997), cert. denied, 118 S. Ct. 26 (1997).
105. The OC-16/99 Advisory Opinion from the Inter-American Court, paras. 84, 86-87, 122-124.
106. Ibid., para. 137.
107. Ibid., paras. 139-140.
108. Opened for signature on 24 April 1963, 596 U.N.T.S. 487. Other inter-state complaint bodies whose authority the United States has accepted include those provided under the ICCPR, the Torture Convention, and the Racial Convention. All of the said mechanisms have yet to be invoked by any contracting countries, possibly out of fear of jeopardizing their diplomatic relations with targeted countries should the mechanisms be activated. Alongside those treaty-based petitioning procedures available to sovereign states, human rights activists speaking for U.N. members may take advantage of 1235 and 2535 procedures under the Human Rights Commission to charge the USA with gross violations of human rights in the application of the death penalty. Finally, unlike the ICCPR, the Torture and Racial Conventions enable States parties to refer any treaty disputes to the ICJ for judgment. However, when ratifying the two Conventions, the USA instituted reservations to withhold ICJ jurisdiction.
109. Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), I.C.J. General List No. 99 (Order of 9 April 1998).
110. They were attorneys Barton Legum, Don Malone, and Donald F. Donovan.
111. Breard v. Netherland, 949 F.Supp. 1255 (E.D. Va. 1996), aff'd sub nom. Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998), cert. and stay denied sub nom. Breard v. Greene, 523 U.S. 371, 1998 U.S. LEXIS 2465 (1998) (per curiam).
112. Brooke A. Masters and Joan Biskupic, "Killer Executed Despite Pleas: World Tribunal, State Department Had Urged Delay," *Washington Post*, 15 April 1998.
113. William J. Aceves, "The Vienna Convention on Consular Relations: Recent Developments," 1999 *ACLU International Civil Liberties Report* 53-54.
114. They were Professors Andreas Paulus, Bruno Simma, Daniel Khan, and Pierre-Marie Dupuy as well as German officials from different administrative departments.
115. Case concerning the Vienna Convention on Consular Relations (F.R.G. v. U.S.) (Order of 3 March 1999).
116. The LaGrand case at the ICJ, paras. 73-74, 77.
117. Ibid., para. 78.
118. Ibid., paras. 90-91.
119. Ibid., para. 102.
120. Ibid., para. 128(7).
121. Avena and Other Mexican Nationals (Mexico v. United States of America) 2004 I.C.J. 128 (31 March) [hereinafter the Avena case at the ICJ].

122. The law enforcement agencies implicated in this case spanned nine U.S. states: California (28 cases), Texas (15 cases), Illinois (3 cases), Arizona (1 case), Arkansas (1 case), Nevada (1 case), Ohio (1 case), Oklahoma (1 case), and Oregon (1 case). For specific names of violated Mexicans, refer to the Avena case at the ICJ, para. 16.
123. They were Carlos Bernal; and Noriega Escobedo, chairman of the Commission on International Law at the Mexican Bar Association, Mexico City.
124. Ms. Babcock is director of the Mexican Capital Legal Assistance Program.
125. Ms. Hoss served as research fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.
126. Mr. Warren is an international law researcher in Ottawa.
127. Professor Dupuy teaches at the University of Paris II (Pantheon-Assas) and at the European University Institute, Florence.
128. They included Catherine Amirfar (New York); Dietmar W. Prager (New York); Donald F. Donovan (New York); Katherine Birmingham Wilmore (London); Michel L. Enfant (Paris); Natalie Klein (New York); and Thomas Bollyky (New York).
129. The Avena case at the ICJ, para. 64.
130. Ibid., paras. 78-80, 84-88.
131. Ibid., paras. 138-143.
132. Ibid., para. 151.
133. Memorandum from the White House to the U.S. Attorney General (28 February 2005) (on file with the author).
134. Adam Liptak, "U.S. Says It Has Withdrawn from World Judicial Body," *New York Times*, 10 March 2005.
135. For instance, United States v. Li, 206 F.3d 56 (1st Cir. 2000) (en banc) (non-capital case declining to apply the Inter-American Court's advisory opinion (OC-16/99)); United States v. Minjares-Alvarez, 264 F.3d 980 (10th Cir. 2001) (non-capital decision noting but distinguishing the ICJ's LaGrand decision); Garza v. Lappin, 253 F.3d 918 (7th Cir. 2001) (capital decision rejecting the relevance of the IACHR's opinion in the Garza case).
136. 2005 U.S. LEXIS 2200, aff'g, 112 S.W.3d 397 (Mo. 2003).
137. Ohio v. Issa, 93 Ohio St. 3d 49, 76-81 (Stratton, J., dissenting).
138. 223 F.Supp. 2d 968 (N.D. Ill. 2002).
139. Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law," *Georgia Journal of International and Comparative Law* 25 (1995/1996): pp. 303-307, 329-330 (stating that, while the UDHR is frequently referred to by human rights activists and the U.S. government in pleadings, most U.S. courts reluctantly employ it to invalidate the disputed domestic law or practice).
140. Wojcik, "Using International Human Rights Law to Advance Queer Rights," pp. 650-652 (describing how U.S. courts almost always disallow claims based on the American Declaration).
141. Henkin, "U.S. Ratification of Human Rights Conventions," pp. 346-349.

142. Schabas, *The Abolition of the Death Penalty in International Law*, pp. 196, 202-206.
143. Kenneth Roth, "The Charade of US Ratification of International Human Rights Treaties," *Chicago Journal of International Law* 1 (2000): pp. 349, 351-352.
144. Henkin, "U.S. Ratification of Human Rights Conventions," pp. 344-345.
145. Schabas, *The Abolition of the Death Penalty in International Law*, pp. 144-145.
146. In Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court held existing state death penalty statutes to be unconstitutional because the statutes granted juries unrestricted and unguided discretion over capital cases. However, the Furman Court did not declare the practice of capital punishment itself to be unconstitutional.
147. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., 27 October 1990).
148. David P. Stewart, "United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations," *Depaul Law Review* 42 (1993): pp. 1192-1194 & nn49-51, 57-58; Lillich and Hannum, *International Human Rights*, pp. 254-259.
149. Connie de la Vega, "Civil Rights during the 1990s: New Treaty Law Could Help Immensely," *University of Cincinnati Law Review* 65 (1997): pp. 458-561; Schabas, *The Abolition of the Death Penalty in International Law*, pp. 82-83, 86-90.
150. Notification of Consular Officers upon Arrest of Foreign Nationals, 32 Fed. Reg. 1040 (1967) (codified at 28 C.F.R. § 50.5) (regulations for Justice Department officials); Proceedings to Determine Deportability of Aliens in the United States: Apprehension, Custody Hearing and Appeal, 32 Fed. Reg. 5619 (1967), amended by Apprehension and Detention of Inadmissible and Deportable Aliens: Removal of Aliens Ordered Removed, 62 Fed. Reg. 10312, 10360 (1997) (codified at 8 C.F.R. § 236.1(e)) (regulations for the INS). For reference purposes, see William J. Aceves, "The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies," *Vanderbilt Journal of Transnational Law* 31 (1998): pp. 273-274.

Chapter 4

1. The resulting survey based on the theory of functionalism is presented in the concluding chapter.
2. 492 U.S. 361 (1989).
3. 540 U.S. 969 (2003) (certiorari denied).
4. Brief of Amici Curiae the European Union and Members of the International Community in Support of Respondent, Roper v. Simmons (No. 03-633) (on petition for a writ of certiorari to the Supreme Court of

Missouri); available via the American Bar Association's Juvenile Justice Center website, at <http://www.abanet.org/crimjust/juvjus/simmons/simonsamicus.html> (visited 14 August 2004).

5. The letter was issued on 7 October 2002 and is obtainable at <http://www.eurunion.org/legislat/DeathPenalty/StanfordvKYGov.htm> (visited 18 August 2004).
6. Brief of Amici Curiae Former U.S. Diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G. Wisner in Support of Respondent, Roper v. Simmons (No. 03-633).
7. 961 P.2d 1279 (Nev. 1998), cert. denied, 526 U.S. 1156 (1999).
8. Jennifer Fiore, "UN Commission on Human Rights: The Juvenile Death Penalty," *Human Rights Advocates* 33 (1999): p. 8.
9. Status of the International Covenants on Human Rights, U.N. ESCOR, 54th Sess., U.N. Doc. E/CN.4/NGO/45 (11 March 1998); Promotion and Protection of Human Rights Status of the International Covenants on Human Rights, U.N. ESCOR, 55th Sess., U.N. Doc. E/CN.4/NGO/9 (29 January 1999).
10. Beazley v. Cockrell, 534 U.S. 945 (2001).
11. Brief of Petitioner, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169); Brief for Petitioner, Stanford v. Kentucky, 492 U.S. 361 (1989) (No. 87-5765); Brief for Amicus Curiae Amnesty International in Support of Petitioners, High v. Zant and Wilkins v. Missouri (Nos. 87-5666, 87-6026).
12. Brief for Amicus Curiae International Human Rights Law Group in Support of Petitioner, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169); Brief for Amicus Curiae International Human Rights Law Group in Support of Petitioners, High v. Zant and Wilkins v. Missouri (Nos. 87-5666, 87-6026).
13. Jennifer Fiore and Connie de la Vega, "The Supreme Court of the United States Has Been Called Upon to Determine the Legality of the Juvenile Death Penalty in Michael Domingues v. State of Nevada," 1999 *ACLU International Civil Liberties Report* 81, 84.
14. Beasley v. Director, 1999 U.S. Dist. LEXIS 22606 (E.D. Tex. 1999), aff'd sub nom. Beazley v. Johnson, 242 F.3d 248 (5th Cir. 2001), cert. denied, 534 U.S. 945 (2001).
15. Brief of Amici Curiae Human Rights Advocates, Human Rights Watch, Minnesota Advocates for Human Rights, Human Rights Committee, Bar of England & Wales in Support of Petitioner, Beazley v. Johnson (No. 00-10618) (on petition for writ of certiorari to the United States Court of Appeals for the Fifth Court), available via the International Justice Project's website, at <http://www.internationaljusticeproject.org/briefs.cfm> (visited 14 August 2004); Brief for the Human Rights Committee of the Bar of England and Wales, Human Rights Advocates, Human Rights Watch, and the World Organization for Human Rights USA as Amici Curiae in Support of

Respondent, Roper v. Simmons (No. 03-633); Motion to File Brief Amicus Curiae and Brief of Amici Curiae Human Rights Advocates, Human Rights Watch, Minnesota Advocates for Human Rights, Human Rights Committee, Bar of England & Wales in Support of Petitioner, Williams v. Texas (No. 03-5956) (on petition for writ of certiorari to the Court of Criminal Appeals of Texas), accessible from the Human Rights Advocates' website, at <http://www.humanrightsadvocates.org/litigation.html> (visited 8 February 2005).

16. 287 F.3d 1224, 1242 (10th Cir. 2002), cert. denied, 537 U.S. 1173 (2003).
17. Hain v. Gibson, 287 F.3d at pp. 1242-1243.
18. Petition for a Writ of Certiorari at pp. 43-57, Hain v. Mullin, 537 U.S. 1173 (2003) (No. 02-6438).
19. 536 U.S. 304 (2002) (predicated on a contemporary interpretation of the Eighth Amendment informed by international opinion and domestic practices, the U.S. Supreme Court concluded that standards of decency had progressed to the level that overruled the sentencing of the mentally retarded to death).
20. 73 Fed. Appx. 742, 743 (5th Cir. 2003) (per curiam), mot. denied, 540 U.S. 1148 (2004).
21. Beazley v. Johnson, 242 F.3d at p. 264.
22. General Comment, No. 24 (52), § 8; Annual General Assembly Report, U.N. GAOR, Hum. Rts. Comm., 50th Sess., Supp. No. 40, pp. 279, 292, U.N. Doc. A/50/40 (3 October 1995). See Beazley v. Johnson, 242 F.3d at pp. 264-265.
23. Beazley v. Johnson, ibid., at p. 267.
24. 770 So.2d 143, 148 (Ala. 2000), cert. denied, 531 U.S. 931 (2000).
25. 811 So.2d 617, 629 (Ala. 2000) (per curiam).
26. 804 So.2d 1122, 2000 Ala. Crim. App. LEXIS 139, 198 (2000).
27. 852 So.2d 821, 823 (Ala. 2001).
28. 117 Nev. 775, 787 (2001) (en banc) (public defenders also argued the relevance of customary international law).
29. 875 So.2d 140, 168 (Miss. 2004) (en banc) (also arguing the applicability of a *jus cogens* norm).
30. Brief of Respondent, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169); Brief for Respondent, Stanford v. Kentucky, 492 U.S. 361 (1989) (N0. 87-5765).
31. Brief for the United States as Amicus Curiae, Domingues v. State of Nevada (No. 98-8327).
32. Patterson v. Texas, 536 U.S. 984 (2002) (Stevens, J., dissenting) (Justices Ginsberg and Breyer joined); In re Kevin Nigel Stanford, 537 U.S. 968 (2002) (Stevens, J., dissenting) (Justices Souter, Ginsberg, and Breyer joined).
33. 781 F.2d 379 (4th Cir. 1986), stay denied, cert. denied, 474 U.S. 1039 (1986) (per curiam).
34. The panel comprised Judges H. Emory Widener, Jr., Sam J. Ervin III, and Emory M. Sneeden.

35. Roach v. Aiken, 781 F.2d at p. 380.
36. Ibid.
37. Thompson v. Oklahoma, 487 U.S. at p. 865.
38. Ibid., at pp. 868-869 & n4.
39. Concurring in part and in the judgment, Justice O'Connor in Stanford gave full support to the principal opinion opposing the relevance of international opinion in the analysis of the Eighth Amendment; see Stanford v. Kentucky, 492 U.S. at p. 363.
40. Ibid., at p. 369 & n1.
41. Ibid., at pp. 362, 370-373.
42. They were Justices C. Clifton Young, Miriam Shearing, and Archie E. Blake.
43. Domingues v. State of Nevada, 961 P.2d at p. 1280.
44. Beasley v. Director, 1999 U.S. Dist. LEXIS at p. 22626 (a 17-years-of-age African American involved).
45. 988 F.2d 1437, 1447 (5th Cir. 1993).
46. Beasley v. Director, 1999 U.S. Dist. LEXIS at p. 22629.
47. Beazley v. Johnson, 242 F.3d at pp. 263-268. Judge Barksdale's disposition was supported by Judges Jerry E. Smith and Jacques L. Wiener, Jr.
48. Five associate justices concurred in the opinion: Perry Ollie Hopper, Alva Maddox, Harold F. See, Champ Lyons, Jr., and Douglas Inge Johnstone.
49. Ex parte Pressley, 770 So.2d at p. 148 & n4 (also citing the RUD packages to the Torture Convention and the Racial Convention).
50. Ibid., at pp. 148-149.
51. Ibid., at pp. 150-151 (Houston, J., concurring).
52. 811 So.2d at p. 629. The reviewing majority was led by Chief Justice Perry Ollie Hopper with concurring Justices Alva Maddox, Ralph D. Cook, Champ Lyons, Jr., and John H. England, Jr. joining the opinion that overruled the Article 6(5) claim in accordance with the Senate reservation. While filing a separate concurrence that objected to the application with full weight of the statutory mitigating factor of "no significant history of prior criminal activity" to the case of Burgess without regard of his record of juvenile delinquency, Justice Douglas Inge Johnstone supported the majority view as to the unenforceability of ICCPR Article 6(5), see Ex parte Burgess, ibid., at p. 630 (Johnstone, J., concurring). Likewise, Justice Harold F. See, Jr. upheld this negative majority opinion on treaty power, although he presented a dissenting statement that argued the need to sustain the decision of the trial court to sentence Burgess to death as opposed to the opinion of the majority, see ibid., at p. 632 (See, J., dissenting). Concurring Justice J. Gorman Houston retained his earlier posture in the Ex parte Pressley appeal by considering the denial of the certiorari application in the Domingues case as implying that the U.S. Supreme Court decreed the Senate reservation should supplant Covenant Article 6(5), see ibid., at pp. 630-632 (Houston, J., concurring). Recusing herself, Justice Jean Williams Brown did not participate in the hearing. Lastly, it is noteworthy that the high court of Alabama eventually overturned the death penalty of Roy

Burgess on the grounds that the trial judge did not take a set of mitigating factors into full account, see ibid., at pp. 623-629.

53. 852 So.2d at p. 823. The majority included Robert B. Harwood, Jr. and concurrers Roy S. Moore, Harold F. See, Jr., Champ Lyons, Jean Williams Brown, Thomas A. Woodall, Jacquelyn L. Stuart. In addition, the majority opinion upholding the invalidity of Article 6(5) in the context of the juvenile death penalty obtained agreement from two groups of concurrers/dissenters: Justices J. Gorman Houston and Douglas Inge Johnstone.
54. 2000 Ala. Crim. App. LEXIS at pp. 198-203. The majority was composed of Judge Pamela W. Baschab and concurrers Francis A. Long, Sr., H. W. 'Bucky' McMillan, Sue B. Cobb, and James Fry. While remanding the Wynn case to the trial court to vacate duplicate convictions and hold a re-sentencing hearing, the Court of Criminal Appeals of Alabama later upheld the imposition of capital punishment on remand against Wynn for capital homicides committed during the course of robbery and burglary, see Wynn v. State, 804 So.2d 1122, 2000 Ala. Crim. App. LEXIS 196 (2000).
55. The majority comprised Justice Miriam Shearing and concurrers Deborah A. Agosti and Nancy A. Becker. The deference of the majority to the Senate reservation was also approved by two sets of justices who concurred in part and dissented in part (A. William Maupin; and Myron E. Leavitt and Cliff Young) because of holding different views regarding the commutation of Servin's death sentence by the majority, see Servin v. State, 117 Nev. at p. 796 (Maupin, C.J., concurring and dissenting), pp.796-799 (Leavitt, J., concurring and dissenting).
56. Ibid., at pp. 787, 788n29. Presiding Justice Shearing, however, instructed the trial court on remand to reduce Servin's sentence to life in prison without parole because the infliction of the death penalty on him was excessive in light of questionable evidence identifying him as a shooter, as well as his age and other mitigating factors, see ibid., at pp. 793-794.
57. Other judges on the panel were Carlos F. Lucero and Michael R. Murphy.
58. Hain v. Gibson, 287 F.3d at p. 1243.
59. Ibid., at p. 1244.
60. Buell v. Mitchell, 274 F.3d 337, 376 (6th Cir. 2001), cited in Hain v. Gibson, ibid.
61. The unanimous Court consisted of Justices James E. Graves, Jr. and concurrers James W. Smith, Jr., William L. Waller, Jr., Kay B. Cobb, Charles "Chuck" Easley, George C. Carlson, Jr., and Jess H. Dickinson. Justice Oliver E. Diaz, Jr. did not participate.
62. Dycus v. State, 875 So.2d at pp. 168-169.
63. Other panel members were Judges Harold R. DeMoss, Jr. and Fortunato P. Benavides.
64. Villarreal v. Cockrell, 73 Fed. Appx. at p. 743.
65. Justice William Ray Price, Jr. wrote the dissent with endorsement from Justices Duane Benton and Stephen N. Limbaugh, Jr.
66. Simmons v. Roper, 112 S.W.3d at p. 419.
67. Roper v. Simmons, 2005 U.S. LEXIS at pp. 2335-2337.

68. Ibid., at p. 2335.
69. Trop v. Dulles, 356 U.S. 86, 102 & n35 (1958); Coker v. Georgia, 433 U.S. 584, 596 & n10 (1977); Enmund v. Florida, 458 U.S. 782, 796-797 & n22 (1982), cited in Thompson v. Oklahoma, 487 U.S. at p. 830 n31.
70. Thompson v. Oklahoma, ibid., at p 831 & n34.
71. Ibid., at p. 830 nn32 & 33.
72. While concurring with the Thompson plurality in the outcome, Justice O'Connor said nothing about the utility of international law in her decision making. She queried the constitutionality of Oklahoma's death penalty laws because the laws failed to specify any minimum age at which a juvenile offender would be subjected to a penalty of death. In her view, Oklahoma did not meet the element of "special care and deliberation" required in death penalty decisions due to their drastic and irreparable attributes, see ibid., at p. 856.
73. Stanford v. Kentucky, 492 U.S. at pp. 384, 388-390 & nn4, 10 (Brennan, J., dissenting).
74. Domingues v. State of Nevada, 961 P.2d at p. 1280 (Springer, J., dissenting).
75. Ibid., pp. 1280-1281 (Rose, J., dissenting).
76. Servin v. State, 117 Nev. at p. 794 (Rose, J., concurring)
77. Ibid.
78. Ibid., at p. 795.
79. Ibid., at pp. 795-796.
80. Patterson v. Texas, 536 U.S. at p. 984.
81. They were Chief Justice Ronnie L. White and Justices Michael A. Wolff and Richard B. Teitelman. Justice Wolff filed a separate concurrence; see Simmons v. Roper, 112 S.W.3d at pp. 414-418 (declaring that, in case the U.S. Supreme Court differed with the Simmons majority, the Missouri Supreme Court should make an alternative state law-based presumption of incapacity on the part of juvenile offenders and require the burden of disproving that hypothesis to rest on the prosecution).
82. State v. Simmons, 944 S.W.2d 165 (Mo. banc 1997), cert. denied, 522 U.S. 953 (1997).
83. Simmons v. Roper, 112 S.W.3d at p. 413.
84. The majority consisted of Justices Stevens, Souter, Ginsburg, and Breyer. Concurrer O'Connor, although casting doubt on the validity of the majority's arguments of a new national consensus and diminished juvenile culpability, agreed with the Roper majority that international law constituted one of the objective parameters to direct the Eighth Amendment interpretation; see Roper v. Simmons, 2005 U.S. LEXIS at pp. 2292-2294.
85. Atkins v. Virginia, 536 U.S. at p. 312.
86. Roper v. Simmons, 2005 U.S. LEXIS at pp. 2245-2249.
87. Telephone Interview with Professor William J. Aceves (25 January 2000).
88. Warren Mail (18 & 20 January 2000).
89. Ibid.

90. They were attorneys William G. Broaddus, Alexander H. Slaughter, Jill M. Misage, Franklin B. Greer, Dorothy C. Young, and A. Eric Kauders.
91. Breard v. Netherland, 949 F.Supp. 1255 (E.D. Va. 1996), aff'd sub nom. Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998), cert. and stay denied sub nom. Breard v. Greene, 523 U.S. 371, 1998 U.S. LEXIS 2465 (1998) (per curiam); Republic of Paraguay v. Allen, 949 F.Supp. 1269 (E.D. Va. 1996), aff'd, 134 F.3d 622 (4th Cir. 1998), cert. and stay denied sub nom. Breard v. Greene, 523 U.S. 371, 1998 U.S. LEXIS 2465 (1998) (per curiam).
92. Mark Warren, "Foreign Nationals and the Death Penalty in the United States," available at <http://deathpenaltyinfo.org/article.php?scid=31&did=579#developWarre> (visited 19 January 2005).
93. Protection of Migrants, A/RES/54/166, 24 February 2000.
94. Amnesty International, United States of America: Osvaldo Torres, Mexican National Denied Consular Rights, Scheduled to Die, AI Index: AMR 51/057/2004 (2 April 2004).
95. Telephone Interview with Sandra L. Babcock, Esq. (18 January 2000) [hereinafter Babcock Interview]; Electronic Mail from Chip Wright, Esq. of Hunton & Williams (18 January 2000); Warren Mail (20 January 2000).
96. Warren Mail (18 January 2000); Brief of Amici Curiae Republic of Argentina, Republic of Brazil, Republic of Ecuador, and Republic of Mexico in Support of Petition for a Writ of Certiorari, Republic of Paraguay v. Gilmore, 523 U.S. 371, 1998 U.S. LEXIS 2465 (1998) (No. 97-1390).
97. They were Association of Christians Against Torture and National Coalition to Abolish the Death Penalty, informed by Warren Mail (20 January 2000).
98. Petition for Writ of Certiorari at p. 17, Faulder v. Johnson, 119 S. Ct. 909 (1999) (No. 98-7001) [hereinafter Faulder's Petition before the U.S. Supreme Court].
99. Warren Mail (24 January 2000).
100. Ibid. (20 January 2000).
101. Ibid. (18 January 2000).
102. Ibid.; Brooks' Letter to Ndiaye; Letter from Robert F. Brooks and William H. Wright, Jr., Esqs. to Ms. Imma Guerras, Assistant to the United Nations Special Rapporteur on Summary and Arbitrary Executions (14 July 1997) (all on file with the author).
103. Warren Mail (20 January 2000).
104. Question of the Death Penalty, C.H.R. Res. 1999/61; Warren Mail (24 January 2000).
105. 133 F.3d 1253 (9th Cir. 1998), cert. denied, 119 S. Ct. 422 (1998).
106. Flores v. Johnson, 210 F.3d 456 (5th Cir. 2000), cert. denied, 531 U.S. 987 (2000).
107. Letter from Robert F. Brooks, Esq., to the Honorable Madeleine K. Albright, Secretary of State (14 May 1997) (on file with the author).
108. Participants included such as AI in Canada, Germany, and Paraguay; ACLU, USA; Center for Capital Punishment Studies, UK; Human Rights Committee, American Branch of the International Law Association, USA;

Human Rights Watch, USA; International Commission of Jurists, Switzerland; International Federation ACAT, France; Justice Action, Australia; National Coalition to Abolish the Death Penalty, USA; Rights International, The Center for International Human Rights Law Inc., USA; Union Internationale des Avocats, Belgium; Carla Ryan, Counsel to Karl LaGrand; Sandra Babcock, Counsel to Stanley Faulder; and Professors Hurst Hannum, Jordan J. Paust, John C. Sims, and William J. Aceves.

109. Letter to the Honorable Madeleine Albright, Secretary of State (26 February 1999) (on file with the author).
110. Babcock Interview (18 January 2000); Warren Mail (24 January 2000).
111. Warren, "Foreign Nationals and the Death Penalty in the United States."
112. Faulder's Petition before the U.S. Supreme Court at pp. 28-29, 32, 34; Appellant's Opening Brief at pp. 11-14, Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997) (No. 96-14) [hereinafter Murphy's Opening Brief before the 4th Circuit]; Brief of Amicus Curiae United Mexican States in Support of Petitioner at p. iii, Murphy v. Netherland, 118 S. Ct. 26 (1997) (No. 97-5808) [hereinafter Mexico's Amicus in Murphy].
113. Petition for a Writ of Habeas Corpus at pp. 12, 16, 21-22, Breard v. Netherland, 949 F.Supp. 1255 (E.D. Va. 1996) (No. 3:96CV366); Appellant's Opening Brief at pp. 19-20, 22, Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998) (No. 96-25) [hereinafter Breard's Appeal Brief before the 4th Circuit]; Amicus Brief of the Human Rights Committee of the American Branch of the International Law Association, Breard v. Pruett at pp. 2, 4, 19-30, ibid.
114. Merit Brief at pp. 3-7, Ohio v. Loza, 1997 Ohio App. LEXIS 4574 (Ohio Ct. App.) (No. 96-10-0214); Breard's Appeal Brief before the 4th Circuit, pp. 15-16.
115. Appellant's Reply Brief at pp. 1, 8, 10, Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997) (No. 96-14) [hereinafter Murphy's Reply Brief at the 4th Circuit].
116. Faulder's Petition before the U.S. Supreme Court, pp. 35-37; Appellant's Opening Brief at pp. 11-14, Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997) (No. 96-14).
117. Section 2253(c) provides:

    (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

        (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

        (B) the final order in a proceeding under section 2255.

    (2) A certificate of appealability may issue under paragraph (1) only if theapplicant has made a substantial showing of the denial of aconstitutional right.

    (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

118. Petition for Rehearing and Suggestion for Rehearing in Banc at pp. 4-11, Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997) (No. 96-14); Mexico's Amicus in Murphy, pp. 4-6.
119. Brief Amicus Curiae of the United Mexican States at p. 6, Ohio v. Loza, 1997 Ohio App. LEXIS 4574 (Ohio Ct. App.) (No. 96-10-0214) [hereinafter Amicus Mexico in Loza].
120. 956 P.2d 906 (Okla. Crim. App. 1998).
121. This information was provided by Mark Warren.
122. Amended Complaint at pp. 10, 12-14, Faulder v. Johnson (CIV No. H-99-1809) (S.D. Tex. 14 June 1999) (citing the UDHR, the ICCPR, the Torture Convention, some national and international tribunal decisions, and customary law as the basis for a claim against the death row phenomenon).
123. Complaint, United Mexican States v. Woods, No. CIV-97-1075, slip op. (D. Ariz. 19 May 1997).
124. Brief Amicus Curiae of a Group of Law Professors Including David J. Bederman et al. at pp. 2, 4, 6-7, 11-12, Republic of Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770) [hereinafter Bederman's Amicus in Paraguay before the 4th Circuit].
125. Mexico's Response to Defendants Motion to Dismiss at pp. 1-7, United Mexican States v. Woods, No. CIV-97-1075, slip op. (D. Ariz. 19 May 1997); Plaintiffs-Appellants Brief at pp. 4, 7-15, United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997) (No. 97-15878); Opposition to Defendant's Motion to Dismiss at pp. 22-25, Republic of Paraguay v. Allen, 949 F.Supp. 1269 (E.D. Va. 1996) (No. 3: 96CV745) [hereinafter Opposition in Paraguay at the U.S. District Court].
126. Statement Amicus Curiae of International Law Professors, Republic of Paraguay v. Gilmore, 523 U.S. 371, 1998 U.S. LEXIS 2465 (1998) (No. 97-1390) [hereinafter Amicus International Law Professors in Paraguay before the U.S. Supreme Court].
127. 46 P.3d 703 (Okla. Crim. App. 2002).
128. Valdez v. Oklahoma, 46 P.3d at p. 708nn19-22.
129. Faulder's Petition before the U.S. Supreme Court, p. 34.
130. Murphy's Opening Brief before the 4th Circuit, p. 15; Murphy's Reply Brief at the 4th Circuit, pp. 1-2, 8-9.
131. Mexico's Amicus in Murphy, p. 3.
132. Murphy's Reply Brief at the 4th Circuit, p. 2n1.
133. Bederman's Amicus in Paraguay before the 4th Circuit, p. 11; Republic of Paraguay v. Allen, 134 F.3d at p. 626 & n3.
134. Paraguay v. Gilmore, Breard v. Greene, Brief for the United States as Amicus Curiae, quoted by S. Adele Shank and John Quigley, "Obligations to Foreigners Accused of Crime in the United States: A Failure of Enforcement," pp. 11-12, 14-21, & n53 (on file with the author).
135. For instance, see Murphy v. Netherland, memorandum opinion, at pp. 2, 7-8, aff'd, 116 F.3d at p. 100; LaGrand v. Stewart, 133 F.3d at pp. 1261-1262; Villafuerte v. Stewart, 142 F.3d 1124, 1125 (9th Cir. 1998); Ibarra v. State, 11 S.W.3d 189, 197 (Tex. Crim. App. 1999), cert. denied, 531 U.S. 828

(2000); State v. Reyes-Camarena, 330 Or. 431, 435, 437 (2000) (en banc); Torres v. Gibson, No. CIV-99-155-R (W.D. Okla., 23 August 2000), p. 73 (unpublished opinion), aff'd sub nom. Torres v. Mullin, 317 F.3d 1145 (10th Cir. 2003), cert. denied, 2003 U.S. LEXIS 8548 (2003); Ohio v. Issa, 93 Ohio St. 3d 49, 56-57, cert. denied, 122 S. Ct. 1445 (2002); Plata v. Dretke, 111 Fed. Appx. 213, 216 (5th Cir. 2004).

136. Breard v. Pruett, 134 F.3d at pp. 619-620.
137. Breard v. Netherland, 949 F.Supp. at p. 1263.
138. Breard v. Greene, 1998 U.S. LEXIS at pp. 2470-2471. The same argument also appeared in other consular cases such as People v. Madej/Poland, 193 Ill. 395, 403 (2000), cert. denied, 121 S. Ct. 2262 (2001).
139. Valdez v. Oklahoma, 46 P.3d at pp. 708-710.
140. Judge Johnson nevertheless concluded that Valdez was entitled to relief on the closely-related grounds that he was prejudiced by ineffective assistance of trial counsel, cross-reference Tables 4.2 and 4.3.
141. 371 F.3d 270 (5th Cir. 2004).
142. Medellin v. Dretke, 371 F.3d at p. 280.
143. Faulder v. Johnson, 81 F.3d at p. 520; Murphy v. Netherland, memorandum opinion, at p. 8, aff'd, 116 F.3d at p. 101; Ohio v. Loza, Findings of Law and Fact, at p. 6; Breard v. Greene, 1998 U.S. LEXIS at p. 2474; Al-Mosawi v. State, 956 P.2d at pp. 909-910 (Iraqi petitioner did not prove that the failure of trial or appellate counsel to raise breaches of his consular treaty rights constituted deficient performance); Barrow v. State, 749 A.2d 1230, 1242 (Del. 2000) (no due process violation as a result of the failure by Delaware police officers to apprise Guyanese defendant of his right to consular access); Torres v. Gibson, No. CIV-99-155-R (W.D. Okla., 23 August 2000), p. 73; Valdez v. Oklahoma, 46 P.3d at p. 712 (Lumpkin, J., concurring/dissenting); Bell v. Commonwealth, 264 Va. 172, 189 (2002) (since Jamaican appellant's guilt was solid and uncontroverted, it was harmless error for Virginia authorities to delay consular notification), cert. denied, 537 U.S. 1123 (2003); United States v. Ortiz, 315 F.3d 873, 886-888 (8th Cir. 2002), cert. denied, 123 S. Ct. 2095 and 124 S. Ct. 920 (2003).
144. The Oregon Supreme Court quoted Ailes v. Portland Meadows, Inc., 312 Ore. 376, 381-382 (1991):

    An appellate court may review unpreserved error as plain error [only] if (1) it is an error of law, (2) the error is "obvious, not reasonably in dispute," and (3) it appears "'on the face of the record,' i.e., the reviewing court * * * need [not] go outside the record to identify the error or choose between competing inferences," and the facts constituting the error are irrefutable. See State v. Reyes-Camarena, 330 Or. at p. 435.

145. State v. Reyes-Camarena, ibid., at pp. 436-437.
146. United States v. Lombera-Camorlinga, 206 F.3d 882, 888 (9th Cir. 2000) (en banc), cited in State v. Reyes-Camarena, 330 Or. at p. 436n2.
147. State v. Reyes-Camarena, ibid.
148. United States v. Chanthadara, 230 F.3d 1237, 1256 (10th Cir. 2000), cert. denied, 534 U.S. 992 (2001).

149. The Tenth Circuit panel confirmed Chanthadara's convictions, but nullified his death sentence on the grounds that the jury had been exposed to the trial judge's unfavorable comment on his defense and that the trial court mistakenly removed a venire juror; see United States v. Chanthadara, ibid., at pp. 1246-1247, 1264-1275.
150. Kasi v. Commonwealth, 256 Va. 407, 419 (1998), cert. denied, 527 U.S. 1038 (1999); a parallel argument is also found in Plata v. Dretke, 111 Fed. Appx. at p. 217.
151. Murphy v. Netherland, 116 F.3d at pp. 99-100.
152. Ohio v. Loza, 1997 Ohio App. LEXIS at pp. 4578-4580.
153. Breard v. Greene, 1998 U.S. LEXIS at pp. 2472-2473.
154. Ohio v. Loza, Findings of Law and Fact, at p. 5.
155. Teague v. Lane, 489 U.S. 288, 305-307 (1989) ("new constitutional rules of criminal procedure generally should not be applied retroactively to cases on collateral review" given the consideration of interests of federal-state comity and judgment finality); Flores v. Johnson, 210 F.3d at pp. 457-458. See also Plata v. Dretke, 111 Fed. Appx. at p. 216.
156. Kasi v. Commonwealth, 256 Va. at p. 419.
157. 264 Va. at pp. 187-188.
158. The LaGrand terms quoted by Justice Kinser to uphold the proposition of no "legally enforceable individual rights" were: "Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in [the ICJ] by the national State of the detained person"; "[the] obligation can be carried out in various ways," and "the choice of means must be left to the United States."
159. Article 36(2) sets forth that: "[T]he 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."
160. 243 F.3d 192, 198 (5th Cir. 2001).
161. Medellin v. Dretke, 371 F.3d at p. 280.
162. Breard v. Greene, 1998 U.S. LEXIS at pp. 2475-2476.
163. William J. Aceves, "Application of the Vienna Convention on Consular Relations (Paraguay v. United States)," *American Journal of International Law* 92 (1998): p. 522.
164. Breard v. Greene, 1998 U.S. LEXIS at p. 2472.
165. State v. Reyes-Camarena, 330 Or. at p. 436.
166. Rocha v. State, 16 S.W.3d 1, 13-14, 16 (Tex. Crim. App. 2000).
167. Ibid., at pp. 16-17.
168. Ibid., at p. 19.
169. Lombera-Camorlinga, 2000 U.S. App. LEXIS 3378, 2000 WL 245374, at *5 (2000), cited by Rocha v. State, 16 S.W.3d at p. 18.
170. Rocha v. State, ibid., at p. 19.
171. State v. Reyes-Camarena, 330 Or. at p. 437.
172. Bell v. Commonwealth, 264 Va. at p. 189.

173. 206 Ariz. 70 (2003) (en banc).
174. State v. Prasertphong, ibid., at p. 83 & n7.
175. For example, United States v. Li, 206 F.3d 56, 60 (1st Cir. 2000); United States v. Lombera-Camorlinga, 206 F.3d at p. 885; United States v. Cordoba-Mosquera, 212 F.3d 1194, 1195-1196 (11th Cir. 2000), cert. denied, 531 U.S. 1131 (2001); State v. Buenaventura, 660 N.W.2d 38, 46 (Iowa 2003).
176. United States v. Chaparro-Alcantara, 226 F.3d 616, 622 (7th Cir. 2000), cited in State v. Prasertphong, 206 Ariz. at p. 83. Due to an unconstitutional sentencing procedure, Prasertphong's death sentence was later revoked by the Supreme Court of Arizona in a supplemental opinion; see State v. Prasertphong, 206 Ariz. 167 (2003).
177. Valdez v. Oklahoma, 46 P.3d at p. 712 (Lumpkin, J., concurring in part and dissenting in part).
178. The Polish national's death sentence was later vacated by the United States District Court for the Northern District of Illinois, see Madej v. Schomig, 223 F.Supp. 2d 968 (N.D. Ill. 2002), aff'd sub nom. Madej v. Briley, 365 F.3d 568 (7th Cir. 2004).
179. People v. Madej/Poland, 193 Ill. 2d at pp. 401-404.
180. Ill. Code Civ. P., 735 Ill. Comp. Stat. 5/2-1401(c).
181. Ibid., 5/2-1401(a).
182. See, e.g., United Mexican States v. Woods, No. CIV-97-1075, slip op. at p. 6 (D. Ariz. 19 May 1997).
183. Ex parte Young, 209 U.S. 123 (1908).
184. United Mexican States v. Woods, No. CIV-97-1075, slip op. at p. 6, aff'd, 126 F.3d at p. 1223; Republic of Paraguay v. Allen, 949 F.Supp. at pp. 1272-1273, aff'd, 134 F.3d at pp. 626-629, cert. and stay denied sub nom. Breard v. Greene, 1998 U.S. LEXIS at p. 2475; Federal Republic of Germany v. United States, 119 S. Ct. 1016, 1017 (1999).
185. United Mexican States v. Woods, 126 F.3d at p. 1224n2.
186. Ibid., at p. 1223.
187. Federal Republic of Germany v. United States, 119 S. Ct. at p. 1017.
188. Breard v. Greene, 1998 U.S. LEXIS at pp. 2476-2477.
189. Rocha v. State, 16 S.W.3d at p. 25 (Holland, J., concurring); People v. Madej/Poland, 193 Ill. 3d at 407; Ohio v. Issa, 93 Ohio St. 3d at pp. 79-80; Torres v. Mullin, 124 S. Ct. 562, 563 (Breyer, J., dissenting); Torres v. Mullin, 124 S. Ct. 919 (Stevens, J., dissenting).
190. People v. Madej/Poland, 193 Ill. 3d at pp. 407-408 (McMorrow, J., concurring in the majority's affirmance of Madej's convictions, but dissenting from the affirmance of Madej's sentence).
191. Ohio v. Issa, 93 Ohio St. 3d at p. 73 (Stratton, J., dissenting).
192. Ibid., at p. 80.
193. Valdez v. Oklahoma, 46 P.3d at pp. 707-709, 710-713.
194. People v. Madej/Poland, 193 Ill. 2d at pp. 409-410 (McMorrow, J., dissenting), 411 (Harrison, J., dissenting), 412 (Heiple, J., dissenting); Ohio

v. Issa, 93 Ohio St. 3d at pp. 80-81 (Stratton, J., dissenting); Rocha v. State, 16 S.W.3d at pp. 26-27 (Holland, J., concurring).

195. Torres v. Mullin, 124 S. Ct. at p. 565. On 13 May 2004, Governor Brad Henry of Oklahoma announced the commutation of the death sentence of Mexican national Osbaldo Torres to life without parole, admitting the principle of reciprocity regarding consular treaty application and identifying the ICJ judgment in Avena as binding on U.S. courts. See Office of Governor Brad Henry, *Governor Henry Grants Clemency to Death Row Inmate Torres*, at <http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1 > (visited 10 January 2005).
196. Ohio v. Issa, 93 Ohio St. 3d at pp. 78-79.
197. Madej v. Schomig, 223 F.Supp. 2d at pp. 978-979.
198. Ibid., at p. 980.
199. Ibid.
200. Ibid.
201. After Judge Coar's decision ordering the state of Illinois to re-sentence Madej in line with constitutional requirements, the governor of Illinois reduced his death sentence to life in prison without the possibility of parole.
202. The force of the IACHR's precautionary measures, rebuffed by the U.S. Fourth Circuit Court in the Roach case, will be discussed later with consular violations cases.
203. According to AI's report in 1991, only seven countries (the USA, Barbados, Iran, Iraq, Nigeria, Pakistan, and Bangladesh) had executed juvenile offenders in the prior decade. Moreover, at the time of the Thompson appeal, opposition to juvenile capital punishment existed in leading multilateral instruments: Fourth Geneva Convention, art. 68; ICCPR, art. 6(5); Protocol Additional I to the Geneva Conventions, art. 77(5); Protocol Additional II to the Geneva Convention, art. 6(4); American Convention, art. 4(5); Protocol No. 6 to the European Convention, art. 3; and U.N. Capital Safeguards of 1984, No. 3. See Amnesty International, *United States of America: The Death Penalty and Juvenile Offenders* at pp. 1, 78-79, AI Index: AMR 51/23/91 (October 1991).
204. The USA has yet to sign the 1969 Vienna Convention on the Law of Treaties. However, it has accepted the Convention as "the authoritative guide to current treaty law and practice," see Connie de la Vega and Jennifer Fiore, "Sixteenth Annual International Law Symposium 'Rights of Children in the New Millennium': The Supreme Court of the United States Has Been Called Upon to Determine the Legality of the Juvenile Death Penalty in Michael Domingues v. State of Nevada," *Whittier Law Review* 21 (1999): p. 217.
205. De la Vega and Brown, "Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?" p. 759.
206. Similar treatment appears as well in William A. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights: Is

the United States Still a Party?" *Brooklyn Journal of International Law* 11 (1995): pp. 297-299.

207. Anglo-Norwegian Fisheries Case (United Kingdom v. Norway), 1951 I.C.J. Rep. 116, 131, 138 (the expression of dissent to the evolution and creation of a customary norm must be made "consistently and uninterruptedly"), see Weissbrodt, "Execution of Juvenile Offenders by the United States Violates International Human Rights Law," pp. 367-368 & n155; Schabas, *The Abolition of the Death Penalty in International Law*, p. 305 & n59.
208. Schabas, ibid., pp. 48, 80.
209. Ibid., pp. 279-280, 305-306.
210. Brief for Amicus Curiae Amnesty International at p. 42, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169).
211. Ved P. Nanda, "The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights," *DePaul Law Review* 42 (1993): pp. 1319, 1332; de la Vega and Brown, "Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?" p. 739.
212. American Law Institute, *Restatement (Third)*, § 111 Comment d, p. 44.
213. Provisions that oblige the federal government to ensure compliance with international law by its state units include: ICCPR, art. 50; American Convention, art. 28(2). The IACHR also ruled the USA to be in breach of the American Declaration because its federal authorities left the applicability of the juvenile death penalty to the discretion of the states; see Roach and Pinkerton v. United States, Case 9.647 (1987). Related discussions on the subject of federalism are available in Weissbrodt, "Execution of Juvenile Offenders by the United States Violates International Human Rights Law," pp. 359-361; Jordan J. Paust, "Customary International Law and Human Rights Treaties Are Law of the United States," *Michigan Journal of International Law* 20 (1999): pp. 314-315.
214. According to the International Law Commission, it is necessary to follow at least three criteria to discern the status of *jus cogens* norms: "(1) that the norm is embodied in part or in whole in an international agreement; (2) that the rule has been applied by courts, including the International Court of Justice, and other organs; and (3) that the rule, when incorporated into multilateral conventions, prohibits derogation," cited by Kha Q. Nguyen, "In Defense of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States," *George Washington Journal of International Law & Economics* 28 (1995): p. 422.
215. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights," pp. 285-296; idem, *The Abolition of the Death Penalty in International Law*, pp. 81-82.
216. De la Vega and Brown, "Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?" pp. 751, 753.
217. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. C.H.R., Ser. A:

Judgments and Opinions, No. 3 (8 September 1983), para. 61; see also Schabas, *The Abolition of the Death Penalty in International Law*, p. 86.

218. General Comment, No. 24 (52), § 8.
219. United States—Initial Report, U.N. Doc. ICCPR/C/79/Add.50 (1995), §§ 14, 16.
220. General Comment, 24 (52), §18.
221. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights," pp. 315-316; Cathleen E. Hull, "'Enlightened by a Humane Justice': An International Law Argument against the Juvenile Death Penalty," *Kansas Law Review* 47 (1999): p. 1089 n94.
222. Schabas, ibid., pp. 316-323. Professor Schabas examines U.S. intent by means of two modes of analysis. Can a reservation to Article 6(5) vitiated by the Human Rights Committee be dissociated from the International Covenant? Or does this reservation ineluctably constitute an essential condition for U.S. ratification of the Covenant? After exploring a variety of evidence (e.g., failure to attach reservations against the juvenile death penalty at the time of signing the American Convention and the Child Rights Convention), Professor Schabas reasons that the United States wishes to be bound by the ICCPR as a whole rather than by the specific death penalty provision in Article 6(5). In this connection, the invalid reservation is severable from the ICCPR, and the USA has a responsibility to stand by all Covenant prescriptions, including Article 6.
223. See "United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights," *International Legal Materials* 31 (1992): p. 648.
224. Genocide Convention, art. 5; Torture Convention, arts. 2 & 4. See also other international provisions demanding domestic legislation, Race Convention, art. 2(c) & (d); ICCPR, art. 2(2); International Covenant on Economic, Social, and Cultural Rights, art. 11(2).
225. Hernan de J. Ruiz-Bravo, "Suspicious Capital Punishment: International Human Rights and the Death Penalty," *San Diego Justice Journal* 3 (1995): pp. 400-402; Aceves, "The Vienna Convention on Consular Relations," pp. 262-263.
226. Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, 4 March to 22 April 1963, Sen. Exec. Rep. No. 91-9, 91st Cong., 1st Sess., at pp. 2, 5 (appendix) (statement by Deputy Legal Adviser J. Edward Lyerly) (1969), quoted by Aceves, ibid., p. 268n53.
227. Aceves, ibid., pp. 268-272.
228. Amicus Mexico in Loza, at p. 6.
229. For example, public defenders David H. Bodiker, Stephen A. Ferrell, and Laurence E. Komp (Loza); attorneys Alexander H. Slaughter, William G. Broaddus, and Dorothy C. Young from McGuire, Woods, Battle & Boothe, L.L.P. and Virginia public attorney Michele J. Brace (Breard).
230. Ruiz-Bravo, "Suspicious Capital Punishment," pp. 393-394, 397, 402; John Quigley, "Human Rights Defenses in U.S. Courts," *Human Rights*

Quarterly 20 (1998): p. 563; Molora Vadnais, "A Diplomatic Morass: An Argument against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations," *UCLA Law Review* 47 (1999): pp. 311, 318-319.

231. Aceves, "The Vienna Convention on Consular Relations," p. 265.
232. Opposition in Paraguay at the U.S. District Court, pp. 1, 13-15.
233. Aceves, "The Vienna Convention on Consular Relations," pp. 306-313.
234. Bederman's Amicus in Paraguay before the 4th Circuit, pp. 10-11; Aceves, ibid., pp. 297-302.
235. Complaint at p. 3, Republic of Paraguay v. Allen, 949 F.Supp. 1269 (E.D. Va., 1996) (No. 3:96CV745).
236. Jordan J. Paust, "Breard and Treaty-Based Rights under the Consular Convention," *American Journal of International Law* 92 (1998): p. 696.
237. Aceves, "The Vienna Convention on Consular Relations," pp. 303-305; David J. Bederman, "Deference or Deception: Treaty Rights as Political Questions," *Colorado Law Review* 70 (1999): pp. 1446-1450.
238. Bederman, ibid., p. 1481.
239. 369 U.S. 186, 217 (1962).
240. O'Connell, "The Prospects for Enforcing Monetary Judgments of the International Court of Justice," p. 916; Ordonez and Reilly, "Effect on the Jurisprudence of the International Court of Justice on National Courts," pp. 346, 368.
241. Henry J. Richardson III, "The Execution of Angel Breard by the United States: Violating an Order of the International Court of Justice," *Temple International and Comparative law Journal* 12 (1998): p. 127; Louis Henkin, "Breard: Provisional Measures, U.S. Treaty Obligations, and the States," *American Journal of International Law* 92 (1998): pp. 679-680, 683.
242. S.C. Res. 461, U.N. SCOR, 34th Sess., Resolutions & Decisions at p. 24, U.N. Doc. S/INF/35 (1980), invoked by Shank and Quigley, "Obligations to Foreigners Accused of Crime in the United States," p. 16n78.
243. Amicus International Law Professors in Paraguay before the U.S. Supreme Court; Shank and Quigley, ibid., pp. 15-17.
244. Shank and Quigley, ibid., pp. 14, 17.
245. United States v. County of Arlington, Virginia, 669 F.2d 925 (4th Cir. 1982), cert. denied, 459 U.S. 801 (1982) (deciding against a county of Virginia for collecting taxes on Germany's embassy property in violation of the Vienna Convention on Diplomatic Relations); Sanitary District of Chicago v. United States, 266 U.S. 405 (1925) (against Illinois authorities for diverting water from the Great Lakes in default of a treaty obligation to Canada), cited in Shank and Quigley, ibid., p. 16nn73 & 74.

Chapter 5

1. Kathryn M. Bockley, "A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise," *North Carolina Journal of International Law & Commercial Regulation* 21 (1995): p. 254.
2. The technical hurdles of admissions based on nationality continued until 1965 when Congress made amendments to promise resettlement of a great many refugees from Asia and Latin America. Bockley, ibid., pp. 258-259.
3. Esther Rosenfeld, "United States Immigration Policy—A History of Prejudice and Economic Scapegoatism?: Fatal Lessons: United States Immigration Law during the Holocaust," *U.C. Davis Journal of International Law & Policy* 1 (1995): pp. 250, 254-263.
4. Guy S. Goodwin-Gill, *The Refugee in International Law*, 2d ed. (Oxford: Clarendon Press, 1998), pp. 9, 212, 215.
5. U.S. Department of State, *Emergency Refugee and Migration Assistance Fund: Congressional Budget Presentation (Fiscal Year 1999)*, at <http://www.state.gov/www/global/pm/99cpd1a.pdf> (visited 11 June 2001).
6. Bureau of Population, Refugees, and Migration, *Fact Sheet: U.S. Refugee Admissions and Resettlement Program*, at <http://www.state.gov/g/prm/refadm/fs/index.cfm?docid=2134> (visited 10 July 2001).
7. The measures included permanent asylum granting, mass parole, and extended voluntary departure status; see David Forsythe, "Refugee Policy in Western Hemisphere," in *The Politics of International Law: U.S. Foreign Policy Reconsidered* (Boulder, Colorado: Lynne Rienner Publishers, Inc., 1990), pp. 93-94.
8. Ibid., pp. 95-101; James R. Zink, "Race and Foreign Policy in Refugee Law: A Historical Perspective of the Haitian Refugee Crises," *DePaul Law Review* 48 (1998): pp. 569, 590-591, 600-605.
9. Lawyers Committee for Human Rights, *The Implementation of the Refugee Act of 1980: A Decade of Experience* (1990), p. 2, quoted by Bockley, "A Historical Overview of Refugee Legislation," at p. 271.
10. Zink, "Race and Foreign Policy in Refugee Law," p. 573.
11. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 and 18 U.S.C.). For more detailed information, refer to Lawyers Committee for Human Rights, *Is This America? The Denial of Due Process to Asylum Seekers in the United States* (October 2000).
12. Regina Germain, "Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees," *Georgetown Immigration Law Journal* 16 (2002): pp. 517-525.
13. Convention relating to the International Status of Refugees, 28 October 1933, art. 3, 159 L.N.T.S. 199, 205.

14. No more than eight countries ratified the Convention; see Robert L. Newmark, "Non-Refoulement Run Afoul," *Washington University Law Quarterly* 71 (1993): p. 838n22.
15. Provisional Arrangement concerning the Status of Refugees Coming from Germany, 4 July 1936, art. 4, 171 L.N.T.S. 75, 79. The Provisional Arrangement won support from seven countries.
16. Richard A. C. Cort, "Resettlement of Refugees: National or International Duty?" *Texas International Law Journal* 32 (1997): pp. 312-313.
17. Gordon A. Christenson, "The Use of Human Rights Norms to Inform Constitutional Interpretation," *Houston Journal of International Law* 4 (1981): pp. 49-50.
18. UDHR, art. 2.
19. Ibid., art. 9.
20. Ibid., art. 5.
21. Ibid., arts. 7 (equal protection of law), 8 (effective remedy), 10 (a fair and public hearing).
22. Cf., Haitian Center for Human Rights et al. v. United States, Case 10675, Report 51/96, Inter-Am. C.H.R. 550, OEA/Ser.L/V/II. 95, Doc. 7 rev. (1997) [hereinafter Haitian Center for Human Rights] (U.S. interdiction was in violation of Article I of the American Declaration).
23. Roman Boed, "The State of the Right of Asylum in International Law," *Duke Journal of Comparative & International Law* 5 (1994): pp. 8-10.
24. Fourth Geneva Convention, arts. 42, 79.
25. Ibid., art. 43.
26. Ibid., arts. 37 (being treated humanely during custody) and 85 (providing minimum safeguards concerning hygiene and health during internment).
27. Goodwin-Gill, *The Refugee in International Law*, p. 124.
28. Cf., Schabas, *The Abolition of the Death Penalty in International Law*, pp. 195-196.
29. Refugee Convention, art. 1(A)(2).
30. Ibid., art. 1(B).
31. Joan Fitzpatrick, "Revitalizing the 1951 Refugee Convention," *Harvard Human Rights Journal* 9 (1996): p. 232.
32. Recommendation E of the Final Act, see Newmark, "Non-Refoulement Run Afoul," p. 840 & n42.
33. Fitzpatrick, "Revitalizing the 1951 Refugee Convention," pp. 229-232.
34. Goodwin-Gill, *The Refugee in International Law*, pp. 152-153, 247-253, 305-306.
35. Ibid., pp. 88-91, 152.
36. Refugee Convention, art. 32(2).
37. Christenson, "The Uses of Human Rights Norms to Inform Constitutional Interpretation," p. 49n63; Goodwin-Gill, *The Refugee in International Law*, p. 248.
38. Executive Committee Conclusion No. 44 (1986), § (b)(c)(e), Report of the 37th Session: U.N. Doc. A/AC.96/688, para. 128, cited by Goodwin-Gill, ibid., at pp. 250-251. See also the 1999 UNHCR Guidelines on Applicable

Criteria and Standards relating to the Detention of Asylum Seekers in Amnesty International, *United States of America: Lost in the Labyrinth—Detention of Asylum Seekers*, at pp. 56-58 (September 1999).

39. Refugee Convention, art. 1(A)(2) & (B).
40. Newmark, "Non-Refoulement Run Afoul," p. 835.
41. Blackmun, "The Supreme Court and the Law of Nations," pp. 43-44; Goodwin-Gill, *The Refugee in International Law*, pp. 123-137, 141, 143.
42. Executive Committee Conclusion No. 22 (1981), § II(A)(2), Report of the 32d Session: U.N. Doc. A/AC.96/601, para. 57(2); "UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council," *International Legal Materials* 32 (1993): p. 1215; Haitian Center for Human Rights, Case 10675 (1997).
43. Refugee Protocol, art. I(2) & (3).
44. Ibid., art. I(1).
45. General Comment, No. 20 (44), § 9, U.N. GAOR, Hum. Rts. Comm., 44th Sess., U.N. Doc. HRI/GEN/1/Rev.1 at p. 30 (1994).
46. General Comment, No. 24 (52), § 8.
47. Goodwin-Gill, *The Refugee in International Law*, pp. 231-232.
48. Ibid., at p. 232n133.
49. GA. Res. 2312, U.N. GAOR, 22d Sess., Supp. No. 16, at 81, U.N. Doc. A/6912 (1967).
50. Paul Weis, "The United Nations Declaration on Territorial Asylum," *Canadian Yearbook of International Law* 7 (1969): p. 97.
51. Ibid., at pp. 98-99, 136.
52. Declaration on Territorial Asylum, art. 3(1). For further reference, see Weis, ibid., pp. 102-116, 142-144; Goodwin-Gill, *The Refugee in International Law*, pp. 123, 141, 143, 145-147. Cf., some commentators interpret the term "rejection at the frontier" as embodying the case of high-seas interdiction as well, see Arthur C. Helton, "The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects," *New York Law School Journal of Human Rights* 10 (1993): pp. 340-341; Boed, "The State of the Right of Asylum in International Law," pp. 19, 23, 26.
53. Declaration on Territorial Asylum, art. 3(2).
54. Report of the UN Conference on Territorial Asylum, U.N. Doc. A/CONF.78/12 (21 April 1977).
55. Ibid., art. 1.
56. Weis, "The United Nations Declaration on Territorial Asylum," pp. 112, 142.
57. See Principles concerning Treatment of Refugees (adopted by the Asian-African Legal Consultative Committee), 1966, art. III(3), reprinted in UNHCR, Collection of International Instruments concerning Refugees 201 (1979); Resolution on Asylum to Persons in Danger of Persecution (by the Committee of Ministers of the Council of Europe), 29 June 1967, art. 2, reprinted in ibid., at p. 305 (1992). All are quoted in Boed, "The State of the Right of Asylum in International Law," p. 24nn104 & 106.

58. In its discussion on the draft Refugee Convention, the Ad hoc Committee on Stateless Persons and Related Problems remarked that certain government actions such as the simple return of refugee ships to the high seas were not equated with an internationally outlawed act of refoulement; Goodwin-Gill, *The Refugee in International Law*, pp. 155, 161, 166-167.
59. Arthur C. Helton, "Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise," *University of Michigan Journal of Law Reform* 17 (1984): p. 262.
60. Brief of Petitioner-Appellee, and Kansas Legal Services, Amicus Curiae at pp. 20-21, 36, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) (No. 81-1238) [hereinafter Brief in Rodriguez-Fernandez before the 10th Circuit].
61. Elisa C. Massimino, "Relief from Deportation under Article 3 of the United Nations against Torture," *Lawyers Committee for Human Rights' Annual Handbook: Advanced* 467-468 (1997); Boed, "The State of the Right of Asylum in International Law," pp. 18-20.
62. The Torture Convention does not explicitly instruct whether Article 3(1) is categorical. Article 2(2), however, states: "no exceptional circumstances whatsoever, whether a state of war…or any other public emergency, may be a justification for torture." By reference to Article 2(2), Article 3(1) should be read as non-derogable because its purpose alike is to forestall an act of torture though in the country of return. See David Weissbrodt and Isabel Hortreiter, "The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties," *Buffalo Human Rights Law Review* 5 (1999): p. 15.
63. Despite lacking clarification in the Refugee Convention, the term "persecution" in the UNHCR's construction indicates "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group...[and] other serious violations of human rights–for the same reasons." An act of torture carries all those definitional characteristics and constitutes one form of persecution. See Boed, "The State of the Right of Asylum in International Law," p. 19 n99.
64. Weissbrodt and Hortreiter, "The Principle of Non-Refoulement," p. 9.
65. Child Rights Convention, art. 2(1).
66. Ibid., art. 37(b).
67. Ibid., arts. 12(2), 37(d).
68. Ibid., art 37(a) & (c).
69. Ibid., art. 41(b).
70. European Convention on Extradition, 13 December 1957, art. 3(2), Europ. T.S. 24, 359 U.N.T.S. 274.
71. European Convention on the Suppression of Terrorism, 10 November 1976, art. 5, Europ. T.S. 90, reprinted in *I.L.M.* 1272 (1976).
72. Vilvarajah and Others v. United Kingdom, 30 October 1991, Series A. No. 215, 14 E.H.R.R. 248; Chahal v. United Kingdom, 15 November 1996, 23

E.H.R.R. 413, quoted in Goodwin-Gill, *The Refugee in International Law*, p. 125.

73. Boed, "The State of the Right of Asylum in International Law," pp. 29-30.
74. Resolution on Asylum to Persons in Danger of Persecution, 29 June 1967, art. 2.
75. Recommendation No. R (84) 1 adopted by the Committee of Ministers of the Council of Europe on 25 January 1984.
76. See, e.g., Article 4(5) of the Inter-American Convention on Extradition in Goodwin-Gill, *The Refugee in International Law*, pp. 125n31, 443.
77. Weissbrodt and Hortreiter, "The Principle of Non-Refoulement," p. 46.
78. American Convention, art. 27(2).
79. Ibid., art. 27(1).
80. OAS/Ser.L/V/II.66, Doc. 10, rev. 1, pp. 190-193 (1984). As the deliberative outcome of an ad hoc group composed of experts and government representatives from Central America, the Cartagena Declaration was later endorsed by the OAS General Assembly; Goodwin-Gill, *The Refugee in International Law*, p. 21.
81. Convention on the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45 [hereinafter OAU Refugee Convention].
82. Ibid., art. I(1) & (2) (these factors consist of external aggression, occupation, foreign domination, and any other events incurring serious disturbances to public order such as civil wars, famine, and drought).
83. Paul Weis, "The Convention Concerning the Specific Aspects of Refugees Problems in Africa," *Human Rights Journal* 3 (1982): p. 455; Paul Kuruk, "Asylum and the Non-Refoulement of Refugees: The Case of the Missing Shipload of Liberian Refugees." *Stanford Journal of International Law* 35 (1999): pp. 324-325.
84. OAU Refugee Convention, art. II(3). Also Kuruk, ibid., pp. 326, 328, 331-332.
85. Kuruk, ibid., p. 331.
86. OAU Refugee Convention, art. I(4)(f) & (g) & (5).
87. U.S. Committee for Refugees, *Statistics 2001: Refugee and Asylum Seekers Worldwide—Statistics by Region and Host Country*, at <http;//209.225.33.28/world/statistics/wrs01-tableindex.htm> (visited 11 August 2001). See also Goodwin-Gill, *The Refugee in International Law*, pp. 129-134, 141, 143, 168-170 (averring that nations on average have pursued a policy of not returning refugees to persecution in any manner whatsoever).
88. For instance, see Scott M. Martin, "Non-Refoulement of Refugees: United States Compliance with International Obligations," *Harvard International Law Journal* 23 (1983): pp. 358, 365; Helton, "The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti," pp. 337-338; Newmark, "Non-Refoulement Run Afoul," p. 836; Blackmun, "The Supreme Court and the Law of Nations," p. 43; Kathleen M. Keller, "A Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-Refoulement,"

Yale Human Rights & Development Law Journal 2 (1999): pp. 186-187. Cf., Report of United Nations High Commissioner for Refugees, 40 U.N. GAOR, Supp. No. 12 at p. 6, U.N. Doc. A/40/12 (1985) (viewing non-refoulement as a peremptory norm); the Cartagena Declaration on Refugees, art. III(5).

89. Case concerning United States Diplomatic and Consular Staff in Tehran, 1980 ICJ Reports 42, para. 91 (holding that the bar to arbitrary incarceration is a fundamental principle in international jurisprudence), see Goodwin-Gill, *The Refugee in International Law*, pp. 219, 249n12; American Law Institute, *Restatement (Third)*, § 702, Comment h, Reporters' Notes 1 & 6, pp. 164-165, 167-168, 171-172 (identifying the prohibition against arbitrary detention as a customary international norm, which virtually all countries, including the United States, have enshrined in their individual municipal legislation).
90. Goodwin-Gill, *The Refugee in International Law*, pp. 212, 215-218.
91. Tolley, "Interest Group Litigation to Enforce Human Rights," p. 627; Lillich and Hannum, *International Human Rights*, p. 803.
92. See treatment in Chapter 6.
93. The petitioners were: the Centre Karl Leveque, Port-au-Prince, Haiti; the Haitian-Americans United for Progress, Cambria Heights, U.S; the Haitian Center for Human Rights, Port-au-Prince, Haiti; the Haitian Centers Council, New York, New York ; the Haitian Refugee Center, Inc., Miami, Florida; the National Coalition for Haitian Refugees, New York, New York; the Washington Office of Haiti; Dukens Luma; Fito Jean; Jeannette Gedeon; and unnamed Haitian nationals who had been and were being returned to Haiti against their will.
94. Haitian Center for Human Rights, para. 151.
95. Ibid., para. 155.
96. 509 U.S. 155 (1993).
97. Haitian Center for Human Rights, para. 157.
98. Ibid., para. 160 & n36.
99. Ibid., paras. 161-162.
100. Ibid., paras. 164-171.
101. Ibid., paras. 172-178, 180.
102. Case 9903, Report 51/01, Inter-Am. C.H.R., OEA/Ser./L/V/II.111, Doc. 20 rev. (2001) [hereinafter Rafael Ferrer-Mazorra].
103. 788 F.2d 1446 (11th Cir. 1986), rev'g in part & aff'g in part Fernandez-Roque v. Smith, 622 F.Supp. 887 (N.D. Ga. 1985), cert. denied, 479 U.S. 889 (1986).
104. On 23 July 1999, the Law Group sent a letter to the Inter-American Commission expressing its intent to withdraw participation in the case.
105. Rafael Ferrer-Mazorra, paras. 216-219.
106. Ibid., paras. 222-223.
107. 8 U.S.C. § 1182(d)(5)(A).
108. For instance, 8 C.F.R. § 212.12(b)(I), (d)(4)(iii), & (e) (covering the discretion of the Associate Commissioner for Enforcement or his or her

designate over the handling of parole applications lodged by excludable alien detainees).
109. Rafael Ferrer-Mazorra, paras. 225-227.
110. Ibid., para. 228.
111. Ibid., paras. 229-230.
112. Ibid., paras. 232-235.
113. Ibid., paras. 238, 241-242.
114. Ibid., para.215n87.
115. Harold H. Koh, "The 'Haiti Paradigm' in United States Human Rights Policy," *Yale Law Journal* 103 (1994): pp. 2404-2405 & n72.
116. "UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council," p. 1215.
117. Rafael Ferrer-Mazorra, Case 9903 (2001).
118. Haitian Center for Human Rights, Case 10675 (1997).
119. Pub. L. No. 89-732, 2 November 1966, 80 Stat. 1161 (amended in 1980); see Jonathan Wachs, "The Need to Define the International Legal Status of Cubans Detained at Guantanamo," *American University Journal of International Law & Policy* 11 (1996): p. 82.
120. Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. (1976 & Supp. V 1981)).
121. Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1988)); see also J. Michael Cavosie, "Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law," *Indiana Law Journal* 67 (1992): p. 420.
122. For instance, 8 C.F.R. § 108 (1972); 39 Fed. Reg. 41,832 (1974). For further elaboration, see Ira J. Kurzban, "A Critical Analysis of Refugee Law," *University of Miami Law Review* 36 (1982): p. 875n61; Helton, "Political Asylum under the 1980 Refugee Act," pp. 248-249.
123. The procedures were parole, withholding of deportation, and conditional entry, Helton, ibid., pp. 244 & n5, 251n48.
124. Elizabeth J. Stewart, "International Human Rights Law and the Haitian Asylum Applicant Detention Cases," *Virginia Journal of International Law* 26 (1985): pp. 182-183; Mary J. Lapointe, "Discrimination in Asylum Law: The Implications of Jean v. Nelson," *Indiana Law Journal* 62 (1986): pp. 130-134.
125. Immigration and Naturalization Act of 1952, § 212(d)(5), 66 Stat. 163, 188 (amended 1980) (now at 8 U.S.C. § 1182(d)(5)(A) & (B) (2000)).
126. INA of 1952, § 243(h), 66 Stat. 163, 214 (amended 1965) (now at 8 U.S.C. § 1231(b)(3) (2001)).
127. INA § 240, 8 U.S.C. § 1362 (2001); see Elizabeth Glazer, "The Right to Appointed Counsel in Asylum Proceedings," *Columbia Law Review* 85 (1985): pp. 1161-1162; David Weissbrodt, *Immigration Law and Procedure in a Nutshell*, 4th ed. (St. Paul, Minn.: West Group, 1998), pp. 208-209.
128. 8 U.S.C. § 1252(c) (1976); see Mark D. Kemple, "Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans Constitutional,

Statutory, International Law, and Human Considerations," *Southern California Law Review* 62 (1989): p. 1778.

129. Kurzban, "A Critical Analysis of Refugee Law," p. 873.
130. Helton, "Political Asylum under the 1980 Refugee Act," p. 244n5.
131. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 243(h), 79 Stat. 911, 918 (1965) (amended 1978).
132. Deborah E. Anker and Michael H. Posner, "The Forty Year Crisis: A Legislative History of the Refugee Act of 1980," *San Diego Law Review* 19 (1981): pp. 10-60; Bockley, "A Historical Overview of Refugee Legislation," pp. 266-278.
133. Kurzban, "A Critical Analysis of Refugee Law," pp. 873-878; Cheryl Little, "United States Haitian Policy: A History of Discrimination," *New York Law School Journal of Human Rights* 10 (1993): pp. 273-276.
134. Immigration and Nationality Act Amendments of 30 October 1978, Pub. L. No. 95-549, § 104, 92 Stat. 2065, 2066 (1978) (amended 1980); see Michael J. Creppy, "Nazi War Criminals in Immigration Law," *Georgetown Immigration Law Journal* 12 (1998): p. 449 & n40.
135. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (amended 1996).
136. Anker and Posner, "The Forty Year Crisis," pp. 43, 46, 50, 64; Lapointe, "Discrimination in Asylum Law," pp. 135, 137-140 (asserting all provisions of the Refugee Act to be free from discriminatory implementation in view of legislative history full of treaty commitments).
137. Anker and Posner, ibid., pp. 46-47, 51.
138. Ibid., at p. 51.
139. INA, § 212(d)(5), 8 U.S.C. § 1182(d)(5) (amended 1996).
140. Kurzban, "A Critical Analysis of Refugee Law," pp. 870n28, 878-879.
141. Stewart, "International Human Rights Law and the Haitian Asylum Applicant Detention Cases," pp. 184-185.
142. INA, § 207(a), 8 U.S.C. § 1157(a) (2000), see Anker and Posner, "The Forty Year Crisis," pp. 61-62; Kurzban, "A Critical Analysis of Refugee Law," pp. 875-876, 878-881.
143. Glazer, "The Right to Appointed Counsel in Asylum Proceedings," pp. 1168-1170.
144. INA § 243(h)(1), 8 U.S.C. § 1253(h)(1) (amended 1990), see David Weissbrodt, *Immigration Law and Procedure in a Nutshell*, 2d ed. (St. Paul, Minn.: West Publishing Co., 1989), p. 172.
145. Anker and Posner, "The Forty Year Crisis," pp. 40 & n144, 45, 56, 63.
146. Helton, "Political Asylum under the 1980 Refugee Act," pp. 243-251; Kemple, "Legal Fictions Mask Human Suffering," pp. 1765-1766; Zink, "Race and Foreign Policy in Refugee Law," pp. 568, 580-582.
147. Anker and Posner, "The Forty Year Crisis," pp. 40n145, 45, 48, 63.
148. Evangeline G. Abriel, "Presumed Ineligible: The Effect of Criminal Convictions on Applications for Asylum and Withholding of Deportation under Section 515 of the Immigration Act of 1990," *Georgetown Immigration Law Journal* 6 (1992): pp. 33-34 (stating under 8 C.F.R. §

208.2 that a spouse and minor children alike may gain asylum status as soon as the INS approved an alien's asylum application).

149. INA, § 208, 8 U.S.C. § 1158 (amended 1990). Germane information is treated in Arthur C. Helton, "The Legality of Detaining Refugees in the United States," *New York University Review of Law & Social Change* 14 (1986): pp. 369, 373 & n148; Weissbrodt, *Immigration Law and Procedure in a Nutshell* (1989), pp. 171, 184, 187.
150. Aliens and Nationality, 8 C.F.R. § 208 (1983) (regulations for a detailed asylum process); see Glazer, "The Right to Appointed Counsel in Asylum Proceedings," pp. 1157, 1162-1164, 1167, 1169-1170.
151. Creppy, "Nazi War Criminals in Immigration Law," p. 451.
152. Prior to 1990, only the 1980 interim regulations laid down criminal bars to procuring asylum status. For related comments, see Weissbrodt, *Immigration Law and Procedure in a Nutshell* (1989), pp. 185-186; Abriel, "Presumed Ineligible," p. 37 & n42.
153. Anker and Posner, "The Forty Year Crisis," p. 77; Glazer, "The Right to Appointed Counsel in Asylum Proceedings," pp. 1157, 1177.
154. 8 U.S.C. § 1521 (1988); cited by Wachs, "The Need to Define the International Legal Status of Cubans Detained at Guantanamo," p. 82.
155. Immigration Act of 1990, Pub. L. No. 101-649, § 515(a)(1), 104 Stat. 4978, 5053 (29 November 1990) (amending 8 U.S.C. § 1158) [hereinafter IMMACT]; see Abriel, "Presumed Ineligible," pp. 43-44.
156. IMMACT of 1990, § 515(a)(2) (amending 8 U.S.C. § 1253(h)(2)); Keller, "A Comparative and International Law Perspective on the United States (Non)Compliance with its Duty of Non-Refoulement," pp. 195-196.
157. Letter from John McCallin, Representative, Office of United Nations High Commissioner for Refugees, to Alan K. Simpson, Senator, United States Senate 3 (1 May 1990); adduced by Bobbie M. Guerra, "A Tortured Construction: The Illegal Immigration Reform and Immigrant Responsibility Act's Express Bar Denying Criminal Aliens Withholding of Deportation Defies the Principles of International Law," *St. Mary's Law Journal* 28 (1997): p. 962n88.
158. IMMACT, § 603(b)(3) (amending 8 U.S.C. § 1253(h)(1)), Creppy, "Nazi War Criminals in Immigration Law," pp. 451& n51, 453, 462.
159. Germain, "Rushing to Judgment," p. 508 (the 1993 World Trade Center bombing and the gunfight outside of the CIA headquarters stimulated a congressional reaction to harden U.S. immigration law in counterbalance against the possibility of terrorists sneaking into the United States).
160. Michael J. Parrish, "Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection," *Cardozo Law Review* 22 (2000): pp. 236n73, 238-241.
161. INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B).
162. INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).
163. INA § 235(b)(1)(B)(iii)(IV) (amending 8 U.S.C. § 1225(b)(1)(B)(iii)(IV)).
164. The expedited removal process applies to the following aliens: 1) persons present at ports of entry without valid travel documents (INA §

235(b)(1)(A)(i)); 2) stowaways (INA § 212(a)(6)(C), 212(a)(7), 8 U.S.C. § 1182(a)(6)(c), 1182(a)(7)); and 3) illegally present aliens unless they otherwise prove at least two years of continuous residence in the United States (INA § 235(b)(1)(A)).

165. Lawyers Committee for Human Rights, *Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act* (1999); Amnesty International, *United States of America: Lost in the Labyrinth*, pp. 5-6, 12, 19-21.
166. Andrea Rogers, "Exploitation v. Expulsion: The Use of Expedited Removal in Asylum Cases as an Answer to a Compromised System," *William Mitchell Law Review* 24 (1998): pp. 791-793, 819 (the other two being affirmative and defensive applications provided in the 1990 formal asylum regulations).
167. INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (2001).
168. Details in Jaya Ramji, "Legislating away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act," *Stanford Journal of International Law* 37 (2001): pp. 134-141, 145-146.
169. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43); Keller, "A Comparative and International Law Perspective on the United States (Non)Compliance with its Duty of Non-Refoulement," pp. 196, 198-199, 207 (the crimes in the expansive list now include fraud, tax evasion, theft, bribery, and re-entry after deportation).
170. INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B).
171. INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B); Keller, "A Comparative and International Law Perspective on the United States (Non)Compliance with its Duty of Non-Refoulement," pp. 202, 207.
172. See also INA § 208(b)(2), 8 U.S.C. § 1158(b)(2) (allowing the Attorney General to designate other barred criminal activities by regulations whenever necessary).
173. INA § 208(a)(2)(B) & (D), 8 U.S.C. § 1158(a)(2)(B) &(D).
174. INA § 208(d)(4), 8 U.S.C. § 1158(d)(4); Ilene Durst, "Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative," *Rutgers Law Review* 53 (2000): pp. 131-133.
175. INA § 212 (a)(3)(B)(ii), 8 U.S.C. § 1182(a)(3)(B)(ii).
176. Pub. L. No. 107-56, § 411, 115 Stat. 272 (2001) (codified at INA § 212(a)(3)(B)(iii)(V)(b)); see Germain, "Rushing to Judgment," p. 518.
177. Ibid., § 412 (codified at INA § 212(a)(3)(B)(iv)(VI)).
178. For discussions about these points, refer to Germain, "Rushing to Judgment," pp. 518-526, 528-530; Leslie Castro et al., "Perversities and Prospects: Whither Immigration Enforcement and Detention in the Anti-Terrorism Aftermath? Panel Discussion, October 25, 2001," *Georgetown Journal on Poverty Law & Policy* 9 (2002): pp. 27-29.
179. Pub. L. No. 107-56, § 412, 115 Stat. 272 (2001) (codified at INA § 236A(a)(2)).
180. Ibid. (codified at INA § 236A(5)).

181. Ibid. (codified at INA § 236A(a)(6)).
182. Germain, "Rushing to Judgment," pp. 524n128 & 525.
183. See Chapter 3 concerning the U.S. government's attitude toward the domestic effect of the UDHR, the American Declaration, and the ICCPR. As for the Fourth Geneva Convention, the USA did not attach any qualifications to its articles applicable to securing a set of refugee rights.
184. Foreign Affairs Reform and Reconstruction Act of 1998, Pub. L. No. 105-277, 112 State. 2681, 2681-2682, § 2242(b) (21 October 1998) (instructing administrative agencies to formulate implementing regulations within 120 days); 8 C.F.R. § 208.16(c) (2001) (eligibility for withholding of removal under the Convention against Torture); see Zachary Margulis-Ohnuma, "Saying What the Law Is: Judicial Review of Criminal Aliens' Claims under the Convention against Torture," *New York University Journal of International Law and Politics* 33 (2001): p. 862n6.
185. INA §§ 212(f), 215(a)(1), 8 U.S.C. §§ 1182(f), 1185(a)(1); see Haitian Refugee Center v. Gracey, 600 F.Supp. at pp. 1398-1400.
186. Anker and Posner, "The Forty Year Crisis," pp. 64-65; Kurzban, "A Critical Analysis of Refugee Law," p. 880.
187. Helton, "The Legality of Detaining Refugees in the United States," pp. 354-363, 369, 371.
188. Report, Department of Transportation and Related Agencies Appropriations Bill, 1985, S.Rep. No. 98-561 at 15, 98th Cong., 2d Sess. (1984); see Haitian Refugee Center v. Gracey, 600 F.Supp. at p. 1399.
189. Proclamation 4865 of 29 September 1981, FR 28829, 46 Fed. Reg. 48107, reprinted in 8 U.S.C. § 1182 (supp. note) (1988).
190. Executive Order 12324 of 29 September 1981, FR Doc. 81-28829, 46 Fed. Reg. 48109, reprinted in 8 U.S.C. § 1182, at §§ 2(c)(3) & 3 (supp. note) (1988).
191. Amnesty International, *United States: Failure to Protect Haitian Refugees* at p. 2, AI Index: AMR 51/31/93 (April 1993).
192. Lind, "Cuban Refugees at Sea," p. 795.
193. 57 Fed. Reg. 23133 (1992).
194. Amnesty International, *United States of America/Haiti: The Price of Rejection—Human Rights Consequences for Rejected Haitian Asylum Seekers* at p. 1, AI Index: AMR 51/31/94 (May 1994).
195. Lind, "Cuban Refugees at Sea," pp. 789, 793-794, 803-804; Wachs, "The Need to Define the International Legal Status of Cubans Detained at Guantanamo," p. 86n47.
196. For instance, Immigration and Naturalization Service, INS Role in and Guidelines for Interdiction at Sea (issued on 6 October 1981), and Haitian Migrant Interdiction Operations Instructions (issued on 1 March 1988); see Lawyers Committee for Human Rights, *Refugee Refoulement: The Forced Return of Haitians under the U.S.-Haitian Interdiction Agreement* (March 1990), pp. 13-14.
197. 5 U.S.C. § 553 (1982).

198. 544 F.Supp. 973, 1003-1004 (S.D. Fla. 1982), rev'd sub nom. Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985).
199. 47 Fed. Reg. 30,044-46 (1982) (codified at 8 C.F.R. §§ 212.5, 235.3 (2001)); see the pertinent narration in Helton, "The Legality of Detaining Refugees in the United States," pp. 359-360, 369.
200. On 28 December 1987, the Department of Justice published Regulations on Mariel Cuban Parole Determinations, 52 F.R. 48799, 8 C.F.R. §§ 212.12, 212.13 (1992), which clearly set out the structure of the Cuban Review Plan. The regulations are quoted in Rafael Ferrer-Mazorra, Case 9903, para. 118 & n31.
201. Sandra B. Reiss, "The International Covenant on Civil and Political Rights: Can It Free the Cuban Detainees?" *Emory International Law Review* 6 (1992): pp. 585-589, 594.
202. 515 F.Supp. 1049 (N.D. Ga. 1981).
203. Helton, "The Legality of Detaining Refugees in the United States," pp. 357-358.
204. Kemple, "Legal Fictions Mask Human Suffering," pp. 1737n13, 1749-1750.
205. Agreement on Migrants-Interdiction, 23 September 1981, United States-Haiti, 33 U.S.T. 3559, T.I.A.S. No. 10241, cited by Creola Johnson, "Quarantining HIV-Infected Haitians: United States' Violations of International Law at Guantanamo Bay," *Howard Law Journal* 37 (1994): pp. 320-321.
206. Joint Statement of the United States and Cuba, 1 May 1995, reprinted in CUBAINFO (The Johns Hopkins University, Paul H. Nitze School of Advanced International Studies), 18 May 1995, at pp. 1-2, quoted in Wachs, "The Need to Define the International Legal Status of Cubans Detained at Guantanamo," pp. 79 & n4, 86.
207. Wachs, ibid., p. 86n47.

Chapter 6

1. The USA has ratified the Refugee Protocol, not the Refugee Convention. Since Article I of the Refugee Protocol directly introduces Articles 2 to 34 of the Refugee Convention into its text, the term "Protocol" is used in this chapter and thereafter before all relevant refugee treaty articles that are derived from the Convention but that are codified into U.S. law through the Protocol. This terminology is consistent with the language adopted by the U.S. Supreme Court and the lower courts when addressing Convention provisions incorporated via the Protocol.
2. Brief of the Lawyers Committee for International Human Rights and the U.S. Helsinki Watch Committee as Amici Curiae at pp. 15, 23-32, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) (No. 81-1238); Brief for Petitioners, Jean v. Nelson at pp. 16-20, 472 U.S. 846 (1985) (No. 84-5240). The same treatment is also in Christenson, "The Uses of Human Rights Norms to Inform Constitutional Interpretation," pp. 49-50.

3. Stewart, "International Human Rights Law and the Haitian Asylum Applicant Detention Cases," pp. 200, 212-213; Tamara J. Conrad, "The Constitutional Rights of Excludable Aliens: History Provides a Refuge," *Washington Law Review* 61 (1986): pp. 1472, 1477. Cf., Kemple, "Legal Fictions Mask Human Suffering," pp. 1743-1754 (stating indeterminate jailing of Mariel Cubans as equivalent to (rather than analogous to) illegal criminal punishment that stood in conflict with substantive due process safeguards under the Fifth and Sixth Amendments).
4. Detention of Aliens in Bureau of Prison Facilities: Hearing before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, House of Representatives, 97th Cong., 2d Sess. (1982) (Statement of Arthur C. Helton) (on file with the author).
5. Tolley, "Interest Group Litigation to Enforce Human Rights," p. 627; Lillich and Hannum, *International Human Rights*, p. 803.
6. Rafael Ferrer-Mazorra, paras. 28-40.
7. Although the assertion that Soroa-Gonzales was implicated in a drug crime in Cuba prior to his flight to the USA was dismissed by an Administrative Law judge as unfounded, Judge Shoob found that the Attorney General and the INS district director still had the petitioner imprisoned in a maximum security penitentiary. Further, the use of lengthy custody against the Cuban concerned was apparently contrary to "established policies both of parole generally and of treatment of the 'Freedom Flotilla.'" For these two reasons, immigration officials were ruled to have abused their parole discretion in revoking Soroa-Gonzales' parole status and refusing to restore it in violation of 8 U.S.C. § 1182(a)(23) and 8 C.F.R. § 212.5 (which regulated part of the terms for parole cancellation and prohibited prolonged detention of excludable aliens). See Soroa-Gonzales v. Civiletti, 515 F. Supp. at pp. 1057, 1059, 1060-1061.
8. Ibid., at p. 1061 n18.
9. 567 F.Supp. 1115 (N.D. Ga. 1983), rev'd, 734 F.2d 576 (11th Cir. 1984).
10. Fernandez-Roque v. Smith, 567 F.Supp. at p. 1122 n2.
11. Rodriguez-Fernandez v. Wilkinson, 654 F.2d at pp. 1390-1392 (McWilliams, J., dissenting).
12. 684 F.2d 204 (2d Cir. 1982), rev'g Vigile v. Sava, 535 F.Supp. 1002 (S.D.N.Y. 1982). The majority comprised the designated Judge Jose A. Cabranes from the U.S. District Court for the District of Connecticut and Second Circuit Judge Walter R. Mansfield.
13. Bertrand v. Sava, 684 F.2d at pp. 207n6, 212-218.
14. Ibid., at pp. 109, 218-219.
15. Ibid., at pp. 219-220 (Kearse, J., concurring).
16. Louis v. Nelson, 544 F.Supp. at pp. 1001-1002 & n53.
17. However, Judge Spellmen ruled in favor of the Haitian detainees on the grounds that the INS failed to meet the notice and comment requirements under the Administrative Procedure Act when adopting the new parole practice at issue, Louis v. Nelson, ibid., at pp. 993-997, 1003.

18. The majority consisted of Judges John C. Godbold, Paul H. Roney, James C. Hill, Peter T. Fay, Robert S. Vance, Albert J. Henderson, Jr., and R. Lanier Anderson, III.
19. Jean v. Nelson, 727 F.2d at p. 964 n4.
20. Ibid., at pp. 963-965, 971.
21. Since neither the Attorney General nor the INS conceded any intent to formulate a discriminatory policy against Haitians' parole applications, the majority remanded the Jean case to the trial court to reconsider whether lower-level INS officers abusively acted to the contrary. In this respect, the Circuit majority thought it fit for the Haitians concerned to invoke immigration laws (rather than international or constitutional sources) in challenging disparate INS decisions. See Jean v. Nelson, 727 F.2d at pp. 963, 967, 977-978, 984.
22. Judge Gerald B. Tjoflat was the only member in the first group; see ibid., at pp. 984-986 (Tjoflat, j., concurring in part and dissenting in part) (holding a diverging view on to what extent the district court on remand had to inquire the Attorney General's parole administration). The second group included Judges Phyllis A. Kravitch, Frank M. Johnson, Jr., Joseph W. Hatchett, and Thomas A. Clark; see ibid., at pp. 986-989 (Kravitch, J., concurring in part and dissenting in part) (interpreting 8 U.S.C. § 1182(d)(5) as levying facially neutral standards for the Attorney General to exercise his parole discretion).
23. Fernandez-Roque v. Smith, 622 F.Supp. at pp. 891n4, 892.
24. Ibid., at p. 903.
25. The Paquete Habana, 175 U.S. at p. 700, quoted by Fernandez-Roque v. Smith, ibid., at p. 902.
26. Fernandez-Roque v. Smith, ibid., at p. 903. Based on President Carter's invitation, Judge Shoob finally ordered the INS to file a plan that would provide the Cuban plaintiffs in the second group with individual parole revocation hearings.
27. Garcia-Mir v. Meese, 788 F.2d at pp. 1454-1455. The majority was made up of Judges Frank M. Johnson, Jr. and Robert S. Vance as well as designated Judge Clarence W. Allgood from the U.S. District Court for the Northern District of Alabama.
28. 754 F.Supp. 1536, 1542-1543 (W.D. Okla. 1990) (Judge Lee R. West on the U.S. District Court for the Western District of Oklahoma).
29. 746 F.Supp. 1006, 1013-1014 (C.D. Cal. 1990), aff'd, 941 F.2d 956, 963 (9th Cir. 1991), cert. denied, 506 U.S. 842 (1992) (Judge Irving Hill from the U.S. District Court for the Central District of California and Ninth Circuit Judges Robert R. Beezer, Procter Hug, Jr., and Cynthia H. Hall).
30. 988 F.2d 1437, 1447-1449 (5th Cir. 1993), amended, 997 F.2d 1122 (1993), aff'g Ramos v. Thornburgh, 761 F.Supp. 1258, 1261 (W.D. La. 1991) (Judge F. A. Little on the U.S. District Court for the Western District of Louisiana and Fifth Circuit Judges William L. Garwood and Emilio Garza). Gisbert v. United States Attorney Gen. was decided by a quorum because

Fifth Circuit Judge John R. Brown on the panel passed away before the decision was filed.

31. 44 F.3d 1441, 1450-1451 (9th Cir. 1995) (en banc), cert. denied, 516 U.S. 976 (1995) (Ninth Circuit majority Cynthia H. Hall, J. Clifford Wallace, Procter Hug, Jr., Charles Wiggins, Melvin Brunetti, David R. Thompson, Edward Leavy, Ferdinand F. Fernandez, Pamela A. Rymer, and Andrew J. Kleinfeld). Ninth Circuit dissenter Harry Pregerson opined in favor of the Cuban detainee on municipal law grounds without reference to the applicability of international law, Barrera-Echavarria v. Rison, 44 F.3d at pp. 1451-1452 (Pregerson, J., dissenting).
32. Bilder, "Integrating International Human Rights Law into Domestic Law," p. 10.
33. Fernandez v. Wilkinson, 505 F.Supp. at p. 790.
34. Ibid., at p. 792.
35. Ibid., at pp. 795-799.
36. Christenson, "Using Human Rights Law to Inform Due Process and Equal Protection Analysis," pp. 15-16.
37. The majority was made up of Judges James K. Logan and William E. Doyle.
38. Rodriguez-Fernandez v. Wilkinson, 654 F.2d at pp. 1386-1387.
39. Ibid., at pp. 1387-1389.
40. Ibid., at p. 1389 (citing Leng May Ma v. Barber, 357 U.S. 185 (1958)).
41. Ibid., at p. 1388.
42. Vigile v. Sava, 535 F.Supp. at pp. 1007, 1015-1018.
43. Ibid., at p. 1016.
44. Ibid., at pp. 1018-1020.
45. The sources cited were the Refugee Protocol, the UDHR, the ICCPR, the U.S.-Haitian interdiction agreement, the customary ban on non-return, the Refugee Act, Executive Order 12324 and the accompanying guidelines, and the First and Fifth Amendments.
46. See, e.g., Motion of the International Human Rights Law Group for Leave to File Brief as Amicus Curiae, Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987) (No. 85-5258); Brief of Amici Curiae Haitian Service Organizations, Immigration Group and Refugee Advocates, Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (No. 92-344); Thomas D. Jones, "Aliens—Interdiction of Cubans and Haitians on High Seas—Rights of Cubans and Haitians in Safe Haven Outside United States," *American Journal of International Law* 90 (1996): p. 477 (asserting violations of the ICCPR in the Christopher case).
47. Haitian Refugee Center v. Gracey, 600 F.Supp. 1396 (D.D.C. 1985), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987).
48. Haitian Refugee Center v. Gracey, 809 F.2d at p. 800; see also Haitian Refugee Center v. Baker, 789 F.Supp. 1552, 1559-1560 (S.D. Fla. 1991), remanded, 949 F.2d 1109 (11th Cir. 1991) (per curiam), cert. denied, 502 U.S. 1122 (1992).

49. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, Cuban American Bar Association v. Christopher, No. 94-2138 (S.D. Fla., 26 October 1994, Atkins J.).
50. Haitian Centers Council v. McNary, 1992 U.S. Dist. LEXIS 8452 (E.D.N.Y. 1992), rev'd, 969 F.2d 1350 (2d Cir. 1992), vacated as moot sub nom. Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (Sale II: the non-return case).
51. Michael Ratner, "How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation," *Harvard Human Rights Journal* 11 (1998): pp. 193-194; Koh, "The 'Haiti Paradigm' in United States Human Rights Policy," pp. 2400-2401.
52. Victoria Clawson, Elizabeth Detweiler, and Laura Ho, "Litigating as Law Student: An Inside Look at Haitian Centers Council," *Yale Law Journal* 103 (1994): pp. 2378-2380.
53. Clawson et al., ibid., pp. 2348-2349, 2379; Harold H. Koh, "Human Rights International Law Symposium: America's Offshore Refugee Camps," *University of Richmond Law Review* 29 (1994): pp. 147, 149-150.
54. Clawson et al., ibid., pp. 2373-2374.
55. Hearing before the Legislation and National Security Subcommittee of the Committee on Government Operations, 102d Cong., at pp. 71, 76-78 (1992) (Attorney Ira J. Kurzban in Baker testified before Congress about the plight of Haitian interdictees), quoted by Ratner, "How We Closed the Guantanamo HIV Camp," p. 191n22; U.S. Policy toward Haitian Refugees: Hearings before the Subcomm. on International Operations and the Subcomm. on Western Hemisphere Affairs of the House Comm. on Foreign Affairs, 102d Cong., 2d Sess. (11 June 1992) (testimony of Harold H. Koh) cited by Koh, "The 'Haiti Program' in United States Human Rights Policy," p. 2400n54.
56. Clawson et al., "Litigating as Law Student," pp. 2371, 2378-2380.
57. For instance, see Brief for the Petitioners, Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (No. 92-344).
58. Haitian Refugee Center v. Gracey, 600 F.Supp. at p. 1406.
59. Ibid., 809 F.2d at pp. 838-839 (Edwards, J., concurring in part and dissenting in part).
60. Ibid., at pp. 839-841.
61. Ibid., at p. 841.
62. Haitian Refugee Center v. Baker, 949 F.2d at pp. 1110, 1113-1114.
63. Haitian Centers Council v. McNary, 1992 U.S. Dist. LEXIS at p. 8456.
64. Ibid., 969 F.2d at pp. 1369, 1373-1381 (Walker, J., dissenting).
65. Sale v. Haitian Centers Council, 509 U.S. at p. 178 & n35.
66. Ibid., at p. 180.
67. Ibid., at pp. 180-182.
68. Ibid., at p. 183.
69. Ibid., at pp. 184-185.
70. Ibid., at p. 187 & n27.
71. 43 F.3d 1412 (11th Cir. 1995), cert. denied, 515 U.S. 1142 (1995).

72. Cuban American Bar Association v. Christopher, 43 F.3d at pp. 1425-1426.
73. Ibid. at pp. 1426-1427.
74. Ibid., at pp. 1418-1419, 1428-1429.
75. Ibid., at p. 1430.
76. Haitian Refugee Center v. Gracey, 809 F.2d at p. 805.
77. Ibid., at pp. 801, 806-807.
78. Ibid., at pp. 809-811.
79. Ibid., at pp. 811-812 n15.
80. Ibid., at pp. 812-815.
81. Ibid., at pp. 815-816.
82. Ibid. at p. 816 (Buckley, J., concurring).
83. Haitian Refugee Center v. Baker, 502 U.S. 1122 (1992) (Thomas, J., denial of certiorari).
84. Ibid., 789 F.Supp. at pp. 1558-1561.
85. Ibid., at p. 1562.
86. Ibid., at pp. 1562-1563.
87. Ibid., at pp. 1563-1564.
88. Ibid., at pp. 1565-1567.
89. Ibid., at pp. 1566-1570.
90. The claim resting on the First Amendment also elicited the same positive result; ibid., at pp. 1571-1574.
91. Ibid., at pp. 1574-1575 (using non-extraterritoriality to reject the Refugee Act; the entry fiction against the Fifth Amendment; no right of action against President Reagan's order; and no force of law against INS guidelines).
92. Ibid., at p. 1577.
93. Ibid., at p. 1578.
94. Ibid., 949 F.2d at pp. 1113-1115 (Hatchett, J., dissenting).
95. Cuban American Bar Association v. Christopher, No. 94-2138 (S.D. Fla., 26 October 1994, Atkins J.) (memorandum order), adduced by Jones, "Aliens," p. 477n1.
96. Haitian Centers Council v. McNary, 969 F.2d at pp. 1361-1365.
97. Ibid., 969 F.2d at pp. 1367-1368 (Newman, J., concurring).
98. Sale v. Haitian Centers Council, 509 U.S. at pp. 189-198 (Blackmun, J., dissenting).
99. 512 F.2d 1043, 1045 (5th Cir. 1975) (dismissing the appellants' argument that the forcible abduction at issue ran counter to the U.N. Charter and the U.S.-Venezuela treaty as well as the Fourth and Fifth Amendments), cert. denied, 423 U.S. 946 (1975).
100. 510 F.2d 62, 66-68 (2d Cir. 1975) (lack of protest over Lujan's abduction by either Argentina or Bolivia cured any violation of international law because only the offended nations had a sovereign right to demand that the USA comply with Article 2(4) of the U.N. Charter and Article 17 of the OAS Charter), cert. denied, 421 U.S. 1001 (1975).
101. 504 U.S. 655, 663-670 (1992) (fact of Humberto Alvarez-Machain's coercive abduction by several Mexicans hired by the United States' DEA

agents did not foreclose his trial in the USA for kidnapping and murdering of an agent on assignment because the U.S.-Mexican extradition treaty did not specifically bar such an abduction). Following the U.S. Supreme Court ruling, the OAS Permanent Council requested an opinion on the Alvarez-Machain case from the Inter-American Juridical Committee of the OAS. The Committee found that the abduction in question contravened Mexico's territorial sovereignty and Alvarez-Machain's individual human rights such as the right of due process, see Legal Opinion on the Decision of the Supreme Court of the United States of America, O.A.S. Res. CJI/Res. II-15/92, Inter-American Juridical Committee, O.A.S. Doc. No. OEA/Ser. G/CP/doc. 2302/92 (1 September 1992), reprinted in 13 *H.R.L.J.* 395, 396 (1992). In December 1992, the U.S. District Court on remand dismissed the Alvarez-Machain case for lack of evidence, and Dr. Alvarez-Machain was released subsequently. In June 1993, the United States and Mexico agreed to negotiate over the prohibition against transborder kidnapping; see Steven A. Homes, "U.S. Gives Mexico Abduction Pledge," *New York Times*, 22 June 1993. After his return to Mexico, Alvarez-Machain instituted a civil action based on, among other instruments, the ATCA, which was fought to the U.S. Supreme Court, see further elaboration in Chapter 2 regarding Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004).

102. 71 F.3d 754, 762-765 (9th Cir. 1995) (U.S.-Honduras extradition treaty did not specify extradition as the only way for the United States to gain custody of a Honduran national for purposes of prosecution in U.S. courts).
103. John B Quigley, "Enforcement of Human Rights in U.S. Courts: The Trial of Persons Kidnapped Abroad," in *World Justice? U.S. Courts and International Human Rights*, Mark Gibney, ed. (Boulder, Colorado: Westview Press, 1991), pp. 63, 68-73, 76n29.
104. 500 F.2d 267 (2d Cir. 1974).
105. The standards invoked were Article 2(4) of the U.N. Charter; Article 17 of the OAS Charter; and the 1960 U.N. Security Council resolution (outlawing Israel's abduction of war criminal Adolf Eichmann from Argentina and its impingement on Argentine sovereignty).
106. United States v. Toscanino, 500 F.2d at pp. 275-278.
107. Quigley, "Enforcement of Human Rights in U.S. Courts," pp. 63-64, 75.
108. 124 S. Ct. 2686 (2004).
109. 124 S. Ct. 2633 (2004).
110. 339 U.S. 763, 777 (1950) (disallowing habeas relief to 21 extraterritorial German respondents because they had no residence or physical presence in the United States from the start of their perpetration of war crimes to the finish of their captures, trials, and imprisonments).
111. Rasul v. Bush, 124 S. Ct. at p. 2693.
112. Ibid., at pp. 2693-2694.
113. Ibid., at p. 2696.
114. Ibid., at pp. 2698-2699.
115. Ibid., at p. 2699.
116. Hamdi v. Rumsfeld, 124 S. Ct. at pp. 2645, 2650-2651.

117. Other members were Chief Justice Rehnquist as well as Justices Kennedy and Breyer, with Justices Souter and Ginsburg as concurrers/dissenters.
118. Pub. L. 107-140, 115 Stat. 224. For further information, see Hamdi v. Rumsfeld, 124 S. Ct. at pp. 2635, 2639-2640.
119. Treaty stipulations used were: Third Geneva Convention, arts. 118, 85, 99, 119, 129; Hague Convention (II) on Laws and Customs of War on Land, 29 July 1899, art. 20, 32 Stat. 1817; Hague Convention (IV) on Laws and Customs of War on Land, 18 October 1907, art. 20, 36 Stat. 2301; and Geneva Convention on Laws and Customs of War on Land, 27 July 1929, art. 75, 47 Stat. 2055. See Hamdi v. Rumsfeld, 124 S. Ct. at p. 2641.
120. Ibid., at p. 2642.
121. Ibid., at p. 2650.
122. Ibid., at p. 2644.
123. Ibid., at pp. 2644, 2647-2650.
124. Ibid., at pp. 2644, 2650.
125. Ibid., at p. 2647.
126. Thomas D. Jones, "Haitian Refugee Center, Inc. v. James Baker, III: The Dred Scott Case of Immigration Law," *Dickinson Journal of International Law* 11(1992): p. 27; Carlos M. Vazquez, "The 'Self-Executing' Character of the Refugee Protocol's Nonrefoulement Obligation," *Georgetown Immigration Law Journal* 7 (1993): pp. 57-58.
127. Helton, "Political Asylum under the 1980 Refugee Act," pp. 248-250; Abigail D. King, "Interdiction: The United States' Continuing Violation of International Law," *Boston University Law Review* 68 (1988): pp. 784-787.
128. For instance, see Judge Carter and the Second Circuit majority in Bertrand; Judge Spellmen in Jean; Judge Richey in Gracey; the Eleventh Circuit majority in Baker; Judge Johnson and Second Circuit Judges Pratt and Newman in McNary; the Eleventh Circuit majority in Christopher.
129. Yuji Iwasawa, "The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis," *Virginia Journal of International Law* 26 (1986): pp. 660-661 & n144; King, "Interdiction," pp. 783-784.
130. Vazquez, "The 'Self-Executing' Character of the Refugee Protocol's Nonrefoulement Obligation," pp. 58-59.
131. Executive Committee Conclusion No. 6 (1977), para. (c), Report of the 28th Session: U.N. Doc. A/AC.96/549, paras. 53.3 & 53.4, extracted from Goodwin-Gill, *The Refugee in International Law*, pp. 121n17, 127, 137, 472.
132. Goodwin-Gill, ibid., pp. 152, 195-202, 248-251, 305-306.
133. Ibid., p. 247.
134. For two such rulings, see H.R.C., Delia Saldias de Loepz v.Uruguay, U.N. Doc. A/36/40 (1981), at p. 176 (refugee confinement based on Uruguayan laws was contrary to Article 9(1) of the ICCPR for lacking judicial process to determine its legality); E.C.H.R., Cyprus v. Turkey, App. Nos. 6780/74, 6950/75, 4 Eur. Comm'n H.R. 482 (1982) (Turkish government's detention policy absent due process against Greek Cypriot refugees violated Article 5(1) of the European Convention). The above are cited in Eve B. Burton and

David B. Goldstein, "Vietnamese Women and Children Refugees in Hong Kong: An Argument against Arbitrary Detention," *Duke Journal of Comparative & International Law* 4 (1993): pp. 81-88. Similar opinions are available in Goodwin-Gill, *The Refugee in International Law*, pp. 250-251, 481, 491, 503 (Executive Committee Conclusion Nos. 22, 44, 72); Amnesty International, *United States of America: Lost in the Labyrinth*, pp. 56-57 (the 1999 UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers).

135. Study of the Right of Everyone to Be Free from Arbitrary Arrest, Detention and Exile, U.N. Doc. E/CN.4/826/Rev.1, at p. 7 (1964), derived from Reed Brody, "Current Development," *American Journal of International Law* 85 (1991): p. 713.
136. See Rasul v. Bush, 124 S. Ct. 2686 (2004); Zadvydas v. Davis, 533 U.S. 678 (2001) (voiding the indefinite detention by the INS of two non-deportable aliens who were unable to find sheltering countries willing to accept them following the completion of their prison terms in the United States); Clark v. Martinez, 2005 U.S. LEXIS 627 (2005) (inadmissible aliens could be jailed only for up to six months and, after that time limitation, the aliens should be released into the USA if they were found undeportable to their native countries).
137. Stewart, "International Human Rights Law and the Haitian Asylum Applicant Detention Cases," pp. 200, 212-213.
138. Helton, "Political Asylum under the 1980 Refugee Act," p. 262.
139. Memorial of the United States (U.S. v. Iran), 1980 ICJ Pleadings (Case concerning United States Diplomatic and Consular Staff in Tehran) at p. 182 (12 January 1980) (citing the UDHR and the ICCPR to assert the right to be free from arbitrary detention), quoted in Johnson, "Quarantining HIV-Infected Haitians," p. 314; American Law Institute, *Restatement (Third)*, § 702, Reporters' Notes 6 and 10, pp. 171, 173-174 (a number of enactments that regard arbitrary detention as one of those prohibited acts that could immediately drive the United States to discontinue the flow of its foreign aid to the perpetrating country).
140. Brody, "Current Development," pp. 709-712.
141. Henkin, "The Constitution and United States Sovereignty," p. 881.
142. Cf., Lobel, "The limits of Constitutional Power," pp. 1075, 1134-1153 (*jus cogens* norms implicitly impose constitutional limitations on the political branches in exercising their foreign policy power); Kemple, "Legal Fictions Mask Human Suffering," pp. 1801-1803 (viewing the prohibition of arbitrary detention as *jus cogens* that preempts the Paquete Habana thesis).
143. American Law Institute, *Restatement (Third)*, § 702 Reporters' Notes 1, pp. 167-168.
144. General Comment, No. 24 (52), § 8.
145. Barbara C. Alexander, "Detention of Asylum-Seekers in the United States," *Human Rights Brief* 7 (2000): p. 21.
146. Cross-reference Chapter 1 n78.

147. Cf., Refugee Protocol, arts. 2, 4, 27 (simple presence); 18, 26, 32 (lawful presence); 15, 17(1), 19, 21, 24, 28 (lawful residence). Also compare the geographic references in Articles 33(2) and 1(F)(b) (within/outside an asylum country) with Article 33(1). Relevant scholarly opinions are accessible in Johnson, "Quarantining HIV-Infected Haitians," p. 316; Goodwin-Gill, *The Refugee in International Law*, p. 142.
148. Amicus Curiae and Brief Amicus Curiae of the United Nations High Commissioner for Refugees in Support of Haitian Refugee Center, Inc., et al. at p. 10, Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987) (No. 85-5258).
149. Haitian Center for Human Rights, Case 10675 (1997).
150. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents at p. 9, Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (No. 92-344) [hereinafter UNHCR Amicus in Sale].
151. 124 S. Ct. at p. 2696.
152. Helton, "The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti," pp. 336-337; Goodwin-Gill, *The Refugee in International Law*, pp. 129, 132.
153. Helton, ibid., pp. 340-341 & n89.
154. Legal Resolution of Situation of Refugees, Repatriated and Displaced Persons in the American Hemisphere, AG/RES. 1103 (XXI-0/91) (7 June 1991), mentioned by UNHCR Amicus in Sale at p. 12.
155. See § 701 Comment e, p. 153.
156. Murray. v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Hoffman-LaRoche Ltd. v. Empagran S.A., 124 S. Ct. 2359 (2004) (reaffirming the continued validity of the Charming Betsy doctrine).
157. Haitian Refugee Center v. Gracey, 809 F.2d at pp. 830- 833 (Edwards, J., dissenting); Haitian Refugee Center v. Baker, 789 F.Supp. at pp. 1563-1564.
158. Steven M. Kahaner, "Separation of Powers and the Standing Doctrine: The Unwarranted Use of Judicial Restraint," *George Washington Law Review* 56 (1988): pp. 1075-1076.
159. Vazquez, "The 'Self-Executing" Character of the Refugee Protocol's Nonrefoulement Obligation," p. 64.
160. The plenary power thesis was built on a series of U.S. Supreme Court holdings; see Chae Chan Ping v. United States (the Chinese Exclusion Case), 130 U.S. 581, 603-611 (1889); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); Fong Yue Ting v. United States, 149 U.S. 698, 707-711, 713 (1893); Kauff v. Shaughnessy, 338 U.S. 537, 542-543 (1950); Shaughnessy v. Mezei, 345 U.S. 206, 214-215 (1953). See also Kemple, "Legal Fictions Mask Human Suffering," p. 1754; Reiss, "The International Covenant on Civil and Political Rights," pp. 618-624.

Conclusion

1. In actuality, the echoing from the international abolitionist movement began with Furman v. Georgia, 408 U.S. 238 (1972), which was also argued and

supported by amici partly on human rights grounds, as was Gregg v. Georgia, 428 U.S. 153 (1976) (information provided by Mark Warren).

2. According to Mark Warren, there were other attempts before Domingues—it was merely the first case that a state supreme court accepted for review on this specific ICCPR basis. For example, Christopher Thomas raised this Covenant claim in 1993, but the Virginia Supreme Court simply ignored it.
3. Human rights activists also raised an ICCPR-based claim in the 1995 return case of Christopher.
4. The legal team in Faulder posed the consular rights issue in 1992. It took until 1996 for the case to reach the Fifth Circuit, but Canada's first amicus brief was submitted in 1993 (information offered by Mark Warren).
5. The number of the cases examined in this book only represents the segment of consular claims litigated in U.S. courts that resulted in pertinent appellate opinions.
6. De la Vega and Fiore, "Sixteenth Annual International Law Symposium 'Rights of Children in the New Millennium'," pp. 220-221; Paust, "Customary International Law and Human Rights Treaties Are Law of the United States," pp. 326-327.
7. Quigley, "Human Rights Defenses in U.S. Courts," p. 591.
8. Christenson, "Using Human Rights Law to Inform Due Process and Equal Protection Analyses," pp. 3-37; Richard B. Lillich, "The Role of Domestic Courts in Enforcing International Human Rights," in *Guide to International Human Rights Practice*, Hurst Hannum ed. (Philadelphia: University of Pennsylvania Press, 1992), pp. 228-246; Tolley, "Interest Group Litigation to Enforce Human Rights," p. 637.
9. Death Penalty Information Center, "Foreign Nationals: Current Issues and News," available at <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579> (visited 11 August 2004).
10. Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004) (certiorari granted 10 December 2004).
11. The contributions of legal counsel and many amici to instituting the Rasul case in the U.S. courts were important as well. The defense team for the Guantanamo detainees included: Joseph Margulies from Margulies & Richman, P.L.C., Minneapolis, Minnesota; the CCR (Barbara J. Olshansky, Steven Macpherson Watt, and Michael Ratner); MacArthur Justice Center, University of Chicago Law School; John J. Gibbons and Gitanjali S. Gutierrez from Gibbons, Del Deo, Dolan Griffinger & Vecchione, P.C. from Newark, New Jersey. Amicus supporters, for example, comprised 175 British parliamentarians; former U.S. government lawyers, officials, and federal judges; former U.S. diplomats; the Commonwealth Lawyers Association; the International Commission of Jurists from Geneva, Switzerland and its American section; and the Human Rights Institute of the International Bar Association, London.

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APPENDIX 1:

Human Rights Activists Asserting International Law in Death Penalty and Refugee Cases

Human Rights Activists Asserting International Law in Death Penalty and Refugee Cases

Case	Attorney	Amicus
Juvenile Cases/Activists		
Roach (decision entered in 1986)	J. Michael Farrell, O. Grady Query, and John H. Blume, III	
Thompson (1988)	Harry F. Tepker, Jr. and Victor L. Streib (public defender)	The International Human Rights Law Group (Larry Garber; and Robert H. Kapp) (Professor Dinah Shelton, U. of Santa Clara Law School)
		Amnesty International (Nigel S. Rodley from AI—UK) (Jessica Neuwirth; John E. Osborn; and Ian Crawford) (Paul L. Hoffman, Joan W. Howarth, Joan F. Hartman, Mary E. McClymont, and David Weissbrodt from AIUSA Legal Support Network)
		Defense for Children International-USA (Anna Mamalakis Pappas)
Stanford (1989)	Frank W. Heft, Jr., J. David Niehaus, and Daniel T. Goyette (public) (argued for Kevin Stanford) Nancy A. McKerrow (public) (argued for Heath Wilkins)	The International Human Rights Law Group (Larry Garber; and Robert H. Kapp) (Thomas S. Williamson, Jr. and Mary E. O'Connell from Covington & Burling)
		Amnesty International (Nigel S. Rodley from AI—UK) (Jane G. Rocamora; John E. Osborn; and Ian Crawford) (Paul L. Hoffman, Joan Fitzpatrick, Joan W. Howarth, Mary E. McClymont, and David Weissbrodt from AIUSA Legal Support Network)

Case	Attorney	Amicus
		Defense for Children International-USA (Anna Mamalakis Pappas)
Domingues (1998)	Morgan D. Harris, Robert L. Miller, and Phillip J. Kohn (public)	Human Rights Advocates; and Minnesota Advocates for Human Rights (joined during cert.) (Jennifer Fiore and Professor Constance de la Vega, U. of San Francisco Law School)
Beasley/Beazley (1999/2001)	David L. Botsford and Walter C. Long from Sheinfeld, Maley & Kay, Austin, Texas	Human Rights Committee of the Bar of England and Wales (at the Eastern District Court of Texas) (Clive A. Stafford Smith from Louisiana Crisis Assistance Center, New Orleans, Louisiana)
		Human Rights Advocates; Human Rights Watch; Minnesota Advocates for Human Rights; and The Human Rights Committee of the Bar of England and Wales (joined cert.) (Professor Constance de la Vega)
Ex parte Pressley (1/28/2000)	John C. Robbins and Dennis Jacobs from Birmingham, Alabama	
Ex parte Burgess (7/21/2000)	Bryan A. Stevenson and J. Drew Colfax, Equal Justice Initiative of Alabama, Montgomery	
Wynn (10/6/2000)	Valerie Lynn Palmedo Goudie and Fred Lawton, III from Anniston, Alabama	
Ex parte Carroll (4/20/2001)	Joe W. Morgan, Jr., Birmingham	
Servin (10/17/2001)	Michael R. Specchio and Cheryl D. Bond from Washoe county, Nevada (public defender)	

continued

Appendix 1, continued

Case	Attorney	Amicus
Hain (2/20/2002)	Steven Michael Presson and Robert W. Jackson from Jackson & Presson, P.C., Norman, Oklahoma	Oklahoma Conference of Churches (Rex D. Friend, Law Office of Parr and Friend, Oklahoma City)
Patterson (8/28/2002)	J Gary Hart from Austin, Texas	
In re Kevin Nigel Stanford (10/21/2002)	Margaret O'Donnell from Frankfort, Kentucky	Human Rights Advocates et al. (Prof. Constance de la Vega)
Villarreal (8/26/2003)		International Criminal Justice Law Clinic et al. (Thomas H. Speedy Rice from Gonzaga University School of Law)
Simmons/Roper (8/26/2003)	Patrick J. Berrigan from Watson & Dameron L.L.P., Kansas City, Missouri Jennifer L. Brewer from St. Louis, Missouri	The Human Rights Committee of the Bar of England and Wales; Human Rights Advocates; Human Rights Watch; and The World Organization for Human Rights USA (joined cert.) (Professor Constance de la Vega; Michael Bochenek from Human Rights Watch, New York; Audrey J. Anderson and William H. Johnson from Hogan & Hartson L.L.P., Washington, D.C.; Thomas H. Speedy Rice from University of Central England School of Law, Birmingham, Great Britain; Philip Sapsford, Queen's Counsel from Goldsmith Chambers, London, Great Britain; and Hugh Southey, London, Great Britain)
		The European Union and Members of the International Community (i.e., 45 members of the Council of Europe, Canada, Mexico, and New Zealand) (joined cert.) (Professor Richard J. Wilson from American University of Washington College of Law)

Case	Attorney	Amicus
		Former U.S. Diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G. Wisner (joined cert.) (Donald F. Donovan from Debevoise & Plimpton L.L.P., New York, New York) (Stephen B. Bright from Southern Center for Human Rights, Atlanta, Georgia) (Professors Harold H. Koh, James J. Silk, and Mary J. Hahn from Allard K. Lowenstein International Human Rights Clinic, Yale Law School, New Haven, Connecticut)
		President James E. Carter, Jr., President Frederik Willem De Klerk, President Mikhail Sergeyevich Gorbachev, President Oscar Arias Sanchez, President Lech Walesa, Shirin Ebadi, Adolfo Perez Esquivel, The Dalai Lama, Mairead Corrigan Maguire, Dr. Joseph Rotblat, Archbishop Desmond Tutu, Betty Williams, Jody Williams, American Friends Service Committee, Amnesty International, International Physicians for the Prevention of Nuclear War, and the Pugwash Conferences on Science and World Affairs (Nobel Peace Prize Laureates) (joined cert.) (Thomas F. Geraghty, Director, Bluhm Legal Clinic, Northwestern University School of Law, Chicago, Illinois)
Williams (10/20/2003)	Walter C. Long and Mark Olive from Austin, Texas	Human Rights Advocates, et al. (Constance de la Vega)
		World Organization against Torture, et al. (William H. Johnson, Hogan & Hartson, LLP)

continued

Appendix 1, continued

Case	Attorney	Amicus
		Nobel Peace Prize Laureates (Clive Stafford Smith, New Orleans)
Dycus (4/15/2004)	Raymond Wong and Robert McDuff	
Consular Cases/Activists		
Faulder (1996)	Sandra L. Babcock (public)	Canada (Marjorie A. Meyers) (at the Fifth Circuit) Canada (Margaret K. Pfeiffer) (at the Supreme Court)
Murphy (1996/1997)	Robert F. Brooks and William H. Wright, Jr. from Hunton & Williams Michele J. Brace (public)	Professor John Charles Boger from Chapel Hill, North Caroline Professor John B. Quigley, U. of Ohio State Law School S. Adele Shank from Columbus, Ohio
Loza (1996/1997)	David H. Bodiker, Stephen A. Ferrell, and Laurence E. Komp (public)	Professor John B. Quigley, U. of Ohio State Law School S. Adele Shank from Columbus, Ohio Robert S. Frost from Lakewood, Ohio
Mexico (1997)	John P. Frank, Jose A. Cardenas, Todd E. Hale, Barry Willits, and Rebecca L. Story from Lewis & Roca	
Breard (1996/1998)	Alexander H. Slaughter, William G. Broaddus, Dorothy C. Young, F. Brawner Greer, A. Eric Kauders, Jr., and Jill M. Misage from McGuire, Woods, Battle & Boothe Michele J. Brace (public) (joined at the Fourth Circuit)	The Human Rights Committee of the American Branch of the International Law Association (Jeffrey L. Bleich) (joined at the Fourth Circuit)

Case	Attorney	Amicus
Paraguay (1996/1998)	Loren Kieve and Jonathan Tuttle from Debevoise & Plimpton, Washington, D.C. Donald F. Donovan, Barton Legum, Michael M. Ostrove, and Alexander A. Yanos from Debevoise & Plimpton, New York Professors Rodney A. Smolla and Linda A. Malone from College of William and Mary Professor Leslie M. Kelleher from U. of Richmond Law School	A Group of Professors (joined at the Fourth Circuit) (David J. Bederman; Frederick M. Abbott; Richard B. Bilder; David D. Caron; Anthony D'Amato; Lori F. Damrosch; William Dodge; Martha A. Field; Joan M. Fitzpatrick; Egon Guttman; Louis Henkin; Harold H. Koh; Burt Lockwood; Stefan Riesenfeld; Oscar Schachter; Herman Schwartz; Anne-Marie Slaughter; Ralph Steinhardt; and David Weissbrodt)
		Union Internationale Des Avocats from Belgium (joined at the Fourth Circuit) (John Cary Sims from Sacramento, California) (Steven A. Hammond from Hughes Hubbard & Reed, New York)
		The Human Rights Committee of the American Branch of the International Law Association; and the Lawyers Committee for Human Rights (joined at the Supreme Court) (Paul L. Hoffman from Bostwick & Hoffman, Santa Monica, California) (Professor William J. Aceves, California Western School of Law)
		Argentina, Brazil, Ecuador, and Mexico (joined at the Supreme Court) (Joseph D. Lee and Asim Bhansali from Munger Tolles & Olson, Los Angeles, California)

continued

Appendix 1, continued

Case	Attorney	Amicus
		International Law Professors (joined at the Supreme Court) (George A. Bermann; David D. Caron; Abram Chayes; Lori F. Damrosch; Richard N. Gardner; Louis Henkin; Harold H. Koh; Andreas F. Lowenfeld; W. Michael Reisman; Oscar Schachter; Anne-Marie Slaughter; and Edith B. Weiss)
LaGrand v. Stewart (1/16/1998)	Carla G. Ryan (for Karl H. LaGrand) Bruce A. Burke (for Walter LaGrand)	
Al-Mosawi (3/11/1998)	Bryan Lester Dupler and Hossein Reza Parvizian, Capital Post Conviction Division, Oklahoma Indigent Defense System, Norman, Oklahoma	
Villafuerte (4/20/1998)	Daniel D. Maynard, Douglas C. Erickson, and Jennifer A. Sparks from Maynard, Murray, Cronin & O'Sullivan, Phoenix, Arizona	
Kasi (11/6/1998)		
Federal Republic of Germany (3/3/1999)	Peter Heidenberger of Berliner, Corcoran & Rowe (as counsel of record); Donald F. Donovan of Debevoise & Plimpton (on the motion)	
Ibarra (10/20/1999)	Walter M. Reaves, Jr. from West, Texas	
Barrow (2/3/2000)	Anthony A. Figliola, Jr. and Sheryl Rush-Milstead from Wilmington, Delaware (for Hector S. Barrow) Thomas A. Foley and Jerome M. Capone from Wilmington, Delaware (for Jermaine Barnett)	
Rocha (4/12/2000)	Randy McDonald from Houston, Texas	
Flores (4/20/2000)	Allen R. Ellis from Mill Valley, California Elizabeth A. Cohen from Austin, Texas	Mexico (Sandra L. Babcock)

Case	Attorney	Amicus
Reyes-Camarena (5/16/2000)	David E. Groom and Stephen J. Williams from Salem, Oregon (public defender)	
People v. Madej/Poland (8/10/2000)	Douglass W. Cassel, Jr., from the Center for International Human Rights, Northwestern University, Chicago, Illinois (for the Counsel General for the Republic of Poland) Charles F. Smith, Jr. and Amarjeet S. Bhachu from Skadden, Arps, Slate, Meagher & Flom, Chicago, Illinois (for Gregory Madej) Stephen E. Eberhardt from Tinley Park, Illinois (for Gregory Madej) (At the Supreme Court of Illinois)	Mexico (Professor John B. Quigley, Ohio State U. Law School) (At the Supreme Court of Illinois)
		Germany (Walter A. Hess from Chicago, Illinois) (At the Supreme Court of Illinois)
		Human Rights Committee of the Bar of England and Wales (Ali Nassem Bajwa from Temple, London) (At the Supreme Court of Illinois)

continued

Appendix 1, continued

Case	Attorney	Amicus
Madej v. Schomig (9/24/2002-2004)	Christina M. Tchen and Amarjeet Singh Bhachu from Skadden, Arps, Slate, Meagher & Flom, Chicago, Illinois James F. Martin from Cohn & Baughman, Chicago, Illinois Stephen E. Eberhardt, Attorney at Law, Crestwood, Illinois Sanjay K. Chhablani, Southern Center for Human Rights, Atlanta, Georgia (At the federal district court)	
Torres v. Gibson/Torres v. Mullin (8/23/2000-2003)	Mark Henricksen and Lanita Henricksen from Henricksen & Henricksen Lawyers, Inc., El Reno, Oklahoma	Mexico (Sandra L. Babcock)
Chanthadara (11/1/2000)	Vicki Mandell-King, and Michael G. Katz from Denver, Colorado (federal public defender) Gary Peterson from Oklahoma City, Oklahoma	
Issa (8/29/2001-2002)	A. Norman Aubin and Herbert E. Freeman From Faulkner & Tepe	National Association of Criminal Defense Lawyers (Thomas H. Speedy Rice)
Valdez (5/1/2002)	Robert A. Nance and F. Andrew Fugitt from Oklahoma City Margaret K. Pfeiffer and LeeAnn Anderson-Mccall from Sullivan & Cromwell, Washington, D.C.	Mexico (Sandra L. Babcock; and Susan Otto)
Bell (6/7/2002)	Marie Donnelly and Mark B. Williams from the Virginia Capital Representation Resource Center	

Case	Attorney	Amicus
Ortiz (11/5/2002)	Cenobio Lozano, Jr. from Harrisonville, Missouri Frederick A. Duchardt, Jr. from Kearney, Missouri; and Jennifer Brewer from St. Louis, Missouri Thomas M. Bradshaw from Armstrong & Teasdale, Kansas City, Missouri	Colombia (William T. Barker, Sonnenschein & Nath, Chicago, Illinois; Jerome Thomas Wolf, and James M. Kirkland, Sonnenschein & Nath, Kansas City, Missouri)
Prasertphong (9/2/2003)	Susan A. Kettlewell, Rebecca A. McLean, and Lori J. Lefferts, from Tucson, Arizona (pubic defender)	
Medellin (5/20/2004)	Gary Allen Taylor, Austin, Texas Michael B. Charlton, Law Office of Michael B. Charlton, Alvin, Texas	
Medellin (08/18/2004 –) (U.S. Supreme Court review)	Donald F. Donovan, Debevoise & Plimpton, New York Gary Allen Taylor Michael B. Charlton	Mexico (Sandra L. Babcock)
		American citizens and organizations abroad (10 amici) (Joseph Margulies, MacArthur Justice Center, University of Chicago)
		International law experts and former diplomats (10 amici) (Lori Fisler Damrosch, New York, NY)
		Human Rights Groups and Bar Associations (10 amici) (Kevin R. Sullivan, King & Spalding LLP, Washington, D.C.)
		Foreign Sovereigns (13 Latin American nations) (Asim Bhansali, Keker and Van Nest LLP, San Francisco, California)

continued

Appendix 1, continued

Case	Attorney	Amicus
		The European Union and Members of the International Community (45 amici) (S. Adele Shank and John B. Quigley, Columbus, Ohio)
		NAFSA: Association of International Educators and U.S. Catholic Mission Association et al. (30 amici) (Stephen F. Hanlon, Holland & Knight LLP, Washington, D.C.)
		Brief of Former U.S. Diplomats (Madeleine Albright et al.) (Harold H. Koh, Yale Law School, New Haven, Connecticut)
		American Bar Association (Robert J. Grey Jr., Chicago, Illinois)
Plata (8/16/2004)	Kathryn M. Kase, Texas Defender Service, Houston, Texas Philip Harlan Hilder, Hilder & Associates, Houston, Texas	Mexico (Andrew A. Hammel, Law Office of Adrienne Urrutia, San Antonio, Texas)
Detention Cases/Activists		
Rodriguez-Fernandez (1980/1981)	Henri J. Watson and Dennis D. Goodden from Kansas city, Missouri Timothy J. Carmody from Olathe, Kansas	Kansas Legal Services, Inc. (William E. Metcalf and Roger L. McCollister from the above company)
		The International Human Rights Law Group (joined at the Tenth Circuit) (Steven M. Schneebaum, Harry A. Inman, and Amy Young-Anawaty from Patton, Boggs & Blow, Washington, D.C.)

Case	Attorney	Amicus
		The Lawyers Committee for International Human Rights; and the U.S. Helsinki Watch Committee (joined at the Tenth Circuit) (Jerome J. Shestack from Philadelphia, Pennsylvania) (Merrie F. Witkin; and Christopher K. Hall from New York, New York)
Soroa-Gonzales (1981)	Deborah Ebel and Barbara Twine from Atlanta Legal Aid Society, Atlanta, Georgia	
Bertrand (3/5/1982-6/25/1982)	Harriet Rabb and Susan D. Susman from Immigration Law Clinic (for Laissez-Moi Vigile) Steven Shapiro from New York Civil Liberties Union (for Laissez-Moi Vigile et al.) Stanley Mailman and Arthur C. Helton from Mailman & Ruthizer, New York City (for Joseph Bertrand and Pierre Baptiste)	
Jean (6/18/1982-1984)	Ira J. Kurzban and Christopher K. Hall from Kurzban, Kurzban & Weinger, Miami, Florida Bruce J. Winick from ACLU Foundation of Florida, Coral Gables, Florida Michael J. Rosen from ACLU Foundation of Florida, Miami, Florida Professor Irwin P. Stotzky from U. of Miami Law School, Coral Gables, Florida Mary B. Gilmore, Terrence A. Corrigan, Marla Simpson, and Robert E. Juceam from New York City	The Lawyers Committee for International Human Rights; Immigration Law Clinic of Columbia University School of Law; Anti-Defamation League of B'Nai B'Rith; and American Jewish Congress (Arthur C. Helton; Harriet Rabb; Lucas Guttentag; Jeffery P. Sinensky; Ruti G. Teitel; Phil Baum; Lois C. Waldman; Glenn S. Kolleeny; and Scott Horton)

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Appendix 1, continued

Case	Attorney	Amicus
		Amnesty International USA (joined at the Supreme Court) (Joan Hartman, Paul Hoffman, Deborah Perluss, and Ralph Steinhardt from AIUSA Legal Support Network, Los Angles, California)
		The Procedural Aspects of International Law Institute (Hurst Hannum; and Richard B. Lillich) The International Human Rights Law Group (David Carliner; and Amy Young) The International League for Human Rights (Jerome J. Shestack) The Center for Constitutional Rights (Sara Wunsch; and Frank E. Deal) (joined at the Supreme Court)
Fernandez-Roque (1983)	Dale M. Schwartz, Myron N. Kramer, Deborah S. Ebel, Kenneth Hindman, and David A. Webster from Atlanta, Georgia	The Lawyers Committee for International Human Rights
Garcia-Mir (1985/1986)	William Thompson from Atlanta Legal Aid Professors Deborah Ebel and David A. Webster from Emory University School of Law, Atlanta, Georgia	The Lawyers Committee for Human Rights (Arthur C. Helton)
Barrios (1990)		
Alvarez-Mendez (1990/1991)	Francis Logan and Charles D. Weisselberg from U. of Southern California Law Center, Los Angeles, California	

Case	Attorney	Amicus
Gisbert (1991/1993)	Leo J. Lahey from Lafayette, Los Angeles Gary Leshaw from Atlanta Legal Aid Society, Atlanta, Georgia Karen M. Frederiksen and Mark D. Kemple from Gibson, Dunn & Crutcher, Los Angeles, California David A. Webster from Atlanta, Georgia	
Barrera-Echavarria (1995)	Mark D. Kemple and Karen M. Fredericksen from Gibson, Dunn & Crutcher, Los Angeles, California	
Return Cases/Activists		
Gracey (1985/1987)	Charles Gordon from Gordon & Bryant, Washington, D.C. The Lawyers Committee for Human Rights (Marvin E. Frankel; Arthur C. Helton; and Jo. R. Backer) Ira J. Kurzban from Kurzban, Kurzban & Weinger, Miami, Florida	Amnesty International USA (joined at the D.C. Circuit) (William A. Bradford, Jr.; and David W. Burgett)
		International Human Rights Law Group (joined at the D.C. Circuit) (Robert B. Owen; and Carlos M. Vazquez)
		United Nations High Commissioner for Refugees (joined at the D.C. Circuit) (Professor Ralph G. Steinhardt from U. of George Washington, Washington, D.C.)

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Appendix 1, continued

Case	Attorney	Amicus
Baker (1991)	Ira Kurzban from Kurzban, Kurzban & Weinger, Miami, Florida Robert E. Juceam from Fried, Frank, Harris, Shriver & Jacobson, New York, New York	
McNary/Sale (1992/1993)	Harold H. Koh from Allard K. Lowenstein International Human Rights Law Clinic, Yale Law School, New Haven, Connecticut A group of Yale and Berkeley Law Students (joined at the Second Circuit) The Center for Constitutional Rights (Michael Ratner) Joseph F. Tringali, Jennifer Klein, and Cyrus R. Vance from Simpson Thacher & Bartlett, New York, New York American Civil Liberties Union, New York (Lucas Guttentag; and Judy Rabinowitz) Lawyers Committee for Urban Affairs (Robert Rubin; and Ignatius Bau)	Human Rights Watch (joined at the Second Circuit & the Supreme Court) (Kenneth Roth) Other activists joined at the Supreme Court in the name of Human Rights Watch: (Karen Musalo and Brett R. Parker from Refugee/Human Rights Clinic, University of San Francisco Law School) (Stephen L. Kass and Eve C. Gartner from Berle, Kass & Case, New York, New York) (Richard A. Boswell from U. of California, Hastings College of the Law, San Francisco, California)
		Amnesty International; and Amnesty International USA (joined at the Second Circuit & the Supreme Court) (Paul L. Hoffman from Los Angeles, California) (Professor Bartram S. Brown from Chicago-Kent Law School)

Case	Attorney	Amicus
		Haitian Service Organizations, Immigration Groups, and Refugee Advocates[a] (joined at the Second Circuit & the Supreme Court) (Nicholas deB. Katzenbach from Riker, Danzig, Scherer, Hyland & Perretti, Morristown, NJ) (Terry Helbush from National Immigration Project of the National Lawyers Guild, Inc. Boston, Massachusetts) (Paige O. Haines from Human Rights Program Carter Presidential Center, Atlanta, Georgia)
		The Lawyers Committee for Human Rights (joined at the Second Circuit & the Supreme Court) (Arthur C. Helton, New York, New York) (O. Thomas Johnson, Jr. and Andrew I. Schoenholtz from Covington & Burling, Washington, D.C.) (Professor Carlos M. Vazquez from Georgetown University Law Center, Washington, D.C.)
		Office of the United Nations High Commissioner for Refugees (joined at the Second Circuit & the Supreme Court) (Julian Fleet from UNHCR, Washington, D.C.) (Guy S. Goodwin-Gill) (Joseph R. Guerra) (Professor Ralph G. Steinhardt)
		U.S. Committee for Refugees (joined at the Second Circuit) (Professor Mark Gibney, Department of Political Science, Purdue University, West Lafayette, Indiana)

continued

Appendix 1, continued

Case	Attorney	Amicus
		The Association of the Bar of the City of New York (joined at the Supreme Court) (Michael Lesch; John D. Feerick; Sidney S. Rosdeitcher; Stephen Lew; and Robert P. Lewis)
		The International Human Rights Law Group (joined at the Supreme Court) (Susan P. Crawford, William T. Lake, Carol F. Leek, W. Hardy Callcott, and Katarina Mathernova from Wilmer, Cutler & Pickering, Washington, D.C.) (Steven M. Schneebaum) (Janelle M. Diller)
		Members of Congress: Senator Edward M. Kennedy and former Representative Elizabeth Holtzman (joined cert.) Joshau R. Floum, Nicholas W. Van Aelstyn, and Timothy R. Cahn from Heller, Ehrman, White & McAuliffe, San Francisco, California) (Professor Deborah E. Anker from Harvard Immigration Clinic, Cambridge, Massachusetts)
		Nicholas Deb. Katzenbach; Benjamin R. Civiletti; and Griffin Bell, Former Attorneys General of the United States of America (joined cert.) (Michael W. McConnell, Toquyen T. Truong, Carlos T. Angulo, and Gary A. Winters from Mayer, Brown & Platt, Washington, D.C.)

Case	Attorney	Amicus
		American Jewish Committee and Anti-Defamation League (joined at the Supreme Court) (Ruth Lansner and Steven M. Freeman from Anti-Defamation League, New York, New York) (Professor David Martin, U. of Virginia School of Law, Charlottesville, Virginia)
Christopher (1995)	Elliot H. Scherker, Roberto Martinez, and Oscar Levin from Greenberg, Traurig et al., Miami, Florida Marcos D. Jiminez and Carlos B. Castillo from White & Case, Miami, Florida Robert L. Boyer from Miami, Florida. Leopoldo Ochoa, Coral Gables, Florida Jose Garcia-Pedrosa and Martias Dorta from Tew & Garcia Pedrosa, Miami, Florida Manuel Kadre from Murai, Wald, Biodo & Moreno, Miami, Florida Harold H. Koh from Allard K. Lowenstein International Human Rights Law Clinic, Yale Law School, New Haven, Connecticut	

[a] They included the American Baptist Churches; the American Council for Nationalities Service; Casa de Proyecto Libertad; Catholic Community Services; the Center for Immigrants Rights; the Child Welfare League of America; Florida Rural Legal Services, Inc.; Global Exchange; the Haitian Refugee Center; the International Ladies Garment Workers Union; the International Rescue Committee; the International Institute of Boston; the Lawyers' Committee for Civil Rights under Law of Texas/Immigrant & Refugee Rights Project; the Lutheran Immigration and Refugee Service; the Midwest Immigrant Rights Center; the National Conference of Black Lawyers; the National Emergency Civil Liberties Committee; National Immigration Project of the National Lawyers Guild/Haiti Asylum Committee; Northwest Immigrant Rights Project; People for the American Way; The Refugee Assistance Council; Refugees, Immigration and International Ministries Commission of Ecumenical Ministries of Oregon; Travelers & Immigrants Aid; the Union of Councils for Soviet Jews; and the U.S. Committee for Refugees.

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