(c) Commentary

Judicial Remedies for Treaty Violations in Criminal Cases: Consular Rights of Foreign Nationals in United States Death Penalty Cases

Douglass Cassel[*]

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Abstract: Litigation over the right of detained foreign nationals to be notified of their right to seek consular assistance in death penalty cases is important to the more than 80 foreign nationals currently on death row in the United States. It also raises more general questions about the role of international law and of international courts in sensitive criminal cases before national courts. International courts and litigants may enhance the likelihood of compliance in such cases by insisting on fair and deliberate procedures, on transparent and thoroughly articulated reasoning, and on prudent shaping of remedies.

1. INTRODUCTION

Fundamental questions about judicial remedies for violations of international law are raised by recent and current litigation before the International Court of Justice, the Inter-American Court of Human Rights and the courts of the United States of America, involving failures to advise foreign nationals in the US of their rights to consular assistance in death penalty cases.

The Vienna Convention on Consular Relations requires that detained foreign nationals be advised of their right to contact their consulates for assistance.[1] But it does not specify remedies for failure to provide such notice. Suppose a state arrests a foreign national for murder, puts him on trial, convicts and sentences him to death – all without advising him of his consular rights. The treaty violation is clear. However, is the only remedy, as the US government contends, a diplomatic apology and undertaking to avoid future violations? Or are there ju-

* Director, Center for International Human Rights, Northwestern University School of Law, Chicago. The author is counsel for the Consul General of the Republic of Poland in the case of People *v.* Madej, pending in the state courts of Illinois. He is also counsel appearing for two *amici curiae* before the Inter-American Court of Human Rights in the proceedings on Advisory Opinion OC-16.

1. Vienna Convention on Consular Relations, 21 UST 77, TIAS No. 6820, 596 UNTS 261 (hereafter 'Convention'), Art. 36.

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dicial remedies, as Germany, Mexico, Paraguay and others insist, which could nullify the judgment and allow a new trial?

Judicial remedies seem also not to have been recognized until recently in state practice under the Convention. May they nonetheless be inferred from the customary international law of state responsibility, which requires reparations – including restoration of the *status quo ante* – for internationally wrongful acts?[2] Or from the general principle of law that "any breach of an engagement involves an obligation to make reparation"?[3]

Suppose that judicial remedies are, in principle, available. Must the court find that the foreign national was prejudiced by the treaty violation? In other words, that if he had been advised of his rights, he would likely have contacted his consulate, the consulate would likely have provided assistance, and the assistance would likely have changed the outcome of his trial?

Even if there are judicial remedies for Convention violations, may they be denied in a given case based on a state's procedural rules of general applicability, such as default of untimely claims or restrictions on *habeas corpus*? Consular rights under the Convention are to be exercised in conformity with a state's laws and regulations provided, however, that the state's rules "must enable full effect to be given to the purposes for which [consular] rights [...] are intended."[4] In cases where timely compliance with the Convention could have avoided their application, do generally applicable procedural restrictions deny 'full effect' to consular rights?

Such questions have recently been addressed to a limited extent by the Inter-American Court of Human Rights (IACHR). In Advisory Opinion OC-16/99, issued in response to a request by Mexico, the Court advised unanimously that the right under the Convention to be notified of rights to consular assistance is an individual right, which concerns the protection of the human rights of foreign nationals, and which makes effective the due process guarantees of the International Covenant and Civil and Political Rights, which are minimum guarantees susceptible to expansion in light of other international instruments like the Convention.[5] Mexico contended before the Court that there are judicial remedies for

2. *See* Draft Articles on State Responsibility, provisionally adopted by the International Law Commission ('ILC') on first reading, ILC Report, 1996, Chapter III, State Responsibility, Arts. 41-46, accessible at http://www.un.org/law/ilc/reports/1996.
3. Factory at Chorzów (Claim for Indemnity) (Germany *v.* Polish Republic) Merits, Judgment of 13 September 1928, 1928 PCIJ, (Ser. A), No. 17, at 29, *in* I. Brownlie, Principles of Public International Law 18 (1979); *see also* ICJ Statute Art. 38(1)(c) ("the general principles of law recognized by civilized nations").
4. Convention Art. 36.2.
5. Advisory Opinion OC-16/99, 1 October 1999, The Right to Information Concerning Consular Assistance Within the Framework of Guarantees of Due Process of Law, paras. 141.1, 141.2 and 141.6 (on file with author in Spanish; all English translations herein, including the title, are unofficial by the author). The Court also held unanimously that the requirement that individuals be notified of their consular rights "without delay" means that notice must be given at the moment they are de-

violations of consular rights in death penalty cases. Its position was supported by Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Paraguay, and several scholars and non-governmental organizations. The US opposed. In its 6-1 opinion on this point, the Court advised that the failure to notify foreign nationals of their consular rights in death penalty cases affects their due process rights, and that imposing the death penalty in such cases amounts to taking life "arbitrarily" in violation of international human rights treaties, "with the legal consequences inherent in a violation of this nature, that is to say, those which follow from the international responsibility of the State and the duty to make reparation."[6]

The Court did not further clarify the remedial implications of its ruling. While it almost certainly contemplates judicial remedies,[7] their conditions and contours remain to be specified in light of general principles of law on state responsibility and reparations.

Such questions were also presented to the International Court of Justice (ICJ) in 1998 in a suit brought by Paraguay against the United States,[8] based on an Optional Protocol authorizing states to bring disputes over "interpretation or application" of the Vienna Convention before the compulsory jurisdiction of the ICJ.[9] The ICJ unanimously ordered provisional measures requesting the US not to execute Paraguay's national pending a ruling on the merits.[10] Although US federal authorities requested the state of Virginia to delay the execution, they also opposed a request for a judicial stay before the US Supreme Court, which then denied the stay.[11] Virginia carried out the execution that same day. Paraguay later withdrew its suit.[12]

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prived of their liberty and in any case before they make their first statement to authorities, *id.* para. 141.3; that individual rights under Art. 36 of the Convention do not depend on protests by the sending states, *id.* para. 141.4; that Arts. 2, 6,14 and 50 of the International Covenant on Civil and Political Rights concern the protection of human rights in the Americas, *id.* at para. 141.5; and that international provisions on respect for human rights, including Art. 36.1(b) of the Convention, should be respected by states independently of their federal or unitary structure, *id.* at para. 141.8.

6. *Id.*, at para. 141.7. The lone dissenter declined to find violations of due process or the right to life to be inherent in every capital case where notice of consular rights is not given, but would instead make such determinations on a case-by-case basis. Partly Dissenting Opinion of Judge Oliver Jackman, paras. 2 and 3.
7. At least one judge left no doubt: a violation of due process, he wrote, "carries with it the consequences which are necessarily produced by illicit conduct with these characteristics: nullity and responsibility. This does not mean impunity, because it is possible to provide for a retrial to be conducted in a proper manner." Concurring Opinion of Judge Sergio García Ramírez, *id.*, at 3.
8. Vienna Convention on Consular Relations (Paraguay *v.* United States of America), ICJ (1998). This and all other ICJ documents cited herein are accessible at http://www.icj-cij.org.
9. Optional Protocol Concerning the Compulsory Settlement of Disputes, Art. I.
10. Paraguay *v.* US, Request for the Indication of Provisional Measures, Order of 9 April 1998, *see supra* note 8 and at http://www.icj-cij.org.
11. Breard *v.* Greene, 523 US 371 (1998).
12. Paraguay *v.* US, Order of 10 November 1998, *supra* note 8.

A similar case was brought by Germany in 1999.[13] Again the ICJ unanimously indicated provisional measures,[14] but again the US permitted a constituent state (Arizona) to carry out the execution. Germany's suit, now pending, is not likely to be decided before 2001.[15]

How international courts resolve these questions, and whether US authorities and courts respect their rulings, is of most immediate concern to the more than 80 foreign nationals currently on death row in the US,[16] most of whom were not advised of their rights to seek consular assistance before being sentenced to death.[17] Future rulings will come too late, however, for the 14 foreign nationals executed in the US since 1993.[18]

Broader questions are also at stake. To what extent does international law, in theory and in practice, require that individual rights created by treaty be judicially enforceable? Can international courts effectively intervene in national criminal cases? Especially in death penalty cases, where the right to life is at stake, but local political resistance may be higher? And particularly in the world's most powerful nation, which has repeatedly shown reluctance to submit to international law or courts?

The consular notification cases ask international courts to resolve these questions in unprecedented contexts. Never before has the IACHR (whose contentious jurisdiction the US does not accept) been asked to render an advisory opinion effectively against the US. Never before has the ICJ been asked to judge US domestic conduct. Never before has the ICJ been asked to exercise its compulsory jurisdiction to intervene in a criminal case, let alone a death penalty case.

How international courts and litigants manage these challenges will write an important chapter in the history of international law, potentially affecting its credibility and effectiveness. To date US courts and authorities have affirmed death sentences and carried out executions despite clear treaty violations and in disregard of ICJ orders indicating provisional measures (whose legally binding nature is uncertain).[19] If the ICJ were to issue a definitive order requiring that a death sentence be vacated, would the US or local authorities comply?

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13. The LaGrand Case (Germany *v.* United States of America), ICJ, Application filed 2 March 1999.
14. Germany *v.* US, Request for the Indication of Provisional Measures, Order, 3 March 1999.
15. The US Counter-Memorial is due in March 2000. ICJ Press Release ICJ/567, 8 March 1999.
16. Death Penalty Information Center, *Foreign Nationals and the Death Penalty in the United States*, (hereafter 'DPIC'), at 1-2 (at least on death row as of 31 March 1999), accessible at http://www.essential.org/dpic/ foreignnatl.html.
17. Amnesty International, United States of America: Violation of the Rights of Foreign Nationals Under Sentence of Death (1998) (hereafter 'AI 1998'), at 1.
18. For a list of those executed, *see* DPIC, *supra* note 16, at 2.
19. *Compare* Brief for the US as Amicus Curiae, Paraguay *v.* Gilmore, 1997 US Briefs 1390, at 49-51, *with* S. Adele Shank & J. Quigley, *Obligations to Foreign Nationals Accused of Crime in the United States: A Failure of Enforcement*, 9 Criminal Law Forum 99, at 113-17 (1999).

Even if not, might the international litigation still make a difference, in the US or elsewhere? Already US federal and some local authorities, partly in response to domestic and international lawsuits, are improving compliance with the Convention. They are also being educated – often for the first time – on international law. Might continued pressure change their views on Convention cases, or even alter their legal culture? Will the day soon come when US courts will remedy treaty violations even without international court orders? And can international courts and litigants enhance these prospects, by the manner in which they conduct and adjudicate these cases?

2. THE CONTEXT: CONSULAR ASSISTANCE AND THE DEATH PENALTY

The litigation involving the US, a state party to both the Convention and the Optional Protocol, has focused on the application of the Convention in death penalty cases.

2.1. Consular Assistance Under International Law

Long recognized by customary international law,[20] the right to consular assistance was codified in 1969 by the Convention, which added a requirement that detained foreign nationals be informed of their consular rights.[21] Many bilateral consular conventions further require that consulates be notified of the detention of one of their nationals, regardless of whether the national requests such notification.[22]

Article 36 of the Convention sets forth consular notification rights. It provides:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

20. *See* B. Sen, A Diplomat's Handbook of International Law and Practice 323 (1979). For recent evidence of customary law, in the form of UN General Assembly resolutions, rules of international tribunals, and a declaration of Ibero-American heads of state, *see* OC-16, note 5 *supra*, at para. 82 and note 68 *infra*, para. 123, n. 88.
21. *See generally* M.J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 Michigan Journal of International Law 565 (1997).
22. As a result, US State Department guidance on *Consular Notification and Access, January 1998*, lists 56 countries and jurisdictions as requiring 'mandatory notification,' regardless of any request from the person detained, in the event their nationals are detained in the US. (Accessible at http://www.state.gov/www/global/legal_affairs/ ca_notification/ ca_prelim.html).

> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within a consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded to the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
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> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

The Convention thus confers upon detained foreign nationals the following rights:

1. To be *informed* of their rights of consular communication "without delay";[23]
2. Upon request, to have their *consulates informed* "without delay" of their detention;
3. To be free to *communicate* with and to have *access* to their consular officers;
4. To have "any communication" to their consular post *forwarded* "without delay"; and
5. To require that consular officers *refrain* from taking action on their behalf, by expressly opposing such action.

None of these rights purports to guarantee that the detained national will, in fact, receive consular assistance. Rather, they are rights to communicate with the consulate, and to be informed of that right. The one exception is a negative right: the right to insist that consular officers not take certain actions on their behalf. There is no corresponding positive right to require that consulates do act on their behalf.

Article 36 also confers corresponding rights on consular officers. They are entitled to be notified upon the national's request of his detention "without delay," to receive communications from nationals "without delay," and to commu-

23. The IACHR interprets "without delay" to mean "at the moment the accused is deprived of liberty and in any case before he makes his first declaration before authorities." OC-16, note 5 *supra*, paras. 106, 141.3.

nicate with and have access to their nationals. In addition, they have the right to visit their nationals, to converse and correspond with them, and to "arrange for their legal representation." Article 5 of the Convention gives consular officers broad authority to protect the interests of their nationals within the limits of international law, to help and assist them and, where permitted by local law and practice, even to represent them before local courts, if they are unable to defend their own interests by reason of absence "or for any other reason."[24]

The consul, then, is not generally entitled to act as the national's lawyer, but is entitled to arrange for a lawyer.[25] The right to communicate with the national may also place the consul in a position to assist the lawyer. Moreover, the consul may "assist the accused in diverse acts of defense, such as [...] obtaining evidence in the country of origin, verifying the conditions in which legal assistance is provided and observing the situation of the accused while he is in prison."[26]

In most cases the foundation of this entire edifice of rights is the national's right to be informed of his rights. Most persons arrested for capital offenses in the US are uneducated and unsophisticated about international law. If they are not informed of their rights, the consul is not advised and, unless she happens to learn of the detention from other sources, is not in a position to render assistance.

2.2. Consular Assistance in Practice

In practice both consular assistance and state compliance with the Convention vary widely.[27] In a large country like the US, consulates may be located either quite near or very far from where a foreign national may happen to be detained. Consular resources may range from part-time honorifics for expatriates, to substantial teams of professionals, including lawyers. Demands on consular resources, too, may range from merely occasional, to constant and overwhelming, depending on the concentration of a country's nationals in a particular city or region.

At least in the US, where millions of foreign nationals are present, it is probably safe to say that the vast majority of detained foreign nationals receive little or no assistance from their consulates. Even if US compliance with the Convention were perfect, that situation would probably not change. Consulates simply do not have the resources to attend to large criminal caseloads. (But they

24. Art. 5(a), (e) and (i), quoted in OC-16, note 5 *supra*, at para. 79.
25. "The United States does not permit foreign consular officers to act as attorneys in the United States, nor may its own consular officers abroad act as attorneys for American Citizens. We believe that this is the general practice of States." Paraguay *v.* US, Verbatim Record, 7 April 1998, ICJ, para. 2.11 (US argument).
26. OC-16, note 5 *supra*, at para. 86.
27. *See* Paraguay *v.* US, Verbatim Record, 7 April 1998, ICJ, para. 2.9 (US argument).

may be able to attend to the far smaller number of death penalty cases; see 2.4 below.)

Compliance with the Convention is likewise far from perfect. At least until recently the duty to advise foreign nationals of their consular rights appears to have been generally disregarded in the US.[28] US diplomats also report spotty compliance in other countries.[29]

2.3. Death Penalty in Practice in the US

The US is one of a relatively few developed countries to retain the death penalty.[30] Its scores of executions annually rank it among the world's top legal executioners.[31] Forty jurisdictions within the US authorize the death penalty: the federal government, the military, and 38 of the 50 states.[32] In 1992 the US ratified the International Covenant on Civil and Political Rights, subject to numerous reservations.[33] Among them it reserved the "right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."[34]

If the death penalty in the US were administered fairly with adequate provision for defense, the widespread failure to advise foreign nationals of their con-

28. *See* Commission on Human Rights, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye, Addendum, Mission to the United States of America*, UN Doc. E/CN.4/1998/68/Add.3 (1998), (hereafter 'Special Rapporteur'), paras. 105-10, 118-19.
29. *See* Paraguay *v.* US, Verbatim Record, 7 April 1998, ICJ, paras. 2.12 and 2.13 (results of incomplete US State Department inquiry).
30. Only 13 of the 45 nations listed as "high human development" by the United Nations Development Programme retain the death penalty: Antigua and Barbuda, Bahamas, Bahrain, Barbados, Chile, Japan, Kuwait, Qatar, Singapore, the Republic of Korea (South Korea), United Arab Emirates and the US. UN Development Programme, Human Development Report 1999, at 134 (1999); Amnesty International, The Death Penalty: List of Abolitionist and Retentionist Countries, at 5-7 (1999). Amnesty lists all other developed countries as abolitionist for all crimes, for ordinary crimes only, or *de facto*. *Id.* at 1-5. Of the 13 retentionist developed countries, only five – Japan, Kuwait, Singapore, the United Arab Emirates and the US – conducted executions during 1998, with the US accounting for the most (68). Amnesty International, Death Sentences and Executions in 1998, at 3 (1999). Taiwan, also listed by Amnesty as executing during 1998, is developed, but not listed separately by the UN Development Programme. The Amnesty reports are accessible at http://www.amnesty.org/ailib/aipub/1999/ACT/.
31. Amnesty International reports that of 1,625 known executions during 1998, 80% took place in four countries: 1,067 in China, over 100 in the Democratic Republic of Congo, 68 in the US and 66 in Iran. Amnesty International, Facts and Figures on the Death Penalty, at 2 (Revised 10 September 1999), (hereafter 'AI 1999'). Accessible at http://www.amnesty.org/ailib/intcam/dp/dpfacts.htm.
32. AI 1999, *id.*, at 4.
33. 138 Congressional Record S4781-01 (daily ed., 2 April 1992), *reprinted in* F.Newman & D. Weissbrodt, International Human Rights: Law, Policy, and Process, Selected International Human Rights Instruments 189 (1996).
34. *Id.*, reservation (2).

sular rights might make little practical difference. But it is not. Among serious deficiencies in US death penalty practice generally are incompetent defense counsel, lack of adequate resources for the defense, racial and ethnic discrimination, limitations of legal recourse against death penalties and, in many states, political pressures on elected judges to impose the death penalty.[35]

In 1972 the US Supreme Court held capital punishment unconstitutional because of the arbitrary manner in which it had been imposed.[36] In the words of Justice William O. Douglas, who participated in that ruling:

> [W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.[37]

In 1976, however, the Supreme Court permitted resumption of the death penalty, subject to additional procedures and criteria.[38] By 1994, however, one Supreme Court Justice pronounced the experiment a failure:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice and mistakes.[39]

In 1997 the American Bar Association, whose nearly 400,000 members make it the largest and most influential organization of lawyers in the country, called on every US jurisdiction that imposes capital punishment to impose a moratorium on executions until sufficient measures have been taken to "(1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed."[40]

The ABA based its recommendation for a moratorium on incompetence of defense counsel, inadequate procedures, and racial discrimination. It explained:

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35. *See generally* Special Rapporteur, note 28 *supra*; American Bar Association, Recommendation and Report approved by House of Delegates, February 3, 1997 (hereafter 'ABA Report') (on file with author); S.B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, But for the Worst Lawyer*, 103 Yale Law Journal 1835 (1994); Amnesty International, Rights for All: The Death Penalty in the United States of America (1999), accessible at http://www.amnestyusa.org/rightsforall/dp/index.html>, last checked 12 September 1999.
36. Furman *v.* Georgia, 408 US 238 (1972).
37. 408 US, at 255.
38. Gregg *v.* Georgia, 428 US (1976); Jurek *v.* Texas, 428 US 262 (1976).
39. Callins *v.* Collins, 114 S. Ct. 1127, 1129 (1994) (Blackmun, J., dissenting).
40. ABA Report, note 35 *supra*, Recommendation.

> **I. Competent Counsel**
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> [...] [G]rossly unqualified and under compensated lawyers who have nothing like the support necessary to mount an adequate defense are often appointed to represent capital clients. In case after case, decisions about who will die and who will live turn not on the nature of the offense the defendant is charged with committing, but rather on the nature of the legal representation the defendant receives. [...]
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> It is scarcely surprising that the results of poor lawyering are often literally fatal for capital defendants. [...]
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> Even when experienced and competent counsel are available in capital cases, they often are unable to render adequate service for want of essential funding to pay the costs of investigations and expert witnesses. [...]
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> **II. Proper Processes**
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> The ABA consistently has sought to ensure that adequate procedures are in place to determine whether a capital sentence has been entered in violation of federal law. [...]
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> Regrettably, none of these recommendations has been generally adopted. In fact, the Supreme Court has denied death row prisoners the very opportunities for raising constitutional claims that the ABA has insisted are essential. Prisoners have not been entitled even to a single stay of execution to maintain the status quo long enough to complete post-conviction litigation. The federal courts typically have refused to consider claims that were not properly presented in state court, even if the failure to raise them was due to the ignorance or neglect of defense counsel. [...]
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> **III. Race Discrimination**
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> [...] Numerous studies have demonstrated that defendants are more likely to be sentenced to death if their victims were white rather than black. ... And in countless cases, the poor legal services that capital clients receive are rendered worse still by racist attitudes of defense counsel.[41]

In 1998 the UN Human Rights Commission Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, following a mission to the US, among other recommendations, joined in the call for a moratorium on the death penalty in the US.[42] Among other points he noted that "the small percentage of defendants who receive a death sentence are not necessarily those who committed the most heinous crimes. Many factors, other than the crime itself, appear to influence the imposition of a death sentence. Class, race and economic status, both of the victim and the defendant, are said to be key elements."[43]

41. *Id.*, at 23, 24, 25, 27, 28, 29-30 (footnotes omitted).
42. *See* Special Rapporteur, note 28 *supra*, para. 156(a).
43. *Id.*, at para. 62.

Foreign nationals are not exempt from these general flaws in the US death penalty. In addition, their defense must often surmount obstacles of language, culture, and discrimination against their ethnic or national group or against foreigners generally, as well as difficulties in securing evidence in mitigation from their home countries.

Cases reported in the US illustrate such problems. For example:

1. A Texas lawyer appointed to defend a Salvadoran national called his client a "wet back" – a derogatory term for undocumented immigrants from Latin America – before an 'all white jury' that then imposed the death sentence;[44]
2. The defense lawyer for a Canadian national sentenced to death completely failed to present evidence of mitigating circumstances, including a brain injury that impaired his client's ability to control his actions;[45]
3. The defense lawyer for a Mexican national sentenced to death appealed the denial of his *habeas corpus* claims one day late; as a result, the issues were procedurally barred.[46] The Mexican was later executed;[47]
4. Another Mexican national sentenced to death had no court-ordered interpreter for at least 35 days;[48]
5. Another Mexican national's death sentence was upheld on appeal, even though the court found that his confession was coerced and had been admitted into evidence with the assistance of perjured statements by police;[49]
6. Another Mexican national confessed to US police after being told that Mexican police had arrested his mother;[50]
7. Another Mexican national appeared to Mexico to have been "singled out for the death penalty when other participants in the crime, all United States citizens, were offered plea bargains that spared their lives;"[51] and
8. A Polish national's death sentence was upheld, even though the court ruled that his defense counsel, who failed to conduct any investigation of

44. *Ex Parte* Guzmon, 730 S.W.2d 724, 736 (Tex.Crim.App. 1987)(*en banc*); *see* Bright, note 30 *supra*, at 1843, n. 51.
45. *See* Faulder *v.* Scott, 81 F.3d 515, 519, 520 (5th Cir. 1996).
46. Murphy *v.* Netherland, 116 F.3d 97, 99 (4th Cir. 1997).
47. DPIC, *supra* note 16, at 2.
48. State *v.* Zuniga, 357 S.E.2d 898, 907 (N.C. 1987).
49. *Ex Parte* Fierro, 934 S.W.2d 370, 371-72 (Tex.Crim.App. 1996).
50. Flores *v.* State, 871 S.W.2d 714, 721 (Tex.Crim.App. 1993) (*en banc*).
51. W.J. Aceves, *International Decisions: Murphy v. Netherland*, 92 AJIL 87, 88 (1998) (quoting Amicus Brief of the United Mexican States in Murphy *v.* Netherland, 116 F.3d 97 (4th Cir. 1997), at 3).

> mitigating circumstances, "fell below the minimum level of competent representation."[52]

In short, persons charged with capital offenses in the US – especially foreign nationals – need all the help they can get. Consulates concerned for the lives of their nationals cannot afford to rest on the assumption that the US legal system, in the absence of consular assistance, will ensure a fair trial or adequate defense.

2.4. Consular Assistance in US Death Penalty Cases

Approximately 100 foreign nationals have been sentenced to death in the US.[53] Since 1993 at least 14 have been executed.[54] Until recently, consulates in the US had little practical opportunity to assist their nationals in death penalty cases, because in "virtually every case" foreign nationals were not advised of their consular rights and did not request consular assistance.[55] As the UN Special Rapporteur reported in 1998, "[a]lthough [...] the State Department has, on several occasions, informed officials of various states, [...], of their duties under [Convention] article 36, it appears that the periodic advisories given by the Department receive no consideration."[56]

In recent years, however, as US defense counsel have become aware of the Convention, and foreign consulates in the US have learned that their nationals were sentenced to death, the potential importance of consular assistance in death penalty cases has been demonstrated. Among governments which have attempted actively to assist their nationals, whether by filing civil suits, intervening in post-conviction proceedings, filing briefs *amicus curiae*, appearing at clemency hearings, or making diplomatic requests for the federal government to intervene with state authorities, have been at least Canada,[57] Germany,[58] Honduras,[59] Mexico,[60] Paraguay[61] and Poland.[62] Mexico in particular, which accounts

52. People *v.* Madej, 177 Ill.2d 116, 134-37 (Sup.Ct.Ill. 1997). The author represents the Consul General of the Republic of Poland in pending litigation seeking to overturn the conviction and death sentence.
53. DPIC, *supra* note 16, at 3 (99 reported death sentences).
54. *Id.*, at 2.
55. AI 1998, *supra* note 17, at 1; *see also* Special Rapporteur, note 28 *supra*, para. 118.
56. Special Rapporteur, *id.*, para. 119.
57. *See* Brief Amicus Curiae of the Government of Canada in Support of Petition for Writ of Certiorari. 25November 25 1998, filed in Faulder *v.* Johnson, US Supreme Court no. 98-7001 (on file with author), (stay granted only pending cert.), 119 S.Ct. 614 (1998), (cert. denied), 119 S.Ct. 909 (1999); *see* Faulder *v.* Scott, 81 F.3d 515 (5th Cir.), (cert. denied), 117 S.Ct. 487 (1996); Faulder *v.* Johnson, 178 F.3d 741 (5th Cir. 1999); Faulder *v.* Texas Board, 119 S.Ct. 2362 (1999) (denying stay of execution); Faulder v. Johnson, 119 S.Ct. 2363 (1999) (denying stay of execution).
58. *See* Germany *v.* US, 119 S.Ct. 1016 (1999); LaGrand Case (Germany *v.* USA), ICJ, General List No. 104, application filed 2 March 1999.
59. *See* letter of J. Fernando Martines Jiménez, Minister of Foreign Relations, Republic of Honduras, to Inter-American Court of Human Rights, dated 28 April 1998, in regard to Request for Advisory

for the largest number of foreign nationals on US death row,[63] has at least since 1997 adopted a "policy of vigorous intervention" in death penalty cases, which includes "gathering and presenting mitigating evidence and attendance at legal proceedings."[64] In addition, as noted above, Mexico has gone to the extent of requesting an advisory opinion from the Inter-American Court of Human Rights, while both Germany and Paraguay have filed cases within the compulsory jurisdiction of the ICJ.

In most of these cases, timely consular notice was not provided by US authorities and the attempted assistance has come too late; US courts typically find that the foreign national waived his Convention rights by not asserting them sooner. Still, even the belated efforts show that foreign consulates, when made aware of prospective executions of their nationals, can and do respond energetically through a variety of legal and diplomatic means.

In at least one case to date, consular intervention appears to have freed a man from death row. When Mexico learned that one of its nationals had been sentenced to death for murder, it persuaded a prestigious law firm to represent him. With investigative assistance from the Mexican consulate, the lawyers were able to show that the national had been 'framed' (wrongly accused) by police. The national was freed and returned to Mexico. According to one of his US lawyers, "[w]ithout the Mexican consul's involvement, I have no doubt that he would never have been released."[65]

Opinion OC-16 (on file with author); oral argument of Government of Honduras before Inter-American Court of Human Rights in regard to Request for Advisory Opinion OC-16, June 12, 1998, transcript at 54-56 (reporting participation in Arizona state clemency hearing for Honduran national José Roberto Villafuerte) (on file with author); *see also* Villafuerte *v.* Stewart, 111 F.3d 616 (9th Cir. 1997), (cert. denied), 522 U.S. 1079 (1998); Villafuerte *v.* Stewart, 142 F.3d 1124 (9th Cir. 1998); In Re Villafuerte, 523 US 1090 (1998) (denying stay of execution); Villafuerte *v.* Arizona, 523 US 1091 (1999) (denying stay of execution).

60. *See, e.g.*, United Mexican States *v.* Woods, 126 F.3d 1220 (9th Cir. 1997); Consulate General of Mexico *v.* Phillips, 17 F.Supp. 2d 1318 (S.D.Fla. 1998); Amicus Brief of the United Mexican States in Murphy *v.* Netherland, 116 F.3d 97 (4th Cir. 1997); Request for Advisory Opinion OC-16 before Inter-American Court of Human Rights, filed 9 December 1997 (on file with author).
61. *See* Breard *v.* Greene, 523 US 371 (1998); Paraguay *v.* USA, ICJ, General List No. 99, application filed April 3, 1998.
62. *See* People *v.* Madej, Circuit Court of Cook County, Illinois, Case Nos. 81-C-6407 and 98 CH 10183, Memorandum Opinion and Order, 3 May 1999 (intervention by Consul General of Poland in post-conviction proceedings) (on file with author), appeal pending, Illinois Supreme Court nos. 87574, 87725, 87726 and 87852 consolidated; Brief *Amicus Curiae* of the Consul General of the Republic of Poland, June 28, 1999, in US ex rel. Madej *v.* Gilmore, US D.Ct. N.D.Ill., case no. 98 C 1866 (on file with author).
63. Three Mexican nationals have been executed in the US since 1993; as of early 1999, 43 of the 82 foreign nationals reportedly on death row in the US were Mexican. DPIC, note 16 *supra*, at 1, 2.
64. Aceves, note 51 *supra*, at 88 (quoting Amicus Brief of United Mexican States in Murphy *v.* Netherland, 116 F.3d 97 (4th Cir. 1997), at 13).
65. M.A. Jacobs, *Foreign Convictions Raise Rights Issues*, Wall Street Journal, 4 November 1997.

3. CASES OF FOREIGN NATIONALS SENTENCED TO DEATH IN THE US

3.1. The Paraguayan case

Angel Breard, of dual Paraguayan and Argentinian nationality, was convicted by a Virginia state court of murder and attempted rape and sentenced to death in 1993. He was not advised of his rights to consular assistance. The Paraguayan consulate did not learn of the legal proceedings against him until 1996,[66] after his conviction was affirmed on appeal by Virginia courts, and post-conviction *habeas corpus* proceedings were underway before federal courts. According to the State Department investigation of the case,[67] Mr. Breard was in a better position than most foreign nationals in capital cases. He had arrived in the US as a student in 1986 – six years before his arrest. He had sufficient command of English to serve as a translator in prison and did not require an interpreter at trial. He was acquainted with US culture – he had been married briefly to a US citizen – and knew enough when arrested in 1992 to assert his right to an attorney and to call his uncle.

Unlike many death penalty defendants in the US, Breard was defended by two competent "criminal defense lawyers experienced in death penalty litigation," who spent at least 400 hours on his case.[68] They were in touch with sources in Paraguay for information that might assist his defense and obtained his medical records from both Paraguay and Argentina.[69] In the face of strong evidence of guilt (blood, semen, hair samples and DNA tests) his US attorneys advised him to plead guilty, thus improving his odds of avoiding the death penalty. He was also advised by his mother to plead guilty.

On these alleged facts, the State Department understandably "concluded that Breard had the kinds of assistance that consular officers generally seek to ensure."[70] While rejecting the possibility of setting aside his conviction or sentence, the Department expressed its deep regret and advised Paraguay that it had "reminded officials of the State of Virginia of the need to advise all alien detainees" of their right to consular assistance. Further, it stated, "[w]e have now had extensive discussions with such officials about how consular notification and access should be implemented."[71]

66. Paraguay *v.* Allen, 134 F.3d 622, 625 (4th Cir. 1998).
67. "Facts Concerning Angel Breard", attached to letter of 7 July 1997 from US State Department Deputy Legal Adviser James H. Thessin to Ambassador Jorge G. Prieto of Paraguay, Appendix B to Brief for the United States as Amicus Curiae in the cases of Paraguay *v.* Gilmore and Breard *v.* Greene, US Supreme Court, 1997 US Briefs 1390 (1998), at 52.
68. Paraguay *v.* US, Verbatim Record, 7 April 1998, ICJ, par. 2.24 (5) (US argument).
69. *Id.*
70. Brief for the US, 1997 US Briefs 1390, at 8.
71. Letter of James Thessin, note 67 *supra*.

But Paraguay alleged that Breard had fallen victim to a cultural misunderstanding. Against the advice of his US attorneys and his mother, he had made decisions – to plead not guilty, but then to confess on the stand – that were "objectively unreasonable" in the context of US legal culture.[72] Consular assistance, argued Paraguay, might have avoided these fatal mistakes.

The State Department was unimpressed. Who better than his competent US attorneys to explain US legal culture to Breard? "It is difficult to believe that a consular officer could have proven more persuasive."[73]

As logical as this may sound, it is not entirely convincing. Expert knowledge of US legal culture may not suffice for US attorneys to counsel a foreign national, if they are unfamiliar with the differing assumptions of his native legal culture, assumptions that inform his evaluation of their advice and may lead him to reject it. What is needed is a 'cultural bridge' – someone familiar with, or at least likely to understand both legal cultures.

Nothing in the State Department's report of its investigation evidences that either Breard's US lawyers or his Paraguayan mother fit that description. According to Paraguay's counsel, the US trial lawyers "had no familiarity, [...] , with the justice system or culture of Paraguay and were not equipped to address misconceptions concerning the functioning of the American justice system that a Paraguayan national might be expected to have."[74]

A Paraguayan consular officer, in contrast, would more likely possess both the sophistication and the bi-cultural awareness to appreciate why Breard thought as he did, and to dissuade him from a course of action that might make sense in Paraguay, but not in Virginia. In the contention of Paraguay's counsel:

> Paraguayan consular officers are familiar with the characteristics of both justice systems, understand the misconceptions of Paraguayan nationals about the United States justice system and are skilled in explaining the differences in terms that Paraguay nationals can understand. Had a Paraguayan consular officer been permitted to assist Mr. Breard, the officer would have provided Mr. Breard with information that would have enabled him to make more informed decisions in the conduct of his defence. [...] Had he had the assistance of Paraguayan consular officers, [the] result would have been different, at least with respect to the sentence.[75]

Granted, on the limited facts available, the assessments by both the US and Paraguay suffer from a degree of speculation. A judicious evaluation ought to have the benefit of a hearing on the facts. What understanding did Breard's lawyers have of Paraguayan legal culture? Did they have a clue as to why their client might reject their advice? Did his mother understand or explain the differ-

72. Paraguay *v.* US, Verbatim Record of Proceedings before the ICJ, Public Sitting of April 7, 1998 at 10:00 a.m., at 9.
73. *Id.*
74. *Id.*
75. *Id.*, at 9-10.

ences in legal culture to her son? To what degree did the Paraguayan consulate possess bi-cultural legal expertise or have access to such an expert?

Unfortunately, these and other such questions will have to remain unanswered, because Breard's request for a hearing was denied and he was executed. At the same time, the difficulty of answering such questions with confidence, even on a more fully developed record, might suggest that courts should generally avoid such inquiries. There is usually no way to be certain; a man's life ought not to hang on guesswork.

Unable to persuade the State Department, both Breard and Paraguay tried the US federal courts. Breard filed a *habeas corpus* petition, but lost in both the district and appellate courts on grounds of procedural default, because he had not raised the violation of his consular rights before the Virginia state courts.[76] Paraguay filed suit, but also lost in both courts, on the ground that the US Constitution generally does not permit foreign nations to sue constituent states of the US in federal courts.[77]

The appellate court made its rulings on January 22, 1998. Although US Supreme Court rules allowed 90 days, until April 22, to file petitions for discretionary review (*certiorari*), both Breard and Paraguay filed swiftly, because Virginia had scheduled his execution for April 14. Meanwhile, Paraguay continued fruitless discussions with both the State Department and the Governor of Virginia.[78]

With no relief forthcoming in the US, on April 3 Paraguay filed an application and request for provisional measures before the ICJ. At oral argument on April 7, Paraguay argued that the Convention was violated, that judicial remedies were available under general principles of state responsibility, that the violation prejudiced Breard because of his cultural misunderstanding, and that provisional measures were needed to preserve his life pending a ruling on the merits.[79]

The US did not dispute the violation. However, it countered that only diplomatic remedies were available, that it had given the customary apology and undertaking, that Breard had not been prejudiced, that there was no dispute over interpretation or application of the Convention, that the ICJ had neither *prima facie* jurisdiction nor a basis for provisional measures, and that ICJ intervention

76. Breard *v.* Netherland, 949 F.Supp. 1255 (E.D.Va. 1996); Breard *v.* Pruett, 134 F.3d 615 (4th Cir. 1998).
77. Paraguay *v.* Allen, 949 F.Supp. 1269 (E.D.Va. 1996), affirmed, 134 F.3d 622 (4th Cir. 1998) (Eleventh Amendment to US Constitution bars suits against states except for ongoing violations). As an alternative ground, the district court also held that it lacked jurisdiction to review final decisions of a state court. 949 F. Supp., at 1273.
78. *See* Shank & Quigley, note 19 *supra*, at 103
79. *See generally* Paraguay *v.* US, Verbatim Record, 7 April 1998, ICJ (accessible at http://www.icj-cij.org).

in such cases could disrupt national criminal justice systems and the work of the ICJ itself.[80]

On April 9 the ICJ issued a unanimous order indicating provisional measures. The Court ruled that "there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention."[81] Only at the merits stage could the Court resolve that dispute, as well as determine "whether any such remedy is dependent upon evidence of prejudice to the accused in his trial and sentence."[82]

Finding, therefore, *prima facie* jurisdiction under the Optional Protocol,[83] and that executing Breard would make it impossible to grant the relief sought by Paraguay,[84] the Court ordered that the US "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, [...]"[85]

In response, the US government took two contrasting steps. On the one hand, Secretary of State Madeleine Albright wrote to the Governor of Virginia, urging him to delay the execution. She explained:

> I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. The execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention. The immediate execution of Mr. Breard in the face of the Court's April 9 action could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad.[86]

On the other hand, the US government filed a brief before the US Supreme Court, signed by attorneys from both the State and Justice Departments, asking the Court not to grant *certiorari* or to stay the execution.[87] The brief endorsed the rulings of the US appellate court, and repeated the US arguments to the ICJ. Among other points, it also contended that the Convention is not judicially enforceable in US courts to reverse a conviction or sentence, and that ICJ provisional measures are not legally binding.

On 14 April the Supreme Court denied all relief.[88] Ruling that US procedural rules govern implementation of the Convention in the US, a five-justice majority

80. *Id.*
81. Order, 9 April 1998, para. 31.
82. *Id.*, at para. 33.
83. *Id.*, at para. 34.
84. *Id.*, at para. 37.
85. *Id.*, at para. 41 (I).
86. Brief for the US as *Amicus Curiae*, Paraguay *v.* Gilmore, 1997 US Briefs 1390, Appendix F.
87. Brief for the US as *Amicus Curiae*, Paraguay *v.* Gilmore, 1997 US Briefs 1390. (Although the reported brief is dated 16 April it was in fact provided to the US Supreme Court on 13 April)
88. Breard *v.* Greene, 523 U.S. 371, 140 L.Ed. 2d 529 (1998).

held that Breard procedurally defaulted his claim under the Convention.[89] In addition, since US laws governing *habeas corpus* precluded an evidentiary hearing on a defaulted claim, he could not show how he was prejudiced by the violation.[90] In any event, the Court opined, no showing of prejudice "could even arguably be made;" Breard's claim was "far more speculative" than claims of prejudice routinely rejected by US courts.[91]

With respect to Paraguay's suit, the majority noted that the Convention does not "clearly" provide one nation a right to sue in another nation's courts to set aside a conviction and sentence. US constitutional limits on federal court suits against states by foreign nations were a further reason why Paraguay "might not succeed."[92]

A sixth justice concurred in the majority's conclusion, but not in all of its reasoning.[93] Three others dissented, each arguing for more time to consider the issues,[94] with one suggesting further argument "on the potential relevance of proceedings in the international forum."[95]

The Court ruled in the morning. By the evening of that same day, April 14, 1998, Angel Breard was put to death.

3.2. The German case

German nationals Karl and Walter LaGrand were arrested in Arizona in 1982, convicted of murder, attempted murder, attempted armed robbery and kidnaping, and sentenced to death.[96] The State of Arizona failed to advise them of their consular rights.[97]

In subsequent federal *habeas corpus* proceedings, they contended that this failure "effectively blocked [their] ability to gather exculpatory or mitigating evidence," specifically "background information concerning their abusive childhoods in Germany and the difficulties that children of mixed marriages encountered in Germany."[98] The federal appeals court acknowledged that "this evidence could have related to mitigation," but nonetheless held their claim under the

89. 140 L.Ed. 2d at 537.
90. *Id.*, at 538.
91. *Id.*
92. *Id.* The Court also ruled that Paraguay's Consul General could not sue under a US civil rights statute. *Id.*, at 539.
93. *Id.*, at 539-540 (Justice Souter). His concurring statement omitted any reference to the majority's theory of procedural default or to the federal statute restricting hearings on *habeas corpus* petitions.
94. *Id.*, at 540-541 (separate dissents by Justices Stevens, Breyer and Ginsburg).
95. *Id.*, at 541 (Justice Breyer).
96. *See* LaGrand *v.* Stewart, 133 F.3d 1253 (9th Cir. 1998).
97. *Id.*, at 1261.
98. *Id.*, at 1262.

Convention procedurally defaulted, because they had not raised it before Arizona state courts.[99]

Germany did not learn until 1992 that its nationals were on death row; even then, it was alerted by the LaGrands, not by Arizona.[100] Germany then "used every diplomatic means at its disposal" to prevent their executions, including appeals by the German President and Chancellor to the US President.[101] Yet Germany did not bring legal proceedings to challenge the Convention violations, apparently because Arizona authorities claimed that they had not known that the LaGrands were German.

However, on February 23, 1999, an Arizona state attorney admitted for the first time that Arizona authorities knew all along, since 1982, of their German nationality.[102] Karl LaGrand was executed the next day,[103] but a few days later, literally on the eve of Walter's scheduled execution, Germany sued the US before the ICJ and requested provisional measures. As there was no time for a hearing before the full Court, the ICJ's Vice-President met with representatives of the parties on the morning of the scheduled execution.[104] As in the Paraguayan case, the ICJ then unanimously ordered provisional measures, indicating that the US "should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, ..."[105]

Germany then sued the US and Arizona before the US Supreme Court, requesting a stay of the execution. That afternoon, as in the Paraguayan case, the Court declined the stay. A majority of five justices doubted that the US had waived sovereign immunity from suit against the US, or that the Supreme Court had original jurisdiction under the US Constitution over that suit. With respect to Arizona, they doubted that the Convention authorized foreign nations to sue states, and also thought such a suit in "probable contravention" of US constitutional limits on states being sued by foreign nations in federal courts. They further objected to the "tardiness" of both suits.[106]

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99. *Id.*, at 1261, 1262; *accord*, LaGrand v. Stewart, 170 F.3d 1158, 1161 (9th Cir. 1999).
100. The LaGrand Case (Germany *v.* United States of America), General List No. 104, ICJ, Request for the Indication of Provisional Measures, 2 March 1999, para. 3.
101. The LaGrand Case (Germany *v.* United States of America), General List No. 104, ICJ, Application filed 2 March 1999, para. 9.
102. *Id.*, at paras. 5, 9.
103. *Id.*, at para. 8.
104. Germany *v.* USA, Request for the Indication of Provisional Measures, Order, 3 March 1999, para. 12.
105. *Id.*, at para. 29(I). While voting for the Order, President Schwebel expressed "profound reservations about the procedures followed both by the Applicant and the Court" in requesting and issuing the Order "without affording the United States a hearing or opportunity to present written observations." *Id.*, Separate Opinion of President Schwebel. Judge Oda made clear that he voted for the Order only "with great hesitation" and "solely for humanitarian reasons." *Id.*, Declaration of Judge Oda.
106. Germany *v.* US *et al.*, 119 S. Ct. 1016, 1017 (1999).

Two justices concurred in the result,[107] while two others dissented, arguing that more time was needed for fuller briefing and that it was "at least arguable that Germany's reasons for filing so late are valid."[108]

Meanwhile Walter LaGrand's lawyer also asked the Court to stay his execution. This request was denied by a seven justice majority; the two dissenters in Germany's case again dissented, for the same reasons.[109]

That evening Walter LaGrand was put to death.[110] Germany's suit before the ICJ remains pending; the US Counter-Memorial is due in March 2000.[111]

3.3. Other cases

Breard and *LaGrand* are the only cases to date to have generated even tentative US Supreme Court opinions on the Convention, and also the only Convention cases brought before the ICJ. However, lower US federal and state courts have rejected claims under the Convention in other death penalty cases on the same grounds which proved fatal to Breard and the brothers LaGrand: procedural default,[112] statutory limitations on federal *habeas corpus* proceedings,[113] alleged absence of prejudice to the defendant as a result of the violation,[114] and the US constitutional immunity of states from being sued in federal courts by foreign nations.[115] No US court appears to have set aside a death penalty or reversed a conviction in a death penalty case.[116]

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107. *Id.* (Justices Souter and Ginsburg, concurring). They joined in the order, except that they disavowed any reliance on US Constitutional limits on suits against states in federal courts (the Eleventh Amendment).
108. *Id.*, at 1017-1018 (Justices Breyer and Stevens, dissenting).
109. LaGrand *v.* Arizona, 119 S.Ct. 1137 (1999).
110. R. Cohen, *U.S. Execution of German Stirs Anger*, New York Times, 5 March 1999.
111. ICJ Press Release ICJ/567, 8 March 1999.
112. *E.g.,* Murphy *v.* Netherland, 116 F.3d 97 (4th Cir. 1997), (cert. and stay of execution denied), 521U.S. 1144 (1997); In re Montoya, 520 US 1284 (1997) (denying stay of execution and *habeas corpus*).
113. *Id.*, Villafuerte *v.* Stewart, 142 F.3d 1124 (9th Cir. 1998); *see also* Ohio *v.* Loza, 1997 Ohio App. LEXIS 4574 (Ohio Ct.Ap.. 1997) (denying Convention claim based on similar statutory limits on state post-conviction review).
114. Murphy v. Netherland, note 107 *supra*; Faulder v. Scott, 81 F.3d 515 (5th Cir. 1996), *accord*, Faulder v. Johnson, 178 F.3d 741 (5th Cir. 1999); People *v.* Madej, note 57 *supra*.
115. United Mexican States *v.* Woods, 126 F.3d 1220 (9th Cir. 1997); Consulate General of Mexico *v.* Phillips, 17 F.Supp.2d 1318 (S.D.Fla. 1998).
116. At least one state court has vacated a conviction based on a Convention violation in a non-death penalty case. Ademodi *v.* Minnesota, County of Hennepin, Minnesota, D.Ct. for the 4th Judicial District, Court File no. 90063152, 116. Order dated 21 December1998 (on file with author). As this article went to press, this decision was reportedly reversed on appeal, but only for lack of evidence, and not on the ground that no judicial remedy is available for Convention violations.

4. APPLICABLE POSITIVE INTERNATIONAL LAW

The main question of international law, implicitly answered in the affirmative by the recent IACHR advisory opinion, remains pending before the ICJ in Germany's case against the US: Is there a judicial remedy for Convention violations?

There are also prior questions as to the existence of individual rights under the Convention, and subsequent questions about the extent to which municipal law can restrict judicial remedies otherwise available under international law.

4.1. Does the Convention confer individual rights?

The Convention confers individual rights so explicitly that, if not for recent, strained contentions of the US government, the issue would hardly merit mention. The IACHR found the language of Article 36, confirmed by its drafting history, "unequivocal" in recognizing individual rights.[117] Article 36.1(b) requires detaining authorities to advise foreign nationals of their 'rights' to request consular notification and to communicate with consuls, while article 36.2 requires that municipal laws and regulations must enable full effect to be given to the purposes of the 'rights' in the article.

Despite this language the US government has tried, without evident success, to persuade its domestic courts that Convention rights belong not to the "individually affected foreign national," but rather to the consulate.[118] The US cites the Convention's preambular language that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance functions by consular posts on behalf of their respective states."[119] US courts, impressed by the clear language of article 36, have responded that "foreign nationals are more than incidental beneficiaries of Article 36(1)(b) [...] [I]ndividual foreign nationals have rights under Article 36(1)(b) of the Vienna Convention."[120]

Before the IACHR the US formulation was that rights of consular notification and access "are in the first instance rights of States, not individuals." The Convention's intent and effect "are to establish legal rules governing relations between States, not to create rules that operate between States and individuals."[121] Whatever may be meant by the novel concept of rights "in the first in-

117. OC-16, note 5 *supra*, at para. 82 and paras. 82-84.
118. US *v.* Lombera-Camorlinga, 1999 US App.LEXIS 5053, at 3 (1999).
119. These "privileges and immunities" refer to immunities of diplomats from suit, and not to the "rights" conferred by Art. 36. Oc-16, note 5, *supra*, para. 74; *accord*, Shank & Quigley, note 17 *supra*, at 123-124.
120. US *v.* Lombera-Camorlinga, note 112 *supra*, at 3-4, but *see* note 138, *infra*.
121. Request for Advisory Opinion OC-16 before the IACHR, Written Observations of the United States of America, 1 June 1998, at 26-27 (on file with author).

stance," the effort to read individual rights out of article 36 conflicts with its plain language.

It also conflicts with the position of the US some years ago, when the shoe was on the other foot. In its Memorial to the ICJ in the Tehran hostages case, the US argued that "Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers."[122] In short, as the IACHR unanimously concluded, Article 36 confers on individuals the right to be informed about consular assistance.[123]

4.2. Is there a judicial remedy?

The more serious US argument is that while the Convention confers rights, it does not confer judicial remedies, or at least not the remedy of setting aside criminal convictions and sentences. Vacating a criminal conviction, the US contends, "must be distinguished from the entirely different question whether a sending state such as Paraguay (or an arrested foreign national) might have recourse to the courts for an order directing cessation of an ongoing refusal of authorities to allow consular notification and access, as guaranteed by the Convention."[124] The only remedies for past violations, insists the US, are traditional diplomatic apologies and undertakings, such as those it gave Paraguay in the *Breard* case.

The US argument rests on five principal points:

1. Nothing in the language of article 36, or indeed of the entire Convention, expressly contemplates judicial remedies;
2. Nor does the negotiating history;[125] and
3. Nor does state practice under the Convention. As the US told the ICJ in the *Paraguay* case,

122. Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America *v.* Iran), 1980 ICJ Pleadings, at 174 (Memorial of the Government of the United States of America). More recently, in Paraguay *v.* US before the ICJ, the US argued that the Hostages case involved a "much more aggravated situation [...] It was a profound, potentially very dangerous disruption of international relations and [...] it perhaps trivializes that case to analogize it to a situation where the Applicant is seeking not to deal with matters of great consequence at stake in the Hostages case, but rather to disrupt the operations of the criminal courts of a party to the Statute [...] ." Verbatim Record, 7 April 1998, at 13-14. Surely the US does not suggest that the death penalty is not of "great consequence." In any event, nothing in the language of Art. 36 supports a reading that it confers rights only when war and peace hang in the balance.

123. OC-16, note 5 *supra*, para. 141.1.

124. Brief for the United States as *Amicus Curiae* in Paraguay *v.* Gilmore, 1997 US Briefs 1390, 16 April 1998, at 15 (footnote omitted).

125. Paraguay *v.* US, ICJ, Verbatim Record, 7 April 1998, at 25-26, paras. 3.22-3.27.

> Roughly 165 States are parties to the Vienna Convention. Paraguay has not identified *one* that provides such a *status quo ante* remedy of vacating a criminal conviction for a failure of consular notification. Neither has Paraguay identified any country that has an established judicial remedy whereby a foreign government can seek to undo a conviction in its domestic courts based on a failure of notification. In the United States today, foreign nationals and the Government of Paraguay are attempting to have our courts recognize such a remedy as a matter of United States domestic law. But if our courts do so, the United States will become, as far as we are aware, the first country in the world to permit such a result. A number of foreign ministries have advised us that this result would certainly or most likely not be possible in their countries.[126]

4. This absence of judicial remedies is hardly surprising, given the "common international understanding that consular assistance is not essential to the criminal proceeding against a foreign national;"[127]
5. Finally, for an international court to order setting aside of convictions on the basis of Convention violations "would significantly impair the rights of the United States to the orderly and conclusive functioning of its criminal justice system." [128] The ICJ should not "assume the role of a supreme court of criminal appeals."[129]

Particularly in combination, these arguments deserve to be taken seriously. They may suggest that judicial remedies be limited to serious cases, such as death penalty cases. They may also suggest limits on the scope of remedies: in some cases, for example, courts might appropriately choose to vacate and remand the death penalty, but not necessarily the underlying conviction. Yet the weight of the arguments does not go so far as to preclude judicial remedies in death penalty cases altogether.

4.2.1. Treaty language

To begin with, the US contention that the Convention's silence on judicial remedies precludes setting aside convictions or sentences proves too much: the same argument would equally invalidate judicial orders to cease *ongoing* violations, which as noted above even the US appears to concede are available under the Convention.

But even if the US were to withdraw that apparent concession, silence on remedies in the text of a treaty does not mean that judicial remedies are not implicitly contemplated. As Paraguay's counsel observed before the ICJ:

126. *Id.*, at 18, paras. 2.16 and 2.17 (emphasis in original) (paragraph nos. omitted).
127. *Id.*, at 18, para. 2.15.
128. *Id.*, at 28, para. 3.35.
129. *Id.*, at 29, para. 4.7.

> One need not find the remedy in the text of the Convention. If the United States argument were accepted, it would be necessary to reproduce the Articles on State Responsibility in every treaty [...] Instead, the fundamental understanding with respect to remedies is part of a legal context in which any treaty must operate [...] Indeed, this Court would have to [...] repudiate a long line of authorities because it has never imposed a requirement in considering whether [a] particular remedy was available that that remedy appear in the given international instrument on which the claim was founded. [...] It is intrinsic to the notion of a violation, as *Chorzow* itself suggests, that consequences flow from that violation.[130]

The IACHR appears to endorse Paraguay's argument. It found that violations of the Convention right to be notified of consular rights in death penalty cases affect due process and the right not to be deprived of life arbitrarily, "with the legal consequences inherent in a violation of this nature, that is to say, those which follow from the international responsibility of the State and the duty to make reparation."[131]

4.2.2. Negotiating history

Nothing in the negotiating history purports to depart from the well-known doctrine articulated long ago in *Chorzow,* "that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[132] The US relies on a statement by Belarus that negotiators were "drafting a consular convention, not an international penal code."[133] However, that and similar statements by the Soviet Union "were in support of a position that was rejected by the drafters. They cannot be considered as an interpretation of the text that was finally adopted."[134]

4.2.3. State practice

The state practice cited by the US may be at once too general and too specific. Too general, because it considers judicial remedies for Convention violations generally, rather than in the specific context of death penalty cases as did the IACHR. Few cases are of greater concern to sending states than death penalties imposed on their nationals. In death penalty cases there seems to have emerged a consistent practice among sending states to assert the availability of judicial remedies for Convention violations. In the US in recent years, at least Canada, Germany, Mexico, Paraguay and Poland have asserted the availability of judicial remedies before US municipal courts. That position was endorsed before the

130. *Id.*, 3 p.m. sitting, at 9.
131. OC-16, note 5 *supra*, paras. 137 and 141.7.
132. Chorzow Factory (Merits), *supra* note 3, at 29.
133. Paraguay *v.* US, ICJ, Verbatim Record, 7 April 1998, at 26, para. 3.27.
134. Shank & Quigley, note 19 *supra*, at 108.

IACHR not only by Mexico and Paraguay, but also by Costa Rica, the Dominican Republic, El Salvador, Guatemala and Honduras. The *only* country that seems to take a contrary view is the US itself. The US might object that state practice in asserting judicial remedies is 'one-way' – suspect because it is practiced only by *sending* states, that could benefit from judicial remedies for their nationals, rather than by *receiving* states – but that asymmetry may simply reflect the reality that, among all these states, only the US executes foreign nationals.[135] Regardless, it is problematic for the US to characterize its exceptional views as representative of state practice.

The US contention that state practice excludes judicial remedies also inappropriately mixes claims by states with claims by individuals. It may well be, as the US told the ICJ, that few (if any) receiving states allow sending *states* to seek judicial remedies in the receiving state's courts for Convention violations. But many states allow *individuals*, including foreign nationals, to assert violations of treaty rights as defenses in criminal proceedings or claims in *habeas corpus* or similar proceedings.[136]

Judicial remedies for Convention violations are also consistent with broader rules of customary international law, which reflect state practice and have long embraced *Chorzow*'s general principle of reparations for international wrongs. The Draft Articles on State Responsibility, adopted on first reading by the International Law Commission in 1996,[137] in general, codify existing rules of customary international law.[138] Draft Article 42, "Reparation" provides as follows:

> 1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.

135. Alone among these states, Guatemala has a death penalty. AI 1999, note 26 *supra*, at 6. But there are no recently reported cases of its use to execute foreign nationals.

136. *E.g.*, US *v.* Rauscher, 119 US 407 (1886). In March 1999 a three-judge US federal court of appeals panel recognized the availability of judicial remedies to individuals whose Convention rights are violated. US *v.* Lombera-Camorlinga, 1999 USApp.LEXIS 5053 (9th Cir.1999) (reversing and remanding denial of motion to suppress statements, for determination of whether defendant was prejudiced by Convention violations). However, the full court has recently voted to rehear the case *en banc*, and the panel decision has been withdrawn. 1999 U.S.App. LEXIS 24611 (1 Oct. 1999). *See also* Ademodi *v.* Minnesota, note 115 *supra*.

137. ILC Report, 1996, Chapter III, State Responsibility (accessible at http://www.un.org/law/ilc/reports/1996/chap03.htm).

138. Draft Art. 38 provides, "The rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part." The US comments on the Draft Articles acknowledge that they "restate the customary obligation to provide reparation," subject to exceptions not applicable here. *Draft Articles on State Responsibility: Comments of the Government of the United States of America*, 37 ILM 468 (1998) (hereafter 'US Comments'), at 14.

The US Comment agrees that "[d]raft article 42(1) appears to state correctly that a wrongdoing state is under an obligation to provide 'full reparation' to an injured state, in addition to ceasing unlawful conduct as required by customary law [...]"[139]

But could a state meet its duty of "full reparation" in Convention cases merely by apology and assurances of non-repetition, as the US contends? Such a contention is not consistent with the Draft Articles. Draft Article 43 provides that injured states are "entitled to obtain [...] restitution in kind," subject to certain exceptions.[140] The Commentary makes clear the ILC view that restitution in kind is the "first" of the remedies available to an injured state.[141] It explains:

> Restitution in kind is the form of reparation which most closely conforms to the general principle of the law of responsibility according to which the author State is bound to 'wipe out' all the legal and material consequences of its wrongful act by reestablishing the situation that would exist if the act had not been committed; as such it comes foremost before any other form of reparation [...].[142]

Restitution in kind under Draft Article 43 thus has "logical and temporal primacy"[143] over other forms of reparation, such as compensation under Article 44, satisfaction (*e.g.*, apologies and nominal damages) under Article 45 or "assurances and guarantees of non-repetition" under Article 46.

The remedy for Convention violations, then, first and foremost – and before consideration of exceptions[144]– must be restitution in kind, not apologies and assurances. And Article 43 defines restitution in kind as "the reestablishment of the situation which existed before the wrongful act was committed." In the case of a Convention violation, that would mean returning the foreign national to his situation before the state failed to advise him of his consular rights, *i.e.*, restoring him to his initial status as a detained person, prior to conviction and sentence. This would require "juridical restitution" – "rescinding of [a] [...] judicial measure unlawfully adopted in respect of the person [...] of a foreigner [...],"[145] i.e., vacating his sentence and conviction, while allowing the state to continue to detain him and to prosecute him anew if it wishes.

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139. The US Comments go on to criticize two later parts of Art. 42 (negligence and subsistence conditions) not at issue here. US Comments, *id.*, at 478-479.
140. Three exceptions (material impossibility, breach of a peremptory norm of international law, and jeopardy to the state's political independence or economic stability, Arts. 43 (a), (b) and (d)) are not relevant here. The fourth –proportionality (Art. 43(c)) – is discussed below.
141. 1993 Yearbook of the International Law Commission (hereafter 'YILC'), vol. II, part 2, at 62.
142. *Id.*
143. *Id.*
144. *See* part 4.2.5 below.
145. 1993 YILC, vol. II, at 64 (footnote omitted). The Commentary goes so far as to recognize material restitution requiring "the release of a detained individual," as ordered by the ICJ in the Tehran Hostages case. *Id.*, at 63 and note. However, release is not necessary for Convention violations, since the individual was already detained prior to the violation.

Whether exceptions might apply in the context of vacating capital convictions and sentences is a separate question, discussed below. But in principle, the remedial rules of customary international law as articulated in the ILC Draft support a remedy of "juridical restitution" for Convention violations.

4.2.4. Importance of consular assistance

The US is correct that, in general, states have not considered consular assistance vital to the integrity of judicial proceedings. But this may be changing in serious criminal cases generally. As discussed above, it has already changed in death penalty cases, as shown by the practice of sending states whose nationals are sentenced to death in the US

This change in state practice reflects evolving international human rights law,[146] as well as mounting sensitivities, particularly among European and Latin American states, toward the death penalty. The International Covenant on Civil and Political Rights provides for certain "minimum guarantees, in equality" for defendants in criminal cases.[147] The UN Human Rights Committee emphasizes that these are "minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing [...]"[148] In death penalty cases (at least), consular assistance may be an additional guarantee needed to ensure a fair hearing. The UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty provide in part:

> 5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives *all possible safeguards* to ensure a fair trial, [...], including the right [...] to adequate legal assistance at all stages of the proceedings.[149]

If "all possible safeguards" are to be required in death penalty cases, then it is not unreasonable to suggest that for foreign nationals, one important "safeguard" is consular assistance – both the consul's direct assistance to the national, and her further assistance in arranging for adequate legal representation. Consular assistance would matter less if the US legal system independently provided adequate safeguards in death penalty cases. But as shown above, and by the call of the American Bar Association for a moratorium on the death penalty, it cannot

146. *See* OC-16, note 5 *supra*, paras. 113-15 and 117, and Concurring Opinion of Judge A.A. Cancado Trindade, paras. 1-35.

147. International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, entered into force 23 March 1976, GA Res. 2200A(XXI), UN Doc.A/6316 (1966), 999 UNTS 171, Art. 14.3.

148. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1 (2 Sept. 1992), General Comment of Human Rights Committee on Article 14.

149. Adopted 25 May 1984, by the Commission on the Control and Prevention of Crime, CES Res. 1984/50, 51 UNESCOR Supp. (No. 1) 33, UN Doc. E/1984/92 (para. 5) (emphasis added).

credibly be contended that the US already provides "all possible safeguards" – far from it.

The UN Human Rights Commission Special Rapporteur on Arbitrary Executions, following his mission to the US in 1997, likewise pointed out that the death penalty "can only be imposed following the strictest observance of the highest procedural safeguards."[150] He noted two reasons. First, the death penalty "is an exception to the right to life and, like any exception, it must be interpreted restrictively[...]"[151] Second is its irreversibility.[152] If a consul learns of mitigating evidence only after a national has been executed, it is too late to be of assistance.

In short, in death penalty cases, consular assistance is of no small importance. In such a sensitive context demanding the utmost procedural protections, the absence of consular assistance, due to a receiving state's failure to notify foreign nationals of their rights, may even be deemed a violation of human rights.[153]

The IACHR has now so ruled. Notification of consular rights contributes to "improving considerably" the possibilities of the defense and may "have repercussions – on occasion decisive – for the respect of other procedural rights."[154] There is now an "internationally recognized principle that States which maintain the death penalty must apply, without exception, the most rigorous control over respect for judicial guarantees in such cases." The irreversibility of executions "demands of the State the strictest and most rigorous respect for judicial guarantees" in death penalty cases.[155] Violation of the right to be notified of rights to consular assistance therefore affects due process of law, and death penalties imposed in such cases constitute arbitrary deprivations of the right to life.[156]

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150. Special Rapporteur, note 28 *supra*, at 5, para 22.
151. *Id.*, at 4, para. 11.
152. *Id.*, at 5, para. 22.
153. Mexico's request for Advisory Opinion OC-16 asks the IACHR whether a foreign national's consular rights under the Convention are human rights within the meaning of that Court's advisory jurisdiction over "treaties concerning the protection of human rights in the American states." American Convention on Human Rights, Art. 64.1; Request at 13 (on file with author). It also asks whether Convention violations also violate rights of defense and due process guaranteed by article 14 of the International Covenant on Civil and Political Rights. *Id.*, at 16-17. Finally, it asks whether Convention violations deny "fundamental rights" guaranteed by the Charter of the Organization of American States and "human rights" proclaimed by the American Declaration on the Rights and Duties of Man. *Id.*, at 18-19.
154. OC-16, note 5 *supra*, at paras. 121, 123.
155. *Id.*, at paras. 135, 136.
156. *Id.*, at paras. 137, 141.7. Judge Jackman, dissenting in part, characterizes this ruling as based on an "immaculate conception of due process." Partially Dissenting Opinion of Judge Oliver Jackman, para. 4. While acknowledging cases where violation of rights to consular notification "may have an adverse – and even a determining – effect," he disagrees that denial of a fair trial is the "inevitable, invariable consequence" of a Convention violation. *Id.* para. 2. He would not elevate the Convention right to notification to the "status of a fundamental guarantee, universally exigible as a *conditio sine qua non* for meeting the internationally acceptable standards of due process. This is not to gainsay its undoubted utility and importance [...]." *Id.* para. 9. In contrast, Judge García Ramírez emphasizes

4.2.5. Burden on the US

The burden of complying with the Convention need not be great. Ordinary police arrest and booking procedures will usually reveal whether a detainee is a foreign national. Even if some detainees may prefer to conceal their nationality, a state such as the US can avoid Convention violations simply by adding an additional warning to those now given when making arrests, such as, "If you are a foreign national, you have the right to contact your consulate for assistance."[157]

On the other hand, the burden on the US or on any receiving state of reversing a capital conviction and sentence is not inconsiderable. Capital cases in the US usually entail expensive and lengthy legal proceedings. To go back to square one, after years of litigation, is not only costly but risky. Witnesses may have died or be difficult to find; even if found, their memories may have faded. Families of the victims face further anguish. One cannot make light of the burden of potential disruption to legitimate interests of a state's criminal justice system.

On the other hand, one should not overstate the degree of disruption. Reversals of US capital convictions and sentences, years after the fact, based on violations of domestic rights or evidentiary doubts, are commonplace. The American Bar Association, citing a 1995 study (prior to recent statutory restrictions on *habeas corpus*), reports that "in 40 percent of all capital cases, [...], death row inmates still have been able to secure relief due to violations of their basic constitutional rights."[158]

By comparison, the approximately 80 foreign nationals now on US death row represent only 2% of the entire death row population of over 3,500 inmates.[159]

Thus, even if *all* of their convictions were reversed for Convention violations, the total impact would be far smaller than that of ordinary *habeas corpus* review.

Under general rules of customary international law, it is doubtful that the burden on the US could relieve it from making restitution. Draft Article 43(c) allows an exception to the usual duty of restitution in kind, where it would involve a "burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation." [160]

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that Convention rights in death penalty cases are truly in the "critical zone" of rights, where the "most grave risk to human dignity" is at stake. Concurring Opinion of Judge Sergio García Ramírez, at 1.

158. The IACHR "considers it pertinent" that the State give such a warning. OC-16, note 5 *supra*, para. 96.

159. ABA Report, note 35 *supra*, at 29 (footnote omitted).

159. AI 1999, *supra* note 31, at 4 (3,500 on US death row); DPIC, *supra* note 16, at 1-2 (82 foreign nationals on death row).

160. 1993 YILC, vol. II, at 66-67.

However, as that language suggests and the Commentary clarifies, this exception is available only if the violation may otherwise be remedied by financial compensation. The wrongful taking of a human life is not susceptible to remedy by pecuniary compensation. Although damages may be paid to survivors, that affords no remedy for the deceased. And even for survivors, no amount of money can fully compensate for the loss of a loved one.[161]

A further obstacle is that the exception applies only if the burden on the wrongdoer state is "out of all proportion to the benefit which the injured State would gain." The Commentary states that this relieves the wrongdoer state of restitution only if there is a "grave disproportionality between the burden [...] and the benefit [...]"[162] In Convention cases it would be difficult to contend that the burden on the US – retrying a foreign national – is gravely disproportionate to the benefit to the sending state – saving the life of its national.

A straightforward application of the general rule, then, would not allow an exception for the burden on the US (or on any state) of reversing a capital conviction and sentence. Yet this should not necessarily end the discussion. The draft rule was articulated without apparent consideration of the special burdens and sensitivities involved in asking states to reverse criminal convictions, especially convictions for aggravated murder (for which almost all death penalties in the US are imposed).[163] Those burdens and sensitivities were reflected in US objections to ICJ "intrusion" in its criminal justice system in the *Paraguay* case,[164] and in the subsequent US decision not to comply with the provisional measures Order. But they are not limited to the US. In death penalty cases, they may be seen in the growing resistance of Caribbean states to review by the UN Human Rights Committee,[165] the Inter-American Human Rights Commission and Court,[166] or Privy Council.[167] In criminal cases generally, they may be a factor in Peru's defiance of the first IACHR orders to vacate criminal convic-

161. *See* M. Minow, Between Vengeance and Forgiveness, at 5(1998)
162. 1993 YILC, vol. II, at 67.
163. Paraguay *v.* US, ICJ, Verbatim Record, 7 April 1998, 10:00 a.m. sitting, at 15, para. 1.9 (argument by counsel for US).
164. Verbatim Record, 7 April 1998, 10:00 a.m. sitting, at 30, para. 4.11.
165. *See* Reservation of Trinidad and Tobago, effective 26 August 1998, upon re-accession to Optional Protocol, and Reservation of Guyana, effective 5 April 1999, upon re-accession to the Optional Protocol, and note 4, at http://www.un.org/Depts/Treaty. Jamaica withdrew from the Human Rights Committee in 1997.
166. Trinidad and Tobago, Ministry of Foreign Affairs, Note No. 814, May 26, 1998 (on file with author); Amnesty International, Jamaica Schedules Hangings While Petitions Are Pending Before Human Rights Body (1998); Amnesty International, Bahamas – Hangings Challenge International Human Rights Protection System (1998).
167. *See, e.g.*, Robert Verkaik, *Last Appeal to a Lost Empire; The British Privy Council is the Last Hope for Criminals on Death Row in Trinidad and Tobago,* The Independent (London), 25 May 1999.

tions,[168] and in the inability of the European Court of Human Rights to order that convictions or sentences be vacated.[169]

There is no indication that the ILC in drafting Article 43 specifically considered either reversals of criminal convictions or death penalties. While the Commentary refers to cases in which international bodies called on states to release detainees,[170] and to rescind judicial measures in civil cases,[171] it mentions no case of vacating criminal convictions or sentences.

The disproportionate burden exception to restitution in kind might then be expanded to allow for consideration of the "extraordinary form of relief"[172] entailed in setting aside criminal convictions and sentences. Such an expansion would be consistent with the rationale for the exception, which is "based on equity and reasonableness"[173] and seeks an "equitable balance between the conflicting interests at stake."[174]

While the burden in the criminal context should not preclude judicial remedies altogether, it could justify restricting them to serious cases, such as death penalty cases.[175]

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168. *See* Inter-American Commission on Human Rights, Press Release No. 21/99, 9 July 1999; letter of Peruvian Amb. Beatriz Ramacciotti to OAS Secretary General César Gaviria, 1 July 1999 (on file with author); IACHR, Loayza Tamayo Case, Judgment on Reparations, Series C, No. 42, 27 Nov. 1998, para. 192(3); IACHR Press Release CDH-CP6/99, 9 June 1999, Castillo Petruzzi Case, Merits, Judgment, 30 May 1999, ordering para. 13.
169. The Court may order only "just satisfaction." Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, ETS No. 5, Rome, 4 November 1950, as amended by Protocol No. 11, ETS No. 155, effective 1 November 1998, Art. 41 (previously Art. 50). This means that its remedial powers "are limited to awarding compensation. In the draft Convention [...] it was envisaged that the Court should be able [...] also to require that the state concerned [...] require the 'repeal, cancellation or amendment' of the act complained of. These broad powers did not meet with favour [...]." *See* D.J. Harris, M. O'Boyle & C. Warbrick, Law of the European Convention on Human Rights, at 683-684 (1995).
170. 1993 YILC, vol. II, 63 and note 184 (citing two cases involving 'arrest of individuals on board ships' and the ICJ order to release US hostages in the Tehran Hostages case).
171. *Id.*, at 64 and note 189.
172. Paraguay *v.* US, ICJ, Verbatim Record, 7 April 1998, 10:00 a.m. sitting, at 24, par. 3.11 (argument by counsel for US).
173. *Id.*, at 66.
174. To hold that any breach of constitutional rights makes it unlawful to carry out a death sentence "fails to give sufficient recognition to the public interest in having a lawful sentence of the court carried out." OC-16, note 5 *supra*, Partially Dissenting Opinion of Judge Oliver Jackman, para. 6, quoting Thomas and Hilaire *v.* the Attorney General of Trinidad and Tobago (Privy Council Appeal No. 60 of 1998). In Judge Jackman's view, proportionality, among other factors, is indispensable in assessing the role a given right plays in the totality of due process. *Id.* para. 9. His argument, however, differs from the one in the text above, which treats disproportionality as a factor only in the remedy, whereas Judge Jackman treats it as a factor in determining whether a Convention violation rises to the level of a due process violation.
175. Where the judicial remedy is merely to exclude evidence obtained in violation of the Convention and is sought at or before trial, or where the proceeding is not criminal in nature, the burden of judicial remedies is far less than in vacating criminal convictions or sentences. Hence there is less justification for restricting exclusionary remedies requested pretrial or at trial, or remedies in non-

In some death penalty cases, courts might also consider setting aside and remanding for a new hearing on the death sentence, but not on the underlying conviction. To meet the standard of "all possible safeguards," the conviction of guilt should be left intact only where:

1. evidence of guilt is so strong as to exclude any reasonable doubt;
2. the accused was well represented by competent counsel at the guilt or innocence stage;
3. rights of due process and defense were otherwise fully respected;
4. no claimed violations of fundamental rights, nor exculpatory evidence, were barred by municipal law doctrines (*e.g.*, procedural default or restrictions on *habeas corpus)* inconsistent with a state's Convention duty to advise the accused of his consular rights; and
5. there is no credible indication that the consul could have adduced evidence casting doubt on the guilt of the accused.

In cases meeting these high standards, vacating the death penalty and remanding for a new hearing on sentencing only – a form of partial juridical restitution – could address the chief concern of sending states – imposition of death penalties on their nationals – while imposing a much lesser burden on receiving states, since rehearings on punishment are far less costly and risky than retrials of guilt or innocence.

4.3. Must prejudice be shown?

The ICJ identified a related question for the merits of the *Paraguay* case: whether judicial remedies, if any, for Convention violations are "dependent upon evidence of prejudice to the accused in his trial and sentence."[176]

Before both the ICJ and the IACHR the US has argued, on the one hand, that Convention violations were not prejudicial to the accused,[177] and on the other hand, that prejudice should not be taken into account. According to the US, it would be

> unworkable for this or any court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference. Doing so accu-

criminal cases, to serious cases. Compare US *v.* $69,530 in US Currency, 22 F.Supp.2d 587 (W.D.Texas 1998) (suppression motion in civil forfeiture proceeding).

176. Order on provisional measures, 9 April 1998, para. 31. While the Order in the German case does not specify issues for the merits, presumably because the US had no opportunity to respond in writing prior to the Order, the issue will likely arise there as well.

177. Paraguay *v.* US, ICJ, Verbatim Record, 7 April 1998, 10:00 a.m. sitting, at 27, paras. 3.30-3.32; Request for Advisory Opinion OC-16, IACHR, Written Observations of the USA, 1 June 1998 (on file with author), at 46.

> rately would require access to normally inviolable consular archives and testimony from consular officials notwithstanding their usual privileges and immunities.[178]

In ruling that Convention notification violations amount to violations of due process and the right to life in death penalty cases, the IACHR excluded prejudice as a factor in determining whether these fundamental rights have been violated. The IACHR did not, however, explicitly address whether prejudice might play any role in determining the appropriate remedy for such violations.[179]

This is generally correct. Reconstructions of 'what if' are suspect, even when not complicated by consular privilege. Still, there may be clear cases. If a consul, upon learning belatedly of a death penalty, produces exculpatory or mitigating evidence not known to the defense, it is obvious that the Convention violation prejudiced the accused. At the other extreme, if a foreign national has lived in the US all his life, has native command of the language and culture, ample means, and was well represented by the finest defense lawyers, it may be equally clear that failing to advise him of his consular rights was not prejudicial.

The US argument against a prejudice standard was made in opposing *any* judicial remedy. But if, contrary to the US position, there is to be a judicial remedy, and a prejudice standard is unworkable, then the accused cannot be required to show prejudice. Convention violations would then *per se* require vacating the conviction and sentence.

This would conform with the ILC approach to reparations generally. Draft Article 43 defines restitution in kind to require "re-establishment of the situation which existed before the wrongful act was committed [...]." In contrast, under *Chorzow*, reparation must "re-establish the situation which would, in all probability, have existed if that act had not been committed."[180] In other words, the ILC simply turns back the clock to the point before the foreign national was detained, whereas *Chorzow* asks what "in all probability" would have happened, absent the violation. Thus *Chorzow* – but not the ILC – would consider whether the violation was prejudicial.

Noting the two differing formulations, the ILC explains that it opted for the "purely restitutive concept of restitution in kind which, aside from being the most widely accepted in doctrine, has the advantage of being confined to the assessment of a factual situation involving no theoretical reconstruction of what the situation would have been if the wrongful act had not been committed. In

178. *Id.* The US made the same argument to the ICJ in Paraguay *v.* US. Verbatim Record, 7 April 1998, at 18-19, para. 2.18.

179. One judge opined that any use of a prejudice test would be an improper invocation of the idea that "the ends justify the means." OC-16, note 5 *supra*, Concurring Opinion of Judge Sergio García Ramírez, at 2.

180. *Supra* note 3, at 47.

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other words, the Commission considers that restitution should be limited to restoration of the *status quo ante* (which can be clearly determined)."[181]

The US did not object to this choice.[182] Thus, aside from the practicalities invoked by the US in the consular context, current customary law on reparations as tentatively codified by the ILC counsels against a prejudice standard. Convention violations *per se* require setting aside convictions and sentences.

In most cases this has the advantage of avoiding dubious speculation. But in cases where it is obvious that the violation was not prejudicial, a *per se* rule would mean reversing murder convictions, with all the ensuing economic and social costs, even when there is no reason to suspect that consular assistance would have made any difference. Courts might therefore consider the suggestion made by two *amici* before the IACHR that in lieu of a *per se* rule in all cases, there be a strong but rebuttable presumption that the violation was prejudicial.[183] To avoid abuse, the presumption could not easily be overcome.[184] As suggested above in the discussion on burden, it should also be made subject to additional criteria designed to ensure the reliability of the underlying conviction. Even thus circumscribed, it would provide an 'escape' in cases where a *per se* rule might appear patently unjust and might provoke understandable resentment and resistance from states.

4.4. Impact of Municipal Law Doctrines:

The general rule of customary international law is that a State which has violated international law "may not invoke the provisions of its internal law as justification for the failure to make full reparation."[185] Article 36.2 of the Convention reaffirms that consular rights "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights [...] are intended."

In this light, domestic criminal procedures and doctrines fall into two categories: those which allow full reparation and give "full effect" to the purposes of Convention rights, and those which do not.

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181. 1993 YILC, vol. II, at 62.
182. US Comments, *supra* note 138, at 479.
183. Memorial *Amicus Curiae* of International Human Rights Law Institute and MacArthur Justice Center, 28 April 1998 (on file with author, who was one of the signatories to the Memorial), at 55-57 ("presumptive prejudice" for purposes of determining remedy). The Inter-American Commission made a similar suggestion of presumptive prejudice, but would apply it at the stage of determining whether there is a due process violation, rather than at the subsequent stage of determining the remedy for such a violation. Observations of the Inter-American Commission on Human Rights on the Request for Advisory Opinion OC-16, 30 April 1998 (on file with author), at 28-29.
184. "The presumption, however, should not be irrebuttable; the state should be allowed to present clear and convincing evidence that no prejudice resulted." *Id.*, at 56.
185. ILC Draft Art. 42.4.

In the former category, obvious examples are venue and form of action. Legal challenges to Convention violations must be filed in the municipal court of appropriate jurisdiction, and in such form as may be designated by municipal law. A state does not frustrate the Convention or its purposes by designating particular courts or forms for Convention claims, so long as the court is accessible and the form is adequate and effective.[186]

Thus, for example, the US Supreme Court's exclusion of consuls from suing under a particular civil rights statute in *Breard* does not necessarily frustrate the Convention or its purposes. Nor does that Court's reliance in *Breard* on the US constitutional provision which bars foreign nations from suing constituent states in federal courts. There may well be another municipal law forum (state courts) for such suits. Even if not, barring foreign *states* from suing would not necessarily violate the Convention, so long as adequate and effective judicial remedies are available to the foreign *national.*

But as a matter of international law, the other municipal law doctrines invoked by the US Supreme Court in *Breard* are problematic. To bar a late claim under the Convention as procedurally defaulted, when consular rights could have been timely asserted, had the state complied with its duty to advise the foreign national of his consular rights 'without delay', is to penalize the foreign national for the state's breach. It is no answer to blame the defense counsel. If the state had complied with its duty to advise, the defense counsel's oversight would not have mattered. Moreover, as discussed above, the US has also failed in its duty to make public officials, including judges and lawyers, aware of the Convention, and is therefore partly responsible for their ignorance.

The same reasoning applies to municipal laws which bar Convention claims, or hearings on them, in post-conviction *habeas corpus* or other federal court proceedings, if the claims were not raised earlier before state courts. If the US had done its duty – to advise the foreign national of his consular rights promptly upon his detention – he would have been in a position to assert his consular rights at the right time and place. By allowing such restrictions on *habeas corpus* or considerations of domestic federalism to thwart Convention claims, the US fails to give "full effect" to the purposes of consular rights.

Finally, to the extent municipal law tests of prejudice used by US courts to reject Convention claims go beyond the international law test (if any) of prejudice, the US falls short of its international law duty to make full reparation. The international law test may be clarified soon by the expected ruling of the ICJ in the *German* case.

186. *E.g.*, Velásquez Rodríguez, IACHR, Judgment on Merits (1988), 1988 Annual Report of the IACHR (1988), at 49-50, paras. 63-68.

5. CONCLUSION

The immediate stakes in the ongoing litigation over Convention violations in US death penalty cases are important enough: will the lives of foreign nationals, sentenced to death without being advised of their right to seek assistance from their consulates, be spared?

The larger stakes are also important: will international law and the rulings of international courts come to be treated with respect by the world's most powerful nation and its courts? Will there be judicial remedies for violations of treaties that confer rights on individuals, at least when the consequences of those violations may be literally fatal?

With so much at stake, international parties in designing litigation strategy, and international courts in formulating responses, should bear in mind the larger interests of international law and institutions. International law complaints, proceedings, orders and judgments may and should take into account the desirability of enhancing the 'compliance pull' of international law,[187] and of the sentences of international tribunals, both in the case at hand and in such cases generally.[188]

This has contextual, procedural and substantive implications. Contextually, for example, states have both legitimate interests and heightened sensitivities in shielding their justice systems from international court orders setting aside the results of lengthy and expensive criminal prosecutions, particularly in serious cases. This does not mean that international courts should stand aside in the face of violations of fundamental rights or threats to life. It does mean that they should take into account the state's legitimate interests, and seek to frame their proceedings and orders so as to reduce the risk of non-compliance.

Procedurally, for example, efforts should be made to ensure states a fair hearing before orders are entered against them, and that orders and judgments contain sufficient reasoning to suggest that the state's objections have been heard and considered, and that the decision reached was principled and supported by careful review of the law.[189] The recent IACHR advisory opinion meets these criteria. In addition, the IACHR showed prudent restraint on the question of the appropriate remedy. It ruled that Convention violations engender state responsibility and the duty to make reparation, but did not speculate as to the precise form that reparation might take in the variety of conceivable cases. In

187. *See generally* T.M. Franck, *Legitimacy in the International System*, 82 AJIL 705, 712 (1988), and T.M. Franck, The Power of Legitimacy Among Nations (1990) and T.M. Franck, Fairness in International Law and Institutions (1995).

188. *See generally, e.g.,* L.R. Helfer & A.-M. Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale Law Journal 273 (1997); A.F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 Michigan Journal of International Law 399 (1997).

189. *See* Helfer & Slaughter, *id.*, at 284, 318-323.

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contrast, conclusory orders of provisional measures, containing little if any reasoning on the merits, and entered with little or no opportunity for the respondent state to be heard, in sensitive criminal matters – all the more so against a global superpower with a history of disregarding orders and resolutions of international courts and commissions[190] – foreseeably risk noncompliance. If not complied with, they neither save the life of the intended beneficiary, nor enhance the capacity of the international institution to achieve future compliance.

This observation need not imply criticism of the parties or of the ICJ in the Paraguayan and German cases. Diplomatic wheels turn slowly, especially in cases of first impression, and both governments had explanations for their last-minute filings in The Hague (Paraguay's exhaustion of domestic US remedies, Germany's forbearance until an eleventh hour admission by Arizona authorities). Presented with these filings, and faced with clear violations of the Convention, respectable claims for reparations and imminent executions, the ICJ may have had little choice but to order provisional measures.

Yet the results of the summary proceedings in the *Paraguay* case, the *ex parte* proceedings in the *German* case, and the abbreviated ICJ orders in both cases, were unfortunate. Not only did they fail to induce the US government to comply (unlikely, perhaps, in any event), but they detracted from any possibility of persuading the US Supreme Court. One hopes that future litigants will bear these lessons in mind.[191]

Finally there are substantive implications. Convention litigation to date has largely been postured between two extremes. At one extreme, the US contends that foreign nationals sentenced to death without being advised of their consular rights have no judicial remedy whatsoever. In contrast, other states and *amici curiae* argue that Convention violations *per se*, regardless of circumstance or consequences, require nullification not only of death penalties, but of underlying convictions as well.

As suggested above,[192] this stark dichotomy – nothing or everything – is compelled neither by the state of international law nor by prudent assessment of the law's capacity to affect state behavior. Fundamental individual rights must be protected, but state interests are not irrelevant. In at least some limited cases, courts may properly consider an intermediate remedy: setting aside the death penalty and remanding for a new sentencing hearing, without disturbing the underlying conviction. Even if that more limited but still life-saving remedy is ap-

190. *E.g.*, Military and Paramilitary Activities and Against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14; Andrews *v.* US, Annual Report of the Inter-American Commission on Human Rights 1997 (1998) (hereafter 'Annual Report'), at 570; Haitian Centre *v.* US, Annual Report 1996 (1997), at 550; Roach *v.* US, Annual Report 1987-1988 (1988), at 148.

191. *See* Germany *v.* US, Order, March 3, 1999, Separate Opinion of President Schwebel.

192. *See* parts 4.2.5 and 4.3 *supra*.

plied only rarely (because it can be granted only if strict criteria are met),[193] the very fact that courts consider it carefully, before ordering more extreme remedies, is likely to enhance the perceived legitimacy of their judgments and, in the long run, prospects for state compliance, even by the US.

193. *See* part 4.2.5 *supra*.