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# The Supreme Court and the Law of Nations\*

Harry A. Blackmun†

## I. FIRST PRINCIPLES

The Declaration of Independence opens with the following memorable passage:

When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands 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.<sup>1</sup>

As Professor Louis Henkin has noted, the early architects of our Nation understood that the customs of nations—the global opinions of mankind—would be binding upon the newly forged union.<sup>2</sup> John Jay, the first Chief Justice of the United States, observed in *Chisolm v. Georgia* that the United States “had, by taking a place among the nations of the earth, become amenable to the laws of nations.”<sup>3</sup> Although the Constitution gives Congress the power to “define and punish . . . Offenses against the Law of Nations”<sup>4</sup> and identifies treaties as part of “the supreme Law of the Land,”<sup>5</sup> the task of further defining the role of international law in the nation's legal fabric has fallen to the federal courts.

Several first principles have been established. As early as 1804, in *Murray v. Schooner Charming Betsy*, the Supreme Court recognized that “an act of congress ought never to be construed to violate the law of nations if any other

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\* This Article is adapted from remarks delivered by Justice Blackmun on the occasion of Professor Louis Henkin's retirement as President of the American Society of International Law, April 7, 1994. Those remarks appear in the March-May ASIL Newsletter 1 (1994), copyright by the American Society of International Law.

† Associate Justice, Supreme Court of the United States. Justice Blackmun assumed retired status on August 3, 1994.

1. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added).  
2. See Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. MARSHALL L. REV. 215 (1992).  
3. 2 U.S. (2 Dall.) 419, 474 (1793).  
4. U.S. CONST. art. I, § 8, cl. 10.  
5. *Id.* art. VI, cl. 2.

possible construction remains.”<sup>6</sup> In a trilogy of cases in the 1880’s, the Court established that treaties are on equal footing with federal statutes and that, where a treaty and statute cannot be reconciled, the later in time is controlling.<sup>7</sup> Finally, in the case of *The Paquete Habana*,<sup>8</sup> decided in 1900, the Supreme Court addressed the ability of courts to enforce customary international law. In invalidating the wartime seizure of private fishing vessels as contrary to the law of nations, the Court observed: “International law is part of our law, and must be ascertained and administered by the courts . . . [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .”<sup>9</sup> Although commentators continue to debate the extent of executive, legislative, or judicial power to trump customary international law, the import of *The Paquete Habana* is clear: Customary international law informs the construction of domestic law, and, at least in the absence of any superseding positive law, is controlling.

*The Paquete Habana* left many questions unanswered, and courts since have backed away from some of that decision’s more sweeping promises. The principles established during the Supreme Court’s first century, however, continue to define the relationship between the law of nations and domestic American law. This Article considers the Supreme Court’s application of these principles in four recent cases. The first two, *United States v. Alvarez-Machain*<sup>10</sup> and *Sale v. Haitian Centers Council, Inc.*,<sup>11</sup> required the Court to examine the validity of executive action in light of binding international treaties. The last two, *Thompson v. Oklahoma*<sup>12</sup> and *Stanford v. Kentucky*,<sup>13</sup> addressed the implications of international law for Eighth Amendment death-penalty jurisprudence. Unfortunately, I conclude from these cases that the Supreme Court recently has shown something less than “a decent respect to the opinions of mankind.”

## II. CONSTRUING INTERNATIONAL INSTRUMENTS

### A. *United States v. Alvarez-Machain*

Two Terms ago, in the case of *United States v. Alvarez-Machain*, the Supreme Court was asked to consider whether the forced abduction of a

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6. 6 U.S. (2 Cranch) 64, 118 (1804).

7. See *Head Money Cases*, 112 U.S. 580, 597–99 (1884); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *The Chinese Exclusion Case*, 130 U.S. 581, 600, 602–03 (1889).

8. 175 U.S. 677 (1900).

9. *Id.* at 700.

10. 112 S. Ct. 2188 (1992).

11. 113 S. Ct. 2549 (1993).

12. 487 U.S. 815 (1987).

13. 492 U.S. 361 (1989).

Mexican national by United States agents violated a U.S.-Mexico extradition treaty.<sup>14</sup> Over the vehement protest of the Mexican government, Dr. Humberto Alvarez-Machain was kidnaped in Mexico and brought to the United States to stand charges for the kidnaping, torture, and murder of a U.S. Drug Enforcement Administration agent. The district court dismissed the charges, concluding that the abduction violated the U.S.-Mexico extradition treaty.<sup>15</sup>

The Supreme Court disagreed, holding, by a 6–3 vote, that the abduction had not violated the extradition treaty. Although the treaty established comprehensive procedures for the extradition of foreign nationals wanted for prosecution by the other sovereign, Chief Justice Rehnquist observed for the majority that the treaty was silent with regard to “the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation.”<sup>16</sup> In the absence of an express prohibition, the majority reasoned, the kidnaping must be allowed. Ignoring the hornbook principle that a treaty shall be interpreted according to its ordinary meaning and in light of its object and purpose, the majority rejected the contention that its interpretation would eviscerate the treaty’s purpose,<sup>17</sup> even while acknowledging that the abduction “may be in violation of general international law principles.”<sup>18</sup>

Justice Stevens condemned the Court’s holding in a dissent in which Justice O’Connor and I joined. The dissenters argued that construing the treaty’s silence to allow kidnaping would reduce its provisions to mere “verbiage”<sup>19</sup> and would violate the treaty’s spirit and purpose. Extradition treaties codify fundamental international norms. They preserve the territorial integrity of nations, protect individuals from arbitrary detention and arrest, and prevent international conflict. Transborder kidnaping, of course, violates each of these overarching goals. The Supreme Court, it seems to me, thus construed the treaty to permit the precise result that the document was drafted to forbid.

In so doing, the Supreme Court also ignored customary international law. Quoting an article by Professor Henkin, the dissenting opinion observed that with or without an extradition treaty, abducting a person from a foreign country without the foreign government’s consent “‘is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation of the territorial integrity of another state; [and] it eviscerates the [global] extradition system.’”<sup>20</sup> Even *with* the consent

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14. See Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.

15. *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990).

16. *Alvarez-Machain*, 112 S. Ct. at 2193.

17. See *id.* at 2194.

18. *Id.* at 2196.

19. *Id.* at 2198 (Stevens, J., dissenting).

20. *Id.* at 2202 (quoting Henkin, *supra* note 2, at 231) (alteration in original)

of the foreign sovereign, kidnaping a foreign national flagrantly violates peremptory human rights norms. Ironically, in its construction of the treaty, the Supreme Court could have benefited from the example of the highest court of South Africa, which recently dismissed the prosecution of a person kidnaped from a neighboring country. In language strikingly reminiscent of that in *The Paquete Habana*, the court concluded that an “abduction represents a violation of the applicable rules of international law, that these rules are part of [South African] law, and that this violation of the law deprive[d] the Court . . . of its competence to hear [the] case.”<sup>21</sup>

The *Alvarez-Machain* chapter in the Supreme Court’s history closed with a poetic twist. In December 1992, the district court dismissed the criminal charges against Dr. Alvarez-Machain, concluding that the government’s evidence supporting the indictment was insufficient.<sup>22</sup>

In my view, the Supreme Court’s *Alvarez-Machain* decision did tremendous damage to the fabric of both conventional and customary international law. If the Supreme Court’s holding was correct and the abduction of Dr. Alvarez-Machain was consistent with the extradition treaty, then the treaty constrains Mexico from kidnaping U.S. nationals no more than it constrains the United States. Similarly, according to the Court’s reasoning, rather than negotiating for the extradition of John Demjanjuk, Israel could have kidnaped him and held him for trial on any charges it wished. The Court’s interpretation thus would subvert the entire purpose of the global extradition system.

We perhaps can take some comfort in the fact that although the Supreme Court is the highest court in the land, its rulings are not necessarily the final word on questions of international law. The *Alvarez-Machain* decision provoked domestic and international outcry and was deemed by the Inter-American Juridical Committee to be “contrary to the rules of international law.”<sup>23</sup> And the decision and its aftermath inspired a searching re-examination, in both Congress and the Justice Department, of the Government’s kidnaping policy.<sup>24</sup> In June 1993, the United States and Mexico formally agreed to negotiate a ban on the practice of transborder kidnaping.<sup>25</sup> Thus, as is often the case, it appears to have taken a troublesome Supreme

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21. *Id.* at 2206 n.36 (quoting *State v. Ebrahim*, [1991] 2 S. Afr. L. Rep. 553, 568) (alternate translation in 31 I.L.M. 888 (1992)).

22. Seth Mydans, *Judge Clears Mexican in Agent's Killing*, N.Y. TIMES, Dec. 15, 1992, at A20.

23. *Legal Opinion on the Decision of the Supreme Court of the United States of America*, CJI/Res. II-15/92, Inter-Am. Juridical Comm., OEA/ser. G/CP/doc. 2302/92 (Sept. 1, 1992), reprinted in 4 CRIM. L.F. 119 (1993).

24. See *Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992); Paul Hoffman, *U.S. Must Not Kidnap Suspects Abroad*, NEWSDAY, Dec. 2, 1993, at 114 (noting internal Justice Department review ordered by Attorney General Janet Reno in response to *Alvarez-Machain*).

25. Steven A. Holmes, *U.S. Gives Mexico Abduction Pledge*, N.Y. TIMES, June 22, 1993, at A11.

Court decision to launch the process of bringing domestic law in line with international practice.

B. *Sale v. Haitian Centers Council, Inc.*

Last Term, the Supreme Court again was called upon to construe an international treaty, with equally disturbing results for the opinions of mankind. *Sale v. Haitian Centers Council, Inc.*<sup>26</sup> concerned a challenge by Haitian refugees to the U.S. policy of interdicting all Haitians who fled Haiti on the high seas and summarily returning them to Haiti, without any inquiry into their asylum claims or even their intended destination. Central to the Haitian plaintiffs' challenge was Article 33.1 of the United Nations Convention Relating to the Status of Refugees. That Article provides: "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened."<sup>27</sup> The principle of *nonrefoulement* expressed in Article 33.1—that no refugee may be returned to a country where he will suffer persecution—guarantees one of the most fundamental international rights of refugees. More than 120 nations, including the United States, have acceded to the binding obligations of Article 33.1.<sup>28</sup> In 1980, Congress adopted § 243(h) of the Immigration and Nationality Act,<sup>29</sup> which mirrors the language of Article 33.1, in order to bring U.S. law expressly into compliance with the Refugee Convention.

In construing § 243(h) and Article 33.1 in *Haitian Centers Council*, the Court once again failed to respect its first principles of international law. Turning first to the statute, the Court remarkably applied a presumption against extraterritoriality to § 243(h) without considering the fact that the statute was enacted pursuant to a multilateral treaty, and without acknowledging the primacy of the principle of *nonrefoulement* in customary international law.<sup>30</sup> The Court thus ignored a maxim recognized since *Schooner Charming Betsy*: An Act of Congress—and particularly a statute enacted pursuant to a treaty—ought never to be construed to violate a coextensive treaty or otherwise to contradict customary international law.

Having established that § 243(h) does not apply beyond U.S. borders, the Court then reasoned backwards to construe the language of Article 33.1—a global convention—in light of its interpretation of *American* immigration law. The language of Article 33.1 absolutely prohibits the "return" of any refugee

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26. 113 S. Ct. 2549 (1993).

27. Convention Relating to the Status of Refugees, July 28, 1951, art. 33.1, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176, as incorporated in Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

28. U.S. DEP'T OF STATE, TREATIES IN FORCE 399-400 (1994).

29. Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 107 (codified as amended at 8 U.S.C. § 1253(h) (1988 & Supp. IV 1992)).

30. See *Haitian Ctrs. Council*, 113 S. Ct. at 2563.

“in any manner whatsoever,” without geographical limitation.<sup>31</sup> The Supreme Court nevertheless concluded that the prohibition applies only after a refugee successfully enters U.S. territory.<sup>32</sup> Neither the treaty nor the statute, therefore, prevents the United States from reaching *outside* its territory to exercise jurisdiction over bona fide refugees in international waters.<sup>33</sup>

Writing this time for the 8–1 majority, Justice Stevens conceded that “[t]he drafters of the Convention . . . may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape.”<sup>34</sup> “[S]uch actions,” the Court acknowledged, “*may even violate the spirit of Article 33.*”<sup>35</sup> Nevertheless, the Court concluded that “[b]ecause the text of Article 33 cannot reasonably be read to say anything at all about a nation’s actions toward aliens outside its own territory, it does not prohibit such actions.”<sup>36</sup> The Court thus accomplished precisely what Justice Stevens’ dissent had so vehemently criticized in *Alvarez-Machain* the Term before. Once again, the Court interpreted a treaty contrary to its plain meaning, spirit, and purpose, and contrary to the tenets of customary international law.

I was the sole dissenter in *Haitian Centers Council*. Although I shall not belabor the argument, to me the mandate and spirit of the Refugee Convention are clear: “Vulnerable refugees shall not be returned.”<sup>37</sup> Article 33.1 forbids nations from returning any refugee *to* a territory where he will suffer persecution. This, of course, is precisely what the Government did when it interdicted and forcibly returned Haitian refugees.

In the conclusion to my dissent, I noted that Article 33.1 was drafted largely in response to the experience of Jewish refugees during World War II—refugees the United States and nations of Europe repelled and returned to the gas chambers of Nazi Germany. Article 33.1 was meant to ensure that this international nightmare would not be repeated.<sup>38</sup> To allow nations to skirt their solemn treaty obligations and return vulnerable refugees to persecution simply by intercepting them in international waters is, as the district court in *Haitian Centers Council* noted, to turn the Refugee Convention into a “cruel hoax.”<sup>39</sup>

As in the *Alvarez-Machain* case, the *Haitian Centers Council* decision was not the final chapter in domestic compliance with Article 33.1 or in the plight

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31. Convention Relating to the Status of Refugees, *supra* note 27, 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

32. 113 S. Ct. at 2564, 2565–66.

33. *Id.* at 2567.

34. *Id.* at 2565.

35. *Id.* (emphasis added).

36. *Id.*

37. *Id.* at 2568 (Blackmun, J., dissenting).

38. *Id.* at 2577.

39. *Haitian Ctrs. Council, Inc. v. McNary*, No. 92-CV1258, 1992 U.S. Dist. LEXIS 8452, at \*5 (E.D.N.Y. June 5, 1992).

of the Haitian refugees. The political reverberations have been mixed. The decision immediately was invoked in some circles to justify the return of undocumented Chinese immigrants interdicted outside U.S. territorial waters, and the Justice Department's Office of Legal Counsel recently relied on the decision to conclude that refugees interdicted in United States waters enjoy no protection against *refoulement*.<sup>40</sup> But the *Haitian Centers Council* litigation also stirred domestic protest and prompted the filing of a petition challenging the United States policy before the Inter-American Commission on Human Rights.<sup>41</sup> In May 1994, President Clinton finally vindicated the Haitian plaintiffs by terminating the policy, conceding that the United States was returning bona fide refugees to torture at the hands of the Haitian military.<sup>42</sup> While we may celebrate these positive steps toward reconciling United States practice with international law, I regret that they were necessary to counter the Supreme Court's disregard for clear principles of international law.

Do not the decisions in the *Alvarez-Machain* and *Haitian Centers Council* cases reflect a disturbing disregard on the part of the Supreme Court of its obligations when construing international law? Treaties are contracts among nations and thus must be interpreted with sensitivity toward the customs of the world community. In each of these cases, however, the Court ignored its first principles and construed the challenged treaty in a manner directly contrary to the opinions of mankind.

### III. RESPECT FOR THE LAW OF NATIONS IN CONSTITUTIONAL LAW

Although questions of international law typically arise before the Court in cases involving the construction of international conventions, the law of nations is implicated in Supreme Court jurisprudence in other situations as well. International law can and should inform the interpretation of various clauses of the Constitution, notably the Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishments. I thus turn to a second area where the Court has failed to inform its decisions with a "decent respect to the opinions of mankind": the execution of juvenile offenders.

For nearly half a century, the Supreme Court has acknowledged that the Eighth Amendment's Cruel and Unusual Punishments Clause "must draw its meaning from evolving standards of decency that mark the progress of a maturing society."<sup>43</sup> The drafters of the Amendment were concerned, at root,

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40. Memorandum from the Office of Legal Counsel, U.S. Department of Justice, to the Attorney General (Oct. 13, 1993).

41. See *Petitioners Release Resolution of the Inter-American Commission on Human Rights Concerning U.S. Program of Haitian Refugee Interdiction*, 32 I.L.M. 1215, 1216 (1993)

42. See Remarks Announcing William H. Gray III as Special Adviser on Haiti, 30 WEEKLY COMP. PRES. DOC. 1010 (May 8, 1994).

43. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)

with “the dignity of man,”<sup>44</sup> and understood that “evolving standards of decency” should be measured, in part, against international norms. Thus, in cases striking down the death penalty as a punishment for rape<sup>45</sup> or for unintentional killings,<sup>46</sup> the Court has looked to both domestic custom and the “climate of international opinion” to determine what punishments are cruel and unusual.<sup>47</sup>

Taking international law seriously where the death penalty is concerned, of course, draws into question the United States’ entire capital punishment enterprise. According to Amnesty International, more than fifty countries (including almost all of Western Europe) have abolished the death penalty entirely, and thirty-seven others either have ceased imposing it or have limited its imposition to extraordinary crimes.<sup>48</sup> Even those countries that continue to impose the death penalty almost universally condemn the execution of juvenile offenders.<sup>49</sup> They do so in recognition of the fact that juveniles are too young, and too capable of growth and development, to act with the culpability necessary to justify society’s ultimate punishment. The United States, however, persistently has defended its “right” to sentence juvenile offenders to death.

Challenges to the execution of juvenile offenders came to the Court twice in the late 1980’s. In 1987, the Court considered the constitutionality of the death sentence of William Wayne Thompson, imposed by an Oklahoma court for a crime Thompson committed at the age of fifteen.<sup>50</sup> A plurality of four, Justices Brennan, Marshall, Stevens, and I, concluded that the “civilized standards of decency” embodied in the Eighth Amendment prohibited Thompson’s execution.<sup>51</sup> We observed that states that had considered the issue universally limited capital punishment to defendants age sixteen or older at the time of the offense.<sup>52</sup> Writing for the plurality, Justice Stevens noted that this conclusion was consistent with international practice, since the execution of minors was prohibited by the nations of Western Europe<sup>53</sup> and by the Soviet Union.<sup>54</sup> Both the plurality and Justice O’Connor’s concurrence found it significant that three major international human rights treaties

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44. *Id.* at 100.

45. *Coker v. Georgia*, 433 U.S. 584 (1977).

46. *Enmund v. Florida*, 458 U.S. 782 (1982).

47. *Coker*, 433 U.S. at 596 n.10.

48. See INTERNATIONAL SECRETARIAT, AMNESTY INT’L, THE DEATH PENALTY: LIST OF ABOLITIONIST AND RETENTIONIST COUNTRIES 1 (1994).

49. See INTERNATIONAL SECRETARIAT, AMNESTY INT’L, OPEN LETTER TO THE PRESIDENT ON THE DEATH PENALTY 8 (1994) [hereinafter OPEN LETTER].

50. *Thompson v. Oklahoma*, 487 U.S. 815 (1987) (plurality opinion).

51. *Id.* at 830, 838.

52. *Id.* at 829 n.30.

53. *Id.* at 830.

54. *Id.* at 831.

explicitly prohibited juvenile death penalties<sup>55</sup> and that one of these instruments—Article 68 of the Geneva Convention—had been ratified by the United States.<sup>56</sup>

In a dissent joined by Chief Justice Rehnquist and Justice White, Justice Scalia denounced as “totally inappropriate” the plurality’s reliance on international practice. “[T]he views of other nations, however enlightened the Justices of this Court may think them to be,” Justice Scalia argued, “cannot be imposed upon Americans through the Constitution.”<sup>57</sup> Justice Scalia’s view that international practice is irrelevant to construction of the Eighth Amendment is ironic for an originalist, given that the drafters of the Constitution necessarily referred to foreign, rather than American, norms at the time it was adopted. Justice Scalia’s position did not prevail, however, and today *Thompson v. Oklahoma* stands for the proposition that the Eighth Amendment prohibits the execution of fifteen-year-old offenders.

Two Terms later, the same question returned to the Court in cases involving juveniles sentenced to death for crimes they committed at the age of sixteen or older. This time a different conception of the Eighth Amendment prevailed. In a 5–4 majority opinion, the Supreme Court held in *Stanford v. Kentucky*<sup>58</sup> that the Eighth Amendment does *not* prohibit the execution of juveniles for crimes committed at age sixteen. Now writing for the majority, Justice Scalia emphasized that “it is *American* conceptions of decency that are dispositive,” and rejected the contention of the petitioners and their amici that the juvenile sentencing practices of other countries were relevant.<sup>59</sup>

Justice Brennan wrote the dissent for the four members of the *Thompson* plurality. Arguing that the Court consistently has recognized “that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis,”<sup>60</sup> Justice Brennan observed that “[w]ithin the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.”<sup>61</sup>

Justice Brennan was correct. As Amnesty International has reported, the United States “stands *almost alone in the world* in still executing offenders

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55. See American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 4(5), OEA/ser. K/XVII/1.1, doc. 65, rev. 1, corr. 2 (1970) (entered into force July 18, 1978), International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 6(5), 999 U.N.T.S. 171, 175 (entered into force March 23, 1976) [hereinafter ICCPR]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, art. 68, 6 U.S.T. 3516, 3560, 75 U.N.T.S. 287, 330 (entered into force Oct. 21, 1950).

56. 487 U.S. at 831 n.34; *id.* at 851 (O'Connor, J., concurring).

57. *Id.* at 868 n.4 (Scalia, J., dissenting).

58. 492 U.S. 361 (1989).

59. *Id.* at 369 n.1.

60. *Id.* at 389 (Brennan, J., dissenting).

61. *Id.* at 390.

who were under-18 at the time of the crime.”<sup>62</sup> There can be no question that the law of nations prohibits the execution of juvenile offenders. At least seventy-two of the countries that *retain* the death penalty prohibit the execution of persons under eighteen at the time of the offense.<sup>63</sup> Global conventions such as the International Covenant on Civil and Political Rights, to which over 125 nations have acceded,<sup>64</sup> forbid the death penalty for offenses committed by juveniles under eighteen.<sup>65</sup> In the decade preceding the *Stanford* decision, only eight juvenile offenders had been executed worldwide. Three of these executions occurred in the United States.<sup>66</sup> Since 1984, nine juvenile offenders have been executed in the United States alone,<sup>67</sup> and, as of October 1993, at least thirty-one condemned juveniles were on America’s death rows.<sup>68</sup> These figures have led Amnesty International to conclude that the United States has carried out more executions of juvenile offenders and has more juvenile offenders on death row than perhaps any other nation.<sup>69</sup> Rather than trying to reconcile the dissonance between domestic and international practice, however, the Supreme Court’s recent decisions have exacerbated it. In a 5–4 decision last term, the Supreme Court upheld a law allowing Texas courts to sentence juvenile offenders to death without ever instructing the jury to consider the defendant’s age as a circumstance mitigating against death.<sup>70</sup>

Refusing to consider international practice in construing the Eighth Amendment is convenient for a Court that wishes to avoid conflict between the death penalty and the Constitution. But it is not consistent with this Court’s established construction of the Eighth Amendment. If the substance of the Eighth Amendment is to turn on the “evolving standards of decency” of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States. Under the principles set forth in *The Paquete Habana*, interpretation of the Eighth Amendment, no less than interpretations of treaties and statutes, should be informed by a decent respect for the global opinions of mankind.

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62. OPEN LETTER, *supra* note 49, at 8.

63. *Id.* at 8 n.10

64. U.S. DEP’T OF STATE, *supra* note 28, at 350.

65. ICCPR, *supra* note 55, art. 6(5), 999 U.N.T.S. at 175.

66. *Stanford*, 492 U.S. at 389 (Brennan, J., dissenting) (citing Brief for Amnesty International as Amicus Curiae at 6, *Thompson v. Oklahoma*, 487 U.S. 815 (1987) (No. 86-6169)).

67. INTERNATIONAL SECRETARIAT, AMNESTY INT’L, UN MEMBER STATES AND THEIR POSITIONS ON THE DEATH PENALTY FOR CRIMES COMMITTED BY PERSONS BELOW 18 YEARS OF AGE (1994).

68. OPEN LETTER, *supra* note 49, at 8 n.11.

69. *Id.* at 8.

70. See *Johnson v. Texas*, 113 S. Ct. 2658, 2672 (1993). Although I have focused here on the execution of juvenile offenders, my argument applies more broadly to the Court’s death-penalty jurisprudence. See *Campbell v. Wood*, 114 S. Ct. 2125, 2126 (1994) (Blackmun, J., dissenting from denial of certiorari) (arguing that state-sponsored hanging violates evolving standards of decency; noting that “the only three jurisdictions in the English-speaking world that impose state-sponsored hangings are Washington, Montana, and South Africa”); *Wills v. Texas*, 114 S. Ct. 1867, 1868 n.2 (1994) (Blackmun, J., dissenting from denial of certiorari) (arguing that execution of mentally retarded juvenile offenders violates evolving standards of decency).

The Supreme Court's recent death-penalty decisions have not provoked a political response similar to that following the *Alvarez-Machain* and *Haitian Centers Council* decisions. No doubt this political recalcitrance is due in part to the country's current romance with the death penalty. I am confident, however, that at some point the courts and the country will come to appreciate that the execution of juvenile offenders—and the imposition of the death penalty generally—is no more tolerable than other violations of international law.

#### IV. CONCLUSION

Professor Henkin poignantly has observed that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”<sup>71</sup> Unfortunately, as the cases I have discussed illustrate, the Supreme Court's own recent record in the area is somewhat more qualified. At best, I would say that the present Supreme Court enforces *some* principles of international law and *some* of its obligations *some* of the time.

The reasons for the Court's failures in this area are not very clear. Concerns about separation of powers and judicial competence often make courts reluctant to second-guess other branches of government in areas involving international affairs. Modern jurists also are notably lacking in the diplomatic experience of early Justices such as John Jay and John Marshall, who were familiar with the law of nations and comfortable navigating by it.

Never before, however, has an understanding of international law been more important. During my thirty-four years of service on the federal bench, the United States has become economically and politically intertwined with the rest of the world as never before. International human rights conventions—still a relatively new idea when I came to the bench in 1959—have created mutual obligations that are accepted throughout the world. As we approach the 100th anniversary of *The Paquete Habana*, then, it perhaps is appropriate to remind ourselves that the United States is part of the global community, that “[i]nternational law *is* part of our law,” and that courts should construe our statutes, our treaties, and our Constitution, where possible, consistently with “the customs and usages of civilized nations.”<sup>72</sup> Although the recent decisions of the Supreme Court do not offer much hope for the immediate future, I look forward to the day when the majority of the Supreme Court will inform almost all of its decisions almost all of the time with a decent respect to the opinions of mankind.

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71. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979)

72. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis added).

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