

“VERTICAL” CONFLICT BETWEEN INTERNATIONAL AND NATIONAL TRIBUNALS

PROBLEMS WITH THE CONCEPT OF “VERTICAL CONFLICTS”

*by A. Mark Weisburd**

In this brief discussion, I want to make two points. First, I wish to point up the problematic character of the concept of vertical conflicts between international and national courts. In my view, this phrasing assumes relationships between national and international institutions that are not generally present. Second, I wish to explain my conclusion that this characterization of the connection between international and national judicial systems is based on an indefensible view of the nature of law.

The phrase vertical conflict implies that international and national courts form parts of one legal system, with the international tribunals at the top. As a description of the status of all international tribunals relative to that of domestic courts, however, this view is inaccurate. Of course, states are free to incorporate into domestic legal systems the principle that international tribunals should have the authority to control the proceedings of domestic courts. Indeed, with respect to interpretation of the treaties constituting the European Union, a number of European domestic courts have determined that the states forming the European Union have conferred power of this sort on the European Court of Justice.¹

But it certainly does not follow that each international tribunal necessarily enjoys the authority to review or otherwise control the courts of states subject to the jurisdiction of the tribunal. To understand this point, it is helpful to consider the ways in which courts can relate to one another. Of course, one court may adopt another's view of the law because that view seems persuasive, whatever the formal relation between them. However, if the issue is not one court's voluntary adoption of another's views but the capacity of one court to constrain another, we must consider two questions presented by the interactions of international tribunals and national courts: first, the extent to which decisions of international tribunals can amount to binding precedent for national courts; second, the extent to which a national court is obliged to enforce judgments rendered by international tribunals, either by executing them or by according them preclusive effects. Regarding both questions, it is clear that the instruments establishing a particular international tribunal may be inconsistent with any argument that domestic courts have any obligation to defer to or implement the judgments of the tribunal. Further, a state's domestic constitution may limit that state's authority to enter into obligations requiring its courts either to follow the precedent or to enforce the judgments of international tribunals.

Consider first the question of an international tribunal's authority to create binding precedent. Such a tribunal need not have that authority. The International Court of Justice (ICJ) provides an example. As is well known, Article 59 of the Statute of the ICJ provides, “The decision of the Court has no binding force except between the parties and in respect of that particular case.”² Such unqualified language seems to mean not simply that the ICJ is not bound by its previous decisions, but that no one is bound by an ICJ decision except the parties to that case. Further, in several cases dating from the

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¹ See JOSEPHINE STEINER & LORNA WOODS, TEXTBOOK OF EC LAW 76–95 (6th ed. 1998).

² Statute of the International Court of Justice, June 26, 1945, art. 59, Stat. 1055, 33 UNTS 993.

1950s, domestic courts refused to treat the ICJ's decisions as creating binding precedent.³ Indeed, even the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has held that it is not obliged to treat decisions of the ICJ as binding on it, despite the fact that the ICJ is the principal judicial organ of the United Nations and the ICTY is a court within the same system.⁴

As for enforcing judgments, it would seem that international tribunals would be considered, vis à vis national courts, as foreign institutions, their judgments entitled to no more respect than that afforded judgments of domestic courts of a foreign country. This follows from the fact that such tribunals are not part of the domestic legal system of any state. Of course, this result can be modified by treaty, as was done in the treaties establishing the European Court of Justice⁵ and the Inter-American Court of Human Rights.⁶ However, the treaty establishing the European Court of Human Rights⁷ contains no such provision, and its judgments are not directly enforceable in the courts of the states parties to that treaty.⁸ Likewise, the Iran-United States Claims Tribunal does not see its awards as automatically enforceable in the courts of the parties to the agreement establishing it.⁹ The language and interpretation of these instruments would seem to imply that, absent a clear treaty obligation, international law does not require domestic courts to enforce the judgments of international tribunals. In any event, the few domestic court decisions addressing this issue have not treated the judgments of international tribunals as equivalent to those of domestic tribunals for enforcement purposes.¹⁰

With respect to limitations imposed by a state's own constitutional arrangements, I will focus on the law of the United States. I doubt that American courts would treat as binding decisions of foreign courts or international tribunals regarding legal questions involving the public law of the United States. For example, suppose an international tribunal has occasion to construe a treaty to which the United States is a party. I take it that no court in the United States would be constrained to follow the tribunal's construction of the treaty. Indeed, I believe that constitutionally American courts could not simply defer to the international tribunal. This follows from the fact that Article III of the U.S. Constitution vests "the judicial power of the United States" in one Supreme Court and such inferior courts as Congress may establish, and from the fact that a treaty to which the United States is a party is part of "the supreme law of the land."¹¹ If American courts simply deferred to an international tribunal on treaty construction, they would be treating that court as possessing an authority to construe an American legal instrument equivalent to that of an American court. In essence, they would be treating the tribunal as exercising a judicial power of the United States. But such a tribunal, not being a court established under Article III of the Constitution, cannot

³ *Anglo-Iranian Oil Co. v. Idimitsu Kosan Kabushiki Kaisha*, 20 ILR 305 (Japan High Ct. Tokyo 1953); *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co.*, 22 ILR 23 (Italy Civ. Ct. Rome 1954); *Mackay Radio and Telegraph Co. v. Lal-la Fatma Bent si Mohammed el Khadar*, 21 ILR 136 (Morocco Ct. App. Int'l Trib. 1954).

⁴ *Prosecutor v. Delalic*, Feb. 20, 2001, 40 ILM 630, 636, para. 24 (2001).

⁵ *Treaty Establishing the European Economic Community*, March 25, 1957, arts. 187, 192, 298, 298 UNTS 3, 78, 79 (1957).

⁶ *American Convention on Human Rights*, Nov. 22, 1969, art. 68, 1144 UNTS 119.

⁷ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 UNTS 221, *amended by* Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; Protocol No. 11, E.T.S. 115.

⁸ Rudolf Bernhardt, *The Convention and Domestic Law*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 25, 37-38 (R. St. J. Macdonald et al. eds., 1993); NEVILLE MARCH HUNNINGS, *THE EUROPEAN COURTS* 36 (1996).

⁹ *Islamic Republic of Iran v. United States*, Case No. A/21, 14 Iran-U.S. Cl. Trib. Rep. 324, 331-32 (1987).

¹⁰ *"Socobel" v. Greek State*, 18 ILR 3 (Belg. Trib. Civ. De Bruxelles 1951); *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992).

¹¹ U.S. CONST. art. III.

exercise the judicial power of the United States. Hence, American courts could not lawfully treat its decisions as binding.

With respect to enforcing the judgments of international tribunals, the rule in the United States is that judgments from the courts of foreign countries will be enforced if enforcement would not be contrary to the public policy of the United States.¹² In other words, there is in American law no requirement that the judgments of foreign courts—including presumably international tribunals—be enforced as a matter of course.

One basis upon which American federal courts rely for refusing to enforce a foreign judgment is that such a judgment would interfere with proceedings in an American court.¹³ This point is of obvious importance in cases in which an international tribunal would, in effect, seek to insert itself into a case currently in the American court system. Indeed, to the extent that the proceedings were federal, it would appear to be unconstitutional for the federal courts to give effect to rulings of international tribunals that would effectively revise final judgments of American courts. This conclusion follows from several decisions in which the Supreme Court (Court) has held unconstitutional statutes which either have the effect of subjecting judicial decisions to revision by executive branch officials¹⁴ or operate to overturn particular final judgments of the courts.¹⁵ In particular, the Court has observed, “Article III establishes a ‘judicial department’ with the ‘province and duty . . . to say what the law is’ in particular cases and controversies.”¹⁶ To subject the judicial department to control by another body, including an international tribunal, would thus contravene Article III.

In short, it would appear that one cannot simply assume either that international tribunals are empowered to create binding precedent or that domestic courts either enforce or accord preclusive effect to the judgments of such tribunals. Further, as the example of the United States demonstrates, at least some states will be forbidden by their own constitutions to recognize the authority of an international tribunal.

If the treaty establishing an international tribunal thus does not compel domestic courts to defer to an international tribunal, such a tribunal can affect domestic judgments only to the extent domestic courts are persuaded by the tribunal’s reasoning. Judgments of international tribunals supported by poorly reasoned opinions will be ignored; indeed, given the foregoing arguments, a domestic court might well violate its obligations if it did not ignore such an opinion. In this connection, I will comment briefly on the case which apparently provided some of the inspiration for this panel, the ICJ’s decision in the *LaGrand* case.¹⁷ That case, as most of you probably know, addresses a situation in which a German national, entitled under Article 36 of the Vienna Convention on Consular Relations (Vienna Convention)¹⁸ to be informed of his right to have German consular officials told of his arrest by authorities of the state of Arizona, was not so informed. The ICJ’s opinion in effect reads into the Vienna Convention a right on the part of individuals not given the information required by Article 36 to an individual judicial remedy.¹⁹ This result would appear to have no grounding in the language of the treaty. This interpretation therefore seems unpersuasive, and I would hope that it would have little impact upon American courts.

¹² *Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146 (5th Cir. 1990).

¹³ *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

¹⁴ *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792); *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865); *United States v. O’Grady*, 89 U.S. (22 Wall.) 641 (1874). See also Appendix, 117 U.S. 697.

¹⁵ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

¹⁶ *Id.* at 218.

¹⁷ *LaGrand (F.R.G. v. U.S.)*, June 27, 2001, 40 ILM 1069 (2001).

¹⁸ Vienna Convention on Consular Relations, April 24, 1963, art. 36, 21 UST 77, 6820, 596 UNTS 261.

¹⁹ *LaGrand*, *supra* note 17, at paras. 91, 128(4).

I now wish to address my second point: the view of the law implicit in the idea that international tribunals are in some sense superior to domestic courts. This view, I suggest, reflects the opinion that judges of domestic courts and judges of international tribunals are engaged in a "common global enterprise of judging" providing "a foundation of a global community of law".²⁰ This view seems to depend on the idea that different courts are not just courts of this or that state, but "simply adjudicative entities engaging in resolving disputes, interpreting and applying the law as best they can."²¹ That seems to me profoundly wrong, and based at least in part on a totally false premise.

To use the famous phrase of Justice Holmes, law is not some "brooding omnipresence in the sky,"²² apart from the human institutions that create and apply it. It is a human construct. And, as recognized in the famous case of *Erie Railroad v. Tompkins*,²³ "law in the sense in which courts speak of it today does not exist without some definite authority behind it."²⁴ References to courts applying "the law" as best they can seem to assume that the law is exactly the extra-human entity whose nonexistence Holmes stressed. If, however, law is a human construct, then the humans who create the law must have some claim of authority to do so, and their claim necessarily is limited by that authority. If the humans in question are judges of domestic courts, their authority is solely that embodied in the constitutions and statutes creating those courts. They can properly neither claim power not granted to them nor avoid exercising the power they are required to exercise—even when avoidance could be couched in terms of respect for other entities engaged in "a common judicial enterprise."

The assumption that there is such an enterprise is itself doubtful. Of course, there will be many occasions in which courts can and should assist one another. But the first duty of any court is to the body that created it and to the law of that body—not to some global community of judges. American courts sit to enforce decisions made by American political institutions. For an American judge to refuse to give effect to a constitutionally authorized determination by such an institution—whether that determination takes the form of a statute enacted by a legislature or a decision of an executive official on a matter within his authority—would be a usurpation, even if justified in the name of global judicial cooperation.

PAYING DECENT RESPECT TO INTERNATIONAL TRIBUNAL RULINGS

by Harold Hongju Koh*

Let me comment on Mark Weisburd's provocative, but fundamentally overdrawn, presentation regarding "vertical" conflicts between international and national tribunals. On the one hand, Professor Weisburd sets up and attacks a straw man—the "bindingness" of international tribunal decisions on U.S. domestic courts—a proposition for which no one is seriously arguing. Second, he waves a red herring—the potential unconstitutionality of domestic judicial decisions that choose to follow international law precedents. On closer examination, I would argue, it becomes clear that neither of these propositions is really at stake in the cases that currently vex the U.S. courts.

²⁰ Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1104 (2000).

²¹ *Id.* at 1114.

²² *So. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

²³ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

²⁴ *Id.* at 79 (Holmes, J., dissenting) (quoting *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 533 (1928)).

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Let me clarify what claims are really being made here. Contrary to Professor Weisburd's position, this debate is not about international courts "binding" national courts with their rulings. Nor is it about the unconstitutionality of American judicial actions. Most decidedly, it is not—as Professor Weisburd suggests at the end of his remarks—about some fundamental assault on the very nature of law by American judges or scholars interpreting international treaties. Rather, the question we are being asked is how much deference U.S. national courts should give to rulings of international tribunals, particularly when those rulings construe treaties that also happen to be part of U.S. law.

In answering that question, most of us would reject the answer "total deference." We have never had in the United States a monistic system in which international tribunals sit in some form of binding vertical appellate review of domestic adjudication. Most of us, however, would also reject the answer "no deference." From the very beginning of the U.S. Republic, dating back to the Declaration of Independence, American courts have treated international law as part of our law and paid decent respect to the opinions of mankind.¹ To reject that history and adopt a rule of "no deference" to international precedents would be fundamentally antihistorical. In a modern system of global adjudication, concepts of comity, judicial prudence, and American constitutional doctrine all require that American courts not treat every question of international law as a question of first impression. Instead, U.S. courts should look where appropriate to interpretations of international law by international bodies, and then apply what I would call a rule of "selective incorporation," a position that requires neither total deference to nor total rejection of parallel international rulings. For those familiar with my general view of "transnational legal process," what I am saying is that in the process of internalizing international norms into national law, U.S. courts should not be simply internalization-blockers nor rubber stamps, but should play their familiar historical role of "selective norm-internalizers."²

With this framework in mind, let me review what I believe to be the four key points of Professor Weisburd's presentation, with only the first two of which I can agree. Professor Weisburd says, first, that unless the rules of the domestic legal system so provide, the rulings of international tribunals are not binding on domestic courts and generally, may not be entitled to any more respect than are accorded to the rulings of courts of sister states. On this point, I agree. So far, so good.

Second, he says that U.S. courts need not enforce the judgments of foreign or international tribunals if it would offend public policy to do so. Again, I agree, but add that this is hardly a new proposition. It restates the Supreme Court's 1895 ruling in *Hilton v. Guyot*, which defined "comity" as "neither [a] matter of absolute obligation . . . nor of mere courtesy and good will, [but] the recognition that one nation allows within its territory to the judicial acts of another . . . having due regard to international duty and convenience."³

At Professor Weisburd's third proposition, however, we start to disagree. He says that it would be unconstitutional for a U.S. court to "simply defer" to the rulings of an international court. To "simply defer," he says, treats the foreign tribunals as "possessing the authority to construe an American legal instrument equivalent to that of an American court. In essence, they would be treating the tribunal as exercising a judicial

¹ For a historical review, see generally Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 36 U.C. DAVIS L. REV. 1085 (2002).

² See generally Harold Hongju Koh, *1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997).

³ *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

power of the United States."⁴ This, he claims, is a violation of Article III of the Constitution, because a non-Article III tribunal cannot lawfully exercise the judicial power of the United States.

This may be trivially true, if one emphasizes the words "simply defer," because, as we all know, Article III requires that our federal judges be independent.⁵ An independent judge should not blindly defer to anyone, whether it is the International Court of Justice (ICJ), the International Criminal Tribunal for the Former Yugoslavia, a judge from the state courts, or President George W. Bush. Every judge in the United States has a constitutional duty to deliberate independently and to determine independently the law to be applied in each case.

But that is a far cry from a case involving interpretation of an international convention that the United States and more than 180 other countries have ratified. Under such circumstances, it makes little sense to claim, as Professor Weisburd does, that this is somehow just an "American legal instrument." Other judicial bodies are entitled to and in some cases obliged to interpret what that instrument means, which is precisely why the American executive branch may choose to go before an international body seeking a definitive interpretation of the meaning of the treaty. Why, for example, did the United States government decide, during the Iran Hostage crisis, to go to the ICJ seeking provisional measures and a final judgment proclaiming that Iran was holding American diplomats in violation of the Vienna Conventions on Diplomatic and Consular Rights (Vienna Conventions)?⁶ The answer: precisely because the United States did not consider the Vienna Conventions to be merely *Iranian* legal instruments. The United States did not consider the Vienna Conventions to be legal instruments belonging solely to the United States, Iran, or any other national legal system. The U.S. government assumed that when Iran ratified those treaties, it committed itself internationally to be bound by those treaties and intended to forswear political acts that violated those treaties. And when the ICJ so held, and our courts cited the ICJ's ruling with approval,⁷ U.S. courts were not giving away any judicial power of the United States. Instead, they were simply deferring to a persuasive reading by an expert judicial body construing the same words of the same governing treaty on the same fact pattern.

This brings me to Professor Weisburd's fourth and final argument, with which I strongly disagree. He asserts that somehow U.S. judges and judges of international tribunals are not engaged in a common global enterprise of judging. International law, he seems to say, has no claim of authority behind it, and is not really law at all, and therefore U.S. judges have no legal obligation to follow it. This is not the time or place to reopen the age-old debate over the nature and sources of authority underlying international law. But whether the ultimate source of authority is political consent or natural law, or some combination of the two, it seems clear that when the president and Senate of the United States commit by ratification that U.S. officials shall obey international treaty commitments, they are committing U.S. judges to follow those obligations as well. United States judges who are sworn to uphold the Constitution and laws of the United States are constitutionally obliged by Article III and the supremacy clause of our Constitution to carry out our binding treaty commitments. If an international tribunal has construed a particular provision of a treaty, and determined the intent of the treaty parties in a persuasive way, the U.S. court should defer to that interpretation. As Chief

⁴ Weisburd, A. Mark, *Problems with the Concept of "Vertical Conflicts"*, *supra* at 42-45.

⁵ U.S. CONST. art. III.

⁶ See Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3 (May 24).

⁷ See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

Justice Burger wrote in *Sumitomo Shoji America, Inc. v. Avagliano*, "When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we [as judges] must, absent extraordinarily strong contrary evidence, defer to that interpretation."⁸

With this understanding, it is not only constitutional for U.S. judges to look to and, when persuaded, to follow rulings of international tribunals, particularly when they construe treaties to which the U.S. is a party, but there are also times when it would be constitutionally irresponsible for U.S. judges *not* to look to international rulings, for at least four reasons: comity, separation of powers, federalism, and canons of statutory and constitutional construction.

First, in some cases, U.S. judges could not refuse to follow international tribunal rulings without violating traditional notions of comity and of giving "decent respect to the opinions of mankind," an originalist notion rooted in the Declaration of Independence.⁹ In the *Aerospatiale* case, Justice Blackmun suggested that judges applying the concept of comity should "consider if there is a course that furthers, rather than impedes, the development of an ordered international system. A functioning system for solving disputes across borders serves many values, among them predictability, fairness, ease of commercial interactions, and 'stability through satisfaction of material expectations' These interests are common to all nations including the United States."¹⁰

A second concern is separation of powers. If a U.S. court were to construe a treaty completely differently from the way that a hundred other treaty partners and an international tribunal knowledgeable about the treaty had done, that ruling would be bound to create judicial disruption of our foreign policy. To take a hypothetical example, the first Bush Administration ratified the Torture Convention that includes a requirement that contracting states not extradite people to countries where they are likely to be tortured.¹¹ If an authoritative international tribunal were to hold that people are being tortured in, for example, Saudi Arabia or Turkey, and a U.S. judge were asked to extradite a suspect to one of these countries, the judge would be obliged to consider the international decision and to follow it, or place the U.S. government in violation of its obligations under the Torture Convention. In so doing, the U.S. judge would not be violating the Supreme Court doctrine, but following it (particularly the language quoted above from the *Sumitomo Shoji* case).

Third, it may violate principles of federalism for a U.S. court, notwithstanding the supremacy clause, to uphold a state law that violates our international obligations or interferes with the conduct of our foreign policy. In *Crosby v. National Foreign Trade Council*,¹² the Supreme Court struck down a state selective purchasing law under the foreign commerce clause of the Constitution.¹³ In *Crosby*, the United States' Brief noted that the state action had "generated protests from a number of U.S. allies and trading partners. . . . Senior United States officials have acknowledged that the Act and the consequent protests from U.S. allies have been an irritant that has, among other things,

⁸ *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).

⁹ THE DECLARATION OF INDEPENDENCE, para. 1-2 (U.S. 1776) ("When in the Course of human events, it becomes necessary for one people 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. (emphasis added)).

¹⁰ *Societe Nationale Industrielle Aerospatiale v. [U.S.] Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 555, 567 (1987) (Blackmun, J.) (citation omitted).

¹¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 UNTS 85 (entered into force June 26, 1987).

¹² *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

¹³ U.S. CONST. art I, §8.

diverted the United States' and Europe's [foreign policy] attention from focusing where it should be."¹⁴

Fourth and finally, failing to follow international rulings may violate canons of both statutory and constitutional construction. The most obvious is the famous *Charming Betsy* principle, which requires that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains."¹⁵ The best example of a canon of constitutional construction is the Eighth Amendment to the Constitution, which bans "cruel and unusual" punishments.¹⁶ As I elaborate below, in a global era, it makes little sense to construe this phrase without taking into account whether or not a particular punishment is unusual outside as well as inside the United States.

Let me illustrate these points by addressing four concrete situations: *Breard v. Greene*,¹⁷ the *LaGrand* case,¹⁸ the treatment of Taliban detainees on Guantanamo, and *Atkins v. Virginia*, a pending U.S. Supreme Court (Court) case involving the execution of people with mental retardation.¹⁹

Breard, as everybody knows, is the case in which the Court refused to stay the execution of a Paraguayan national notwithstanding an ICJ order to the contrary. Three points are uncontested. First, no one denies that the treaty was squarely violated. Virginia officials had not informed Paraguayan consular authorities of Breard's arrest and trial, as was required by Article 36 of the Vienna Convention on Consular Relations.²⁰ Second, the ICJ issued a clear and non-onerous request for court-to-court comity. The ICJ's provisional measures order requested that the United States government—including the Court—"take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings."²¹ Satisfying that request would have required only that the Court stay the execution for a short period, grant the petition of certiorari, and set the case for plenary briefing and oral argument, a result that should have been required anyway simply by the international significance of the matter. Third, the resulting execution constituted a disruption of U.S. foreign policy-making by a state of the union. Then-Secretary of State Madeleine Albright (Secretary) sent a remarkable letter to the governor of Virginia, urging him to stay Breard's execution "in light of the [ICJ's] request, the unique and difficult foreign policy issues, and other problems created by the Court's provisional measures."²² Yet remarkably, the

¹⁴ Brief for the United States as Amicus Curiae at *11, *Natsios v. Nat'l Foreign Trade Council*, 2000 WL 194805 (2000) (No. 99-474).

¹⁵ *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). For a recent citation of this proposition, see Justice Scalia's opinion in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 815, 818-19 (1993).

¹⁶ U.S. CONST. amend. VIII.

¹⁷ *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam).

¹⁸ *LaGrand* case (F.R.G. v. U.S.), 2001 ICJ REP. 104 (June 27), at <<http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>>.

¹⁹ *Atkins v. Virginia*, No. 00-8452 (U.S. argued Feb. 20, 2002), *decided* 122 S.Ct. 2242 (June 20, 2002) [Ed. note: after these remarks were delivered, the Supreme Court in *Atkins* banned the execution of people with mental retardation, relying, in part, on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved," 122 S.Ct. at 2249 n.21.]

²⁰ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 UST 78.

²¹ Case concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Request for Provisional Measures, Order, 1998 ICJ REP. 266, §§18, 20 (Apr. 9), at <<http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm>>.

²² Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998), available at <<http://www.asil.org/ajil/agoral.htm>>. Albright wrote,

As Secretary of State . . . I have a responsibility to bear in mind the safety of Americans overseas. I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. The execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention. The immediate

solicitor general's brief to the Court opposed the stay, ignoring the very interference with foreign policy that the Secretary said would be likely if the execution took place. Even more remarkable, the governor then rebuffed the Secretary's request, citing his obligations to the citizens of Virginia.²³ Yet it was precisely to prevent state officials from following their loyalties to their own citizens, in the process creating unwanted international disputes for our nation, that the framers discarded the Articles of Confederation in favor of a federal constitution.²⁴ I would argue that the state's action in *Breard* has been at least as disruptive of U.S. foreign policy as was the Massachusetts Burma Act invalidated in *Crosby*. Thus, in retrospect, it seems clear that three of the concerns I have described above—comity, separation-of-powers, and federalism—should have led the Court to grant the stay and hear plenary argument in *Breard*.

A similar situation has arisen in the aftermath of Arizona's execution of two German brothers, Karl and Walter LaGrand, who also had not been advised of their rights to consular notification and access. In March 1999, Germany applied in the ICJ for provisional measures to block one brother's execution.²⁵ The ICJ issued those measures the next day, again requesting that the United States take all measures at its disposal to prevent the execution. Once again, the solicitor general successfully opposed the stay, arguing that the provisional measures were not binding "and did not furnish a basis for judicial relief."²⁶ Undeterred, Germany pressed on, and more than two years later, won a sweeping judgment against the United States before the ICJ.

Subsequently, there have been a flurry of cases in U.S. courts raising claims by individual defendants, citing *LaGrand* in support of suppressing evidence obtained in the absence of consular notification. The rulings thus far fall into five basic categories, some of which seem plainly wrong and some which seem to reach defensible outcomes.

The first class of cases, which strikes me as plainly wrong, are those decisions that do not even mention the *LaGrand* decision.²⁷ Given that the ICJ has issued a detailed ruling analyzing how the Vienna Convention applies to these cases, it strikes me as indefensible for a U.S. court to stick its head in the sand and to refuse even to acknowledge the existence of the decision.

The second class of cases are those that mention *LaGrand*, then assume without deciding that the Vienna Convention confers some enforceable rights on criminal defendants, but go on to treat the Vienna Convention violation as harmless error for a variety of other reasons, e.g., failure to show prejudice.²⁸ Given that these cases do not turn on an interpretation of the Vienna Convention, but rather on a conclusion that even a blatant treaty violation would constitute harmless error on the facts of the case, detailed discussion and reliance on an international precedent may not be necessary to decide the case.

execution of Mr. Breard in the face of the Court's April 9 action *could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations* and thereby limit our ability to ensure that Americans are protected when living or traveling abroad. (emphasis added).

²³ See Norman Kempster, *Despite Warnings, Virginia Executes Paraguayan Citizen*, L.A. TIMES, Apr. 15, 1998, at A6.

²⁴ See, e.g., THE FEDERALIST NO. 80, at 477 (Alexander Hamilton) (New American Library ed. 1961) (expressing concern that the United States might be held internationally responsible for "an unjust sentence against a foreigner" issued by a state court).

²⁵ See generally *LaGrand* case, 2001 ICJ REP. 104.

²⁶ *Id.* at para. 33.

²⁷ See, e.g., *United States v. Emuegbunam*, 268 F.3d 377 (6th Cir. 2001); *State v. Martinez-Rodriguez*, 33 P.3d 267 (N.M. 2001).

²⁸ See, e.g., *United States v. Minjares-Alvarez*, 264 F.3d 980 (10th Cir. 2001); *State v. Lopez*, 633 N.W.2d 774 (Iowa 2001); *State v. Issa*, 752 N.E.2d 904 (Ohio 2001).

A third set of cases are those that say that Vienna Convention violations are not redressable by a private remedy. These rulings clearly require the court to look to the *LaGrand* opinion, for that opinion directly speaks to this claim by calling the violations that occurred violations of U.S. obligations not just to Germany but directly to the *LaGrand* brothers.²⁹

A fourth position, best captured by a recent Ninth Circuit en banc decision, states that there is a Vienna Convention violation, which might be redressable by individual remedy, but that the remedy of the exclusionary rule is not a remedy that has been applied by any other signatory to the treaty.³⁰ This approach does not strike me as unreasonable, given that it actually requires the U.S. court to look at both the treaty and the international decision, and to decide how the treaty has actually been construed by the treaty parties, even if concluding that the individual defendant is entitled to no relief.

The fifth and final possibility is that the U.S. court could hold that any Vienna Convention violation is a *per se* basis for suppressing the evidence, an outcome which only one U.S. court has reached, and even then in a decision that was subsequently overruled.³¹

That brings me to my third example: the treatment of Taliban detainees on Guantanamo. The Bush administration initially announced that none of the detainees on Guantanamo were entitled to the protections of the Geneva Convention. After intense criticism and a fierce internal debate, the White House changed course and announced that the Geneva Conventions apply to Taliban (but not Al Qaeda) detainees, but that anyone who fought for the Taliban violated the laws of war and thus still cannot claim prisoner of war (POW) status.³² In my opinion, this is an incorrect application of the Geneva Conventions. A correct reading should have required that all detainees in U.S. custody be presumed to be POWs until each had his status individually determined by the "competent tribunal" required by Article 5 of the Third Geneva Convention. Recently, the Inter-American Human Rights Commission (Commission) took the same position, issuing a precautionary measures order stating that international human rights and humanitarian law applies to these detainees and directing the United States to forthwith bring the detainees before a competent tribunal to decide whether or not they are POWs.³³ If a U.S. court should hear a properly presented habeas petition by a Guantanamo Taliban detainee challenging the failure to award him POW status, the question may arise of how much deference the court is required to give to this Commission ruling.³⁴

²⁹ The ICJ ruled, *inter alia*, that: (1) Article 36, paragraph 1 of the Vienna Convention creates an individual right to consular notification and access; (2) that a foreign national deprived of his Article 36 rights and sentenced to a "severe penalty" is entitled to "review and reconsideration" of his conviction and sentence; (3) that application of domestic rules of procedural default to the *LaGrand* brothers violated the United States' obligation to give "full effect" to the purposes of Article 36; (4) that a foreign national need not demonstrate prejudice by the Article 36 violation before he may obtain an effective remedy for the violation; and (5) that the provisional measures order should have been treated as binding upon the United States. *LaGrand* case, 2001 ICJ REP. at §§123-27.

³⁰ *United States v. Lombera-Camorlinga*, 206 F.3d 882, 884-85 (9th Cir. 2000) (en banc) (holding that suppression of evidence was not an appropriate remedy for violation of the Vienna Convention).

³¹ *State v. Reyes*, 740 A.2d 7 (Del. Super. Ct. 1999), *overruled by State v. Tiaseca*, cited in *State v. Vasquez*, 793 A.2d 1249 n.6 (Del. Super. Ct. 2001).

³² See *Status of Detainees at Guantanamo*, Office of the White House Press Secretary (February 7, 2002), available at <<http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>>.

³³ See Letter from Juan E. Mendez, President, Inter-American Human Rights Commission, Re "Detainees In Guantanamo Bay, Cuba, Request For Precautionary Measures" (March 13, 2002), available at <<http://www.humanrightsnow.org>>.

³⁴ At this writing, the District of Columbia federal court has rejected habeas petition filed on behalf of two British and one Australian detainee on Guantanamo. See Jess Bravin, *Guantanamo Detainees Lose Bid for Access to U.S. Courts*, WALL ST. J. (July 31, 2002), available at <<http://online.wsj.com>>.

Would the U.S. court be bound by it? Of course not. Should the court ignore the Commission ruling and say it is entitled to no deference at all? That strikes me as highly foolish. After all, an expert international human rights body has construed provisions of treaty law over which it has the power of interpretation and has expressed a view different from that expressed by the executive branch of one Organization of American States (OAS) member state. President Bush has made a blanket determination that no one on Guantanamo is entitled to POW status, while the Commission has said that this finding should be determined case by case by individual process. In *INS v. Cardoza-Fonseca*, the Court declared that the UN High Commissioner on Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* "provides significant guidance in construing the [Refugee] Protocol, to which Congress sought to conform . . . [and] has been widely considered useful in giving content to the obligations that the Protocol establishes."³⁵ Similarly, the interpretations of the Commission should give U.S. courts significant guidance in construing and giving content to the obligations set forth in the inter-American human rights instruments that the Commission interprets, and should bear on whether or not a U.S. court finds it legal to deny a Taliban detainee on Guantanamo POW status.

Finally, let me mention *Atkins v. Virginia*, the challenge currently before the Court to the execution of persons with mental retardation by the state of Virginia.³⁶ In 1989, the last time this issue was before the Court, only two states expressly banned the execution of persons with mental retardation. Since then, when one adds states that now specifically ban the practice and states that have abolished the death penalty, altogether thirty states, the District of Columbia, and the federal government now ban the practice, along with a number of states, such as New Hampshire, which have not banned the practice *de jure* but have not, in fact, executed a person with mental retardation for decades. This raises an important question of constitutional construction under the Eighth Amendment of the Constitution. Can we now say that the execution of persons with mental retardation is a "cruel and unusual" practice?

In *Atkins*, my students and I filed an amicus brief on behalf of nine former American diplomats who pointed out that the only other country in the world that regularly executes persons with mental retardation is Kyrgyzstan.³⁷ When we filed our brief so arguing, Kyrgyzstan's ambassador to Washington rushed to set the record straight, noting that the United States now stands alone, because Kyrgyzstan has executed no one—much less a person with mental retardation—in the past few years.³⁸ Given this near-unanimity of state practice, the only logical conclusion is that the current U.S. practice of executing persons with mental retardation violates customary international law, which "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."³⁹ Moreover, when thirty states of the union, the federal government, the District of Columbia government, and 184 other nations have banned the practice of executing persons with mental retardation, it is hard to deny that Virginia's practice is now—by any sensible reading of the term—"unusual" for purposes of the cruel and unusual punishments clause of the Eighth Amendment.

³⁵ *INS v. Cardoza Fonseca*, 480 U.S. 421, 439 n.22 (1987).

³⁶ *Atkins v. Virginia*, 122 S.Ct. 2242 (decided June 20, 2002) following this panel, discussed in *supra* note 19.

³⁷ See Brief of Amici Curiae Diplomats Morton Abramowitz et al. at 1–21, *McCarver v. North Carolina*, 2000 U.S. Briefs 8727 (N.C. June 8, 2001), available at <<http://www.deathpenaltyinfo.org/ForeignServiceBrief.html>>.

³⁸ See Baktybek Abdrysaev, Letter to the Editor, *Penalties in Kyrgyzstan*, N.Y. TIMES, June 30, 2001, available at <<http://www.nytimes.com/2001/06/30/opinion/L30KYRG.html?ex=995179324&ei=1&en=76edcd977f0cf7e8>>.

³⁹ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

Significantly, at oral argument in *Atkins*, Justice Ginsburg asked the Virginia state attorney "in making this cruel and unusual decision . . . does what the rest of the world think about executing the mentally retarded . . . have any relevance at all? I mean, we have, since the time we said we don't look to the rest of the world, been supporters of international human rights tribunals . . . for the former Yugoslavia, for the former Rwanda. But is it still, would you say, just irrelevant that most of the rest of the world thinks that mentally retarded people—because it's inhuman to execute them?"⁴⁰ In responding, the attorney for the state of Virginia repeatedly waffled on whether international practice is relevant, and ultimately concluded that it was not.⁴¹

In closing, let me say that if we want to demonstrate our global leadership in human rights, our concept of cruel and unusual punishment should be measured by evolving standards of decency that take into account not just the practices in Texas but also the practices in Kyrgyzstan. After September 11th, if we want to lead a global war against terrorism that is supported by other nations, that is backed by international law, and that invokes what President Bush recently called in his State of the Union address "non-negotiable demands for human dignity,"⁴² then our courts, no less than our politicians, need to consult, take account of, and selectively incorporate into their decisions the relevant rulings of expert international tribunals.

⁴⁰ See *Atkins v. Virginia*, No. 00-8452, 2002 WL 341765, at *48 (Feb. 20, 2002) (United States Supreme Court Official Transcript).

⁴¹ *Id.*

MS. RUMPZ: This Court has said previously that the notions of other countries and the notions of other lands cannot play the deciding factor in what—

JUSTICE GINSBURG: Not deciding. I asked you if it was relevant.

MS. RUMPZ: Well, it is relevant in—as Justice Scalia said in one of his opinions, to determine whether our practice is a historical accident or not. But it certainly is not relevant in deciding the Eighth Amendment principle. . . .

JUSTICE GINSBURG: I asked if it was relevant. . . . I didn't ask if it was dispositive.

MS. RUMPZ: It's not dispositive, and it is relevant once the Eighth Amendment principle has already been established. It's not relevant in establishing whether something is cruel and unusual.

JUSTICE SOUTER: Why do you need it after it's been established?

QUESTION: You don't.

MS. RUMPZ: You don't. You—you look—you look after the fact to see whether—I guess my answer I guess is it's not relevant.

But see *Atkins*, 122 S.Ct. at 2249 n.21 (taking note of the overwhelming disapproval of the world community for this practice in the course of invalidating it under the Eighth Amendment).

⁴² President George W. Bush, State of the Union Address (Jan. 29, 2002) (transcript available online at <<http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>>) ("America will always stand firm for the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance.").