The Role of International Law in United States Death Penalty Cases

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Keywords: death penalty; Vienna Convention on Consular Relations; United States; Mexico; *LaGrand Case*.

Abstract. The United States has repeatedly failed to notify detained foreign nationals of their rights to consular notification and access under Article 36 of the Vienna Convention on Consular Relations. In capital cases, US non-compliance with this ratified Treaty has led to litigation by foreign governments and individual lawyers in domestic courts and international tribunals. While these efforts have had mixed results in individual cases, litigation by Mexico, Germany and other actors has led to increased compliance with Article 36, and a growing recognition of the significance of US treaty obligations.

1. INTRODUCTION

Over the last decade, international law has played an increasingly prominent role in efforts to abolish or limit the application of the death penalty in the United States. Capital litigators who once regarded international law as exotic and impractical have begun to invoke international treaties and customary international law in state and federal court. Consequently, state and federal judges across the country have been compelled to review, with increasing frequency, decisions by foreign courts and international tribunals.[1]

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1. A cursory review of recent state supreme court opinions in Ohio, Iowa and Oklahoma – three randomly-chosen states in the mid-western United States – reveals few opinions addressing international law. Of those opinions, nearly all relate to capital litigation. In Iowa, for example, the supreme court addressed questions of treaty interpretation or international law only twice in the last ten years; both cases involved violations of the 1963 Vienna Convention on Consular Relations. *See* State *v.* Lopez, 633 N.W.2d 774 (Iowa 2001); Ledezma *v.* State, 626 N.W.2d 134 (Iowa 2001). The Ohio Supreme Court has addressed questions of international law in ten cases over the last eight years; every one was a capital case. In the last thirty-five years, the Oklahoma Court of Criminal Appeals has addressed international treaties on three occasions, all involving violations of the Vienna Convention. *See* Flores *v.* State, 994 P.2d 782 (Okla. Crim. App. 1999); Martinez *v.* State, 984 P.2d 813 (Okla. Crim. App. 1999); Al-Mosawi *v.* State, 956 P.2d 906 (1998).

15 Leiden Journal of International Law 367–387 (2002)

While the United States judiciary remains, by and large, resistant to the notion that international law should guide their determinations in individual cases, a surprising number of judges have delivered thoughtful judgments reflective of international norms on capital punishment.[2]

This essay argues that international law has had measurable effects in capital cases, affecting the judgment of key decision-makers such as judges, juries, governors and parole boards. Equally important, international law has contributed to the growing unease within the United States over the administration of the death penalty. This has been accomplished through the advocacy of individual practitioners, foreign governments, and non-governmental organizations on matters of international law, as well as through the decisions of international tribunals regarding the administration of the death penalty.

The history of litigation over Article 36 of the Vienna Convention on Consular Relations ('VCCR')[3] provides a useful paradigm for this thesis. In the post-*Furman*[4] era, the United States has executed seventeen foreign nationals from thirteen different countries.[5] Their executions might have passed without undue attention, were it not for the fact that in virtually every case, the United States had failed to notify the detainees of their rights to consular notification and assistance under Article 36 of the VCCR. These widespread and uncontested violations of Article 36 in capital cases resulted in unprecedented litigation by foreign nationals as well as foreign governments in United States courts, attracting media attention and academic scrutiny.[6]

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2. *See*, *e.g.*, Servin *v.* State, 32 P.3d 1277, at 1290–1291 (Nev. 2001) (Rose, J., concurring).
3. 24 April 1963, 21 UST 77.
4. Furman *v.* Georgia, 408 U.S. 238 (1972). In Furman, the United States Supreme Court struck down the death penalty statutes of Georgia and Texas, finding that the imposition of the death penalty in the petitioners' cases constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. In Furman's wake, death sentences across the country were commuted to life. Four years later, in Gregg *v.* Georgia, 428 U.S. 153 (1976), the Court upheld the constitutionality of Georgia's newly amended death penalty statute, crushing abolitionists' hopes that the Court would find the death penalty unconstitutional *per se*. The thirty-year period since the Supreme Court announced its decision in Furman is commonly known as the "modern" death penalty era.
5. Death Penalty Information Center, Foreign Nationals and the Death Penalty in the United States, available at http://www.deathpenaltyinfo.org/foreignnatl.html (visited 9 January 2002).
6. *See*, *e.g.*, H.S. Schiffman, *Breard and Beyond: The Status of Consular Notification and Access Under The Vienna Convention*, 8 Cardozo J. Int'l & Comp. L. 27 (2000); K. Trainer, *The Vienna Convention on Consular Relations in the United States Courts*, 13 Transnat'l L. 227 (2000); D. Cassel, *Judicial Remedies for Treaty Violations in Criminal Cases: Consular Rights of Foreign Nationals in United States Death Penalty Cases*, 12 LJIL 851 (1999); C.E. Van Der Waerden, *Death and Diplomacy: Paraguay v. United States and the Vienna Convention on Consular Relations*, 45 Wayne L. Rev. 1631 (1999); S.F. Marbury, *Recent Developments: Breard v. Greene: International Human Rights and the Vienna Convention on Consular Relations*, 7 Tul. J. Int'l & Comp. L. 505 (1999); C.A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 Stan. L. Rev. 529 (1999); W.C. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights,*

In virtually all of these cases, foreign nationals have petitioned courts to vacate their death sentences as a remedy for violations of Article 36. To date, no court in the United States has provided this relief; indeed, as noted above, several foreign nationals have been executed, leading casual observers to conclude that litigation has resulted in no tangible benefit to the petitioners, and has failed to advance the ultimate goal of abolishing the death penalty. Both of these conclusions are mistaken.

In an attempt to disprove these assumptions, this essay examines several cases of foreign nationals who have challenged their death sentences under Article 36. Rather than focusing on the appellate opinions resulting from Article 36 litigation, this essay looks at the "multidimensional world of law-in-operation," to borrow a phrase from Phyllis Goldfarb.[7] This examination reveals that – contrary to popular belief – advocacy by capital defense lawyers, foreign governments and other actors has led some decision-makers to accept the view that international law – and, in particular, violations of Article 36 – *matter*.

Harold Koh's writings on the "transnational legal process" provide a useful conceptual framework for this analysis.[8] Koh defines transnational legal process as

> the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.[9]

Wrongs and Remedies, 31 Vand. J. Transnat'l L. 257 (1998); J.J. Paust, *Breard and Treaty-Based Rights under the Consular Convention*, 92 AJIL 691 (1998); M.J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 Mich. J. Int'l L. 565 (1997); V. Uribe, *Consuls at Work: Universal Protections of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 Hous. J. of Int'l L. 375 (1996); A. Shank & J. Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 St. Mary's L.J. 719 (1995); G. Dean Gisvold, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 Minn. L. Rev. 771 (1994).

7. P. Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 Hastings L.J. 717, at 731 (1992). Goldfarb has strongly criticized legal scholars' tendency to analyze appellate cases as a primary method of understanding law, noting that it "ties critical scholars too closely to a particular set of power relations and thereby limits the scope, and perhaps the accuracy, or their social theory." *Id.* Jerome Frank has expressed similar views. "It is absurd that we should continue to call an upper court opinion a case. It is at most an adjunct to the final step in a case" (*i.e.*, an essay published by an upper court in justification of its decision). J. Frank, *Why Not a Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907, at 908 (1993).
8. *See*, *e.g.*, H. Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Houst. L. Rev. 623, at 625 (1998); H. Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181, at 183–184 (1996); H. Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 Yale L.J. 2391, at 2391–2392 (1994); H. Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, at 2358–2375 (1991).
9. Koh, *Transnational Legal Process*, *supra* note 8, at 183–184.

Stated differently, it is "the process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation's domestic legal system."[10]

This essay proceeds in three parts. Section 2 describes Koh's theory of transnational legal process. Section 3 provides a brief overview of litigation in United States capital cases over violations of Article 36, applying Koh's framework to the events that have shaped – and continue to shape – the response of the US Government and the US judiciary to Article 36 violations in capital cases. This section focuses on the roles of various transnational agents – governmental, institutional and individual – that have contributed to the evolution of international norms regarding consular notification in capital cases.

Section 4 concludes that transnational legal actors have largely succeeded in establishing an international rule of law prohibiting the execution of foreign nationals who have been deprived of their rights to consular notification and access. While the United States domestic legal system has not yet internalized this norm of international law, there are positive signs that the judiciary and other key decision-makers are deeply troubled by the United States' repeated violation of a ratified treaty.

2. KOH'S MODEL OF TRANSNATIONAL LITIGATION

Harold Koh first articulated his theory of transnational public litigation in 1988,[11] at a time when the phenomenon of individual plaintiffs suing governmental officials in US courts under international law was "novel and expanding."[12] Commenting upon private litigants' increasing use of international law in domestic fora, Koh focused on the availability of civil remedies for violations of international law – particularly crimes of terrorism. The distinguishing characteristic of such litigation, according to Koh, was its attempt to vindicate personal, individual human rights, as opposed to state rights, in domestic courts.[13] Thus, transnational public litigation diverged from the traditional, "dualist" concept of international

10. Koh, *Bringing International Law Home*, *supra* note 8, at 625.
11. H. Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation*, 22 Tex. Int'l L.J. 169 (1987).
12. *Id.*, at 199.
13. *Id.*, at 195.

law, which viewed international law as a set of rules that governed relations between nations.[14]

Koh has since identified five components of transnational public litigation:

> (1) a *transnational party structure*, in which states and nonstate entities equally participate; (2) a *transnational claim structure*, in which violations of domestic and international, private and public law are all alleged in a single action; (3) a *prospective focus*, fixed as much upon obtaining judicial declaration of transnational norms as upon resolving past disputes; (4) the litigants' strategic awareness of the *transportability of those norms* to other domestic and international fora for use in judicial interpretation or political bargaining; and (5) a subsequent process of *institutional dialogue* among various domestic and international, judicial, and political fora to achieve ultimate settlement.[15]

Transnational public litigation is, in turn, a key component of the *transnational legal process* – a process of institutional dialogue that, over time, causes international legal norms to "seep into and become entrenched in domestic legal and political processes."[16] The transnational legal process provides a key to understanding why nations, even those that have previously resisted acknowledging international obligations, will eventually obey international law.

There are four phases in a nation's internalization of international legal norms in the transnational legal process: interaction, interpretation, internalization and obedience. In the first phase, one or more transnational actors provokes an interaction with another in a law-declaring forum, forcing an interpretation or enunciation of an international rule of law. Through this process of interaction and interpretation, the moving party seeks to compel the other party to acknowledge the binding character of the norm, and internalize the enunciated rule of international law into its domestic normative system. Once the party considers itself bound by its internal obligation to follow the norm, it will obey the rule of international law.[17]

Koh identifies six key agents in the transnational legal process. The first

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14. *Id.* The distinctions between "dualist" and "monist" visions of international law have been debated by numerous legal scholars. In very general terms, the dualist view of international law conceives of international and domestic law as distinct and separable, with domestic law determining the extent to which international law should be incorporated into a legal regime. A monist view, by contrast, sees international and domestic law as part of the same legal order, with the result that domestic courts are required to give effect to individual rights established under international law. *See* I. Brownlie, Principles of Public International Law, 4th Ed., 32–35 (1990); L. Henkin, International Law: Politics and Values 64–67 (1995).
15. Koh, *Transnational Public Law Litigation*, *supra* note 8, at 2371 (emphasis in original, citations omitted).
16. *Id.*
17. Koh, *Bringing International Law Home*, *supra* note 8, at 643.

are "transnational norm entrepreneurs." Transnational norm entrepreneurs are non-governmental transnational organizations or individuals who

> (1) mobilize popular opinion and political support both within their host country and abroad; (2) stimulate and assist in the creation of like-minded organizations in other countries; (3) play a significant role in elevating their objective beyond its identification with the national interests of their government; and (4) often direct their efforts toward foreign audiences toward persuading them that a particular normative regime reflects a widely shared or even universal moral sense.[18]

The second set of agents is comprised of "governmental norm sponsors," or governmental officials, such as former Irish President Mary Robinson, who use their official positions to promote normative positions.[19] The third agent consists of a transnational issue network, or a professional network comprised of transnational norm entrepreneurs and governmental norm sponsors. This network discusses issues and general political solutions at both global and regional levels, as well as in organizational meetings, academic conferences, and on the internet.[20] The fourth set of agents are found in interpretive communities and law declaring fora, such as international tribunals, treaty bodies, domestic and regional legislatures, non-governmental organizations, commissions and others.[21] The fifth agent is found in bureaucratic compliance procedures developed by domestic regimes to institutionalize compliance with an international rule of law. Issue linkages constitute the sixth and final agent in the transnational legal process. This term refers to the process whereby norms are reinforced by analogous rules of law on distinct issues.[22]

Although Koh has focused nearly exclusively on civil litigation,[23] his theoretical framework can be readily applied to transnational capital litigation – with a few observations. For example, Koh has repeatedly stated that the aim of transnational public litigation is to provoke a political settlement or obtain a declaratory judgment that announces the violation of an international norm.[24] In capital litigation, however, a declaratory

18. *Id.*, at 645 (quoting E. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 Int'l Org. 479, at 482 (1990).
19. *Id.*, at 647.
20. *Id.*, at 648.
21. *Id.*, at 648–649.
22. As an example of issue linkages, Koh cites the influence of the twelve-mile territorial limit, first adopted pursuant to the law of the sea. This same territorial rule is likely to bind the United States in its policy of intercepting refugees on the high seas. *Id.*, at 652–653.
23. *See* Koh, *Transnational Public Law Litigation*, *supra* note 8, at 2368 (noting only two "tracks" followed by transnational public litigants: (1) international tort suits; and (2) institutional reform suits).
24. Koh, *supra* note 11, at 195; Koh, *Transnational Public Law Litigation*, *supra* note 8, at 2348–2349.

judgment is worth little to the individual facing execution.[25] Lawyers representing capital defendants have two principal goals: (1) to obtain a judgment vacating their client's conviction (or to prevent a conviction in the first instance); and (2) to prevent – or at least postpone – their client's execution. Defense lawyers seldom have the resources to engage in civil litigation, and in most cases, are foreclosed from challenging their clients' convictions and sentences in civil proceedings.[26] Monetary damages, therefore, are not even an option.

Granted, some governments, non-governmental organizations, and individual lawyers may hope to prevent future executions through transnational litigation in capital cases – but this is rarely the principal focus of their efforts.[27] This is not to say that declarations regarding US violations of international law in capital cases are worthless; simply that they are often the by-product of litigation focused on obtaining a remedy that benefits the individual facing execution. Declarations by international decision-makers, foreign governments and other transnational actors are nonetheless of value to future litigants, and have political consequences, as well. Germany's litigation in the *LaGrand Case*, described below, is an example of one case that was initially brought on behalf of individual defendants, but later evolved into litigation whose focus was the prevention of future violations of Article 36 of the Vienna Convention. Mexico's litigation before the Inter-American Court of Human Rights[28] served a

25. There are, of course, exceptions to this rule. For example, capital defense counsel could seek to use a court's declaration regarding violations of international law in support of a clemency request. Executive clemency may be granted, in some states, by the governor of that state, and in others, by a pardons board. Both the governor and the pardons board are political creatures, and may be influenced by concerns that they will be vilified for allowing an execution to proceed when there has been a declaration that the defendant's conviction or death sentence violates international law. In these cases, defense counsel may use the declaratory judgment as a "political bargaining chip," as Koh suggests. Koh, *supra* note 11, at 195. The case of *Gerardo Valdez*, described in detail, *infra*, is an example of a case in which this strategy was at least partly successful. Nonetheless, in many cases state political actors have shown remarkable indifference – and at times, astounding insensitivity – to international law. *See* L. LaFay, *Court to Hear Appeal of Mexican National in Beach Murder Case*, The Virginian-Pilot, 9 April 1997, B5 (quoting a state prosecutor who characterized the defendant's Vienna Convention arguments as "ridiculous," and suggesting that the remedy for the violation might be a declaration of war by Mexico on the United States).
26. *See*, *e.g.*, Preiser *v.* Rodriguez, 411 U.S. 475 (1973); Moody *v.* Rodriguez, 164 F.3d 893 (5th Cir. 1999).
27. Sometimes, it is difficult to distinguish between the goal of preventing an individual execution, and support for the abolition of the death penalty. The European Union, for example, commonly supports death row inmates seeking stays of execution if they are juvenile offenders, foreign nationals whose Art. 36 rights were violated, or suffer from a severe mental illness. In addition, the European Union has a policy of promoting the universal abolition of the death penalty. *See* European Union, Guidelines to EU Policy Towards Third Countries on the Death Penalty (available at http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm) (last visited 24 February 2002).
28. *See* OC-16/99, Inter-Am. Ct. H.R. (1 October 1999).

similar purpose.[29] Both Germany and Mexico, through their litigation before international tribunals, have obtained judgments clarifying the application of Article 36 of the Vienna Convention in capital cases. These judgments may, in turn, provoke the United States to conform its conduct to international norms.

In 1991, Koh presciently observed that "we stand at a moment of startling, perhaps unprecedented, revival in transnational adjudication."[30] With regard to transnational litigation in capital cases, he was absolutely correct. The following section traces some of the more significant litigation regarding Article 36 of the Vienna Convention, viewing key developments through the lens of Koh's transnational legal theory.

3. Litigation of Article 36 Violations in Capital Cases: 1992–Present

3.1. The *Faulder* case

Ten years ago, few lawyers in the United States had heard of the Vienna Convention on Consular Relations. Ratified by the United States in 1969, the Treaty had been all but forgotten by the judges, lawyers and court personnel who came into contact with foreign nationals in the criminal justice system. In the first two decades after its ratification, the few courts to consider the rights established in Article 36 limited their analysis to the validity of deportation orders.[31] This all changed in 1992, when the Government of Canada first learned of the death sentence imposed on Canadian national Joseph Stanley Faulder.

In 1977, Faulder had been convicted of capital murder and sentenced to death in a small East Texas town. An appellate court reversed the conviction in 1979, but upon retrial he was once again convicted and sentenced to die. Faulder had no family in Texas, and no money to retain private counsel. His court appointed lawyer had never before defended a

29. Mexico is now seeking domestic judgments reinforcing the Inter-American Court's Advisory Opinion, as well as the ICJ's Judgment in *LaGrand*. *See*, *e.g.*, Valdez *v.* State, No. PCD-2001-1011, Brief Amicus Curiae of the United Mexican States in Support of Gerardo Valdez Maltos (Okla. Crim. App. filed 9 November 2001).

30. Koh, *Transnational Public Law Litigation*, *supra* note 8, at 2400.

31. The reason for this dearth of litigation is straightforward. International law is not a required subject in the vast majority of law schools in the United States. As a result, few law school graduates understand the relevance of international law in domestic legal proceedings. Until recently, most practitioners viewed international law as wholly irrelevant to the defense of an individual charged with a capital crime in the United States. *See* M.F. Davis, *Lecture: International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 Alb. L. Rev. 417, at 418 (2000)

> [L]itigators […] look at judges, and assess what they will find persuasive. International law has not fit that criteria. Indeed, some litigators have been concerned that citations to international law would signal an essential weakness in their case under domestic law.

capital case. Defense counsel presented no mitigating evidence at the penalty phase of the trial, and did not attempt to contact Faulder's family members – all of whom were unaware of Faulder's predicament. At no time was Faulder advised that he had a right to contact Canadian consular officials – even though Canada maintained a consulate in Dallas, only hours from the prison.

Fourteen years passed. In November 1991, the state of Texas scheduled Faulder's execution. New counsel interviewed Faulder, who had been held in virtual isolation on death row. He had had no contact with his family since his incarceration, and no contact with Canadian consular officials. Although Canada had requested, and received, a list of all Canadians incarcerated on Texas' death row for every year Faulder was incarcerated, his name had never appeared on the list. Texas authorities had been aware of his nationality since his arrest, but never notified him of his Article 36 rights.

Faulder filed a post-conviction application in state court, requesting that his death sentence be vacated as a remedy for the violation. He argued that Canadian consular officials would have assisted him in obtaining crucial mitigating evidence from Canada that would have persuaded the jury to recommend a life sentence. In support of his arguments, he presented affidavits and testimony from over a dozen witnesses from Canada who would have testified on his behalf – including a Canadian schoolteacher who stated Faulder had saved her life when she was critically injured in a car accident. Nevertheless, the court ignored the Article 36 argument in its order denying Faulder's *habeas corpus* petition, and affirmed the conviction and death sentence. The Texas Court of Criminal Appeals likewise ignored the issue.

Four years later, Faulder's claim was heard by the Fifth Circuit Court of Appeals. The court denied the claim on the grounds that Faulder could not demonstrate he was prejudiced by the violation.[32] Faulder continued to seek a remedy for the Article 36 violation and other due process claims in subsequent proceedings. Canada vigorously supported his claims, filing several *amicus curiae* briefs before the state and federal courts. Canadian Foreign Minister Lloyd Axeworthy met personally with US Secretary of State Madeleine Albright, and requested that she intervene in the case.

The case attracted media attention both in Canada and in the United States, due to the violation of Article 36. Several Canadian papers, along with the Dallas Morning News and the New York Times, ran editorials advocating commutation of Faulder's death sentence. Human rights groups held vigils and sponsored write-in campaigns, and 4,000 letters poured into the Austin office of the Texas Board of Pardons and Paroles in support of commutation. Delegations of Canadian legislators, mental health experts and prominent activists traveled to Texas and met with the Texas pardons

32. Faulder *v.* Johnson, 81 F.3d 515 (5th Cir. 1996).

board. Amnesty International published a special report on the case, calling for commutation of Faulder's death sentence.

Texas finally rescheduled Faulder's execution for 10 December 1998 – the fiftieth anniversary of the UN Universal Declaration of Human Rights. Days before the execution was to take place, Secretary of State Albright sent a lengthy, detailed letter in support of Faulder's clemency petition to the Texas Governor and the Texas Board of Pardons and Paroles. Although Albright maintained Faulder was entitled to no *judicial* remedy for the Article 36 violation, she noted that "the consular notification issues in this case are sufficiently troublesome that they may provide sufficient grounds for according discretionary clemency relief." Albright also commented upon the vulnerability of Americans abroad who depend on consular assistance:

> As Secretary of State, ensuring the protection of American citizens abroad – including over 300 imprisoned Texans last year – is one of my most important responsibilities. Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations to us. At the same time, we must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad.[33]

Although the Board denied clemency, a federal judge stayed Faulder's execution to determine whether the Board had given Faulder fair consideration. The stay was dissolved several weeks later, and another execution date was set. Before his next execution date, Faulder appealed to the Inter-American Commission on Human Rights, arguing that Texas had subjected him to cruel, inhuman or degrading treatment in violation of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Torture Convention')[34] the 1966 International Covenant on Civil and Political Rights ('ICCPR'),[35] and the 1948 American Declaration of the Rights and Duties of Man[36] by scheduling ten separate dates for his execution and forcing him to go through elaborate rituals associated with his impending death. The Commission issued precautionary measures, and directed the United States to stay his execution, but to no avail. Faulder lost his last appeal and was executed on 17 June 1999.

The *Faulder* litigation bore most of the trademarks of a transnational public lawsuit, as conceived by Koh. Faulder's case developed a transnational party structure, comprised mainly of the Government of Canada,

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33. Letter from Madeleine K. Albright, Secretary of State, to Texas Governor George Bush, 27 November 1998.
34. Adopted 10 December 1984, General Assembly Res. 39/46, 39 UN GAOR Supp. (No. 51), UN Doc. A/39/51 (10 December 1984) (entered into force 26 June 1987).
35. 19 December 1966, 999 UNTS 171, at 174–175 (entered into force 23 March 1976).
36. American Declaration of the Rights and Duties of Man, Art. 18, OAS Res. XXX, O.A.S. Rec. OEA/Ser.L/V/I.4 (2 May 1948).

as *amicus curiae*, and Faulder's counsel.[37] The transnational claim structure drew support from US constitutional law as well as international treaties and customary international law. By appealing to the Inter-American Commission, Faulder's counsel attempted to use the issuance of precautionary measures as political leverage in the clemency process – an ultimately unsuccessful attempt to convince Texas officials to adopt the Commission's norms. While the litigants' overriding goal was to prevent Faulder's execution, it can fairly be said that Faulder's subsidiary goal, in vigorously litigating all international legal arguments, was to further the abolition of the death penalty.[38] Nonetheless, unlike the civil suits analyzed by Koh, obtaining declaratory relief was never the driving force behind the litigation.

The *Faulder* litigation spawned a lively institutional dialogue. The most important exchange of views took place in a series of private meetings between Canadian Foreign Minister Axeworthy and US Secretary of State Albright. When Faulder's legal counsel discovered that members of the Texas pardons board had cast their votes denying clemency without reviewing Albright's letter, she sued the board for violations of due process, attaching Albright's letter as an exhibit. Upon reviewing Faulder's claim, a federal district judge issued an unprecedented stay to examine the board's secretive and unreviewable decision-making process in capital cases. None of this litigation saved Faulder's life – but that does not mean that it had no effect. Public opinion polls in Canada showed a substantial drop in support for the death penalty after Faulder received his last stay of execution.[39] Moreover, the publicity in Faulder's case prompted other lawyers to raise Article 36 violations in their own cases.

3.2. Early litigation by foreign governments

Undoubtedly, foreign governments have been the most influential agents in transnational capital litigation, beginning with Canada's instrumental role in the *Faulder* litigation. In 1996, the Government of Paraguay filed a lawsuit against the Governor of Virginia in the case of *Angel Breard*. Virginia authorities had failed to notify Breard of his Article 36 rights, and he subsequently pleaded guilty and was sentenced to death. Paraguay asked a federal district court to enjoin his execution and declare that Breard's conviction was void, as a remedy for the Article 36 violation.[40] When the court dismissed the action on the grounds that it lacked jurisdiction,

37. Although not a party to the litigation, Faulder's counsel was also aided immensely by the tireless work by Mark Warren, a Canadian volunteer with Amnesty International who, in the seven years of his involvement in the case, played a crucial role in developing the international law themes.
38. In a statement issued to the press shortly before his last-minute stay on 10 December 1998, Faulder encouraged his supporters to continue their fight against the death penalty.
39. J. Tobbetts, *Support for Death Penalty Falls*, Montreal Gazette, 31 December 1998, A3.
40. Republic of Paraguay *v.* Allen, 949 F. Supp. 1269 (E.D. Va. 1996).

Paraguay appealed. The case eventually landed before the United States Supreme Court, where it was consolidated with Breard's appeal of his conviction and death sentence shortly before Breard's scheduled execution.[41]

On 3 April 1998 – eleven days before Breard's execution date – Paraguay also filed suit in the International Court of Justice ('ICJ'), seeking an order of provisional measures from that Court.[42] On 9 April, the ICJ issued an order requesting that the United States "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings […]." The Supreme Court, however, refused to stay the execution and denied Paraguay's appeal. Justices Breyer, Stevens and Ginsburg dissented.[43]

The Supreme Court's decision prompted extensive commentary and debate.[44] International legal scholars were outraged by the Court's refusal to abide by the ICJ's request for precautionary measures. Some took the Court's action as proof of US indifference to international norms.[45] Yet, three justices dissented, and Justice Souter concurred only because he felt there was no causal connection between the Article 36 violation and Breard's conviction and sentence. Moreover, Breard's claim suffered from procedural defects, since counsel had failed to raise the issue until late in the appellate process.[46]

On the positive side, Paraguay's suit attracted a great deal of media coverage. Paraguay was successful in soliciting the support of other foreign governments, four of whom joined in Paraguay's petition for review before the Supreme Court. Most important, Paraguay's suit broke new ground in transnational capital litigation over Article 36 violations. Before Paraguay's lawsuit, no other foreign government had filed suit in a United States court on behalf of a death row inmate.

On 15 May 1997, the Government of Mexico became the second government to sue state officials in a US death penalty case. Mexico's lawsuit, in the case of *Ramon Martinez Villarreal*, sought to block his execution on the grounds that Arizona officials had violated Article 36 of the VCCR and the Consular Convention between Mexico and the United States.[47] The

41. Breard *v.* Greene, 523 U.S. 371 (1998).
42. *Id.*, at 374.
43. *Id.*, at 378–380.
44. *See* note 6, *supra*.
45. *See*, *e.g.*, T.M. Franck, *Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh's Optimism*, 35 Hous. L. Rev. 683, at 687 (1998).
46. These facts lead Koh to the conclusion that *Breard*

> should be remembered as a case in which internalization of international norms into US law through executive and judicial action was attempted, but not completed, due to severe time pressures and the peculiar procedural posture of the case.

Koh, *Bringing International Law Home*, *supra* note 8, at 644, n. 105. This is consistent with Koh's view that adverse Supreme Court decisions "are no longer final stops, but only way stations, in the process of 'complex enforcement' triggered by transnational public law litigation." Koh, *Haiti Paradigm*, *supra* note 8, at 2407.

Government of Mexico further alleged Martinez Villarreal's execution would violate the ICCPR and customary international law, since Martinez Villarreal was mentally retarded and had received ineffective legal representation.

The federal district court dismissed the complaint for lack of subject matter jurisdiction, and Mexico appealed. The Ninth Circuit Court of Appeals affirmed the dismissal.[48] At the same time, Mexico filed an *amicus curiae* brief before the United States Supreme Court in support of Martinez Villarreal's post-conviction appeal. Ultimately, the Supreme Court remanded Martinez Villarreal's case for further proceedings relating to his competency to be executed, without addressing any issues under the VCCR.[49]

While Martinez Villarreal's case was pending, two other Mexican nationals were executed – one in Virginia, and one in Texas.[50] Neither national had been advised of his right to consular notification and access. In the case of *Mario Murphy*, Mexico filed an *amicus curiae* brief in support of his appeal based on the Vienna Convention,[51] and asked Virginia officials to commute the sentence. In the case of *Irineo Montoya*, Mexico's foreign minister contacted Texas Governor George W. Bush and requested that he grant a reprieve.[52] Neither overture was successful.

Viewed through the lens of Koh's model, Paraguay's and Mexico's efforts on behalf of their nationals succeeded in provoking interactions with the lower federal courts, the US Supreme Court, the ICJ and several foreign governments, furthering the internalization of international norms regarding the death penalty. Today, dozens of foreign nationals on death row continue to litigate the claims first raised by Faulder, Breard and others. Foreign governments have also continued their efforts to block the executions of their nationals, by litigating both in domestic courts and before international tribunals. This litigation has led other international law-making fora to issue decisions condemning the execution of foreign nationals who were deprived of any opportunity for consular assistance. The following section describes some of these efforts.

47. Complaint, United Mexican States *v.* Woods (D.C. Ariz. 1997) (No. CV 97-1075-PHX SMM).
48. United Mexican States *v.* Woods, 126 F.3d 1220 (9th Cir. 1997).
49. Stewart *v.* Martinez Villarreal, 523 U.S. 637 (1998).
50. Murphy *v.* Netherland, 116 F.3d 97 (4th Cir. 1997); C. Hoppe, *Texas Executes Mexican Despite Protests*, Dallas Morning News, 19 June 1997, at A1.
51. *See* 116 F.3d, *id.*, at 97.
52. *See* Hoppe, *supra* note 50.

3.1. Litigation by Germany and Mexico before international tribunals

3.1.1. Mexico's request for an advisory opinion from the Inter-American Court of Human Rights

In December 1998, faced with increasing numbers of Mexicans on death rows across the country and widespread violations of Article 36, Mexico sought an advisory opinion from the Inter-American Court of Human Rights regarding the application of Article 36. The Inter-American Court received briefs and heard oral argument from eight nations – including the United States – and eighteen non-governmental organizations, academicians, and individuals appearing as *amici curiae*. Representatives from all governments, as well as advocates for *amici*, traveled to San Jose, Costa Rica and presented arguments lasting two full days. With the notable exception of the United States, every participant in the proceedings before the Inter-American Court emphasized the importance of consular rights in capital cases, encouraged the Court to exercise jurisdiction over the matter, and condemned the execution of those who had been deprived of their Article 36 rights at the time of their arrest.

One and a half years later, in October 1999, the Court issued its opinion.[53] One of the most important aspects of the opinion addressed the importance of consular notification and access for those facing criminal trials. The Court observed that Article 36 provides one of the "minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial" – a right embodied in Article 14(3)(b) of the ICCPR.[54] The Court concluded that the execution of an individual who had been afforded no opportunity to exercise his rights to consular notification and access would constitute an arbitrary deprivation of life in violation of Article 6 of the ICCPR.[55] Thus, Mexico successfully provoked an interaction, not simply between Mexico and the United States, but one that involved numerous sovereign nations and non-governmental organizations, leading to an opinion highly favorable to the rights of foreign nationals charged with capital crimes.

3.1.2. Litigation by Germany in the LaGrand Case

In early 1999, while Mexico's petition was pending before the Inter-American Court, the state of Arizona was preparing to execute the brothers Karl and Walter LaGrand, two German nationals. As the case has been

53. *Supra* note 28.
54. *Id.*, at para. 122.
55. *Id.*, at para. 137.

described elsewhere in great detail,[56] a brief description of the proceedings will suffice.

As in the cases of other foreign nationals on death row, the LaGrands had never been advised of their rights to consular notification and access. When Germany's diplomatic overtures failed to persuade Arizona officials to stop the execution of Karl LaGrand, Germany filed an application in the ICJ on 2 March 1999, and requested provisional measures to prevent Walter LaGrand's execution – Karl LaGrand having already been executed.[57] The ICJ issued provisional measures on 3 March 1999, and requested that the US take all measures at its disposal to prevent the execution of Walter LaGrand.[58]

Germany then appealed to the US Supreme Court to stay the execution, in light of the ICJ's indication of provisional measures. The US Solicitor General, representing the United States, urged the Court to deny the stay, since provisional measures were not binding "and did not furnish a basis for judicial relief."[59] The Supreme Court denied the stay application and allowed Arizona to execute Walter LaGrand.

Despite Walter LaGrand's execution, Germany continued to press for a judgment from the ICJ. After receiving briefs and hearing oral argument from the parties, the ICJ issued its Judgment on 27 June 2001.

The ICJ addressed several questions that had been left unresolved by the US Supreme Court. First, the ICJ unequivocally held that Article 36(1) creates an individual right to consular notification and access.[60] Second, the Court held 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.[61] Third, the Court held that domestic rules of procedural default, as applied in the case of the *LaGrand* brothers, violated the United States' obligation to give "full effect" to the purposes of Article 36.[62]

The Court also established important guidelines for judicial review of such arguments. In *LaGrand*, Germany argued that there was a causal relationship between the breach of Article 36 and the ultimate execution of the LaGrand brothers.[63] Specifically, Germany argued that consular officials would have been able to present persuasive mitigating evidence that would have changed the outcome of the *LaGrand* cases.[64] The United States countered that such arguments were speculative, and challenged

56. *See*, *e.g.*, D. Cassel, *International Remedies in National Criminal Cases: ICJ Judgment in* Germany *v.* United States, 15 LJIL 69 (2002).
57. *See*, *generally*, LaGrand Case (Germany *v.* United States of America), Judgment of 27 June 2001, 2001 ICJ Rep., available at http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm.
58. *Id.*, at para. 32.
59. *Id.*
60. *Id.*, at paras. 77 and 128(3).
61. *Id.*, at para. 128(7).
62. *Id.*, at paras. 91 and 128(4).
63. *Id.*, at para. 71.
64. *Id.*

Germany's assertions that it would have provided such assistance in 1984.[65] The Court ultimately concluded that it was "immaterial" whether consular assistance from Germany would have affected the verdict. Thus, in determining the LaGrands had established a violation, and were entitled to judicial review – despite domestic rules of procedural default – the Court rejected the notion that a foreign national must demonstrate he was prejudiced by the Article 36 violation, before he may obtain an effective remedy for the violation.[66]

Although the ICJ's Judgment came too late to prevent the execution of Walter LaGrand, Germany's persistence in obtaining the Judgment, as well as the decision itself, have served to highlight the international community's dissatisfaction with the United States' administration of the death penalty. The decision promises to have far-reaching impact in the United States. Indeed, it has already caused one court to stay the execution of a Mexican national who, had it not been for the decision in *LaGrand*, almost certainly would have been executed. This case is discussed in the following section.

3.1.3. Mexico's Capital Legal Assistance Program and the case of Gerardo Valdez

In recent years, Mexico has emerged as a key agent in transnational litigation over Article 36. Armed with the new precedent established by the Inter-American Court, the Mexican Foreign Ministry established the Mexican Capital Legal Assistance Program in September 2000. Directed by an experienced capital defense lawyer, the Program works with lawyers and consular officials throughout the United States, providing litigation support to attorneys representing Mexican nationals in capital trials and on appeal. Through the program, Mexico has provided funds for bilingual mitigation specialists, bilingual neuropsychologists, investigators and other experts to assist defense counsel in capital cases. Many of these funds have been provided in jurisdictions that have historically refused to provide adequate resources to defense counsel.

Through this program, Mexico has been able to file *amicus* briefs in twelve cases, and Mexico's counsel has participated in state evidentiary hearings in Georgia and Arizona concerning matters of international law.[67] The legal issues raised by Mexico go far beyond Article 36 of the VCCR

65. *Id.*, at para. 72.
66. While the ICJ's opinion dealt with the specific facts of that case, there is nothing in the ICJ Judgment to indicate the Court would ever require a defendant to show prejudice. In the absence of any authority to the contrary, it can fairly be argued that the ICJ rejected the notion that prejudice was relevant, *in a case involving a severe penalty or prolonged incarceration*, to either (1) the existence of the violation; or (2) the remedy required.
67. Currently, program attorneys are working on cases in California, Arizona, Oregon, Texas, Georgia, Illinois, Florida, Oklahoma, Tennessee and Kentucky. Since its establishment, the Program has provided assistance to defendants in 64 cases.

– although state officials continue to violate the Treaty with impunity. In two Arizona cases, Mexico challenged the imposition of the death penalty on juvenile offenders under the ICCPR, bringing in experts to testify at court hearings on the issue.[68] In a California case, Mexico argued that a court's refusal to grant a change of venue violated the defendant's right to an impartial tribunal under Article 14 of the ICCPR.[69] In a post-conviction case in Illinois,[70] Mexico argued that its national's death sentence was the result of disparate treatment, in violation of Article 26 of the ICCPR and Articles 5 and 6 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.[71] In yet another case where the defendant's confession was procured through the coercive tactics of police officers in El Paso, Texas, Mexico has filed an *amicus* brief raising arguments under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[72] and Article 7 of the ICCPR.[73]

Through its legal counsel in the United States, Mexico acts *both* as a governmental norm sponsor *and* as a transnational norm entrepreneur, blurring the lines between the sets of agents identified by Koh. Mexico is continually seeking to compel the United States to acknowledge the binding nature of the norms announced by the Inter-American Court and the ICJ, by filing *amicus* briefs and letters setting forth Mexico's views. The case of *Gerardo Valdez* is illustrative.

In 1989, Oklahoma authorities arrested Gerardo Valdez and charged him with capital murder. Valdez, who had only a sixth-grade education, spoke little English at the time of his arrest. Hampered by his minimal education, low intelligence and organic brain damage, he was ill-equipped to face the complexities of a capital trial. Because Oklahoma authorities failed to notify him of his right to communicate with consular representatives, Mexico did not learn of his incarceration until April 2001, twelve years after his arrest, and two months before his scheduled execution. At that

68. Brief Amicus Curiae of the United Mexican States in Support of Motion to Strike Death Penalty Allegation, State *v.* Aguilar, No. CR 97-09340 (Maricopa Co. Superior Ct. filed 15 August 2001); Brief Amicus Curiae of the United Mexican States in Support of Pretrial Motions of Felipe Petrona Cabanas and Fredi Bladimir Flores Zeveda, State *v.* Cabanas, No. CR 99-004790 (Maricopa Co. Superior Ct. filed 23 June 2001). Tonatiuh Aguilar was sixteen at the time of the offense for which he was convicted; Felipe Petrona Cabanas was seventeen. After sentencing hearings at which Mexico presented testimony on international law prohibiting the application of the death penalty on juvenile offenders, both were sentenced to life in prison.
69. Letter from Government of Mexico to California Supreme Court, Ramirez *v.* Superior Court, Kern County Superior Court No. SC 076259; Court of Appeal No. FO 37445).
70. Brief Amicus Curiae of the United Mexican States, People *v.* Caballero, No. 88784 (Il. Sup. Ct.).
71. 660 UNTS 195.
72. *Supra* note 34.
73. Brief Amicus Curiae of the United Mexican States in Support of Petition for Writ of Certiorari, Fierro *v.* Johnson, 530 U.S. 1206 (2000).

time, all avenues of appeal had been exhausted, and Valdez's only chance at receiving a reprieve was through executive clemency.

Within days of learning of the case, Mexico's legal counsel interviewed Valdez, and discovered he had suffered a series of traumatic head injuries. Mexico subsequently retained two mental health experts and a bilingual mitigation specialist to investigate Valdez's background. Mexico then took the results of its investigation to the Oklahoma Pardon and Parole Board and asked the Board to commute Valdez's sentence, arguing that commutation was required as a remedy for the Article 36 violation. After considering Mexico's submissions, the Board recommended that Valdez's death sentence be commuted to life in prison without the possibility of parole – only the second time in thirty-five years that the Board had issued such a recommendation.

The Board forwarded its recommendation to Oklahoma Governor Frank Keating. As Mr Valdez's execution date approached, Mexican President Vicente Fox called Governor Keating to express his support for the Board's recommendation. Ten nations,[74] in addition to the European Union, wrote to Keating, expressing their support for commutation. The Government of Australia filed a diplomatic note with the US Department of State, protesting Valdez's treatment by the Oklahoma authorities. Shortly thereafter, Governor Keating granted a thirty-day reprieve to study the case.

On 27 June 2001, the ICJ issued its decision in *LaGrand*. Although Keating was aware of the decision, he nonetheless rejected the Board's recommendation that he commute Valdez's death sentence. Upon the advice of the US Department of State,[75] Keating noted in his executive order denying commutation, that he had "reviewed and reconsidered" the violation of Article 36, but determined that the violation had no prejudicial effect on Valdez's conviction or death sentence.[76]

Valdez's execution date was soon rescheduled for September 2001. In August 2001, the Government of Mexico again petitioned Governor Keating for a thirty-day reprieve, which Keating granted. In the meantime,

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74. Argentina, Brazil, Chile, Colombia, Costa Rica, El Salvador, Iceland, Poland, Switzerland and Uruguay all sent letters to Governor Keating.
75. Letter from William H. Taft IV, Legal Adviser for the US Department of State, to Governor Frank Keating, 11 July 2001. In this official correspondence (which followed a series of informal contacts between Keating's office and the State Department), Taft advised Keating of the ICJ decision, and noted that the State Department was "continuing to study the Court's decision and its potential implications." Taft further advised Keating to issue a written statement describing his "consideration" of certain facts in the *Valdez* case.
76. It is difficult to imagine a case with a stronger showing of prejudice. Valdez's trial counsel failed to investigate Valdez's background, and did not present evidence of his brain damage to the jury. The mental health expert who evaluated Valdez prior to trial did not speak Spanish. Trial counsel failed to hire an investigator, and never traveled to Mexico to learn more of Valdez's impoverished background and history of traumatic head injuries. Presented with new evidence discovered by Mexico's legal team, the psychiatrist who testified for the prosecution at Valdez's trial provided an affidavit stating that he was now convinced Valdez was legally insane at the time of the crime. *See* Second Application for Post-Conviction Relief, Valdez *v.* State, PCD-2001-1011 (filed 22 August 2001).

Mexico recruited new legal counsel to represent Valdez. Shortly thereafter, Valdez's new legal team filed a petition for writ of *habeas corpus* in the Oklahoma Court of Criminal Appeals. The petition raised only one issue: that the court must follow the ICJ's decision in *LaGrand* and vacate Valdez's death sentence as a remedy for Oklahoma's violation of Article 36. Mexico filed a motion for leave to present an *amicus curiae* brief in support of the petition. On 10 September 2001, the court entered an indefinite stay of execution, ordered the state of Oklahoma to respond to the allegations raised in the petition, and granted Mexico's motion. The case remains pending before the court.

There is, of course, no guarantee that the Oklahoma court will follow the ICJ's decision, nor is there any guarantee the court will vacate Valdez's death sentence. Clearly, the international norms articulated by the Inter-American Court and the ICJ require such a result. But even if the court ultimately rejects Valdez's petition, it would be a mistake to conclude the litigation was a failure.

First, Mexico was able to convince a tough, prosecution-oriented pardons board to commute a death sentence based upon a violation of international law – a completely unprecedented event in the history of capital punishment the United States. Second, the norms articulated in the ICJ, and transported to the Oklahoma courts by Mexico and Valdez's legal counsel, resulted in an equally unprecedented stay of execution. Valdez is still alive – which is victory enough for the present. In sum, the case of *Gerardo Valdez* represents another, more advanced stage of the norm-internalization process in the saga of Article 36 litigation.

4. The Fate of Foreign Nationals on Death Row: What the Future May Bring

Several transnational agents may be readily identified from the case litigation described in this essay. Capital litigators, Amnesty International and even foreign governments have assumed the role of transnational norm entrepreneurs. All of these actors have mobilized popular opinion and political support in both the United States and abroad, as described in the cases of *Faulder* and *Breard*. Governmental norm sponsors, such as former Canadian Foreign Minister Lloyd Axeworthy and Mexican President Vicente Fox, have also used their official positions to discourage the United States from executing their nationals. An effective transnational issue network has arisen as a result of active outreach by Amnesty International, individual lawyers and foreign governments. A regular newsletter is circulated via the internet to consular representatives, government officials, capital litigators and human rights activists, informing them of recent developments in Article 36 litigation. Mexico, Paraguay and Poland have reached out to other countries to solicit support for individual cases, and have, in turn, supported the efforts of other sovereign nations.

The ICJ and the Inter-American Court have been the most important law-declaring fora in the history of Article 36 litigation, but there have been others, as well. The UN Commission on Human Rights has passed a number of resolutions calling upon governments to protect the rights of foreign nationals under Article 36.[77] The state of California has passed legislation implementing, at least in part, the notification provisions of Article 36.[78] Bureaucratic compliance procedures have also emerged from Article 36 litigation. The State Department undertook a massive educational campaign in response to *Faulder*, *Breard*, *LaGrand* and other cases, in an attempt to teach local law enforcement officers their obligations under Article 36. Many federal and state courts have adopted a practice of informing foreign nationals of their rights under Article 36 at the time of their first court appearance, something that was unheard of until recently. Issue linkages are also apparent, from Secretary of State Albright's letter linking Faulder's fate to that of Americans arrested abroad.

Litigation over Article 36 violations began ten years ago. Ten years is a short time in the life of a nation, and the transnational agents involved in Article 36 litigation have made enormous strides in compelling the United States to acknowledge the importance of consular notification. The United States has not yet internalized a norm that would require the commutation (or reversal) of death sentences, based upon violations of Article 36 in capital cases. Nonetheless, Koh's six categories of transnational agents remain actively involved in pressuring the United States Government to acknowledge the binding character of the norm. With the ever-expanding list of governments engaged in aggressive litigation around this issue, there is no question – in the author's mind – that US policy will eventually conform to the expectations of the international community. As Koh observed,

> [i]f nations regularly participate in transnational legal interactions in a particular issue area, even resisting nations cannot insulate themselves forever from complying with the particular rules of international law that govern that area.[79]

5. CONCLUSION

In the area of international law and the death penalty, we are in the midst of a paradigm shift.[80] International law is now taught at most training seminars for capital defense lawyers, and prominent members of the death penalty community have advocated its use. As a result of the transnational

77. *See*, *e.g.*, Res. 2000/65 on the Question of the Death Penalty, adopted by the 56th Session of the United Nations Human Rights Commission, 27 April 2000, UN Doc. E/CN.4/RES/2000/65 (27 April 2000).
78. Cal. Pen. Code, Sec. 834(c).
79. Koh, *Bringing International Law Home*, *supra* note 8, at 640.
80. T.S. Kuhn, The Structure of Scientific Revolutions, 3rd Ed. (1996).

capital litigation described in this essay, lawyers representing both US citizens and foreign nationals have begun to litigate international legal issues with increasing frequency. Supreme Court Justices regularly attend conferences with their European colleagues, where they are exposed to the views of the international community.[81] As one commentator recently remarked:

> Globalization has now so pervaded our national culture and identities that a court that consistently ignores international precedents and experiences when considering human rights issues, even if merely for their persuasive or moral weight, risks irrelevancy.[82]

The transnational legal process is far from complete in the realm of capital litigation. Nevertheless, the recent decision of the ICJ in *LaGrand*, which represents the beginning of a new phase of litigation over Article 36 violations, has already prevented one execution. And years from now, with the benefit of hindsight, we may look back on *LaGrand* as the decisive turning point in the United States' internalization of international legal norms regarding capital punishment.

81. C. L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, at 26 (1998). *See also* Davis, *supra* note 31, at 430.
82. Davis, *supra* note 31, at 421.