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# The Transformative Influence of International Law and Practice on the Death Penalty in the United States

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## Chapter 6

# The Transformative Influence of International Law and Practice on the Death Penalty in the United States

*Richard J. Wilson*

In the past decade, international law, policy and practice have had a profound if not transformative role in shifting global law and practice on capital punishment dramatically in the direction of abolition. No other body of law and policy arguably has had so profound an influence in narrowing and eliminating the death penalty worldwide, but especially in the United States. These developments are most evident from what has happened *outside* of the United States. International law's *internal* influence in the United States is, for many reasons relating to U.S. exceptionalism, resisted but no less important. Professor Roger Hood, one of the most recognized authorities on the death penalty, calls this global phenomenon a "new dynamic," one firmly grounded in principles of international human rights:

[F]oremost among the factors that have promoted this new wave of abolition has been the political movement to transform consideration of capital punishment from an issue to be decided solely or mainly as an aspect of national criminal justice policy to one with the status of a fundamental violation of human rights: not only the right to life but the right to be free from excessive, repressive, and tortuous punishments—including the risk that an innocent or undeserving person may be executed (Hood and Hoyle 2009:17).

Much of the momentum for this change comes from international organizations or tribunals. The United Nations' constellation of bodies, the European political and judicial bodies, and the Inter-American and African systems of human rights have all called for an end to the death penalty through a global moratorium on executions followed by eventual abolition. All have criticized the United States for its retention of the death penalty or practices in its administration. Another noted authority, William Schabas, notes that "abolition of the death penalty has become a central theme in the standard-setting and monitoring by ... key international organizations" (Schabas 2004–2005:419).

The views of the international community have begun to penetrate into domestic U.S. institutions as well. In its 2005 decision in *Roper v. Simmons*, for example, the United States Supreme Court struck down the death penalty for all juveniles under 18 years old at the time of their offenses. The Court first took cognizance of world practice. It noted

that “only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. [citation omitted] In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty” (*Roper* 2005:577). More important, however, was the majority’s acknowledgment of the role of international law in its interpretation of the Eighth Amendment to the U.S. Constitution’s “evolving standards of decency that mark the progress of a maturing society,” a standard developed in the Court’s interpretation of that amendment. That evolution includes not just U.S. practice but that of the rest of the world as well. “It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty,” the majority reasoned, “resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions” (*Roper* 2005:578). Although not explicitly mentioned in the Court’s judgment in this and earlier cases on the death penalty, a powerful and persuasive friend-of-court brief was submitted by former U.S. diplomats who argued that the death penalty in the United States impairs U.S. foreign policy interests and strains relationships with our allies (Koh 2002:1119–1120; Warren 2004–2005:316).

The trend in the use and influence of international law on the death penalty has also penetrated deeply into academic literature. Until about a decade ago, the only text dealing with international law and the death penalty was William Schabas’ classic work on the topic (Schabas 2002). Now, in addition to the many new sources cited in this chapter, there is another edited volume devoted exclusively to international law and the death penalty, (York 2008), as well as chapters on international law in the two standard law student texts on capital punishment, among others (Coyné & Entzeroth 2012; Rivkind & Shatz 2009). This chapter will closely review these remarkable external and internal influences of international law in the U.S. debate over the capital punishment experiment. It begins with a short review of the treatment of international law as a source for decision-making in capital cases in the U.S. Supreme Court, followed by a survey of trends in the use of the death penalty worldwide. It will then review the actions of the United Nations and other international bodies in regard to the death penalty generally, as well as in regard to U.S. interactions and engagement with those bodies.

No region of the world has been more vocal and persistent in its opposition to U.S. death penalty practice than Europe, which has itself become a death penalty-free zone. The chapter will examine the actions taken by European legislative and judicial bodies against U.S. practice of the death penalty, as well as those of the other regional treaty bodies, with particular attention to the Inter-American human rights system, in which the U.S. reluctantly participates. It then will examine U.S. interactions with its treaty partners in the area of extradition, where death penalty policy is acted out in the exchanges of prisoners, both accused and convicted, between countries. Finally, the chapter will conclude with an analysis of the impacts on the capital sentencing of foreign nationals in the U.S. courts, particularly as a result of the U.S. executive branch and courts’ efforts at compliance with the judgment of the International Court of Justice in the *Avena* case, involving 51 Mexican nationals on death row in the U.S. (*Avena* 2004).

## An Historical Perspective on International Law in Capital Cases in the United States Supreme Court

In its reliance on international perspectives in *Roper v. Simmons*, the Supreme Court majority hearkened back to principles that are part of the founding roots of America, when international law and practice were essential to our understanding and application of domestic law. The Declaration of Independence itself starts with familiar language, but what follows is not as familiar to many:

When in the Course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation.

Professor Harold Koh notes that in 1776, the fledgling United States had no law of its own, and the Framers of the Constitution looked to what was then called the Law of Nations, or international law, which was necessarily applied in the courts of the American colonies. The newly independent United States had no choice but to display a “decent respect” for the opinions of mankind (Koh 2002:1087). In fact, Professor Koh notes a deep and long pattern of reliance by our Supreme Court on international law in all areas, not just in the interpretation of the Eighth Amendment in its limitations to the death penalty (Koh 2002:1091–1096).

The U.S. Constitution, too, recognizes the legitimate authority of international law. Article VI, clause 2, the so-called supremacy clause, states: “This Constitution, and all the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land*; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding” (emphasis added). Treaties, the most formal expression of international law, thus are given a central role in the governance of the nation by the Constitution itself. The last part of the clause is of particular importance because most death sentences are handed down in the states, and the federal constitution gives clear supremacy to treaties over state law, at least on the face of the document. Supreme Court interpretation of that text is another matter.

Up to and through the 1970s and 1980s, the Court referred to international norms in death penalty cases interpreting the scope of the Eighth Amendment. In the 1977 *Coker v. Georgia* decision, for example, the Court found that international practice regarding the death penalty for rape was relevant to the Eighth Amendment's interpretation through “evolving standards” of “dignity, civilized standards, humanity and decency” (*Coker* 1977:596, n.10). In 1982, in *Enmund v. Florida*, the justices made reference to comparative international practice in interpreting the doctrine of felony murder (*Enmund* 1982:797, n. 22). In *Ford v. Wainwright*, the Court again invoked the practice of “civilized societies” in the capital punishment context (*Ford* 1986:409). And in 1988, a majority in *Thompson v. Oklahoma* found that international practice was relevant in determining that the death penalty was unconstitutional as applied to a fifteen-year-old child (*Thompson* 1988:830).

In 1989, however, a narrow five-to-four majority broke with the deep national tradition of the inclusion of international norms and practice in constitutional analysis, at least as

to the Eighth Amendment. In *Stanford v. Kentucky*, the Court ruled that the Eighth Amendment did not prohibit the execution of juveniles who commit their crimes at age sixteen or older, whatever international opinion may be. Justice Scalia's opinion for the Court asserted, in a footnote, that juvenile sentencing practices in other countries are irrelevant because "it is *American* conceptions of decency that are dispositive" (*Stanford v. Kentucky* 1989:369, n.1). That view, however, held sway for only thirteen years in our constitutional history before swinging back to full acknowledgement of the value of international law in *Atkins v. Virginia*, the Supreme Court's 2002 decision barring the execution of mentally retarded persons (*Atkins* 2002). Moreover, Professor Koh points out that Justice Scalia's view on international law's relevance to the determination of evolving standards of humanity is inconsistent not only with long historical tradition but with the justice's own views in non-capital cases. In the anti-trust context, for example, Justice Scalia argues that U.S. law should not be interpreted inconsistently with international norms (Koh 2002:1085).

As an acknowledged superpower in the post-Cold War world, the U.S. government struggles with the relevancy of international law or world opinion to its foreign policy as well as its domestic law, particularly to advance its objectives in the war on terrorism after the terrorist attacks in New York and Washington on September 11, 2001. Many U.S. judges today continue to be skeptical or reluctant to apply international norms in their decisions. Both Chief Justice Rehnquist and Justice Scalia, for example, wrote stinging dissents in *Atkins v. Virginia*. The two justices explicitly rejected the majority's reliance on international opinion or practice as a source for its jurisprudence. Justice Scalia called the practices of "the so-called 'world community'" irrelevant, asserting that its "notions of justice are (thankfully) not always those of our people" (at 347). Justice Scalia continued his critique of the majority's reliance on international law in *Roper v. Simmons*, discussed in the introduction, characterizing the majority opinion as based on "the subjective views of five Members of this Court and like-minded foreigners" (at 607).

Without question, the Court's low-water mark in domestic application of decisions by international tribunals, and more generally of treaties, came in its 2008 decision in the capital case of *Medellin v. Texas*. The *Medellin* litigation arose from the protracted filings by several countries—Paraguay, Germany and Mexico—in the International Court of Justice (ICJ), or World Court, based in The Hague, Netherlands, which hears only disputes between countries. All of the cases there shared common features. In each, a foreign national from the country in question was sentenced to death in one of the state courts of the U.S., and in each, the country in question alleged that its national had not been properly advised by U.S. officials of the availability of the services of his country's consulate, as provided for under the Vienna Convention on Consular Relations (VCCR), a multi-lateral treaty to which the U.S. and the country in question were parties. All countries had ratified an additional protocol to the VCCR that called on the ICJ to adjudicate disputes as to the meaning and application of the treaty. In each case, the ICJ ruled against the United States. The domestic impact of that international litigation will be discussed more fully in the final section of this chapter.

Medellin was one of 51 Mexican nationals sentenced to death in Texas, and the first to have his case heard by the Supreme Court after the ICJ's *Avena* judgment. The *Medellin* case involved the complex interaction of decisions by the International Court of Justice, the ways in which the U.S. government could act to honor an outcome of that tribunal in favor of the Mexican death-row inmates, and the responses of state and federal courts to an ICJ decision. The Supreme Court's holdings on international law, particularly as to treaties affecting the application of the death penalty, were devoid of any reference to

the supremacy clause of the Constitution. First, it held that neither the *Avena* decision of the ICJ, nor a subsequent presidential memo purporting to order implementation of the decision, was binding on the state courts. Second, it held that none of the relevant international treaty sources—an Optional Protocol to the VCCR on dispute resolution by the ICJ, the U.N. Charter, or the ICJ Statute—was a self-executing treaty, that is, one that operates as law by its terms or intentions, because Congress had not adopted legislation implementing the treaties. A second failed appeal to the Supreme Court cleared the way for Mr. Medellín's execution by Texas on 5 August 2008 (Turner 2008).

The *Medellin* decision represents one face of the Janus-headed Supreme Court on the application of international law; the *Roper* and *Atkins* line of decisions represent the other, and opposite, face. One line makes direct application of treaties nearly impossible, while the other makes customary international law—the practices of the world community—highly relevant. While suspicion of international law's validity may lie, at least in part, in the deep roots of American rebellion against foreign authority, the United States federal and state courts generally stand badly out of step with international law trends regarding the death penalty. They may, however, be forced into a legal corner, as the following sections of this chapter will demonstrate.

## Global Perspectives on the Death Penalty

If one takes a particularly long lens to the issue of the death penalty, the prospects for abolition are excellent. In a recent work examining the decline in global violence over the broad arc of history, Steven Pinker, the Harvard psychologist, notes that since the 17th century, both the number of crimes punishable by death and the number of executions have dropped precipitously. He notes the same trend in the United States, where the rate of executions per 100,000 people has plummeted, particularly in the 17th and 18th centuries. Today “only a few tenths of a percentage point of the nation's murderers are ever put to death. And the most recent trend points downward: the peak year for executions [under post-*Furman* statutes] was 1999, and since then the number of executions per year has been almost halved” (Pinker 2011:150–151).

World law and practice are moving steadily towards abolition. Within only the last fifty years, the world has developed a system of treaties and other international norms, all of which see abolition of the death penalty as a legitimate end of international human rights law (Schabas 2002:1). The most significant international treaties on human rights all contain a provision protecting the right to life, and another protecting against cruel, inhuman or degrading treatment or punishment. While all of those treaties include limited exceptions to the right to life that permit the death penalty in a narrow set of circumstances, a systematic review of all international norms on the death penalty “shows an inexorable progress towards abolition” (Schabas 2002:19).

As of the end of 2012, a total of 140 countries, almost two-thirds of the world's states, have abolished the death penalty in law or practice. Ninety-seven countries and territories have abolished it for all crimes, and another eight have abolished it for all but exceptional crimes such as those committed in wartime, while another thirty-five countries are abolitionist in practice because they have not carried out executions for the past ten years or more. Fifty-eight countries retain the death penalty, but the trend is away from retention, and it is accelerating. Between 1989 and 1999, 40 countries abolished the death penalty, all but one for all crimes in all circumstances. Between the end of 2000 and 2010, another

24 countries abolished the penalty, at least for ordinary crimes (Amnesty International 2012; Hood and Hoyle 2009:6). Moreover, not all retentionist countries execute those they have sentenced to death. In 2012, for example, only 21 countries were recorded as having carried out 682 executions, aside from the secret numbers kept in China. The top five executing countries remained the same as in the previous year—China, Iran, Iraq, Saudi Arabia and the United States (Amnesty International 2013).

State practice regarding the death penalty continues to show a drop in both the number of death sentences and the number of executions. In 2012, the United States was the only country in the Americas to carry out an execution, and Belarus was the only country in Europe and Central Asia to execute someone during that year. Death sentences and executions are largely concentrated in Asia, the Middle East and Africa, although only 5 of the 54 countries of the African Union carried out death sentences during 2012 (Amnesty International 2013:7).

New international criminal tribunals created within the UN system all prohibit capital punishment. Their jurisdiction includes adjudication of the most serious of crimes known to mankind: genocide, war crimes and crimes against humanity. The temporary international criminal tribunals for the former Yugoslavia and for Rwanda, sitting in The Hague and Arusha, Tanzania, respectively, both bar the death penalty, as does the newly created International Criminal Court (Schabas 2002:247–258). This is also true with each of the so-called hybrid tribunals, composed of both local and international elements and created under the patronage of the UN, for example, in Sierra Leone, Kosovo, East Timor, Cambodia, and Lebanon: “none of the modern international or hybrid [International Criminal Law] tribunals imposes the death penalty” (Van Schaack & Slye 2010:1004).

Taken together with the information in other chapters in this book, documenting the decline in the number of death sentences and executions in the United States, it is obvious that the death penalty is moving toward abolition, in law and in fact.

## The UN and U.S. Compliance with International Human Rights Norms on the Death Penalty

The United States was a leader in the creation of the United Nations, which came into being in the wake of the horrors of World War II and the Holocaust. The U.S. also took a leading role in the drafting and adoption by the UN of the Universal Declaration of Human Rights, the first modern statement of individual protection against abuses of state power (Glendon 2002). Our government also took a leading role in the creation of the Organization of American States (OAS) and another lesser-known regional document on human rights in the Western Hemisphere, the American Declaration of the Rights and Duties of Man. The American Declaration was actually adopted some months before the Universal Declaration in 1948. At the time of their adoption, these two human rights declarations were not intended to have the force of law. As “declarations” rather than treaties, they expressed the human rights principles and aspirations for the region and the world, but governments, then as now, were reluctant to guarantee personal freedoms as legally binding obligations. The two documents were, in short, what their names imply—statements of goals for governments and not legally binding “treaties.” But over time, each of the two declarations would gain global recognition, bringing their provisions into the realm of customary international law.

Over its first two decades, the UN became more assertive in its articulation of human rights norms. One of the earliest actions to deal specifically with the death penalty was that of the UN Committee on Crime Prevention and Control in 1982, when it adopted *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*. The *Safeguards* were endorsed by resolution of the UN General Assembly in 1984, and later amended in 1989. The *Safeguards* garnered a strong endorsement from the UN Economic and Social Council again in 1996 (Schabas 2008:18–22, 28).

The UN also adopted several human rights treaties that set out human rights more fully than the declarations of the 1940s. In the UN system, the most important of these global treaties for our purposes were the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), adopted in 1987; and the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention), also adopted in 1966. Each of these treaties has been ratified by the United States. The ICCPR is one of the most important and widely ratified human rights treaties in the world, with 167 ratifying countries as of mid-summer 2013. Article 6 of the ICCPR protects the right to life, and permits the death penalty in certain limited circumstances: “only for the most serious crimes”; only “pursuant to a final judgment rendered by a competent court”; and with the mandatory “right to seek pardon or commutation of the sentence.” Article 6 further forbids the sentence of death for persons under 18 and pregnant women. As to the treaty’s limitations, the Human Rights Committee, charged with interpretation of the ICCPR, has found Article 6 to mean that while “States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the ‘most serious crimes.’” “[T]he death penalty,” the Committee concludes, “should be a quite exceptional measure” (Human Rights Committee 1994:¶¶ 6, 7).

The ICCPR has a Second Optional Protocol that entered into force in 1991. It binds states parties to permanent abolition of the death penalty except under narrow exceptions in wartime; as of mid-2013, that treaty had 76 parties and an additional 36 signatories, binding those who have signed not to violate the object and purpose of the treaty. Together with the 43 ratifications and 2 signatures of Protocol 13 to the European Convention on Human Rights, which abolishes the death penalty for all purposes, and the 11 ratifications of the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, these three instruments move states closer to a global commitment never to return to capital punishment. One can no longer say, in the face of states’ ratification of these treaties, that international law does not *per se* prohibit the death penalty.

The United States consistently has resisted full acceptance of its human rights treaty responsibilities. When it finally ratified the ICCPR in 1992, and both the Torture and Race Conventions in 1994, the government attached numerous exceptions to their provisions, generally called “reservations.” When it ratified both the ICCPR and the Torture Convention, for example, the U.S. filed reservations that limit its obligations to protect against “cruel, inhuman or degrading treatment or punishment,” as expressed in both treaties. The U.S. reservations assert that the clause “means the cruel and unusual punishment” prohibited by the U.S. Constitution. Thus, the government means to assume no new obligations under the treaty; U.S. Supreme Court interpretations of cruel and unusual punishment are said to be good and sufficient.

The Human Rights Committee, after its 2006 review of the last full periodic report of the United States government on its compliance with the ICCPR (another, the fourth, is due in late 2013), was critical of U.S. law and practice on the death penalty. The Committee’s conclusions were pointed:



The State party should review federal and state legislation with a view to restricting the number of offences carrying the death penalty. The State party should also assess the extent to which death penalty is disproportionately imposed on ethnic minorities and on low-income population groups, as well as the reasons for this, and adopt all appropriate measures to address the problem. In the meantime, the State party should place a moratorium on capital sentences, bearing in mind the desirability of abolishing the death penalty (Human Rights Committee 2006:¶ 29).

The call for a moratorium on the death penalty has become a central issue for the entire UN membership. While those actions are directed to all retentionist states, they arguably have most resonance in the large and influential states that carry out the most death sentences, particularly the United States and China, both permanent members of the Security Council. When the UN General Assembly met in 2007, it had twice before failed to muster sufficient support for a resolution on a death penalty moratorium (Schabas 2004–2005:437–438). That year, however, the General Assembly adopted a resolution calling for a global moratorium by a vote of 104 in favor to 54 against (including the United States), with 29 abstentions (UN General Assembly 2007). Since that first decision, the General Assembly has adopted similar resolutions in 2008, 2010 and most recently, in March of 2013 (UN General Assembly 2013). The UN human rights entities have, within recent years, become a locus for intense scrutiny of the scope and limitations on the death penalty. The 47-member UN Human Rights Council replaced the former Commission on Human Rights in 2006, and has since been a pivotal location within the UN for discussion of the death penalty and calls for its abolition. In its 2011 meeting, for example, it called on the UN Secretary General to submit a yearly report to the Council on capital punishment (UN Human Rights Council 2011), which the Secretary General has provided in each subsequent year (UN Human Rights Council 2012). In March of 2013, the Council, along with many non-member states, called for two panel discussions at a future Council session: one on the human rights of children of parents sentenced to death or executed, and a “high-level” panel on the question of the death penalty (UN Human Rights Council 2013a; 2013b).

The UN’s High Commissioner for Human Rights, currently Navi Pillay, has also been actively supportive of abolition. In July of 2012, her office held what it termed the first in “a series of global panel discussions on the abolition of the death penalty,” called *Moving Away from the Death Penalty: Lessons from National Experience* (UN Office of the High Commissioner for Human Rights 2012). And in 2013, Geneva played host to a meeting of the newly created International Commission against the Death Penalty, where both the Secretary General (UN Secretary General 2013) and the High Commissioner for Human Rights (UN High Commissioner for Human Rights 2013) supported calls for a global moratorium and eventual abolition of the death penalty. The International Commission against the Death Penalty was initiated by the government of Spain in 2010, with the support of 16 other governments, to give impetus and momentum to the moratorium/abolition movement (International Commission against the Death Penalty 2013).

The UN has a Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, whose annual reports have made specific references to abuses by the United States in its application of the death penalty. After a special mission to the United States in 1998, the Special Rapporteur called on the United States to adopt a moratorium on executions, among other reform measures (UN Commission on Human Rights 1998:¶ 156). In 2009 (UN Human Rights Council 2009:¶ 77), and again in 2012 (UN Human Rights Council 2012:¶ 87), the Special Rapporteur called for the United States not to apply the death penalty to crimes tried by military commissions at Guantanamo Bay, Cuba. The United

States ignored the recommendation, and six defendants now face trials in which the death penalty can be imposed (Maers 2011; U.S. Department of Defense 2012).

In August of 2012, the current Special Rapporteur, Christof Heyns, together with another Special Rapporteur on Torture, Juan Mendez, issued simultaneous reports on the same day regarding the death penalty generally. Heyns' first recommendation called on all states to "heed the calls made by the United Nations and regional human rights bodies to establish a moratorium on executions with a view to abolishing the death penalty" (UN General Assembly 2012a:¶ 118). Another innovative recommendation from that Rapporteur calls for international organizations to help corporations to "undertake to in no way assist the unlawful imposition of the death penalty" (at ¶ 131). That recommendation refers to an earlier discussion in the report regarding the role of medical personnel in the administration of lethal injections (at ¶¶ 95–97). In addition to the call to medical personnel, there has been a massive and well-organized international effort to help and encourage pharmaceutical companies to prevent the use of their drugs for executions in the United States. This work is exemplified by the Stop the Lethal Injection Project (SLIP) of Reprieve, an NGO based in the United Kingdom (Reprieve 2013).

Professor Mendez, the Rapporteur on Torture, goes even further. After extensive documentation of state practice on the issue, the Rapporteur concludes that a "new approach" is needed for treatment of the issue of the death penalty in international law. Where past analysis was largely within the framework of the right to life, Professor Mendez calls for a debate "within the context of the fundamental concepts of human dignity and the prohibition of torture and cruel, inhuman or degrading treatment or punishment" (UN General Assembly 2012b:¶ 74). The Rapporteur concludes that he is "convinced that a customary norm prohibiting the death penalty under all circumstances, if it has not already emerged, is at least in the process of formation" (at ¶ 72). This legal development could have immense ramifications in the United States, for two primary reasons. First, the Supreme Court has consistently found that customary international law is a source of law in the United States, without the qualifiers it attaches to treaty interpretation. It did this most recently in its 2004 decision in *Sosa v. Alvarez-Machain*, a case that cites with approval the 1900 *Paquete Habana* case, which holds that "international law is part of our law" (referring to the law of nations, or customary international law) (*Sosa* 2004:730). Second, although technically distinct, the concept of customary international law is much closer to the notion of the concept of the legal views of the "world community," a concept the Court's majority was comfortable to invoke in overturning the death penalty in *Atkins v. Virginia* and *Roper v. Simmons*, discussed above.

## The Regional Human Rights Systems and the Death Penalty in the United States: Europe, the Americas and Africa

*Europe.* No region has been more critical of the United States or more aggressive in attacking its position on the death penalty than Europe, itself a virtually death penalty-free zone. There is, however, a threshold question as to what exactly constitutes the geography of "Europe" today, for legal purposes. It might be seen as the 27 countries of the European Union, or as the 47 countries of the Council of Europe, which extends the reach of the continent from the Atlantic Ocean to the furthest Pacific borders of the Russian Federation. Or, most broadly, it might encompass the 57 participating states of

the Organization for Security and Cooperation in Europe (OSCE), including countries from Europe, Central Asia and North America, including the United States. Whatever their geography, each of these entities through their leadership has called for at least a moratorium, and ultimately, for abolition.

The European Union has been a consistent leader within the United Nations on the global moratorium issue, starting at least in 1997, when it sponsored, for each of at least six consecutive sessions of the old UN Commission on Human Rights, a global moratorium with a view to abolition (Dennis 2003:368–369). Within the Union itself, its political bodies have adopted the Charter of Fundamental Rights of the European Union, which explicitly bars the death penalty in its Article 2.2: “No one shall be condemned to the death penalty, or executed” (European Union 2007). The European Parliament, the Union’s legislature, has often called broadly for a universal moratorium on the death penalty (European Parliament 2007), but it has also more bluntly called on the U.S. to institute a moratorium on the penalty (European Parliament 2010:¶ 7). By the same token, the European Parliamentary Assembly had strongly considered revocation of the U.S. status as observer within the 47-member Council of Europe, beginning in 2001, based on its retention of the death penalty (Parliamentary Assembly 2001). In 2011, the Assembly directly called on the United States to “join the growing consensus among democratic countries that protect human rights and human dignity by abolishing the death penalty” (Parliamentary Assembly 2011:1). These political actions join with the legal actions of the European Court of Human Rights, particularly in the extradition context discussed below, to make Europe a powerful regional voice calling for U.S. limitation and eventual abolition of capital punishment.

The 57-member OSCE, whose members include the United States, has also spoken against the death penalty. In July of 2010, the OSCE Parliamentary Assembly adopted a resolution on the death penalty at its annual session. It, like many others, calls for all retentionist states to “declare an immediate moratorium on executions,” but also calls on the United States to adopt a moratorium “leading to the complete abolition of the death penalty in federal legislation” (OSCE 2012:31, ¶¶ 46, 50).

*The Americas.* The Inter-American system for the protection of human rights was set up to monitor compliance with the American Declaration and Convention. The Inter-American Commission on Human Rights, a group of 7 independent experts on human rights sitting in Washington, DC, reviews human rights complaints arising in the Americas. Cases decided by the Commission can go on to the Inter-American Court of Human Rights in San Jose, Costa Rica, so long as the relevant country has ratified the Convention and agreed to submit to the Court’s jurisdiction. The Court, with 7 members appointed in their individual capacity by the OAS General Assembly, decides contentious case and issues advisory opinions, while the Inter-American Commission issues recommendations to governments that arguably have binding legal effects as well. The OAS adopted the American Convention on Human Rights in 1969. The American Convention, along with several other human rights treaties in the Inter-American human rights system, serves as a regional complement to the global treaties. There are 24 active parties to the American Convention; Trinidad & Tobago withdrew in 1999 over disputes on the use of the death penalty there, and Venezuela announced its intent to withdraw from the Convention in September of 2012 (International Justice Resource Center 2012).

At the regional level, the United States signed but has not ratified the American Convention on Human Rights, and it is not subject to the jurisdiction of the Inter-American Court of Human Rights. This does not mean, however, that it can completely avoid scrutiny in that system for its own human rights violations. As a signatory to the Convention, it is bound not to act in violation of the object and purpose of the treaty.

And the Inter-American Commission on Human Rights can still hear individual complaints against the United States. In fact, over time, several decisions by international bodies have found that the human rights recognized in the American Declaration, and in the OAS Charter, a treaty to which the U.S. is a party, together create binding human rights obligations. The Inter-American Commission applies that law to the United States and asserts that its decisions are binding on the United States. The United States government, however, “categorically” rejects any assertion that the American Declaration has acquired binding legal force and refuses to comply with Commission recommendations (Wilson 2002:1160).

Over the past decade, the Inter-American Commission on Human Rights has made the death penalty in the hemisphere, and particularly in the United States, a centerpiece of its contentious jurisprudence. Staff sources there estimated that 60–70 percent of all new filings against the U.S. during 1999 and 2000, some 130 cases, involved the death penalty (Wilson 2002:1174–1175). All of those cases have moved through the system, although many remain to be resolved. Between 2003 and 2013, there have been eight U.S. capital cases involving 14 named death row defendants resolved on the merits, all of which found serious human rights violations. Another 21 cases, involving 34 death-row petitioners, were found to be admissible during the same time period, meaning that they will continue to decision on the merits, while the Commission requested precautionary measures from the U.S. government to protect 29 individuals from execution pending consideration of their cases by the Commission. A few of these matters overlap, and involve the same individuals, but the work of the Commission was significant enough that it published a significant separate study, *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, in 2011 (Inter-American Commission on Human Rights 2011).

The comprehensive study of the death penalty started with a stern rebuke to those countries, including the United States, that execute in “contempt” of decisions by bodies of the Inter-American human rights system. When individuals are executed in defiance of decisions on the merits by the Commission, this signals “a grave violation of international obligations” (at ¶ 58). It also notes that execution of a person under precautionary or provisional measures from the Commission or the Inter-American Court of Human Rights “constitutes an aggravated violation of the right to life” (at ¶ 48). The report goes on to summarize its findings in the myriad death penalty cases it reviews from around the hemisphere, revealing violations of both principles governing limitations on the death penalty as well as fair trial rights. As for the principles, the report addresses such issues as the “heightened scrutiny” standard of review, the improper mandatory imposition of the death penalty by statute, imposition for only the most serious crimes, and the right to apply for amnesty, pardon or commutation of a death sentence (at 25–84). In the fair trial arena, the Commission and Court have touched on a wide array of issues such as the right to an impartial and independent decision-maker, the right to competent counsel, and to legal aid if necessary, and the right to consular access for those foreign nationals facing capital charges (at 85–160). The report concludes with a call to all member states to “impose a moratorium on executions as a step toward the gradual disappearance of the death penalty,” urging states to join the eleven countries of the hemisphere that have ratified the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (at ¶ 141).

A typical death penalty case from the United States gives a better idea of the actions of the Commission in this area. In *Raul Garza v. United States*, the Commission reviewed its first federal death penalty case. In 2001, the Commission held that Mr. Garza had been denied a fair trial and due process of law when the sentencing jury in his case was

allowed to hear evidence of four unadjudicated murders in Mexico with which Mr. Garza was connected. The Commission called for commutation of Garza's death sentence. Attempts to enforce the Commission's decision in the U.S. Courts failed, and on June 19, 2001, Mr. Garza was executed, about a week after the execution of Timothy McVeigh for his role in the Oklahoma City federal building bombing (Wilson 2002:1180–1182).

In *Garza*, the U.S. government aggressively opposed the petitions before the Commission and ultimately refused to take any action to comply with the Commission's recommendations at any stage in the proceedings. The State Department's Office of the Legal Adviser, which represented the U.S. government in this litigation, at no point took action to support the Commission's decision in the courts, as it might have. The petitioner also sought precautionary measures to protect Mr. Garza pending his execution. While most countries in Latin America comply with such measures from the Commission or the Inter-American Court of Human Rights, the United States generally declined to comply with decisions of the Commission, or with its requests for precautionary measures in any death penalty case. One glimmer of cooperation has occurred in the Vienna Convention cases discussed in a later section of this chapter. Despite near-complete rejection by the U.S. government of the authority of the Commission's rulings, the Commission is likely to decide many more capital cases involving the United States.

*Africa.* The African Commission on Human and Peoples' Rights, too, has compiled a recent comprehensive report on its work regarding the death penalty. The Commission's Working Group on the Death Penalty issued its *Study on the Question of the Death Penalty in Africa* in 2011 (African Commission on Human and Peoples' Rights 2011). The study is the culmination of years of effort, during which the Working Group examined arguments and data regarding arguments for and against the death penalty. The Study concludes that "what emerges from the survey of the pros and cons of the death penalty is that the abolitionist case appears more compelling than the retentionist case." In spite of any shortcomings to its own examination of the issue, the Working Group continues, "any additional study is unlikely to change the basic findings of the Study in relation to the necessity for the abolition of the death penalty" (at 54).

Taken together, these actions by the regional human rights bodies represent increasingly aggressive postures in favor of moratoria and eventual abolition of the death penalty. A close reading of their actions shows the synergistic reactions between the global and regional human rights bodies, all leaning inexorably toward abolition.

## Pressure from Outside of the United States: Barring Extradition to Face Capital Punishment

As other countries continue to abolish the death penalty, the United States faces increasing difficulties with extradition, where a bilateral treaty usually governs the exchange of persons accused or convicted of crimes in one of the two countries, whose removal is sought by the receiving country. In such cases, the sending country is increasingly reluctant to send anyone to face a possible death sentence in the United States. It was recently reported in a research memo to the U.S. Congress that the United States has "over 100 bilateral extradition treaties" (Congressional Record 1998:20407). A complete list as of 2011 shows 112 such treaties, plus multilateral treaties with the European Union and some countries in the Americas (U.S. Code 2011). The memo continues that as more

countries abolish the death penalty, “there has been a concomitant trend toward including capital punishment restrictions in new extradition agreements.” An “illustrative list” of such countries totaled 27. Another study of extradition treaties in 2010 adds an additional 7 individual countries, plus the 27 countries of the European Union that uniformly refuse extradition without assurances against the death penalty (Congressional Reference Service 2010:9, n. 42). Thus, at least 61 countries will not send accused persons, often alleged terrorists, to the U.S. for trial without a guarantee that the death penalty will not be imposed. This policy was suggested as early as 1990, where Article 4 of the UN General Assembly’s Model Treaty on Extradition permits the refusal of extradition if the offense for which it was sought carried the death penalty and the sending state does not receive assurances against capital punishment (UN General Assembly 1990). The Princeton Principles on Universal Jurisdiction were adopted by an eminent group of international scholars in 2001. In its Principle 10, the Principles make refusal of extradition based on universal jurisdiction offenses mandatory if the death penalty is possible in the receiving state (Princeton Principles 2001).

The use of extradition to move an accused or convicted person across borders is not the only legal vehicle available to the U.S.: deportation and state-sponsored kidnapping, colloquially called “irregular rendition,” are also available. In 2001, Amnesty International made a chillingly prescient prediction that impediments to extradition might cause the United States government to expand the practice of state kidnapping to guarantee the option of imposing the death penalty here (Amnesty International 2001). Such is exactly the situation in the case of the 14 so called “high-value” detainees at Guantanamo Bay, all of whom arrived there from black sites to which they had been kidnapped by U.S. authorities; six now face the death penalty in military commission trials (Karl 2006).

The contemporary focus on the use of assurances against the death penalty began with the unusual 1989 case of Jens Soering, a young German citizen whose extradition was sought from England to the United States. Soering faced capital murder charges in the Commonwealth of Virginia. His lawyers challenged his extradition on several grounds in Britain, and after full review there, the case went to the European Court of Human Rights (“European Court” or ECHR) in Strasbourg, France. The European Court found a violation of Article 3 of the European Convention on Human Rights, which prohibits “inhuman or degrading treatment or punishment” (Soering 1989:111). The Court concluded that if he were to be extradited to the United States, Soering would face the psychological trauma of what the court called “the death row phenomenon.” The death row phenomenon is comprised of a number of factors, some of which are shared by all inmates on death row in the U.S., and some of which were unique to Mr. Soering. The Court found that the average time a condemned prisoner can expect to stay on death row in Virginia, at the time, was six to eight years. During that time, the Court noted, inmates await their executions with growing anguish, often under repeated warrants for execution, which are ultimately suspended. Conditions on death row are also extremely harsh for all who are under sentence of death. The Court noted the risk of physical and homosexual attack, as well as the stringency of custody in general. Finally, the Court noted that Soering himself was only 18 at the time of his alleged offense, and reports showed strong evidence that he suffered from a mental disturbance that might mitigate his culpability. Taken together, the Court concluded that it could not condone the virtually inevitable mistreatment of Mr. Soering on death row in Virginia, and that to send him there to face a possible capital sentence would constitute inhuman or degrading treatment (Soering 1989:¶¶ 105–109). As a result of the Court’s ruling, England sought and obtained assurances from prosecutors in the state of Virginia that Soering would not be subjected to the possibility

of a death sentence. He was then extradited, tried and sentenced to two life terms (Lillich 1991:141).

The *Soering* precedent has lent itself to a growing jurisprudence on extradition and the death penalty. The death row phenomenon argument has never gained purchase in the U.S. Supreme Court, and is not likely to do so in the future unless the Court changes composition. In 2009, after repeated denials of *certiorari* on the death row phenomenon issue, Justice Stevens seemed to close the door on the issue with his statement that “[m]ost regrettably, a majority of this Court continues to find these issues not of sufficient weight to merit our attention” (*Johnson v. Bredesen* 2009:544, and see *Marriott* 2008:159 *passim*). The fundamental argument that execution or conditions on death row can constitute cruel, inhuman or degrading treatment has prospered in a number of contexts (Schabas 1996). The remainder of this section examines developments in Canada-U.S. exchanges of prisoners, an important case from South Africa, and the definitive jurisprudence of the European Court of Human Rights on this issue.

The Canadian Supreme Court decided *United States v. Burns* in 2001. In that case, the nation’s highest court ruled that assurances against the death penalty must be sought in extraditions involving the United States “in all but exceptional cases” (*United States v. Burns* 2001:¶8). The court found that the justice minister’s failure to seek assurances against the death penalty was a violation of Section 7 of the Canadian Charter of Rights and Freedoms, the Canadian equivalent to the U.S. Constitution’s Bill of Rights. Section 7 protects the right to life, liberty and security “and the right not to be deprived thereof except in accordance with the principles of fundamental justice” (*United States v. Burns* 2001:¶58). The court found that there were many factors that mandate the seeking of assurances, including “the evolution of international extradition standards, the worldwide trend toward abolition, growing concerns over the adequacy of US capital procedures, and the inherent risk of wrongful conviction and execution” (Amnesty International 2001:12–13). William Schabas calls “the danger of executing the innocent” the first and most important reason for the court’s action (Schabas 2001:668). *Burns* was returned, together with *Rafay*, a co-defendant, to Washington State for trial with a guarantee that they would not face the death penalty.

Another Canadian case resulted in advances in international law but has not yet been honored fully within the United States. In 1987, a U.S. national named Roger Judge was convicted in Pennsylvania state court of murder and sentenced to death. He subsequently escaped to Canada, where he was convicted of other crimes and served his time, after which Canadian immigration officials sought his deportation to the United States. Judge’s efforts to obtain assurances against the death penalty resulted in protracted litigation that was unavailing, and he was deported to the United States in August of 1998 (Murphy 2004:180–181). On the day of his deportation, he filed a petition with the Human Rights Committee, pursuant to the First Optional Protocol to the ICCPR (*Judge* 2002). The Committee found that while paragraphs 2 through 6 of Article 6 to the ICCPR contained exceptions permitting the death penalty for the most serious crimes, Canada could not avail itself of those exceptions, which are available only to countries that have not abolished the death penalty:

For countries that *have* abolished the death penalty [as Canada had], there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or by extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out (at ¶10.4).

Canada violated Judge's right to life under Article 6, paragraph 1 of the Covenant, the Committee concluded, by not ensuring that the death penalty would not be carried out in the United States (at ¶ 10.6). As such, Judge was entitled to "an appropriate remedy" from Canada, which should include "such representations as are possible" to the U.S. to prevent the death sentence from being carried out (at ¶ 12). No public record indicates that Canada ever made such representations.

Roger Judge continued his quest for vindication in the U.S. courts after his involuntary return to Pennsylvania. His arguments on Canada's obligations under the ICCPR have thus far failed to persuade either the Pennsylvania Supreme Court (*Commonwealth v. Judge* 2007:149, 152) or a federal district court (*Judge v. Beard* 2012:32). The federal court deferred to the Pennsylvania Supreme Court's decision that the ICCPR was a non-self-executing treaty that conferred no rights on Mr. Judge in the absence of implementing legislation. The federal court did grant Judge relief from his death sentence on grounds of ineffective assistance of counsel not related to the treaty violation, and U.S. litigation may continue.

In May of 2001, the Constitutional Court of South Africa ruled that South African government officials had violated constitutional and statutory obligations by refusing to seek assurances against the death penalty for Khalfan Khamis Mohamed, whose extradition was sought by the United States in connection with the bombing of the U.S. embassy in Tanzania. Mohamed was summarily deported directly into the hands of waiting U.S. officials. Drawing from many international and comparative sources, including its own 1995 decision finding that the death penalty in South Africa violated fundamental human rights and the constitution, the court found that the government had violated Mohamed's right to life and dignity, and his right to be protected from cruel, inhuman or degrading punishment (*Mohamed* 2001). It also took the highly unusual step of sending its judgment directly to the U.S. federal judge presiding over Mohamed's capital murder trial. The judge instructed the jury about the decision, and after three days of deliberation, the jury announced that it could not reach unanimity on the death penalty. Mohamed was sentenced to life imprisonment without possibility of parole (Amnesty International 2001).

The most important decision in this area, however, arises from the ECHR in a case involving surrender by British troops in Iraq of Iraqi prisoners in their custody to officials of that country, where the men faced criminal charges that might result in capital punishment. In *Al-Saadoon and Mufdhi v. United Kingdom*, a Chamber of the European Court dealt with the issue of the death penalty and the possible return, or *refoulement*, of these individuals to situations in which they might face inhuman treatment pending or during their *possible* executions. Two aspects of the decision deserve attention. First, the court held that consistent state practice within the Council of Europe, together with the ratification by all but two member states of Protocol 13, abolishing the death penalty for all purposes, had "amended [Article 2 of the Convention] so as to prohibit the death penalty in all circumstances." The language of that article's provision dealing with possible imposition of the death penalty does not continue "to act as a bar to [the court's] interpreting the words 'inhuman or degrading treatment or punishment' in Article 3 as including the death penalty" (*Al-Saadoon* 2010:¶ 120). Thus, the court seems to both eliminate any further exception to the right to life for the death penalty under Article 2 of the European Convention, while recognizing that the death penalty amounts to cruel and inhuman treatment. The decision by the Court not to send the matter to the Grand Chamber seems to confirm this result (Thienel 2010).

The second important point relates to the Article 3 claim itself. The court returns to language similar to that in *Soering* and the death row phenomenon. From the time of ac-



ceptance by the Iraqi courts of jurisdiction over their cases in 2006, “the applicants were subjected to a well-founded fear of execution. It is reasonable to assume that this fear must have caused the applicants intense psychological suffering” that “intensified . . . and continues to this day” when they were actually transferred (at ¶ 136). In short, surrender of the individuals in question by the United Kingdom failed to take proper account of their obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol 13, because “there were substantial grounds for believing that the applicants would face a real risk of being sentenced to death and executed” (at ¶ 143). This decision, together with that of the Human Rights Committee in *Judge*, seems to close off any possibility that an abolitionist state might surrender a prisoner to a retentionist state without assurances against the death penalty. Indeed, one scholar finds that the prohibition on removal without assurances against the death penalty has ripened into a norm of customary international law (Kelly 2004:62).

## Denial of Consular Access to Foreign Nationals on Death Row in the United States

On May 1, 2002, the Oklahoma Court of Criminal Appeals, the highest court of that state in criminal appeals, vacated the death sentence of Gerardo Valdez, a Mexican citizen who had been convicted of a murder that occurred in 1989. Among the claims raised in his appeal was an argument that the state of Oklahoma did not comply with the terms of the Vienna Convention on Consular Relations (Vienna Convention). Article 36 of that treaty, ratified by the United States, requires that local authorities immediately notify a detained foreign national of his right to communicate with the consulate of his home country. If the detainee requests access to his consulate, Article 36 also requires that the local authorities must promptly notify consular officials of the detention. Finally, authorities must allow consular representatives the right to visit, converse and correspond with their nationals, and to provide them with legal representation (Babcock 2005:68). State officials conceded that Mr. Valdez had not been notified of his consular rights at the time of his detention, and the Mexican government did not become aware of his arrest, conviction and sentence until April of 2001. Oklahoma prosecutors agreed with the defense that the government had not complied with the Vienna Convention, but they argued that non-compliance with the treaty should have no effect on Valdez’s conviction or sentence.

Mexican officials took a strong role in assisting Mr. Valdez as soon as they learned of his detention in Oklahoma. In addition to filing a friend-of-court brief on his behalf in the Court of Criminal Appeals, consular officials assisted in the representation of Mr. Valdez at his clemency hearing before the Oklahoma Board of Pardons and Paroles. Through expert testimony, they established that Mr. Valdez suffered from severe organic brain damage as a result of head injuries sustained in his youth. His brain damage was exacerbated by alcohol abuse in the family, and these factors contributed to and altered his behavior. Mr. Valdez’s appointed lawyer, for whom this was his first capital murder case, had not investigated or found the evidence in question.

The Parole Board heard the new evidence and recommended to the governor that the death sentence be commuted to life without parole. Governor Frank Keating, however, ultimately denied clemency and the case went back to the courts. When presented with his subsequent appeal arguing the Vienna Convention issues, the Oklahoma Court of

Criminal Appeals reversed the conviction, holding that it “cannot have confidence in the jury’s sentencing determination and affirm its assessment of a death sentence where the jury was not presented with very significant and important evidence bearing on [Valdez’s] mental status and psyche at the time of the crime” (*Valdez* 2002:710). The efforts of the Mexican government on behalf of their national had paid off by saving his life.

Gerardo Valdez is one of more than 140 identified foreign nationals from 37 countries on death row in the United States as of February 2013, and like some 60 of those individuals, he is a Mexican national (Death Penalty Information Center 2013b). Valdez’s case is one of many that have evolved from the complex interplay of three cases brought in the International Court of Justice (ICJ), discussed above. Those cases involved, respectively, Paraguay, Germany and Mexico, each of whose governments brought actions in the ICJ on behalf of their nationals: Breard, LaGrand and Avena (and 50 others), respectively (*Case* 1998; *Case* 2004; *LaGrand* 2001; see generally Clarke et al. 2004:283–302). In each case, the foreign governments prevailed. Mexico, by far the most aggressive of the three countries to defend its nationals on U.S. death rows, had begun international litigation even before the *Avena* case, with a request for an advisory opinion from the Inter-American Court of Human Rights (*Advisory Opinion* 2000). The court, in the first international judicial decision on this issue, found that the Vienna Convention confers specific legal and human rights on foreign detainees. The U.S. State Department responded to the decision by asserting that the court was “not charged with resolving disputes under or interpreting the VCCR, and its decision is in no way binding on the United States” (quoted in Warren 2004–2005:324). The cases in the ICJ were unquestionably the appropriate forum for resolving disputes under the VCCR, yet the U.S. continued to balk at compliance with its treaty obligations.

The ICJ’s *Avena* decision is discussed at the outset of this chapter, in conjunction with the disappointing decision by the U.S. Supreme Court in *Medellin v. Texas*, on treaty interpretation, and U.S. acceptance of the decisions of international tribunals. Another U.S. case involving application of the VCCR after *Avena* was also resolved against another Texas death-row inmate from Mexico, Humberto Leal Garcia, who was subsequently executed (Stewart 2011). The ICJ decision in *Avena* also led to the United States’ unfortunate withdrawal from the Optional Protocol to the VCCR, which makes the ICJ the arbiter of disputes as to its application (Quigley 2009). This section, however, will point to positive effects flowing from the *Avena* litigation, cases with outcomes like that achieved for Gerardo Valdez. In addition, it will point to efforts by the Obama administration to comply with its obligations under the *Avena* decision.

One of the most significant accomplishments of the *Avena* litigation in the ICJ was that the United States complied with the ICJ’s provisional measures order in the case, which asked the U.S. not to act to change the status quo during the pending international litigation. State officials in the U.S. did honor the measures, “leading to a five-year moratorium on the execution of Mexican nationals in the United States” (Babcock 2012:185). In the three most urgent cases, defense lawyers contacted prosecutors in Texas and Oklahoma, and in each, the prosecutors agreed to defer the setting of execution dates while *Avena* was pending. Sandra Babcock, a U.S. law professor, former death-penalty litigator, and counsel for the Mexican government in *Avena*, characterizes these steps as “nothing short of extraordinary” for those involved in capital litigation (Babcock 2012:189). Since the decision in *Avena*, there have been a growing number of favorable decisions.

In the Oklahoma case of Osbaldo Torres, his death sentence was commuted to life imprisonment in 2005, with the Oklahoma governor taking note that the U.S. State Department had intervened twice, recommending clemency. On the same day, the Oklahoma criminal appeals court remanded Torres’ case for an evidentiary hearing to

decide whether he had been prejudiced by the Vienna Convention violation. The county district court, having heard evidence from a team of Mexican lawyers and other experts, determined that prejudice had occurred (Crook 2005:695–696). Professor Babcock notes a similar outcome in an Arkansas death penalty case involving Rafael Camargo, another Mexican national whose sentence was commuted to life imprisonment (Babcock 2012:192). Still another favorable decision came from the Nevada courts in the case of Carlos Gutierrez, one of the 51 Mexican nationals from the *Avena* litigation, on death row there. An appellate court ordered remand and reconsideration of the sentence imposed, as well as whether prejudice resulted from the failure of officials to advise Gutierrez of his Vienna Convention rights (Crook 2013:216–218). In Massachusetts, the state supreme court acknowledged its responsibility, after *Avena*, to provide meaningful review when an Article 36 violation of the treaty is established (*Commonwealth* 2011:625). Mark Warren, working with the Death Penalty Information Center in Washington, DC, has compiled an extensive chart of death-sentenced foreign nationals granted executive clemency, released due to innocence, or the subjects of other “noteworthy” developments (Warren 2012).

Section 10.6 of the American Bar Association (ABA) *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* acknowledges the importance of command of international law in capital representation, and particularly the necessity that capital counsel advise a foreign national client of rights under the VCCR (Wilson 2003:1195). This obligation, however, extends not only to advise foreign nationals but also to a more general knowledge of international law, as set out in standards, which call for all capital defense counsel to have a working knowledge of international law, as set out in Guidelines 5.1.B.2.a, and 8.1.B.1, on training (American Bar Association 2003). No organization better personifies the commitment to mastery of international law as it applies under the Vienna Convention than MCLAP, the Mexican Capital Legal Assistance Program. Begun in 2000, the program focuses its resources on all Mexican nationals on death rows in the U.S. or who face the risk of the death penalty in pretrial proceedings. As of 2008, MCLAP had twenty-one veteran attorneys available to advise on issues involving the VCCR and to provide other resources to Mexican national defendants facing capital charges or death sentences. Again, as of 2008, in the 298 cases in which a final disposition had occurred, the project had a ninety-five percent success rate in avoiding or reversing death sentences (Kuykendall et al. 2008:1000).

In an October, 2012 lecture, the U.S. State Department’s Legal Advisor, Harold Koh, noted efforts by the U.S. government to implement the *Avena* decision on three fronts: support of state and federal litigation to implement international legal obligations under *Avena*; support for legislation, the Consular Notification Compliance Act, to implement the *Avena* decision; and promotion of awareness of obligations under the VCCR, including publication of a manual for law enforcement officials (Crook 2013:210–211). These efforts may serve to mitigate some of the consequences of the U.S. withdrawal from the Optional Protocol to the Vienna Convention.

## The Next Frontier: Universal Abolition or Advance by Increments?

Within the decade since the publication of the second edition of this book, there have been extraordinary worldwide advances in the abolition of the death penalty. In the last

edition, this chapter correctly predicted that the death penalty for juveniles would be abolished in the United States, in part based on data on its abolition around the world. That abolition trend is moving inexorably toward worldwide elimination of the death penalty. However, the continued use of the death penalty by the United States, “a country that proudly champions democratic values, human rights, and political freedom, has become one of the greatest obstacles to the acceptance by other retentionist countries that capital punishment inherently and inevitably violates human rights” (Hood and Hoyle 2009:49). What is to be done?

The U.S. death penalty is not likely to disappear through legislative action in the 32 retentionist states, although the pace of abolition by the states has also picked up in the past decade. It is more likely that successful attacks will occur around the edges of the death penalty, limiting it further with movements like the one that challenges the manufacture of certain drugs for use in lethal injections. Another likely candidate for limitation of the penalty might arise in the area of the execution of the mentally ill. Although the U.S. Supreme Court relied on the practice of the international community when it struck down the death penalty for the mentally retarded in *Atkins v. Virginia* in 2002, retardation and mental illness are not the same. In 1986, the U.S. Supreme Court also struck down the death penalty for those who are legally insane in *Ford v. Wainwright*, one of the cases in which the Court took note of the practice of civilized society in its interpretation of the Eighth Amendment (*Ford* 1986). Again, however, the legal definitions of insanity vary, and none is as comprehensive as the term “mental illness.”

The National Alliance on Mental Illness defines the term as “medical conditions that disrupt a person’s thinking, feeling, mood, ability to relate to others and daily functioning. Serious mental illnesses include major depression, schizophrenia, bipolar disorder, obsessive compulsive disorder (OCD), panic disorder, post traumatic stress disorder (PTSD) and borderline personality disorder” (Death Penalty Information Center 2013a). A definition this broad, however, creates problems of definitional boundaries for the courts. Another issue in this area is the question of whether medication, either voluntary or forced, can be used to obtain a stable state of competency in order to carry out an execution. One scholar suggests that the U.S. Supreme Court will have to confront the issue of medicated competency in order to prevent the possibility of further violations of the Eighth Amendment (Entzeroth 2009:660).

International standards make the execution of a severely mentally ill person a violation of human rights. The European Union includes the protection of those suffering from insanity or “any mental illness or any intellectual disability” among its priority areas of concern for limitation of the death penalty (European Union 2008:6; Council of European Union 2013:11). The issue of mental illness seems a likely candidate for further limitation of the death penalty on the road to total abolition.

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