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LAW AND INTERNATIONAL RELATIONS

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PANEL DISCUSSION BY
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INTRODUCTORY REMARKS

MR. KNOWLES: I'd like to thank the circuit for inviting me to come and speak to you. What I would like to talk about in these few minutes is the *Pinochet*¹ case, for two reasons. Firstly, because it was a defining moment in my career and one of the most exhilarating and intellectually challenging experiences I've had as a barrister in England, and secondly, because it has international significance. It truly was a landmark case in all senses of the word. Never before had a former head of state sat in a criminal court in another state to answer for his crimes. What I want to do is recite a little bit of the history and the background to the *Pinochet* case, look at what the House of Lords decided, and what the issues were that were involved in the case. I would like to finish by offering some thoughts about the different approach to international issues that *Pinochet* highlights, in particular, the difference of approach between English judges and United States judges to international law issues.

The background to the *Pinochet* case is fairly well known. Very briefly, in 1973 General Pinochet led a coup that overthrew the government of Salvador Allende, who was the democratically elected socialist president of Chile at that time. During the subsequent two years, there was a fierce repression in Chile, and worldwide some 4000 people disappeared. There were countless other cases of torture, murder, kidnapping, and hostage taking by agents of Chile. Those of you who live in Washington, D.C., will no doubt be familiar with the murder of Letelier,² who was the foreign minister who was blown up by a car bomb in Washington, some say on the orders of General Pinochet. That was one of the crimes Pinochet was accused of in the English court when I was involved in representing him.

The *Pinochet* case arose because of Pinochet's love of all things English. He regularly, despite advice to the contrary, came to England to have tea at Harrods and to do other quintessentially English things. He was in England in October of 1998 when he was arrested by English police on a warrant issued by an English court at the request of a Spanish judge, who had made a request to the United Kingdom for

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1. Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, *Ex parte Pinochet Ugarte* (No. 3) [2000] 1 A.C. 147.

2. Orlando Letelier.

his extradition to Spain to answer for the crimes that were committed during his time as leader. As I only have ten minutes to speak today, and the crimes took twenty-two minutes to read in the court, I can only summarize them here. There were numerous accusations of torture and numerous accusations of murder as well as allegations of attempted murder and hostage taking.

After General Pinochet was arrested, we immediately challenged the arrest warrant on the grounds that, as a former head of state, he was immune from arrest under both international law and English domestic law. This issue had never arisen before in the English courts. A similar issue had been litigated in the United States in General Noriega's trial in federal court in Florida for crimes committed when he was a head of state,³ but this was a novel issue as far as English courts were concerned. The issue squarely was, If you commit crimes when you're head of state, when you cease to be head of state, are you immune from prosecution for those crimes for all time? It's absolutely clear that a serving head of state is immune under the national law.⁴ There is no doubt that neither President Clinton, nor any other head of state, can be arrested while they are head of state. But what about when they cease to be head of state—can they be prosecuted for crimes committed earlier?

Clearly this issue is and was of enormous political sensitivity. Allegations of crimes are easy to level against heads of state, especially when their countries have been involved in foreign conflicts. One person's legitimate military operation is another person's war crime.

The *Pinochet* litigation was interesting and significant, first, because of the novelty of the issues, and, second, because of the effect that it had on the English legal system. Very briefly, the course of the litigation was as follows. The divisional court, the lower court, held that General Pinochet was indeed immune as a former head of state.⁵ The government of Spain, as the prosecutor, immediately appealed to the House of Lords, which is our supreme court, where they won by a three-to-two majority.⁶ Lord Hoffmann delivered the third and decisive vote in the majority.⁷ Had he not participated, the *Pinochet* case probably would have ended there and would have remained an interesting case, but not as interesting as it turned out to be.

Under the English system, it is very rare to have parties appear as amicus—it's much more prevalent in the United States. Following the divisional court's decision, however, Amnesty International, the human rights body, was given leave to intervene, and they argued, as one would have expected, very forcefully in favor of Pinochet's extradition and very forcefully in favor of the argument that a former head of state should have no immunity for crimes committed during their rule. Amnesty's arguments looked back to jurisprudence arising out of the Second World

3. General Manuel Antonio Noriega, the *Commandante* of the Panamanian Defense Forces, was charged with various drug-related crimes. In a motion to dismiss the charges, General Noriega claimed head of state immunity. See *United States v. Noriega*, 746 F.Supp. 1506, 1519-21 (S.D. Fla. 1990).

4. *LaFontant v. Aristide*, 844 F. Supp. 128, 132 (1994) (explaining head of state immunity).

5. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No. 1) [2000] 1 A.C. 61.

6. *Id.*

7. *Id.* at 118.

War, including the judgments of the Nuremberg tribunals, as well as the Yugoslav war crimes tribunals, which dealt with war crimes and international crimes. Lord Hoffmann, unfortunately, did not disclose to anyone—let alone to those of us representing General Pinochet—that he was, in fact, the chairman and a director of Amnesty International. We discovered this in a way that could have come from one of Scott Turow's novels. We received a telephone message in the middle of the night shortly after the judgment was given saying, "By the way, we think you ought to know that Lord Hoffmann is the director of Amnesty International." Why Lord Hoffmann never disclosed that he had close links to one of the parties to the appeal has remained, and no doubt always will remain, a mystery.

We sought a second hearing before the House of Lords, where we argued that because of Lord Hoffmann's links with Amnesty, the court that had heard the first appeal had not been independent or impartial and that its decision could not stand. Never before in English legal history had such an argument been made. We were successful in our arguments, and so for the first time, the House of Lords actually set aside one of its previous decisions. It held that because of Lord Hoffmann, the tribunal had been biased and, therefore, the case had to be argued again.⁸ This brought up a very interesting problem. The House of Lords has twelve judges, and generally they sit in panels of five. We don't have a fixed number of judges who always sit on every appeal, as in the United States Supreme Court. So the case had to be heard before a different panel of judges who hadn't participated in the first hearing. And they came to a very different conclusion, for a very different set of reasons than the first panel, which had held that General Pinochet had absolutely no immunity whatsoever. In essence, the second panel held that General Pinochet enjoyed a limited form of immunity before December 8, 1988, which was the date that Chile, the United Kingdom, and Spain signed the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984.⁹ The opinions are 250 pages in length, so I can't really do more here than give you a couple of sentences to explain them. The House of Lords held that because by December 8, 1988, the Torture Convention had been signed and ratified by Chile, Spain, and the United Kingdom, and by signing the Convention each of these countries had agreed either to prosecute or extradite those accused of torture, the effect of that Convention was to remove General Pinochet's immunity after that point.¹⁰ The effect of this was to greatly limit the number of charges faced by General Pinochet. In fact, only a single charge remained, relating to the death of a young man in 1989.

Lord Hoffmann's embarrassment led the *Pinochet* case to be referred to in the English media as "the Pinochet fiasco." It caused us to really question how we select our judges. There was public debate as to whether there ought to be greater openness in the process of selection, perhaps with confirmation hearings, with

8. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others Ex parte Pinochet Ugarte* (No. 2)[2000] 1 A.C. 119 (1999).

9. Convention for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984 (Cm. 1775)[hereinafter Torture Convention].

10. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No. 3)[2000] 1 A.C. 147.

candidates actually put before the legislature or some other body and questioned on their views.

The process by which judges are selected will have increased importance in the future because later this year the United Kingdom will, for the first time, have a written Bill of Rights in the shape of the Human Rights Act of 1998. Once the Act comes into force, judges will have, for the first time, the power to strike down Acts of Parliament as being inconsistent with the Act. This is a power that our judges have never before enjoyed, and it is one that will obviously be of crucial significance. We will be looking to the jurisprudence of the United States for guidance on how to give content to these very broad guarantees.

The *Pinochet* decision was hailed as a landmark for many reasons. Many observers said that it meant that no torturer anywhere in the world is safe and that all torturers one day can and should have their day of judgment in a domestic court. I want to close with my views on whether these views are correct, and I want to make some observations on the differing attitudes to international law among English and American judges.

In my opinion, while it has symbolic value, the legal significance of the *Pinochet* decision is relatively limited. If Hitler were found alive today in Argentina, it is far from clear that he could be extradited to Poland to face trial for the crimes committed at Auschwitz. Remember that the House of Lords held that General Pinochet had no immunity on the basis of a very, very narrow holding, namely the signing of the Torture Convention.¹¹ Prior to December 1988, General Pinochet had complete and total immunity for the acts of electrocution, murder, bombing, and torture that were allegedly carried out on his orders.

So I think it's an exaggeration to say the *Pinochet* case is such a jurisprudential landmark. The decision is clearly a very political decision. The judgments are good in part and bad in part, particularly from the human rights perspective. They are very clearly an attempt to solve what was for Britain, Spain, and Chile a very difficult and embarrassing diplomatic incident.

One of the most striking things about the *Pinochet* case was the House of Lords' fascination with, and their willingness to learn about, the legal systems of other countries, in particular that of the United States. They were very anxious to know how courts in the United States had dealt with the issue of head of state immunity. We spent many days discussing American immunity cases, such as *Amerada Hess*,¹² the *Marcos* litigation,¹³ and *Filartiga*.¹⁴ The members of the House of Lords were anxious to learn and were anxious to be exposed to international influences. As I've said, the basis of their holding at the end of the day was the effect of an international treaty. And that contrasts very strongly with some of the things I have read in American judicial decisions.

11. Torture Convention, *supra*, note 9.

12. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (involving Liberian corporation who brought action against Argentine Republic).

13. *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F. 3d 1467 (1994) (holding Foreign Sovereign Immunities Act not applicable to former President's acts of torture).

14. *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (1984) (holding Alien Tort statute provided federal jurisdiction over citizens of Paraguay in the United States on a visitor's visa).

It seems that in the United States, judicial attitudes toward international human rights standards can really be summarized in two sentences. First, it seems that judges here think that there really is no need for the United States to sign international human rights treaties, let alone give them effect in your law, because the Constitution contains the necessary human rights guarantees, and it's simply not necessary to look any further. Second, judges, on occasion, have appeared to think that international human rights standards are something for the rest of the world, from my point of view. As a European human rights lawyer who has been involved in death penalty cases in the United States, these views reflect an unhealthy isolationism.

My hope, as the *Pinochet* case is digested at events like this, and its holdings are picked over, and distinguished judges look at how we treated the problems involved, is that international law, especially human rights law, will begin to play a much greater role in American judicial decisions. Because, after all, the United States is a common law jurisdiction; the law is therefore open to influence by reference to international cases and international treaties. One only needs to consider the execution of juveniles or of the mentally retarded as examples of areas in which the United States constitutional jurisprudence is seriously in conflict with international standards. It's absolutely clear in international law that the execution of defendants who were less than eighteen years of age at the time of their crime is a violation of international law.¹⁵ The case of Gary Graham¹⁶ a couple weeks ago is a good example of the United States violating international standards. It really is repugnant that the world's leading democracy should be so oblivious to international human rights standards as a result of out-of-date notions of the relevance of international laws to American society.

There are many, many groups of people who deserve greater protection than is provided to them under the Constitution. It is my hope that the internationalization of the law, which the *Pinochet* case so vividly demonstrated, will lead to a greater awareness of international human rights treaties so that those who really need the protection of the Constitution—criminal defendants and other outcasts of society—have their rights truly protected.

Thank you very much.

PANEL DISCUSSION

MR. BORGES: I will just provide a brief introduction of this panel and an introduction of each of the speakers, and then we'll jump right into the topics. This afternoon's panel is being cosponsored by the American Society of International Law (ASIL).¹⁷ The ASIL was founded in 1906 by Secretary of State Elihu Root to

15. See International Covenant on Civil and Political Rights (1976) 999 U.N.T.S. 171 [hereinafter Political Rights Convention]; Convention on the Rights of the Child GA Res. 44/25, 28 ILM 1448 [hereinafter Child Rights Convention]; American Convention on Human Rights 1979 1144 U.N.T.S. 123 [hereinafter American Convention].

16. Graham was executed in Texas on June 22, 2000, after he was convicted of robbery and murder in 1981. See Kari Haskell, *Ideas & Trends: One Step Further from Death*, N.Y. TIMES, August 27, 2000, § 4 at 23.

17. For further information concerning the ASIL, see the ASIL website at www.asil.org (last visited July 31, 2001).

inform and engage the public on issues of international law. It is a nonprofit, nonpartisan membership association and research institute dedicated to providing both information about international law in all its forms and a forum for debate and discussion.

Today's panel is one such forum. It has been organized under the auspices of the ASIL Judicial Outreach Program, which is chaired by Justice Sandra Day O'Connor. The Judicial Outreach Program provides information resources for federal and state judiciaries.

Today's panel will attempt to tour the horizon of international law and United States practice. Our panelists, who have a broad range of backgrounds and perspectives, will discuss a variety of issues, including how one defines the substance of international law, how international law interacts with our Constitution and with domestic legal practice, and how the work of lawyers and judges is evolving due to globalization.

Directly to my left is Arthur Rovine. Arthur is the president of the ASIL, having started his two-year term in April 2000. He is also a partner in the New York office of Baker and McKenzie, practicing in international litigation and arbitration. Prior to joining Baker and McKenzie in 1983, he served in the Office of the Legal Advisor in the United States Department of State from 1972 to 1983.

In that capacity, he was responsible for the international law, constitutional law, and United States foreign relations law issues involved in many treaties, agreements, and legislation. After his time in the State Department, Arthur Rovine was appointed to be the first United States agent to the Iran/United States Claims Tribunal in The Hague, from 1981 to 1983. He has also served as counsel before the International Court of Justice on numerous cases. His current practice at Baker and McKenzie includes representing major clients in international arbitrations, including a large number of cases involving public international law and issues in front of various tribunals in The Hague, Geneva, and Paris. Arthur has taught public international law in a variety of universities, including Cornell, Georgetown, and Yale, and he's also written widely on the subject.

Next to Arthur is Julian Knowles, to whom we were introduced earlier. I will pass over a lengthy biography of Julian except to say specifically that, besides the *Pinochet* matters, he has worked in the fields of judicial review, extradition, European and international human rights, and criminal law, especially cases where there is a confluence of a few of these issues. He has considerable experience in judicial review in a number of areas, including prisoners' rights, mental health, search warrants, criminal injuries compensation, and international criminal mutual assistance. Julian will also be able to provide an interesting perspective from the United Kingdom when we talk about various issues in the United States in terms of what practice is like in other countries.

Next to Julian is William Paul. William Paul, of Crowe and Dunlevy in Oklahoma City, became president of the American Bar Association in August 1999 for a one-year term. He rejoined Crowe and Dunlevy in 1996, after having served as senior vice president and general counsel to Phillips Petroleum Company for eleven years. Before joining Phillips Petroleum in 1985, Bill Paul had been with Crowe and Dunlevy since 1957 and for six years had served as chairman of the firm's executive committee.

Bill Paul has long been active in the ABA, serving on the board of governors since 1995 and on the board's program and planning committee. He has been a member of the policy-making House of Delegates for twenty-one years. He chaired the delegation from Oklahoma as state delegate from 1986 to 1995. He has chaired the House Committee on Ancillary Business and has been a member of the House Committee on Rules and Calendars.

Besides a great many other affiliations with the ABA and with other bar associations, he is also the past president of the National Conference of Bar Presidents. He was the president of the Oklahoma Bar Association in 1976 and the Oklahoma County Bar Association in 1971. He served on active duty in the United States Marine Corps, where he served in Korea, and was a member of the United States Marine Corps Reserve, retiring with the rank of colonel.

And finally, farthest to the left is Carlos Vázquez, who is a professor of law at Georgetown University. Carlos has been a professor there since 1996 and was an associate professor of law at Georgetown from 1991 to 1996. He has taught courses on the full range of issues that we'll be talking about today, including the federal court system, constitutional law, international law, conflicts of law, international litigation in the United States courts, and an international human rights workshop. Prior to being a professor, he was an associate at Covington and Burling in Washington and a law clerk to the honorable Stephen Reinhardt on the United States Court of Appeals in the Ninth Circuit. He also clerked for the Office of the Legal Adviser. His recent publications have focused on treaty issues, including a very interesting series of articles debating with John Yoo on the role of treaties in American law.¹⁸ Carlos was also the winner of the Francis Deák Prize in 1996, which is awarded by the ASIL for the outstanding article by a young scholar printed each year.

So with the introductions complete, we should proceed directly to the topics at hand.

Earlier today, Julian spoke a bit about international law and, specifically, how it related to issues in the *Pinochet* case. Continuing from there, I would like each panelist to comment on the meaning of the term "international law." What does that term mean? What do they think that the term is referring to and how does it or doesn't it affect practice in a practical way?

MR. ROVINE: Well, certainly our conception of what international law is has changed over the years. I used to think of it, as I suppose so many people did for so long, as the body of rules and regulations that govern relationships among states, among nations in the world community. To some extent that's still true.

But it's the corpus of rules and regulations that govern international relationships of almost countless kinds and among a great number of actors. It's not just states of course; it is international organizations; it is subdivisions of states; it is multinational corporations and corporations that are not multinational. In many

18. See e.g., Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999), a response to John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999).

cases it's individuals. And it's an area of international law that is covering, addressing, trying to deal with more and more areas that we used to think of as municipal law, meaning domestic law within the country.

It has expanded enormously, I would say, especially in the last couple of decades. It's got a long way to go. It's continuing to expand both the number of actors and number of fields that it addresses. The common theme is transnational: it goes beyond national borders.

BORGEN: Julian, commentators have traditionally focused on how international law affects relations among states and international organizations. Could you tell us about international law and its relationship to individuals? Is this relationship something that is actually having an effect in domestic courts or is it mostly an aspirational goal?

KNOWLES: I think it depends on the region that you're talking about. There are a number of regional human rights treaties that began with the European Convention on Human Rights,¹⁹ which obviously governs the states primarily of western Europe, but increasingly also the former Soviet states. Since 1950, citizens in Europe have had the right to petition European courts of human rights if their rights at the domestic level have been violated or domestic rules have not given them relief.

So, certainly in Western Europe, it is very much not just aspirational; it's been very real and there have been numerous cases where rights have been enforced at the international level. My own country of the United Kingdom has been found to have violated its citizens' rights under the Convention on numerous occasions, even though we like to think that we have a very comprehensive system for the protection of rights entrenched in our domestic law. The experience at the European level has been that that is simply not the case.

Within the American sphere, within the American continent, I think it is more aspirational. There is the American Convention on Human Rights,²⁰ which most of the countries of the hemisphere have signed: Canada, the Caribbean countries, and most of the South American countries, but the United States is a very noticeable absentee from the list of signatures. So U.S. citizens do not have the right to seek protection of their rights at the international level because of, as I perceive it, the erroneous belief that the Constitution gives all the protection that is needed, so that it simply is not necessary to look to any super-national, international body to give adequate protection.

My perception is that that very definitely is not the case. You have children being executed and the mentally retarded being executed. Those are just two very specific examples of how the greater protection of the international level, not found under the Constitution, would apply if America were to commit itself to the observance of international human rights standards.

I think that as far as America is concerned, by which I mean the United States, it is still very much an aspiration, but certainly so far as Europe and the states of the southern hemisphere of America are concerned, it is very real. And there are

19. European Convention on Human Rights, (1955) 213 U.N.T.S. 221 [hereinafter European Convention].

20. American Convention, *supra*, note 15.

countless examples of citizens getting relief at the international level when their domestic legal systems have failed them.

BORGEN: Bill, could you please reflect on the types of issues you have perceived as international legal issues, either as general counsel at Phillips Petroleum or as president of the ABA?

MR. PAUL: Well, thank you, Chris. I'll comment quickly on three things. First, from the American Bar Association's perspective on just what international law means, to me, the newest driving force is the global economy. We now live in a time when information is communicated instantly, transportation is no problem, and we are definitely in one single global economy. And that drives us inexorably with great force to find a regime that works, a legal regime that works all over the world.

In the American Bar Association we have various sections. I have used the business law section as a prime example that we are driven to focus intensely on international relationships and international law because of the business that United States businesses desire to do internationally. But they don't desire to do business in a country where there is not a stable legal system.

One of the interesting things we find is kind of a marriage between the laws of economics and principles of desiring to see justice and the rule of law. We see the rule of law as we know it as a stabilizing force, which, if established in a particular country or jurisdiction, creates the environment for a good, healthy, stable economy. And it's really a win-win situation because, as those things are established, it also develops into one of the greatest forces for international peace and stability throughout the country.

The American Bar Association, for ten years, has had a group called "CEELI," Central and East Europe Law Initiative, and it's been enormously successful. With the help of CEELI, the countries that were formerly included as part of, or under the clear influence of, the former Soviet Union have formed western democracies, and they've done this with the help of the CEELI group and with the help of American lawyers and judges—some of whom, without compensation, have given a year of their lives to go work in those countries to help them write statutes and constitutions, establish their judicial system, and create bar associations.

And it's been so wonderful that when I came in as president, I wanted to expand that. So, at my suggestion and request, our board of governors created two new councils this year, including one for Africa and one for Latin America, and I just completed making appointments to those councils, where we hope to follow the CEELI model and be available to assist in the same way. We may not have quite the same opportunities, because all the stars in the universe were in the right place in central and east Europe. Well, that's number one.

And because of these things that I mentioned, there's been a dramatic increase in the focus and devotion of resources of the American Bar Association to international matters—and there will continue to be. And as I say, it's kind of a combination of an effort to establish stable legal systems so that business can flourish and an effort to establish countries based on the rule of law, which we know works.

BORGEN: I would like to take something from that idea and turn to Carlos. One of the things we talk about in terms of rule of law is just exactly what makes international law. Three of the main sources of international law are customary

international law, that is, the customs that we have in the international community that are being followed by states because they believe they are legally obligated to do so; international agreements and treaties; and the general principles of law recognized by civilized nations.²¹ I know that we have covered many of these topics, but I'd like to turn briefly now to treaties and U.S. law. Carlos, first of all, could you tell us a little bit about the current debate as to the difference between self-executing and non-self-executing treaties and what is or is not law in the United States and the controversy that has arisen out of that?

PROFESSOR VÁZQUEZ: That's a question about the force of treaties in the United States under United States law and the extent to which they are enforceable by United States courts, domestic courts. Whether a treaty is self-executing, in my view, is primarily an issue of whether the treaty is enforceable by United States judges without prior implementation by Congress—in other words, whether or not the treaty is directly enforceable. There's a constitutional provision that deals explicitly with the issue, and that is the Supremacy Clause, which declares treaties to be the supreme law of the land.²² One might have construed that provision as making all treaties always judicially enforceable, but in 1829, the Supreme Court held that certain treaties are not self-executing. Certain treaties require implementing legislation before they can be enforced in U.S. courts.²³

There has evolved a doctrine of non-self-executing treaties under which there is a category of treaties that requires prior implementation by Congress before they may be applied by the courts. This doctrine has been correctly described by courts as one of the most confounding in treaty law. I would say it's one of the most confounding in all law.

I've tried to explain in past writings when a treaty is and is not self-executing under the jurisprudence of the Supreme Court.²⁴ As I read the cases, and as I interpret and understand the Supreme Court, a treaty can be non-self-executing, or not enforceable in U.S. courts, for four distinct reasons. One is if the treaty-makers—the President and the Senate—when they entered into the treaty intended the treaty not to be enforceable in United States courts. When there is an affirmative intent on the part of the treaty makers to make the treaty non-self-executing, it will make the treaty non-self-executing, at least under certain circumstances.²⁵ It's a matter of intent.

The second category is when the Constitution requires implementing legislation. There are certain areas in which our Constitution has been construed to require action by Congress before something can become law.²⁶ For example, a treaty cannot, of its own force, make conduct criminal. If we do enter into treaties that require that a particular form of conduct be made criminal—such as the Torture

21. Statute of the International Court of Justice, Article 38.

22. The Supremacy Clause states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land..." U.S. CONST. art. VI, cl. 2.

23. See *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

24. See, e.g., Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

25. See Vázquez, *supra* note 18, at 2188.

26. See Vázquez, *supra* note 24, at 718-19.

Convention, which requires that torture be criminal, even if committed abroad by an alien—that sort of treaty provision is, by virtue of our Constitution, non-self-executing and has to be implemented by Congress.

The third category consists of treaties that are precatory or hortatory.²⁷ A lot of treaties contain provisions that are vague and precatory—*aspirational*, I call them. One of the examples of this would be the U.N. Charter, which has a provision that says countries should cooperate to promote human rights.²⁸ Soon after we became a party to the U.N. Charter, courts in California relied on this provision to strike down certain alien land laws discriminating against aliens.²⁹ The California Supreme Court held that this treaty, the provision that required all parties to agree to cooperate to promote human rights, was not self-executing and thus could not by itself preempt a state law.³⁰

The fourth category is a very confusing category that I will mention briefly. It is a treaty that does not create a private right of action. Often a non-self-executing treaty is defined as a treaty that does not create a private right of action. I think the term “non-self-executing” can be used in that fashion, but I think it’s important to note that a treaty that does not create a private right of action could still be enforced in courts under certain circumstances when a private right of action is not necessary—for example, when a treaty provides a defense to a criminal prosecution. A treaty that does not create a private right of action might still be enforceable in court as a defense. So I think this fourth category is a special one, and treaties that are not self-executing in this fourth sense are treaties that might still be enforceable in court under certain circumstances.

BORGEN: One of the problems that we’re seeing more generally in terms of the different types of treaties is that, as Julian pointed out, the United States might ratify a treaty, particularly a human rights treaty, but attach so many reservations to its ratification that there might be a question as to whether or not the United States is taking that treaty regime seriously. This is a very interesting criticism.

I would like to hear first from Arthur, who was formerly in the Legal Adviser’s Office, on whether the United States is really taking treaties seriously when it attaches raft loads of reservations to them. And then I would like to hear from Julian on the issue of why the United States would attach such reservations. Is such a practice perceived internationally as helping or harming the progress of international law?

ROVINE: I was in the Legal Adviser’s Office in the treaties office at the time the human rights treaties were sent over to the Senate. This was the Carter Administration, the 1970s, and, yes, there were a number of reservations, understandings, and declarations attached and the question is, why? Why go through all that?

27. *See id.* at 712-13.

28. Article I provides that one of the purposes of the charter is “[t]o achieve international cooperation in solving international problems of economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights...” U.N. CHARTER art. 1, para. 3.

29. *See Sei Fujii v. State*, 217 P.2d 481 (Cal. App. 2 Dist. 1950), *vacated*, 242 P.2d 617 (Cal. 1952).

30. *See also People v. Ghent*, 739 P.2d 1250, 1276 (Cal. 1987) (human rights provisions of U.N. Charter do not preempt California’s death penalty law).

BORGEN: As background to this, we should note that treaty issues of the time included issues stemming from the Covenant on Civil and Political Rights,³¹ which was signed and subsequently ratified. There was a Covenant on Economic and Social Rights,³² which was signed but has not been ratified. And there have been subsequent treaties, such as The Hague Convention on the Rights of the Child, which have been signed but not ratified.

ROVINE: It was a very interesting combination of legal and political problems that generated those sometimes called "RUDs."³³ The White House instructions were very clear and they were based essentially on a political problem with legal overtones. And the political problem was the role of the House of Representatives. The feeling expressed was that these treaties are different from the ordinary treaty, which deals with foreign affairs.

This was not an ABM³⁴ treaty. This was not membership in NATO.³⁵ This was racial discrimination or discrimination against women or the execution of minors. These were areas of domestic law, primarily. And the feeling expressed was that in areas of domestic law, if you're going to enter into a treaty that changes that law in any way, then there has to be legislation by both houses. You can't have the Senate alone changing American domestic law.

That was the feeling. It's still the feeling and, as a matter of fact, I think in terms of Carlos's enumeration of the kinds of non-self-executing treaties, we may have already entered an era where one looks at the content of the treaty and, much like we speak of a federal zone or a state zone in the United States in our domestic law, here one would look at whether it is primarily international relations that one is talking about or whether it is primarily one of domestic law making.

So the feeling was, yes, we make the commitment, an international commitment, to human rights as we know them in the United States at this time. At the same time, of course, by making that commitment, we subject ourselves to criticism from the Human Rights Commission in Geneva. We go through all of the procedures that you go through when you are a party to these treaties, but if there are going to be changes in the law, that will have to be done with the Senate and the House, not just by the Senate; thus the reservations.

There would also be no changes in federal relationships. That is to say, if the death penalty were primarily an issue for the states, it would remain an issue for the states. Now, the question was raised whether this is taking our treaty obligations seriously. One of the things I noted at the time as I looked at what other nations had done by way of reservations and understandings was that, on average, the nations that took human rights most seriously had the most reservations. Those that took human rights least seriously had no reservations at all. The Soviet Union, for example, didn't like the World Court, and still doesn't very much as Russia, but

31. Political Rights Convention, *supra*, note 15.

32. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [Hereinafter Economic Rights Convention].

33. Reservations, understandings, and declarations.

34. Anti-Ballistic Missile.

35. North Atlantic Treaty Organisation.

other than that, no reservations. They were simply willing to sign it and say, "We're a party. Whether we do anything about it is another matter."

So, yes, I think in terms of taking our obligations seriously, we and other western democracies were indicating we take them very seriously indeed. We will change our law. We will create laws of decision for the courts only when we have legislation, which includes the House. We are not going to cut them out. That's basically what that was about.

BORGEN: Julian, any reactions?

KNOWLES: When a country signs a multinational human rights treaty that contains guarantees that the state parties to the treaty think are important enough to include in the treaty, it seems to me that this runs very contrary to that whole notion to say, "Okay. We're going to sign this treaty, but we're going to make a reservation to exclude from the protection of the treaty a whole class of citizens." I think that even leaving aside the death penalty, because that's the most obvious example, if the United States or any country signed a treaty and said, "We're going to exclude from the protection of this treaty minority groups," you would see immediately that it would run very contrary to the whole idea of a human rights treaty. The United States reservation to the Convention on the Rights of the Child,³⁶ which deals with the execution of children, provides a good example. Several of the state parties to that Convention filed an objection to that reservation on the grounds that to have a reservation in these terms cutting out from the protection of the Convention the very people whom it was designed to protect ran contrary to the purpose of the Convention. So I think there is a real problem. This problem has also arisen in a case that I've been involved in in Trinidad, where Trinidad has tried to do the same thing under the American Convention of Human Rights³⁷ by cutting out from its protection those on its death row. I think there is a real argument where you have a reservation that cuts out a whole class of people from the protections of a treaty, that that really is incompatible and runs fundamentally contrary to the whole purpose of the treaty.

It's very interesting on the broader question of self-executing, non-self-executing treaties and why countries should sign them. In my own country, Great Britain, we have a modest system where treaties are not self-executing and do not have the force of law unless and until they are incorporated by an act of Parliament.

For a long time there was great debate about whether we should have the European Convention on Human Rights³⁸ as part of our law. There was an idea within the English judiciary that everybody has enough protection under the common law, so why go to a treaty? But with the government that came into power in 1997, headed by Prime Minister Tony Blair, the candidates made it an election promise that we would incorporate the European Convention as part of domestic law because it was so clear that its extra protections were needed and that they could only be gained from international law and international treaty law under the Convention.

36. Child Rights Convention, *supra*, note 15.

37. American Convention, *supra*, note 15.

38. European Convention, *supra*, note 19.

So I think signing a treaty is, in a sense, a sign of humility. I think it's countries that are arrogant about their legal systems that think they don't need protections because their domestic law is enough. But it's countries that are more aware of the flaws in their system who take treaty rights more seriously and are more apt to try to make those guarantees more concrete in their domestic law. And my own country is taking the step of incorporating the European Convention as part of its domestic law on October 2, 2000, which will give us an effective bill of rights for the first time. And it is only right and proper that the citizens should have the extra protections given by the Convention and not left to often-ineffective remedies under domestic law.

I should say, to argue against myself slightly, that it can be a dangerous step to incorporate an international treaty wholesale. The ICCPR,³⁹ for example, contains the right to freedom of expression along the lines of the First Amendment, but has a specific exception for hate speech. Now, I'm not a United States lawyer. My understanding, however, is that the First Amendment very much protects that sort of speech. So there can be tensions and difficulties. You can find under international human rights treaties sometimes less protection than under domestic law. But that's not an insoluble problem, and that's what our courts will have to grapple with in the areas where the European Convention contains less protection than domestic law.

ROVINE: Just a quick response to that. The idea, of course, when President Carter sent the treaties over, was not to cut out classes of individuals—nobody was to be cut out. The idea was to make a commitment internationally to the human rights rules, laws, regulations, and approaches that we have in this country—which aren't bad compared to most—to make that commitment internationally, but not to allow the treaty itself to change our law without the participation of both houses of Congress.

The idea was to say, "Well, of course we need improvements. Who doesn't?" We certainly do need improvements in our human rights law in this country. The idea was to make an international commitment to the situation as it is and to move on from there, not to cut people out, but rather to bring in a more representative body of legislators to make those changes.

VÁZQUEZ: On the question of the reservations, understandings, and declarations, and Julian's suggestion that they reflect a failure to treat these treaties seriously, I think it's useful to distinguish different types of reservations and declarations. On the one hand, there are substantive reservations, such as the reservation that, to the extent that a treaty would require that we prohibit hate speech, we're not going to accept that obligation because it would violate our Constitution. Additionally, to the extent that the provision on the death penalty would prohibit the execution of minors, we would not accept that obligation to the extent it might go beyond the protections afforded by our Constitution.

I think it's fair to say that the substantive reservations basically produce the result that the treaty does not require of us anything beyond what the Constitution already requires. At least that was the intent. I would say that these reservations do reflect

39. Political Rights Convention, Dec. 16, 1966, 999 U.N.T.S. 171; 6 I.L.M. 368-83.

an intent to treat the obligations seriously. We are telling the world that, to the extent that we can't comply—because of our Constitution or because there is no political will to comply in the United States—we're not going to accept these obligations. That reveals an intent to take this treaty seriously, unlike the Soviet Union, which was happy to accept the obligations and then violate them.

On the other hand, there is an additional declaration to the effect that the treaties are to be regarded as non-self-executing. Now, this one I think can be said to be in conflict with the idea that we take our treaties seriously. This non-self-executing declaration goes beyond the substantive reservations and says that, even though we do accept international obligations under this treaty, we're not going to allow our courts to enforce them directly. That, I think, is in tension with the idea that we take our treaty obligations seriously.

Arthur mentioned that the intent behind this was to allow the House to become involved in implementing the treaty domestically. Well, the reason treaties were made the supreme law of the land without the need for involvement by the House is because before our Constitution was adopted, we followed the British rule that Julian mentioned: Treaties always required legislative implementation. And under the Articles of Confederation, this requirement was producing lots of treaty violations by the states. In order to deal with this problem, our treaties were made self-executing, meaning that the moment they obligated us internationally, they would obligate us domestically and the domestic courts should enforce them. This was done, the Framers said, in order to show the world that we take our treaty obligations seriously. We were telling the world that our treaty obligations are backed by judicial enforcement. These non-self-executing reservations seem to be in conflict with this particular purpose the Framers had in making treaties the supreme law of the land.

PAUL: Well, just a couple of comments, including one on the ABA's policy on the death penalty. My first comment is that our situation is a little more complex, I think, in the United States because we are a federal system. The Constitution provides that all powers not expressly granted to the federal government are retained by the states. I'm not a good enough international lawyer to know whether, if there were a treaty that abolished the death penalty, that would be constitutional due to the potential infringement on the powers reserved to the states. I would assume going in that it would not be constitutional. I would assume that a power reserved to the states would be a power to determine whether there would be a death penalty. And in treaty matters, I think the fact that we are a federal system—the fact that much of our sovereignty resides with our fifty states and not with the federal government—is a factor.

Now I'd like to comment on the ABA's policy on the death penalty. It really can be broken down into three pieces, and the predicate has to be that the American Bar Association does not have a position either favoring or opposing the death penalty. We do not. We recognize that that is a matter for each state to determine, and I think thirty-eight of our states have the death penalty. But we do have a policy, and we try to lobby to see our policies implemented in three areas. One, because there is so much evidence that the death penalty is not being administered fairly and our policy is that there should be a moratorium on the death penalty pending a complete review of the system to make sure it works and make sure due process is accorded. The

number one concern is having competent counsel to represent one in a capital case and similar matters. And this year there was a major, major development in Illinois. The governor of Illinois, Governor Ryan...

BORGEN: One quick thing along those lines.

PAUL: Yes.

BORGEN: To bring this in terms of some of the international issues concerning the death penalty, let us consider the case of Angel Francisco Breard.

PAUL: Let me quickly hit the other two points and then let's do that. I'll get off the moratorium. The other two points are that we do have ABA policy opposing the execution of persons who were under the age of eighteen when they committed their crimes. And we do have an ABA policy opposing the execution of defendants who are mentally retarded at the time of execution. That really completes our policy.

BORGEN: Now, the first part that you brought up had to do with effective assistance of counsel.

PAUL: Yes.

BORGEN: Very quickly, for those of you who are not familiar with the *Breard* case,⁴⁰ it was a case out of the Fourth Circuit and it had to do with the execution of a Paraguayan citizen. The actual treaty involved was not a human rights treaty, but it ended up having an aspect that dealt with the death penalty.

Breard was arrested and convicted of capital murder in Virginia.⁴¹ He was a Paraguayan citizen.⁴² And Paraguay, through the Vienna Convention on Consular Relations,⁴³ had an agreement with the United States that said that should one of either country's citizens be arrested in the other country, the consulate of the citizen's country would be notified of the arrest.⁴⁴ This did not happen in the *Breard* case.⁴⁵

AUDIENCE MEMBER: Just to clarify, would the individual have a right to be informed that he has a right to consult with his sovereignty?

BORGEN: The individual would have the right to be informed. That did not happen in this case. There ended up being a public international law question as to whether there was a treaty violation of the Vienna Convention.⁴⁶

Two things happened at about the same time. First, a case was filed by Paraguay before the International Court of Justice (ICJ) in the Hague. Second was a series of appeals brought up to the United States Supreme Court on a variety of issues having to do with Breard's detention.

The ICJ said, in effect, "Since there may be an issue of a treaty breach, we grant provisional measures. Please do not execute Breard until we deal with these issues in the case of Paraguay versus the United States as to whether or not there was some type of breach of a treaty."⁴⁷

40. *Breard v. Greene*, 523 U.S. 371 (1998).

41. *See id.* at 373.

42. *See id.* at 372.

43. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6520 [hereinafter Vienna Convention].

44. *Id.* at 104.

45. *Breard*, 523 U.S. at 373-74.

46. *See id.*

47. *See id.* at 374.

I would ask Carlos to play the role of the United States domestic judge sitting in the criminal case. The ICJ says essentially, "We grant provisional measures. Don't act." What do you do? For whom is it to choose whether or not the United States courts should act at that point? Should the courts follow what the ICJ says? Does the state's governor have the final say? Is it something for the federal courts to decide?

VÁZQUEZ: The posture was that, when the ICJ issued this order for provisional measures, the certiorari petition had been filed, as well as a petition for exercise of original jurisdiction in the Supreme Court on the theory that this was a suit against the state. And the ICJ's decision came a few days before the scheduled execution. The Supreme Court gave the Solicitor General's Office until the day before the execution to file its brief. The Solicitor General's Office took the position, which I have criticized in print,⁴⁸ that the federal government doesn't have any role to play here and that this was a matter that is, under our Constitution, left to the states, and it was Governor Gilmore's decision whether to comply with this ICJ order.

I thought that this couldn't possibly be right. First of all, the federal government in the form of Congress could certainly do something. In addition, I think the executive branch on its own could have done something to order compliance with this ICJ order. We're party to a treaty, the Vienna Convention on Consular Relations (VCCR), which is the supreme law of the land, which requires us to give consular notification. This treaty also gives jurisdiction—compulsory jurisdiction—over disputes to the ICJ. So this compulsory jurisdiction, which is provided by a treaty, is the supreme law of the land. We're party to another treaty, the Statute of the International Court of Justice, which requires us to comply with the orders of the ICJ. I think that these various treaty obligations of the United States gave the executive branch ample authority to order compliance with the ICJ order.

Instead, Madeleine Albright, the Secretary of State, wrote a letter to James Gilmore saying that it was important for our foreign relations and for the welfare of United States citizens traveling in other countries that this ICJ order be complied with. Governor Gilmore responded that his primary duties were owed to the citizens of Virginia, and he accordingly declined to stay the execution, despite the ICJ's order.

BORGEN: Questions from the audience?

CHRIS FIELD: I'm wondering whether there can be a mechanism, a mode for advising and educating those lawyers who handle death penalty cases with respect to these international conventions that implicate the defendant's rights, but that, if not raised in the direct proceedings, simply will not prevail in habeas proceedings.

BORGEN: After the *Beard* case the Department of State's Bureau of Consular Affairs said that they were going to try to work with states and municipalities in terms of making sure that there was a certain level of knowledge and education concerning the various obligations for defendants.

48. See Carlos Manuel Vázquez, *Beard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998).

FIELD: I'm really familiar with that and I think that is a good idea. But the problem is, what about the defense attorney who is being paid \$50 an hour to represent this guy and who has absolutely no familiarity with any international conventions?

AUDIENCE MEMBER: And isn't there another problem associated with that? It does absolutely no good to be raising a VCCR⁴⁹ challenge unless you have statements from foreign governments that they would have intervened, that they would have consulted with the client, and my reading of the cases on the VCCR seem to reiterate this theme. What do you need to talk to your consulate for? What is the consulate going to tell you that the *Miranda* warning doesn't? And without an affirmative statement from the person's country that it would have made a difference to them and it would have resulted in some intervention, you're just whistling Dixie to try to get an issue going anyway. I think we're seeing it on an international level, the thinking, "VCCR. Oh yes, that protects United States citizens when they are traveling abroad, and then, of course, the United States will do whatever they want to foreign citizens." I have to say that I think it's very difficult to get foreign countries to go to the trouble it takes them to write letter after letter of protest to the United States Department of State when, systematically, any letters of protest fall on deaf ears.

ROVINE: The [*Breard*] case, in my judgment, has a disastrous result. It is illustrative, I think, of a weakness that we see all over the world—certainly in the United States—a failure to perceive the reciprocal. I felt that Madeline Albright was right in raising the question she raised. She has to be concerned with Americans traveling abroad. And what if this happened to one of our people? We would be outraged by it, as Paraguay had every right to be outraged by it. It was raised late, but it was still raised. It was raised in time to save a man's life. Perhaps there wouldn't have been anything meaningful to come out of it, but there was time to discuss that. There was time to debate it. There was time to analyze it, to review it, and it didn't happen because the state of Virginia felt that this particular process and this particular procedure and rule had no bearing as far as they were concerned. They were thinking only of the citizens of Virginia. The failure to perceive the reciprocal is absolutely a killer when it comes to the development of international law.

If I can just tell a brief story: In 1987, Senator Helms,⁵⁰ who was then chairman of the Foreign Relations Committee, introduced some legislation that would have done away with immunity for diplomats in this country who commit crimes. The Vienna Convention was something he was familiar with and his statement in the Senate was that it was unjust to declare diplomats, or members of their families for some, immune from prosecution. That wasn't justice. Justice would be that if a diplomat commits a crime, he goes through the normal judicial criminal process in this country and, if convicted, jailed. Now what's wrong with that, you ask? What's wrong with that is, again, the failure to perceive the reciprocal. The State Department asked me to testify against that bill, and I did. And, as I was thinking

49. Vienna Convention, *supra* note 43.

50. Jesse Helms, United States Senator, Republican Party, North Carolina.

about it, I thought that it was not going to be enough to say to Senator Helms, given his views, "Well, this is clearly contrary to the letter and spirit of the Vienna Convention," and I wondered what else might appeal to him. Then it hit me. There was something else that might appeal to him. And when I testified, I said to him, "Senator, the main effect of your legislation will be to weaken the Central Intelligence Agency (CIA), weaken the Drug Enforcement Agency (DEA), and weaken the Federal Bureau of Investigation (FBI), because those folks, when we start throwing diplomats in jail, are going to get thrown in too, whether they've done anything wrong or not—people won't care. They'll say, 'You're doing it to us, we're going to do it to you.' Is that what you really want?"

And I remember Senator Specter,⁵¹ a former prosecutor, said, "Well, Rovine, you say this will weaken the CIA. We'll just have to take our chances with that."

And I said, "With all due respect Senator, just taking our chances with that is not good enough."

In fact, they did back off of this legislation. But it is that view, which sees it from one side and not both, that is the main reason why international law is in such bad shape in the United States.

JUDGE FROM THE AUDIENCE: One thing that you may not be aware of is the Department of State, under initiative by Secretary Albright, has communicated with, I think, all of our Article III judges, certainly all of our chief judges, of all ninety-four districts, advising us of the treaties, advising us in a separate document as to what countries opt in, and under what provisions of the treaty, and urging us, as judges, to implement rules and regulations within our districts to advise a foreign citizen. We are going to begin that process in my district and I think other districts are looking at that too, in light of Secretary Albright's communications to us.

BORGEN: Julian, was there a large amount of international attention on the *Breard* case? What was the view in Europe? Did they perceive this as a problem of American federalism?

KNOWLES: Well, it depends on which publication you're reading. Undoubtedly, the perspective taken depends upon whether you are reading the popular press or the legal press. In the popular press, it received a lot of coverage. The death penalty in the United States does generally. The Gary Graham story was, I think, the second or third item on the national news program, and there were a lot of feature articles on it. The death penalty does hold a shocking fascination, I think it's fair to say, in the countries of western Europe, the United Kingdom in particular. In the legal press, some of the difficulties in *Breard* were highlighted and the reaction was more restrained. What shocked a lot of people was the rush to judgment. If you read the Supreme Court's opinion in *Breard*, according to Justice Souter, there was a merits problem, a *Teague*⁵² problem, and also a procedural bar problem.⁵³ It's interesting to note Justice Breyer's dissent. He just makes the point, "Well, I'm not prepared to accept that it is as hopeless as the majority appears to make it out to be." He at least seemed to think the *Teague* problem, if not the non-exhaustion procedural bar

51. Arlen Specter, United States Senator, Republican Party, Pennsylvania.

52. See *Teague v. Lane*, 489 U.S. 288 (1989).

53. *Breard v. Greene*, 523 U.S. 371, 379 (statement of Souter, J.).

problem, was no answer.⁵⁴ I think everybody is absolutely right in what they said about reciprocity. The United States, by signing the U.N. Charter, which creates the ICJ, undertook to obey the orders of the court, and it just is no answer to say, "We are a federal system and we can't control what the states do." The United States was a federal system when it signed this treaty, and so it seems hard to understand how it could now turn around when somebody actually tries to give the treaty content and meaning and say, "Oh, well, gee, we can't control what Virginia does."

So I think it's absolutely no answer, what the Solicitor General said. I think the reason the ICJ order should have been obeyed is because the United States itself has sought provisional measures from the court, most famously in the hostage case in Iran.⁵⁵ It sought a ruling and it sought provisional measures from the ICJ to protect American citizens who had been seized in Iran. It's hard to imagine that the United States would have been very happy if Iran had responded by saying, "Well, gee, we have a federal structure, and if this little unit wants to seize these people, there is nothing we can do about it."

It really should be a matter of shame in the United States that Breard's appeal failed and that he was executed. It is to be hoped, and I know there is other litigation going through on the same issue, that what we are seeing here are the very first stirrings of awareness of how international law can be used. I think a key to developing and fostering that awareness is obviously education. The ABA has a very important role to play to bring these treaties to the attention of practitioners and the judiciary.

BORGEN: Carlos, a few minutes ago, I believe you said that if one looks at the reservations and understandings that the United States makes to treaties, one sees that what the United States is doing is basically making the treaties contiguous with U.S. constitutional rights. The United States is not changing domestic laws with treaties, but rather only signing those provisions in treaties that mirror our current understanding of one's rights under the Constitution. If that's the case, are we essentially saying that international law is for other people; that international law isn't something that applies here? One other example: the United States has signed and ratified the Convention Against Torture, the implementing legislation being the Torture Victims Protection Act.⁵⁶ The interesting thing about that is that it provides a right of action to foreigners who have been tortured by citizens of a country other than the United States.⁵⁷ It is not a right of action for United States citizens. So, aren't we really saying that international law is for other people?

VÁZQUEZ: Let me address that after making two brief points about the *Breard* case. One is that, unfortunately, the opinion reflects some lack of familiarity with international law. The Court started out its decision by saying that it's unfortunate that the involvement of the ICJ came at the eleventh hour. Well, I think the explanation for that is that, under international law, there is a doctrine of exhaustion

54. See *id.* at 380-81 (stating fuller consideration was warranted by the difficult issues and international aspects of the case as well as by the court's rules governing ordinary cases).

55. United States Diplomatic and Consular staff in U.S. v. Iran, 1979 I.C.J. 7 (YEAR).

56. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as 28 U.S.C. § 1350 (1994)).

57. See *id.* § 2(a)(1).

of domestic remedies. You're not supposed to go to an international forum until you've exhausted all domestic remedies. Technically, Paraguay shouldn't have gone to the ICJ until the Supreme Court had already acted, but because the execution was imminent, the ICJ proceeding needed to go forward before the Supreme Court's treatment of the case.

The second point is that the insult to the ICJ, or the affront to the ICJ, was, in my view, somewhat gratuitous because I think this case presented eminently certiorari-worthy issues. The Fourth Circuit's basis for dismissing the suit brought by Paraguay against Governor George Allen was the idea that this suit was barred by the Eleventh Amendment as a suit against the state.⁵⁸ I think, and I have written at length on this,⁵⁹ this can't be right because the relief being sought by Paraguay was the stay of his execution, which was the very same sort of relief that is sought in every habeas corpus case—at least every one involving the death penalty. As the Supreme Court has explained, the reason federal habeas relief does not violate the Eleventh Amendment is because this is a suit against the official that comes within the *Ex parte Young* doctrine.⁶⁰ And I think that should have been the holding of the Fourth Circuit. I think that the Supreme Court could have granted certiorari, even if only on that issue, and that would have resulted in compliance with the ICJ's order.

AUDIENCE MEMBER: What did the Fourth Circuit do?

VÁZQUEZ: The Fourth Circuit held that the suit brought by Paraguay against the Governor of Virginia, George Allen, was barred by the Eleventh Amendment, which is an Amendment that bars suits against the states. But the suit against George Allen fell comfortably within the *Ex parte Young* exception as a suit seeking prospective relief and naming the official instead of the state. The Fourth Circuit held that the suit did not seek prospective relief, but sought retrospective relief because it sought to undo a past criminal conviction.⁶¹ But all habeas cases do that. In my view, the appropriate analysis would have been that Paraguay's suit would have been seeking prospective relief as long as Breard was alive. So I think that the Fourth Circuit's decision on this—and the Ninth Circuit came out the same way in a similar case⁶²—was erroneous in light of the Supreme Court's *Ex parte Young* exception, and the Supreme Court should have granted certiorari on that ground. It's somewhat of a side point, but I think the Supreme Court, if it had wanted to comply with the ICJ order, could have done so simply by granting certiorari on that issue.

Is the United States guilty of a double standard? This is an accusation that, when it comes to international human rights, is often raised. Although there is some merit to the claim, I think the charge is somewhat exaggerated. The basis for the charge of a double standard is that we allow cases based on international human rights law to be brought in the United States against foreign officials, cases like *Filartiga*,⁶³

58. *Republic of Paraguay v. Allen*, 134 F.3d 622, 627 (4th Cir. 1998), cert. denied, 118 S.Ct. 1352 (1998).

59. See Carlos Manuel Vázquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L. J. 1 (1998).

60. *Ex parte Young*, 209 U.S. 123 (1908).

61. *Allen*, 134 F.3d at 629.

62. See *United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir.), cert. denied, 118 S.Ct. 1517 (1998).

63. *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (1984).

Marcos,⁶⁴ and *Karadzic*.⁶⁵ Cases brought against foreign officials for violations of human rights abroad can be brought in the United States. Yet, when it comes to enforcing international human rights norms against domestic officials, we have interposed the reservations to the human rights treaties, which render the treaties unenforceable against United States officials, and we have cases like *Alvarez-Machain*,⁶⁶ which seem to reject international law as a basis for seeking relief against domestic officials.⁶⁷ And there are other cases like *Sale v. Haitian Centers Council*,⁶⁸ which also suggest that the United States is not allowing the courts to enforce international human rights norms against its domestic officials. I think that there's something to that claim on the surface but, on analysis, I think it's exaggerated because the norms we enforce against foreign officials, such as norms involving torture, war crimes, that sort of thing, are enforceable against domestic officials through constitutional actions and suits based on domestic statutes, such as Section 1983.⁶⁹ So it is not true that our courts routinely enforce against foreign officials norms that we don't enforce against domestic officials. The stronger claim is that we are resistant to allowing our courts to rely on international human rights norms that are not already part of our constitutional law.

64. *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (1994).

65. *Kadic v. Karadzic*, 70 F.3d 232 (1995).

66. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

67. Cf. Carlos Manuel Vázquez, *Misreading High Court's Alvarez Ruling*, LEGAL TIMES, Oct. 5, 1992, at 29 (arguing that *Alvarez* should not be read to hold that customary international law is unenforceable in court against executive officials).

68. 509 U.S. 155 (1993).

69. 42 U.S.C. § 1983 (1994).