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**International Criminal Justice and the
American System of Criminal
Procedure**

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International Criminal Justice and the American System of Criminal Procedure

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Abstract

The Rules of Procedure and Evidence of the International Criminal Court encapsulated rules of criminal justice that complies almost entirely with the dictates of propriety. The American legal system is not even remotely in conformity with those norms of criminal justice. The ICC Statute requires of the Prosecutor to prove the guilt of an accused above reasonable doubt and stipulates that there shall not be a reversal of the burden of proof; in the United States an accused must prove special defences on a balance of probabilities. The ICC State upholds the principle of *ne bis in idem* and prohibits a second trial based on the same conduct; in the United States, the rule against double jeopardy applies to multiple prosecutions for the same offence and regards different states (provinces), and also the federation, as different sovereignties and therefore does not preclude multiple trials for the same crime in a different states or in a state and federal court. International law prohibits cruel and inhuman punishments; the American Constitution prohibits cruel and unusual punishments, meaning unusual in the United States. Those punishments include the death penalty and life imprisonment without the option of parole, which are not competent sentences in the ICC. Sentences in the United States are almost exclusively based on the nature of the crime and the means of perpetration, while the ICC upholds the principle that sentencing must also be individualized and based on the personal circumstances of the convicted person. In the United States juveniles can be prosecuted as though they were adults and until recently, juvenile offenders could be sentenced to death and receive a life sentence without the option of parole.

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The United States can justifiably take pride in having devised and implemented the first truly meaningful constitutional bill of rights in the world. The initial bill of rights enacted through ten constitutional amendments of 1791 contained an impressive list of basic principles of criminal justice, including the right against unreasonable searches and seizures (Amendment IV); the right of persons indicted to stand trial for “a capital, or otherwise infamous crime” to be indicted by a Grand Jury, the right of all persons not “to be twice put in jeopardy of life and limb” for the same offence, not to be a witness against himself, and not to be “deprived of life, liberty, or property, without due process of law” (Amendment V); the right of an accused in criminal proceedings “to a speedy and public trial, by an impartial jury,” “to be informed of the nature and cause of the accusation,” “to be confronted with the witnesses against him,” “to have compulsory process for obtaining Witnesses in his favor” and to “the Assistance of Counsel for the defence” (Amendment VI); and finally, the right not to be exposed to “excessive bail,” “excessive fines,” or “cruel and unusual punishments” (Amendment VIII). These Amendments applied to prosecutions in the federal criminal justice system only.

Following the Civil War (1861-1865), amendments were added to the Constitution that applied specifically to the states and which also contained basic principles of criminal justice, including the guarantee against depriving “any person of life, liberty, or property, without due process of law,” and denial “to any person . . . the equal protection of the laws” (Amendment XIV, Section 1 of 1868). Through a process of “incorporation”, most of the rules of criminal justice contained in the federal bill of rights were proclaimed to be principles of due process within the meaning of the Fourteenth Amendment and thus made applicable to the states. The US Supreme Court declined to incorporate grand jury indictments for capital and other infamous Crimes,¹ and the Eighth Amendment proscription of excessive fines has never come before the court for “incorporation” scrutiny.

In spite of the commendable initiative of the United States to afford *constitutional* protection to certain basic principles of criminal justice, it has sadly fallen behind the times and continues to resist legal reform that would incorporate into the American criminal justice system principles that have come to be accepted by a cross section of legal systems of the world. It might be noted in passing that the federal Bill of Rights affords protection to civil and political rights only — those rights that are of special importance to individuals as citizens of a state — to the exclusion of natural rights of the individual such as the right to human dignity, economic, social and cultural rights, such as the right to education, housing health care and job opportunities, and solidarity rights for the protection of future generations, such as the right to development of less privileged communities and to a clean and healthy environment. Some

¹ *Hurtado v. California*, 110 US 516 (1884).

of these rights are indeed protected in the United States but not as a matter of federal imperatives.

This essay is focused on the protection of basic rights and freedoms within the confines of criminal justice. I shall leave aside matters such as the indictment by a Grand Jury and jury trials in general, the system of judicial elections in state criminal justice systems, and the appointment of judges and justices because of their political alliances rather than their experience and expertise as such. Suffice it to say, that such institutions and practices are not conducive to the administration of justice — with emphasis on *justice*. I shall call attention to those norms of criminal justice that have come to be included in the concept of “due process of law”, and more in particular to those that exemplify instances where the American criminal justice system is at odds with generally accepted international standards.

Those standards may legitimately be construed on basis of the principles of criminal justice that have been incorporated into the Statute of the International Criminal Court (ICC Statute) and the Rules of Procedure and Evidence (RPE) of the International Criminal Court (ICC). There are two compelling reasons why the ICC Statute and RPE should serve as the yardstick of internationally accepted standards of criminal justice. First, they represent a commendable mix of common law and civil law rules and practices of criminal procedure; and secondly, they were adopted by general agreement of drafters that represented a cross-section of the international community of states, including the United States.

As far as the first of these two considerations is concerned, Judge Antonio Cassese of the International Criminal Tribunal for the Former Yugoslavia (ICTY) noted that international criminal proceedings “result from the juxtaposition of elements of the two systems” by fusing “in a relatively felicitous manner, the adversarial or accusatorial system . . . with a number of significant features of the inquisitorial system.”¹ According to one analyst, the merging of elements of the accusatorial with common-law systems of criminal procedure reflects “a truly international convergence,”² while another described it as “the ‘melting pot’ of the most adequate and fortunate tendencies of criminal procedure stemming from all families of legal system . . .”³ Theo van Boven described the ICC Statute as “the result of a healthy cross-fertilization of several legal systems and cultures.”⁴

¹*Prosecutor v. Drazen Erdemović (Separate and Dissenting Opinion of Judge Cassese)*, Case no. IT-96-22-A. par. 4 (7 Oct. 1997); and see also Mireille Delmas-Marty, *The ICC and the Interaction of International and National Legal Systems*, in (eds.) Antonio Cassese, Paola Gaeta & John R.W.D. Jones, vol. 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1915, at 1924-34 (2002).

² Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in the International Context*, 75 INDIANA L.J. 809, 844 (2000).

³David Donat-Cattin, *Protection of Victims and Witnesses and their Participation in the Proceedings*, in (ed.) Otto Triffterer, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 869, 872 (1999).

⁴Theo van Boven, *The Position of Victims in the Statute of the International Criminal Court*, in (eds.) Herman A.M von Hebel, Johan G. Lammers & Julian A. Schukking, REFLECTIONS ON

As to the second reason for referring to the ICC Statute and RPE as a criterion of international standards of criminal justice, it should perhaps be noted that “general agreement” does not only reflect the consensus of States Parties to the ICC Statute; it includes views and concerns of all the States of the world that participated in the proceedings. If general agreement could not be reached, then of course only States Parties had the vote to resolve a matter. However, the basic principles of criminal justice were all adopted by general agreement.

Equal Protection of the Laws

The ICC Statute provides:

The application and interpretation of the law . . . [to be applied by the ICC] must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender. . . , age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.¹

The Fourteenth Amendment to the Constitution of the United States seemingly in similar vein condemns the denial “to any person . . . the equal protection of the laws.” However, equal protection of the laws applies within a particular state only, which in the United States is regarded as a separate and distinct sovereignty. In international law, though, the United States is a single sovereign entity, and since the federal Bill of Rights affords protection to an extremely limited range of basic rights and freedoms (civil and political rights), and indeed to the exclusion of some of the most basic (natural) rights of the individual, it does not from the international law perspective uphold equal protection of the laws in respect of those fundamental rights.

The United States has therefore been condemned on several occasions by the Inter-American Commission on Human Rights for not upholding the principle of equal protection of the laws as provided for in the 1948 *Inter-American Declaration on the Rights and Duties of Man*, which provides: “All persons are equal before the law and have the right and duties established in this Declaration, without distinction as to race, sex, language, creed or any

THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 77, 88 (1999); and see also Sylvia A. Fernández de Gurmendi, *Elaboration of the Rules of Procedure and Evidence*, in (ed.) Roy S. Lee, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 235, 256 (1999); Håkan Friman, *Procedural Law of the Criminal Court — An Introduction*, in (eds.) Flavia Lattanzi & William A. Schabas, vol. 2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 201, 202-03 (2004).

¹Statute of the International Criminal Court, art. 21(3), U.N. Doc. A/CONF.183/9 (17 July 1998), reprinted in 37 I.L.M. 1002 (1998).

other factor.”¹ The United States signed, but never ratified, the 1969 *American Convention on Human Rights* and it is therefore not subject to the provisions of the Convention or the jurisdiction of the Inter-American Court of Human. However, as a Members State of the Organization of American States, it is subject to investigations conducted by the Inter-American Commission on Human Rights based on the 1948 Declaration. Most of those cases dealt with the death penalty and juvenile executions in the United States.²

The Inter-American Commission decided repeatedly that juvenile executions violated the norm of equal justice laid down in Article II of the Declaration. The different arrangements that applied in the states in regard to the death penalty were the basis of this finding.³ Those arrangements did not make the imposition of the death penalty dependent on the nature of the crime, but on the place where the crime was committed, with perhaps only the side of a river where the act took place as the fortuitous divide between a penalty of life or death. The Commission on one occasion summarized its views as follows:

For the federal Government of the United States to leave the issue of the application of the death penalty to juveniles to the discretion of State officials results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not, primarily, on the nature of the crime committed, but on the location where it was committed. Ceding to state legislatures the determination of whether a juvenile may be executed is not of the same category as granting states the discretion to determine the age of majority for purposes of purchasing alcoholic beverages or consenting to matrimony. The failure of the federal government to preempt the states as regards this most fundamental right – the right to life – results in a pattern of legislative arbitrariness throughout the United States which results in arbitrary deprivation of life and inequality before the law, contrary to Articles I and II of the American Declaration of the Rights and Duties of Man, respectively.⁴

It might be noted that the applicants in this case,⁵ and several other cases,⁶ were executed while their complaints were pending before the Inter-American

¹*American Declaration of the Rights and Duties of Man*, art. II, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OES/Ser. L/V/I.4 Rev. (1965).

²*Roach & Pinkerton v. United States of America*, Case 9647, Inter-Am. C.H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1 (1986-87).

³*Id.*, at par. 41.

⁴*Id.*, at par. 63.

⁵See *Id.*, at par. 17.

⁶See *Napoleon Beazley v. United States of America*, Report No. 101/03, Case No. 12.412 (29 Dec. 2003); *Douglas Christopher Thomas v. United States of America*, Report No. 100/03, Case No. 12.240 (29 Dec. 2003); *Gary T. Graham, now known as Shaka Sankefa v. United States of America*, Report No. 97/03, Case No. 11.193 (29 Dec. 2003); see also *Cesar Fierro v. United States of America*, Report No. 99/03, Case No. 11.331 (29 Dec. 2003) (the Commission

Commission on Human Rights. That, in the opinion of the Commission, constituted a violation of the right of the applicants to life and to equal protection of the laws.¹

On 1 March 2005, the U.S. Supreme Court, in *Roper v. Simmons*, proclaimed juvenile executions to be unconstitutional.² It also in recent years decided that a mentally retarded juvenile cannot be sentenced to death,³ and that a life sentence without the option of parole violates the Eighth Amendment guarantee against cruel and unusual punishments.⁴ These judgments did not entirely resolve the absence of equal protection of the laws in the United States, since, for example, the rules applying to prosecution of juveniles as though they were adults and punishments that can be inflicted for serious crimes remained different in different states.⁵

The Burden of Proof

In ICC proceedings the burden of proof rests squarely on the Prosecution to prove the guilt of the accused.⁶ A conviction is only warranted if the Trial Chamber is convinced of the guilt of the accused beyond reasonable doubt.⁷ And, perhaps most importantly, the accused shall not have imposed on him or her “any reversal of the burden of proof or any onus of rebuttal.”⁸ In international law, the presumption of innocence requires that each fact on which an accused’s conviction is based must be proved beyond a reasonable

holding that should the applicant be executed, it would constitute an arbitrary deprivation of life).

¹Roach & Pinkerton (n. 8) par. 37(1).

²*Roper v. Simmons*, 543 U.S. 551 (2005). In *Stanford v Kentucky*, 492 U.S. 361 (1989), the U.S. Supreme Court had set the minimum age at which a juvenile may be sentenced to death at 16 years. On the same day, the U.S. Supreme Court decided that mentally retarded persons were not exempt from capital punishment (*Penry v. Lynaugh*, 492 U.S. 302 (1989)). The Court subsequently reversed this decision, holding that executions of the mentally retarded constituted cruel and unusual punishment and was therefore unconstitutional. *Atkins v. Virginia*, 536 U.S. 304 (2002).

³*Atkins v. Virginia* (n. 14).

⁴*Miller v. Alabama*, 567 U.S. _ (2012); earlier, the U.S. Supreme Court decided that the sentencing of a juvenile to imprisonment without the option of parole for a non-homicide crime violated the Eighth Amendment’s proscription of cruel and unusual punishments. *Graham v. Florida*, 560 U.S. _ (2010).

⁵See Johan D. van der Vyver, *Municipal Legal Obligations of States Parties to the Convention on the Rights of the Child: The South African Model*, 20 EMORY INT’L L. REV. 9, at 29-31 (2006).

⁶ICC Statute (n. 6) art. 66(2).

⁷*Id.*, art. 66(3).

⁸*Id.*, art. 67(1)(i); and see Håkan Friman, *Procedural Law of the Criminal Court* (An Introduction, in (eds.) Flavia Lattanzi & William A. Schabas, vol.2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 201, at 228-29 (2004); William K. Lietzau, *A General Introduction to The General Introduction: Animating Principles Behind the Elements of Crimes*, in (eds.) Flavia Lattanzi & William A. Schabas, vol. 2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 285, at 298 (2004).

doubt,¹ which means that “if one of the links is not proved beyond a reasonable doubt, the chain will not support a conviction.”² Such facts must be distinguished from “predicate facts” included in the evidence before a trial court and which has been defined as “those factual allegations that are not essential to prove the elements of the crime or the mode of responsibility alleged.”³

Many analysts schooled in the common-law traditions of criminal justice have had great difficulty in coming to grips with the provision in the ICC Statute that categorically excluded a reversal of the burden of proof. In common-law systems the burden of proof rests upon the accused to prove any special defenses he or she might rely upon, admittedly not beyond a reasonable doubt but merely on a balance of probabilities. Ilias Bantekas proceeded on the assumption that the defenses listed in the ICC Statute “result in the reversal of the burden of proof . . . from the prosecution to the accused.”⁴ Nothing could be further from the truth. Leila Sadat, more cautiously, found the provision in the ICC Statute excluding a reversal of the burden of proof “not to be desirable, given that at least certain defences are founded upon information which the accused is uniquely positioned to supply.”⁵ Elsewhere she stated that “certain defences, particularly those peculiarly within the control of the accused, should not be on the Prosecutor to disprove, but for the accused to establish, at least insofar as making out a prima facie case.”⁶

There is indeed nothing sinister in upholding the presumption of innocence consistently. If the accused raises a defense constituted by facts peculiarly within his or her knowledge, the Court may call upon the defense to present evidence to substantiate that defense,⁷ but the burden of proof remains upon the the Prosecution to prove the guilt of the accused, which would in this context require of the prosecution to rebut that evidence, above a reasonable doubt. In German law a distinction is accordingly made between *die objective Beweislast* that rests on the accused to produce evidence in support of facts peculiarly

¹*Prosecutor v. André Ntagerura & others*, Case No. ICTR-99-46-A, par. 175 (7 July 2007); and see also in the ICTY, *Prosecutor v. Vidoye Blagojević & Dragan Jokić (Judgment)*, Case No. IT-02-60-A, par. 226 (9 May 2007); *Prosecutor v. Sefer Halilović (Judgment)*, Case No. IT-01-48-A, par. 125 (16 Oct. 2007).

²*Prosecutor v. Ntagerura & others* (n. 21) par. 175.

³*Prosecutor v. Halilović* (n. 21), par. 112.

⁴Elias Bantekas, *Defences in International Criminal Law*, in (eds.) Dominic McGoldrick, Peter Rowe, & Eric Donnelly, *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 263, at 284 (2004); and see also *id.*, at 264-65, 275-76 (stating the accused bears the burden of proving the defense of duress).

⁵LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM*, 215 (2002).

⁶*Id.*, at 147.

⁷See Friman (n. 20) at 228-29; and see, for example, *Prosecutor v. Clément Kayishema & Obed Ruzindana*, Case No. ICTR-95-1-A, par. 113 (1 June 2001) (holding that a defendant raising the defense of an alibi must produce evidence about the accused’s whereabouts at the time the crime was committed but does not shoulder the burden of proof); and see also in support of this decision, *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, par. 172 (26 May 2003).

within his or her knowledge, and *die subjective Beweislast* which denoted the onus of proof in the sense of a burden of persuasion.¹ Drafters of the RPE furthermore enacted special precautions to facilitate the Prosecutor in disproving grounds of justification or exculpation relied upon by the Defense, namely by requiring reasonable prior notice to the Prosecution of such special defenses that will come up for adjudication at trial.²

The Rule against Double Jeopardy

The rule against double jeopardy is well established in national criminal justice systems, though the limitations of its application are not regulated uniformly in different jurisdictions.³ This applies in particular to national attitudes as to the *ne bis in idem* effect of foreign judgments.⁴

The principle, *nemo debet bis vexari pro una et eadem causa* (no one ought to be put twice to trouble over one and the same matter), addresses conflicts that might arise between the demands of retributive justice on the one hand, and fairness to persons accused of criminal conduct on the other. It leans toward the norms of fairness, even if that were to prejudice retribution for wrongdoing.⁵ Fairness to a person standing trial on criminal charges derives, in the double jeopardy context, from the fact that multiple trials could lead to harassment and may prejudice an accused with insufficient financial resources to defend him- or herself repeatedly on the same charges.⁶ The rule against double jeopardy also highlights the undesirability of one court interfering in decisions of another through *de novo* proceedings, since this could result in inconsistent decisions, and undermine “judicial economy” by overburdening available resources and facilities.⁷ It ultimately derives from the principle of

¹As to the distinction between the burden of adducing evidence and the burden of persuasion, see JULIANE KOKOTT, *THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL LAW: CIVIL AND COMMON LAW APPROACHES WITH SPECIAL REFERENCE TO THE GERMAN AND AMERICAN LEGAL SYSTEMS*, 151 (1998).

²Report of the Preparatory Commission for the International Criminal Court, *Finalized Draft Text of the Rules of Procedure and Evidence*, Rule 79, 80, U.N. Doc. PCNICC/2000/INF/3/Add.1 (12 July 2000) (hereafter “RPE”).

³See Christine Van den Wyngaert & Tom Ongena, *Ne bis in idem Principle, Including the Issue of Amnesty*, in (eds.) Antonio Cassese, Paola Gaeta & John R.W.D. Jones, vol. 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 705, at 707, 710-15 (2002).

⁴*Id.*, at 711-12; Immi Tallgren, *Ne bis in idem*, in (ed.) Otto Triffterer, *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 419, at 423-24 (1999); Ilias G. Anagnostopoulos, *Ne Bis in Idem in a European Context*, 16 *INT’L ENFORCEMENT L. REPORTER* 815, at par. 1.2 (2000).

⁵See Tallgren (n. 31), at 421.

⁶*Ibid.*

⁷*Ibid.*; and see the *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol. 1 (*Proceedings of the Preparatory Committee During March-April and August 1996*), par. 170, U.N. Doc. A/51/22 (1996) (noting that “the remark was made that the principle of non bis in idem was closely linked with the issue of complementarity”).

res iudicata, which signifies that “once a case has been decided by a final and valid judgment rendered by a competent tribunal, the same issue may not be disputed again between the same parties before a court of law.”¹

For purposes of the rule against double jeopardy, the ICC Statute makes a distinction between instances where the earlier trial occurred (respectively) (a) in the ICC; or (b) in any other court, which in the normal course of events would be a national court.

If the earlier trial occurred in the ICC, the rule against double jeopardy is based on *the suspect actually having been convicted or acquitted*.² The plea of *autrefois convict/acquit* can in this instance be entered (i) in the ICC itself, or (ii) in any other court. Where the plea of *autrefois convict/acquit* is entered in the ICC following an earlier trial in the ICC itself, the rule against double jeopardy excludes a further trial *based upon the same conduct*.³ Where the plea of *autrefois convict/acquit* is entered in a national court following an earlier trial in the ICC, the rule against double jeopardy excludes a further trial *for the same crime*.⁴

If the person concerned has been convicted or acquitted in the ICC, he or she cannot again be brought to trial *in the ICC* for any crime based on the same conduct. If the person concerned has been convicted or acquitted in the ICC, that person can again be brought to trial *in another court* for “a crime” other than the one for which he or she was convicted or acquitted in the ICC.⁵ The salience of this general provision will depend on the outcome of the preceding trial in the ICC. If the accused has been acquitted in the ICC, the rule stands to reason: the ICC only has jurisdiction over serious crimes under international law (genocide, crimes against humanity, war crimes, and — conditionally — the crime of aggression); and should a conviction for any of those crimes fail in the ICC, one would not want to exclude a prosecution in a national court for a crime other than the one for which he or she stood trial in the ICC (which would most likely be a “lesser crime”).⁶

If the earlier trial occurred in a court other than the ICC, the rule against double jeopardy differs in several respects from the above. The ICC Statute, first of all, does not in this instance deal with the propriety of a further trial in a national court. That is left up to the municipal criminal justice system of the State concerned. The ICC Statute does, on the other hand, have something to

¹*Jean-Bosco Barayagwiza v. The Prosecutor (Declaration of Judge Rafael Nieto-Navia)*, Case No ICTR-97-19-AR72, par. 20 (31 March 2000).

²See Tallgren (n 31), at 428 (noting that a person brought to trial in the ICC can again be prosecuted in a national court if the charges against the accused have been withdrawn in the ICC).

³ICC Statute, (n 6) art. 20(1).

⁴*Id.*, art. 20(2).

⁵*Ibid.*

⁶See Tallgren (n. 31), at 422 (emphasizing that the exceptions were inserted to avoid impunity); William A Schabas, *The Right to a Fair Trial*, in (eds.) Flavia Lattanzi & William A. Schabas, vol. 2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 241, at 261 (2004).

say about a subsequent trial in the ICC.¹ In this instance, the further trial is, as a general rule, precluded if the further trial is based *on the same conduct*. Excluding the exercise of jurisdiction by the ICC for the same conduct is conditional upon the trial in the national court having been conducted in good faith and was not a sham trial intended to shield the suspect from criminal responsibility for any of the crimes within the jurisdiction of the ICC, or was not conducted independently or impartially in accordance with the norms of due process recognized by international law *and* the national trial was conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the accused to justice (both requirements must be present). Emphasis in this context on “the proceedings” rather than a conviction or acquittal has far-reaching consequences. If, for example, proceedings in the other court commenced but it was subsequently decided not to proceed because of insufficient evidence, or because a prosecution would not serve the interest of justice, the matter would remain inadmissible in the ICC.²

The respective Statutes of the ICTY and ICTR proclaiming the principle of *ne bis in idem* precluded as a general rule a second trial for “acts constituting serious violations of international humanitarian law under the present Statute,” but made allowance for double jeopardy in cases where the accused had been *tried* in a national court for “an ordinary crime,”³ or where the proceedings in the national court were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not “diligently” prosecuted.⁴ The ICC Statute does not make this distinction between the international crime and the “ordinary crime”.⁵ Concerns were expressed regarding classifying crimes into those that are more and those that are less “serious” and delegations at the Rome Conference could in the end not come to an agreement as to a precise definition of “ordinary crimes”.⁶

¹ICC Statute (n. 6) art. 20(3); and see also art. 17(1)(c).

²Tallgren (n. 31), at 431.

³“Ordinary crime” in this context denotes an offense under the criminal law of the national state other than the international crime with which the accused is being charged in the International Criminal Tribunal: for example, if the accused was charged, and convicted or acquitted, in the national court for murder and is now being prosecuted in the International Criminal Tribunal for crimes against humanity of which the same act of murder constitutes part, then the plea of *autrefois convict/acquit* will not be upheld by the International Criminal Tribunal.

⁴Statute of the International Criminal Tribunal, art. 21, contained in the annex of the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, reprinted in 32 I.L.M. 1192 (1993) (hereafter ICTY Statute); *Statute of the International Tribunal for Rwanda*, art. 21, contained in the annex of S.C. Res. 955 (1994), reprinted in 33 I.L.M. 1602 (1994) (hereafter ICTR Statute); and see Erik Møse, *Impact of Human Rights Conventions on the ad hoc Tribunals*, in HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN: ESSAYS IN HONOUR OF ASBJØRN EIDE 179, at 203-04 (2003).

⁵See Tallgren (n 31) at 425, 429-30.

⁶See Christine Van den Wyngaert & Tom Ongena, *Ne bis in idem Principle, Including the Issue of Amnesty*, in (eds.) Antonio Cassese, Paola Gaeta & John R.W.D. Jones, vol. 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 705, at 707, 725-26. (2002).

The distinction between precluding a subsequent trial *for the same conduct* and doing so *for the same crime* is of fundamental importance. Defining the rule against double jeopardy as mandating that “no person shall be prosecuted for the same crime” applies, for example, in the United States, but not in the criminal justice system to be applied by the ICC.¹

American courts have interpreted the federal structure of the United States to afford to different states (provinces) as against one another, and to the union as against a state or a state as against the union, separate sovereign status. The “dual sovereignty” doctrine has led the U.S. Supreme Court to decide that successive prosecutions by two states for the same conduct are not barred by the rule against double jeopardy,² and that prosecution in the federal courts is not precluded by the conviction or acquittal of the same accused for the same conduct, or *vice versa*.³

The dual sovereignty doctrine is founded on the common-law conception of crime as an offence against the sovereignty of the government. When a defendant in a single act violates the “peace and dignity” of two sovereigns by breaking the laws of each, he has committed two distinct “offences”.⁴

Perhaps the most notorious case in which the double sovereignty doctrine was applied was the prosecution and conviction of police officers in a federal court for the assault of one Rodney King (which was caught on tape by a bystander) following their acquittal for the same conduct in a state court.⁵

The United States accordingly does not uphold the principle of *ne bis in idem* as commonly understood in other national criminal justice systems and in international law. Permitting duplicate prosecutions in different court systems based on the same cluster of facts derived from two highly contestable assumptions; (a) that the 50 states and the national federation constitute separate sovereignties, and (b) that criminal conduct constitutes offences against the sovereignty of the government. There are indeed a set of crimes which are directed against the sovereignty of a state, such as high treason and sedition, but criminalization of for example theft and murder is designed to

¹See Jordan J. Paust, *Its No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657, at 662-63 (1997); and as to the rule against double jeopardy in the United States in general, see Carl-Friedrich Stuckenberg, *Multiplicity of Offences: Concursum Delictorum*, in (eds.) Horst Fisher, Claus Kreß & Sascha Rold Lüder, INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 559, at 561 note 4 (2001).

²*Heath v. Alabama*, 474 U.S. 82, at 88 (1985).

³*United States v. Wheeler*, 435 U.S. 313, at 320 (1978); and see also *United States v. Lanza*, 260 U.S. 377, at 382 (1922); *Westfall v. United States*, 274 U.S. 256, at 258 (1927); *Bantkus v. Illinois*, 359 U.S. 121, at 128-29 (1959); *Abbate v. United States*, 359 U.S. 187, at 193-94 (1959).

⁴*Heath v. Alabama* (n. 48) at 382.

⁵The incident constituted the basis of the decision in *Kroon v. United States*, 518 U.S. 81 (1996) — though application of the dual sovereignty doctrine was not in dispute in that appeal.

protect the right to property and to life (respectively) of the people and not the sovereignty of the State.

One must also distinguish the rule against double jeopardy from the rules of law regulating cumulative convictions. The rule against double jeopardy prohibits consecutive prosecutions in separate trials for crimes emanating from the same cluster of facts, while cumulative convictions apply to the judgment of a court a single trial involving multiple offences deriving from the same cluster of facts. In American jurisprudence, the rule against cumulative convictions has been encapsulated in the so-called “Blockburger test”:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of an additional fact which the other does not.¹

In the United States, the test was initially stated in the context of the rule against double jeopardy: It was thus decided:

A single act may be an offence against two statutes: and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.²

Or again:

[W]here ... a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence.³

Although the Court was here dealing with consecutive trials, the same principle will of course apply to multiple convictions in a single trial for a

¹*Blockburger v. United States*, 284 U.S. 299, at 304 (1932); and see *United States v. Dixon*, 509 U.S. 688, 696 (1993); Carl-Friedrich Stuckenberg, *Multiplicity of Offences: Concursum Delictorum*, in (eds.) Horst Fisher, Claus Kreß & Sascha Rold Lüder, *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS* 559, at 581 (2001).

²*Morey v. Commonwealth*, 108 Mass. 433, at 434 (1871); and see; Stuckenberg (n. 52), at 580-81.

³*In re Hans Nielsen*, 131 U.S. 176, 188 (1888); and see also, for example, *Bell v. United States*, 349 U.S. 81 (1955) (transporting two women at the same time and in the same vehicle for immoral purposes); *Brown v. Ohio*, 432 U.S. 161, at 168 (auto theft and joyriding); *Harris v. Oklahoma*, 433 U.S. 682 (1977); *Payne v. Virginia*, 468 U.S. 1062 (1984) (murder and robbery).

greater and lesser included offence. In any event, the Blockburger test is in conformity with international law as exemplified by decisions of the ICTY.¹

Cruel, Inhuman or Degrading Treatment or Punishment

The *International Covenant on Civil and Political Rights*² and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*³ prohibit “cruel, inhuman or degrading treatment or punishment.” By contrast, the Eighth Amendment to the Constitution of the United States outlaws “cruel and unusual punishments” only. Punishments that are cruel, inhuman or degrading are not unconstitutional, provided that such punishments are not “unusual”.

When the United States ratified the *Covenant on Civil and Political Rights* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, it included in its instruments of ratification reservations to uphold the constitutional proscription of “cruel and unusual punishments” as interpreted by the U.S. Supreme Court instead of the international law concept of cruel, inhuman or degrading punishments.⁴ This was done in conformity with the United States’ ratification policy, which was summarized by Louis Henkin as follows:

1. The United States will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the United States Constitution.
2. United States adherence to an international human rights treaty should not effect — or promise — change in existing U.S. law or practice.
3. The United States will not submit to the jurisdiction of the International Court of Justice to decide disputes as to the interpretation or application of human rights conventions.
4. Every human rights’ treaty to which the United States adheres should be subject to a "federalism clause" so that the United States could leave implementation of the convention largely to the states.

¹See, for example, *Prosecutor v. Zoran Kupreškić & others*, Case No. IT-95-16-T, par. 682 (14 Jan. 2000); *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, par. 502-03 (15 March 2002); *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, par. 265 (29 Nov. 2002).

²International Covenant on Civil and Political Rights, art. 7, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereafter ICCPR].

³Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 16.1., G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

⁴138 Cong. Rec. S4781-01 (daily ed., April 2, 1992), Reservation I(3); Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990), Reservation I(1).

5. Every international human rights agreement should be "non-self-executing."¹

The American criminal justice system deviates in many respects from principles that have come to be accepted as sentencing directives in enlightened systems of law. In the United States, almost exclusive emphasis is placed, for sentencing purposes, on the gravity of the crime.² In *Solem v. Helms*, it was decided that proportionality of a punishment to the offence is determined with three criteria in mind: "(i) the gravity of the offence and the harshness of the penalty; (ii) the sentences imposed on other criminals [for offences of the same gravity] in the same jurisdiction; and (iii) the sentences imposed for the same crime in other jurisdictions."³ The essence of the penal policy in *Solem* was subsequently overruled in *Harmelin v. Michigan*, where Justice Scalia decided that "the Eighth Amendment contains no proportionality guarantee";⁴ that taking into account mitigating factors for sentencing purposes "has no support in the text and history of the Eighth Amendment";⁵ and "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."⁶ Individualization of sentencing to fit the crime, the criminal, and the interests of society, which have become the international standard of penology, is thus not part of the American sentencing philosophy.

In recent times, there has been a clear trend in the world toward the abolition of the death penalty.⁷ William Schabas has noted that the number of States that retained capital punishment "have ... dwindled to a point where it is no longer conscionable for even the most heinous criminals to be subjected to a sanction which offends the dignity of the international community."⁸ In 1971, the General Assembly of the United Nations adopted a Resolution proclaiming that "the main objective to be pursued" in order to fully guarantee the right to

¹L. Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM.J.INT'L L. 341, at 341 (1995).

²See, e.g., *Weems v. United States*, 217 U.S. 349, 367 (1910) (holding that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offence").

³*Solem v. Helms*, 463 U.S. 277, 292 (1983).

⁴*Harmelin v. Michigan* 501 U.S. 957, 965 (1991).

⁵*Id.* at 994.

⁶*Id.* at 994-95.

⁷The Philippines, for example, abolished the death penalty in June 2006. See also Joan Fitzpatrick & Alice Miller, *International Standards on the Death Penalty: Shifting Discours*, 19 BROOK. J. INT'L L. 273, at 346 (1993) (noting that "international surveys ... continue to evidence gradual abolitionist trends, mixed with continued retention and even expansion in some regions"); LILIAN CHENWI, *TOWARDS THE ABOLITION OF THE DEATH PENALTY IN AFRICA: A HUMAN RIGHTS PERSPECTIVE*, 29-31. Pretoria Univ. Law Press (2007) (Recording abolition of the death penalty in Africa, noting that 13 African countries have abolished the death penalty for all crimes, 19 have abolished the death penalty in practice, while 21 African States still retained the death penalty).

⁸William A. Schabas, *War Crimes, Crimes against Humanity and the Death Penalty*, 60 ALB. L. REV. 733, at 770 (1997); and see also LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM*, 169 (2002).

life provided for in Article 3 of the *Universal Declaration of Human Rights*, was “that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing the punishment in all countries.”¹ A 1984 Resolution of the Economic and Social Council guaranteeing protection of the rights of those facing the death penalty proclaimed that the Resolution “shall not be invoked to delay or to prevent the abolition of capital punishment.”² In 1989, a Protocol was added to the *International Covenant on Civil and Political Rights* aiming at the abolition of the death penalty.³ Since 1997, the United Nations Human Rights Commission Commission (now the Human Rights Council) has adopted annual resolutions proclaiming that abolition of the death penalty will contribute to the enhancement of human dignity and to the progressive development of human rights, and calling on States that have not yet abolished the death penalty to establish a moratorium on all executions with a view to abolishing the death penalty.⁴

On the regional level, the abolitionist trend was evidenced by Protocol 6 of 1983 to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, aimed at the abolition of the death penalty.⁵ Protocol 6 did not exclude the death penalty in respect of acts committed in time of war or of an imminent threat of war, and was consequently succeeded in 2002 by *Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, which abolished the death penalty completely and in all circumstances.⁶ Protocol 13 prohibits derogation from its provisions,⁷ and

¹G.A. Res. 2857 (XXVI) of 20 December 1971, par. 3, 26 U.N. GAOR Supp. (No. 29) at 94, U.N. Doc. A/8429 (1971).

²E.S.C. Res. 1984/50 of 25 May 1984, par. 3, 1 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984).

³Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty, U.N. G.A. Res. 44/128 of 15 December 1989, 44 U.N. GAOR Supp. (No. 49) at 206, U.N. Doc. A/44/49 (1989).

⁴Resolution 1997/12 of 3 April 1997, in COMMISSION ON HUMAN RIGHTS REPORT ON THE FIFTY-THIRD SESSION (10 MARCH - 18 APRIL 1997), ESCOR Supp. (No. 3) at 69, U.N. Doc. E/CN.4/1997/150 (1997); Resolution 1998/8 of 3 April 1998, in COMMISSION ON HUMAN RIGHTS REPORT ON THE FIFTY-FOURTH SESSION (16 MARCH - 24 APRIL 1998), ESCOR Supp. (No. 3) at 56, U.N. Doc. E/CN.4/1998/177 (1998); Resolution 1998/61 of 28 April 1999, in COMMISSION ON HUMAN RIGHTS REPORT ON THE FIFTY-FIFTH SESSION (22 MARCH - 30 APRIL 1999); ESCOR Supp. (No. 3) at 202, U.N. Doc. E/CN.4/1999/167 (1999); Resolution 2000/65 of 26 April 2000, in COMMISSION ON HUMAN RIGHTS REPORT ON THE FIFTY-SIXTH SESSION (20 MARCH - 28 APRIL 2000), ESCOR Supp. (No. 3) at 278, U.N. Doc. E/CN.4/2000/167 (2000); ESCOR Supp. (No. 3) at 202, U.N. Doc. E/CN.4/1999/167 (1999); Resolution 2001/68 of 25 April 2001, in COMMISSION ON HUMAN RIGHTS REPORT ON THE FIFTY-SEVENTH SESSION (19 MARCH - 27 APRIL 2001), ESCOR Supp. (No. 3) at 287, U.N. Doc. E/CN.4/2001/167 (2001), etc.

⁵Protocol No. 6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty (as amended by Protocol No. 11), E.T.S. No. 114.

⁶Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, E.T.S. No. 187 (2002).

⁷*Id.*, art. 2.

also excludes reservations to any of its provisions.¹ The *Charter of Fundamental Rights of the European Union*, adopted by the Council of Europe at Nice on December 7, 2000, which became binding on December 1, 2009, similarly provides that “[n]o one shall be condemned to the death penalty, or executed.”²

The *American Convention on Human Rights* of 1968 prohibits extending application of the death penalty to crimes to which it did not apply at the date of ratification of the Convention by a particular State,³ and further provides that capital punishment shall not be reinstated in States where it has been abolished.⁴ In 1990, a Protocol was adopted by the Organization of American States to altogether abolish the death penalty.⁵

However, at the national level total abolition of capital punishment is not likely in the foreseeable future.⁶ As far as the United States is concerned, 17 of the states do not have an enforceable death penalty, but two of those (Connecticut and New Mexico) retained the enforceability of a death sentence for offences committed before capital punishment was abolished. This, of course, violates the principle of *lex mitior*, which provides that if a lighter sentence for a particular crime were to be enacted after the commission of that crime by an accused before the court but before sentencing, the accused should be given the benefit of the lighter sentence.⁷ Nevertheless, with 33 states still allowing capital punishment, it still is a long cry in the dark before the U.S. Supreme Court can decide that it has become an “unusual punishment” in the United States. Life sentences without the option of parole are also still deeply imbedded in the American criminal justice system.

It might also be noted that while American jurisprudence upholds the principle of no punishment without a crime (*nulla crimen sine lege*), it does not insist on a precise circumscription of punishments applicable to a particular offence (*nulla poena sine lege*).⁸ It has indeed been held in the United States that in the event of an infringement of the law of nations, “the degree of

¹*Id.*, art. 3.

²Charter of Fundamental Rights of the European Union, art. 2(2), 2000/C 364/01.

³American Convention on Human Rights, art. 4(2), 1144 U.N.T.S., O.A.S.T.S. No. 36 [hereafter ACHR].

⁴*Id.*, art. 4(3).

⁵Protocol to the American Convention on Human Rights to Abolish the Death Penalty, reprinted in 29 I.L.M. 1447.

⁶See Fitzpatrick & Miller, (n. 65) at 366.

⁷See ICCPR (n.56) art.15(1); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 7(2), E.T.S. 5, in 1 EUR. Y.B. 316; 213 U.N.T.S. 221; ACHR (n. 76) art. 9.

⁸See *Scharf & Hansen v. United States*, 156 U.S. 51, at 88 (1895) (stating that *nullum crimen, nullum poena sine lege* means that “[u]nless there be a violation of law pronounced, and this by a constant and responsible tribunal, there is no crime, and can be no punishment”); *United States v. Walker*, 514 F. Supp. 294, at 316 (E.D. La., 1981) (holding that a person can only be convicted and punished for acts committed “if the state beforehand has made the commission of those acts a crime and authorized punishment to be imposed ...”).

punishment to be inflicted, upon conviction,” rests “in the breast of the court.”¹

Juvenile Justice

I could not think of a single commendation relating to the juvenile justice system of the United States I might share with the reader. The American juvenile justice system is, to say the least, quite disgusting. This state of affairs derives mainly from a practice in the United States of trying and sentencing a juvenile offender in certain circumstances as an adult.²

The upper age for a person to be tried in a juvenile court ranges from 15 (in 3 states), 16 (in 10 states) and 17 (in 37 states and in federal courts). All the states constituting the United States of America, as well as the American federal criminal justice system, make provision for the prosecution of juveniles as though they were adults. Different rules apply in different states as to the offenses for which this can be done, the procedure to be followed in such cases, and the age upon which a juvenile may be prosecuted as an adult. In some states, a juvenile court decides whether a juvenile offender is to be tried as an adult, while this occurs automatically in other states in cases of certain serious offences. The most common age restriction for trying a juvenile as an adult is 14 years but in states such as Kansas and Vermont the minimum age is as low as 10 years. There are currently altogether 22 states and the District of Columbia that have no minimum age upon which a juvenile could be transferred for trial from the juvenile court to a regular criminal court.

In some states the decision to try a juvenile offender as an adult is almost exclusively based on the nature of the crime and in disregard of the reduced culpability of the accused. Sentencing in some states is also exclusively based on the nature of the crime and not so much on the culpability of the accused. In addition, there is the institution of minimum sentences for juvenile offenders. Juveniles are also treated as adults at a young age for purposes of detention.

In November 2001, a 12 year old American boy, Christopher Pittman, shot and killed his grandparents, Joe Pittman (66 years of age) and Joy Pittman (62 years of age).³ On March 22, 2005, when he was 15 years of age, Christopher was convicted by a jury in Charlestown, South Carolina of the dual murders

¹*United States v. Liddle*, 26 F.Cas. 936, at 938 (2 Wash. C.C., 1808). This case concerned an infringement of article 28 of An Act for the Punishment of Certain Crimes against the United States of 30 April 1790 (1 STAT. 112, at 118), which rendered it a crime to “assault, strike, wound, [or] imprison ... an ambassador or other public minister, ... or in any other manner infract the law of nations...). The defendant was convicted of an infraction of the law of nations. Note, though, that Article 28 did prescribe certain punishments and it is quite possible that the discretion of the court may have been intended to be exercised within the confines of the prescribed sentences.

²See in general PATRICK GRIFFIN & OTHERS, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING (2012) available at <http://www.ncjrs.gov/pdffiles/1/232434.pdf>.

³*State v. Pittman*, 647 S.E.2d 144, 151 (S.C. 2007).

and sentenced to serve two terms of 30 years in prison on the two charges.¹ Christopher was tried as though he were an adult,² and 30 years imprisonment is the minimum sentence prescribed by the law of South Carolina for murder.³ The Court ordered that the two sentences were to run concurrently.⁴ Christopher had to serve the first two years of his sentence in a prison for juveniles, and when he turned 17 he was to be transferred to an adult penitentiary.⁵

Closer scrutiny of the facts in *Pittman* will reveal that the accused at the time of the crime on a regular basis used an anti-depression drug, called Zoloft,⁶ which, if taken by youngsters, could, according to expert evidence, create an inclination to commit suicide and a tendency toward violent acts.⁷ The jury rejected a plea of “involuntary intoxication” based on this evidence,⁸ holding that in view of his conduct at the time of the offence and thereafter the accused was capable of distinguishing between the right and wrong of his conduct.⁹ This outcome does not reflect reduced culpability for youthful offenders. Evidence was also produced to show that Christopher had a boisterous life history.¹⁰ He grew up in central Florida in the care of his father after the mother left them (the mother being the daughter of the murdered couple).¹¹ At one stage he ran away from home, and after an attempted suicide he ended up in a psychiatric hospital.¹² He subsequently moved in with his maternal grandparents (the deceased) in South Carolina.¹³ The day before the killings, he was involved in a brawl on the school bus with a fellow learner, provoking a strong reprimand from the grandparents.¹⁴ Except for the last-mentioned bit of evidence, which was considered as a possible motive for the murders, the rest of the background history did not seem to feature in the verdict of, or sentence imposed by, the Court.

The sentence imposed in the case of Christopher Pittman should not be considered as something out of the ordinary. In dismissing an appeal against that sentence,¹⁵ the Court of General Sessions of South Carolina cited instances where a 13 year old defendant received a sentence of 100 years

¹*Id.*, at 153.

²*Id.* at 161.

³*Id.* at 153.

⁴*Ibid.*

⁵See Kate Randall, *30 Years in Prison for Crime Committed by 12-year-old*, WORLD SOCIALIST WEBSITE, Feb. 19, 2005, available at <http://www.wsws.org/articles/2005/feb2005/juve-f19.shtml>.

⁶*State v. Pittman* (n.84) at 152.

⁷*Id.* at 170-71.

⁸*Ibid.*

⁹*Id.* at 154.

¹⁰*Id.* at 152.

¹¹*Ibid.*

¹²*Id.* at 152.

¹³*Ibid.*

¹⁴*Id.*

¹⁵*State v. Pittman*, 2005 W. L. 831970 (S.C.Gen.Sess.).

imprisonment,¹ where a 15 year old defendant was sentenced to life imprisonment without parole,² where a defendant between the ages of 14 and 15 received a prison sentence of 91½ years,³ where a 13 year old received a mandatory life sentence,⁴ and where a 16 year old defendant received a life sentence without parole plus 60 years.⁵ The ages cited here apply in all instances to the convicted persons at the time the crime was committed. In the period 1976 to 2003, 22 persons were actually executed for crimes they committed while they were juveniles (21 of those having been 17 and one 16 years of age at the time the crime was committed, 11 being black, 11 being white, and one Latino).⁶

Some state courts seem more inclined than others to consider the culpability of juvenile offenders when it comes to sentencing. In *Workman v. Commonwealth*, the Kentucky Supreme Court held that life imprisonment without the option of parole of two 14 year old children convicted of rape “shocks the general conscience of society today and is intolerable to fundamental fairness.”⁷ In *Naovarath v. State*, the Nevada Supreme Court similarly condemned a life sentence imposed on a 13 year old child convicted of murder, holding that “[c]hildren are and should be judged by different standards from those imposed upon mature adults.”⁸ In *State v. Massey*, the Washington State Court of Appeal, by contrast, confirmed the life sentence of a 13-year-old convicted of first degree murder, holding that in determining “whether in view of contemporary standards of elementary decency, the punishment is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness,” the convicted person’s age is not an element to be considered; the inquiry must instead be confined to “a balance between the crime and the sentence imposed.”⁹ The Court confirmed that “there is no cause to create a distinction between a juvenile and an adult who are sentenced to life without parole for first degree aggravated murder.”¹⁰

As noted above, the U.S. Supreme Court has in recent times declared the death penalty and life sentences without parole in the case of juvenile offenders to be unconstitutional. However, these commendable reform measures have not altogether eliminated the absence of due regard in the United States for reduced

¹ *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir. 1999).

² *Harris v. Wright*, 93 F.3d 581 (9th Cir. 1996)). See also *State v. Pilcher*, 27085 (La. App. 2 Cir. 5/10/95); 655 So.2d 636.

³ *State v. Ira*, 2002-NCMA-037, 132 N.M. 8, 43 P.3d 359).

⁴ *State v. Green*, 502 S.E.2d 819 (N.C. 1998).

⁵ *State v. Taylor*, 1996 W.L. 580997 (Tenn. Crim. App. 1996).

⁶ Death Penalty Information Center, *The U.S. in Mid-Year 2012*, available at http://en.Wikipedia.org/wiki/List_of_juvenile_offendersexecuted_in_the_United_States

⁷ *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968).

⁸ *Naovarath v. State*, 779 P.2d 944, 946-47 (Nev. 1989).

⁹ *State v. Massey*, 803 P.2d 340, 348 (Wash. Ct. App. 1990).

¹⁰ *Ibid.*

culpability and a lower standard of blameworthiness when it comes to conviction and sentencing of juveniles *per se*.¹

Defiance of International Commitments

The United States on November 24, 1969 ratified the *Vienna Convention on Consular Relations* of 24 April 1963 (VCCR),² which in terms of Article 36 places an obligation on States Parties that arrested a foreign national or has committed a foreign national to prison or custody pending trial, or has detained a foreign national in any other way, (a) upon the request of the detainee to inform the consular post of the State of nationality of the detainee, without delay, of his or her arrest or detention; (b) to forward, without delay, any correspondence addressed by the person arrested, in prison, custody or detention to the consular post of his or her State of nationality; and most importantly (c) to inform the person arrested, in prison, custody or detention, without delay, of his or her rights under this provision. The United States as a matter of course — it would seem — does not comply with these obligations, notably by not informing foreigners arrested, or in prison, custody or detention of their rights under Article 36. It has consequently been condemned on several occasions by the Inter-American Commission of Human Rights for non-compliance with Article 36. The Commission on one occasion noted that “a heightened level of scrutiny” is called for in all capital cases, that non-compliance with the VCCR constitutes a violation of the rules and principles of the due process of law, and that failure to comply with the VCCR amounted to arbitrary deprivation of the right to life of the convicted person.³

The United States has also been condemned no less than three times by the International Court of Justice (ICJ) for failure to comply with Article 36 of the VCCR, once in regard to a national of Paraguay (Angel Francisco Breard),⁴ once in regard to two German nationals (the brothers, Walter and Karl LaGrand),⁵ and in the most recent case involving 52 Mexicans (Avena and 51 other Mexicans).⁶ In the first two cases, the United States, with the support of

¹See in general Johan D. van der Vyver, *International Standards for the Promotion and Protection of Children's Rights: American and South African Dimensions*, 15 BUFFALO HUM. RTS. L. REV. 81 (2009).

²*Vienna Convention on Consular Relations*, 596 U.N.T.S. 261 (entered into force on 18 March 1967).

³*Case of Ramón Martínez Villareal*, Inter-American Commission, Report No. 52/42, Case No. 11.753, United States, pars. 51, 52, 70 (10 Oct. 2002); see also *Case of Cesar Fierro*, Inter-American Commission, Report No. 99/03, Case No. 11.331, United States (29 Dec. 2003) (noting that should the convicted person be executed, it would constitute an arbitrary deprivation of his right to life).

⁴*Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States)*, 1998 I.C.J. 247 (9 April 1998).

⁵*LaGrand Case (Germany v. United States of America) (Judgment)*, 2001 I.C.J. 465 (27 June 2001).

⁶*Avena and Other Mexican Nationals (Mexico v. The United States of America)*, 2004 I.C.J. 12 (31 March 2004).

the U.S. Supreme Court,¹ declined to support provisional measures ordered by the ICJ not to proceed with executions of the convicted persons pending a final decision of the Court.² The Paraguayan citizen and one of the German nationals (Walter LaGrand) were executed while their respective cases were pending before the ICJ, and the other German national (Karl LaGrand) was executed on 28 June 2001, the day after judgment was given against the United States for non-compliance with Article 36 of the VCCR.³ These cases came before the ICJ pursuant to the *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes* of 24 April 1963⁴ that afforded *ipso facto* jurisdiction to the ICJ to resolve disputes between States Parties to the VCCR and which was ratified by the United States on November 24, 1969.

In the *Paraguayan Case*, the ICJ in preliminary proceedings called on the United States to “take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.”⁵ The convicted person thereupon filed a petition for an original writ of *habeas corpus* and a stay application to “enforce” the ICJ ruling. In *Breard v. Green*, the U.S. Supreme Court decided, by 6 votes to 3, that the Applicant was not entitled to the relief sought, because he procedurally defaulted his claim under the VCCR, “if any”,⁶ by failing to raise non-compliance by the United States with the Convention in the state courts.⁷ Though judgments of the ICJ, according to the judgment, deserve “respectful consideration,” the U.S. Supreme Court upheld the procedural default rule of the state of Virginia, because, in its view, “absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.”⁸ The fact that the convicted person was unaware of his rights under the VCCR and, in direct violation of the Convention, was not informed of those rights, was seemingly for purposes of the case neither here nor there. As noted by one analyst of the judgment:

It was not that the Supreme Court found international law to be irrelevant; rather, it found its own view of international law to be

¹*Breard v. Greene* (n. 116); and see also *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999).

²*Paraguay v. United States* (n. 113); *LaGrand Case (Germany v United States of America) (Request for the Indication of Provisional Measures)*, 1999 I.C.J. 9 (3 March 1999).

³*LaGrand Case (Germany v United States of America)* (n.114) at par. 127(4) (the ICJ deciding, by 14 votes to 1, that by not permitting the review and reconsideration of the conviction and sentence of the LaGrand brothers after having failed to comply with the provisions of Article 36(1) of the CVCR, the United States breached its obligations to the Federal Republic of Germany and the LaGrand brothers).

⁴Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 596 U.N.T.S. 487 (entered into force on 19 March 1967).

⁵*Paraguay v. United States* (n. 113) at par. 41.

⁶*Breard v. Green* (n. 116) at 375; and see also *id.*, at 376 (stating that the VCCR “arguably” confers on an individual the right to consular assistance following arrest).

⁷*Id.*, at 375.

⁸*Ibid.*

more relevant than that of the International Court [of Justice] — so much that it was not even willing to await a final judgment.¹

The Governor of the state of Virginia Jim Gilmore declined a request of Secretary of State Madeleine Albright for a stay of execution,² and Breard was executed before the ICJ could decide the case on its merits.

Walter LaGrand and Karl LaGrand were convicted of an attempted bank robbery in Arizona in which a bank employee was killed and another seriously injured. They were sentenced to death, again without having been informed of their rights under the VCCR. The execution of Walter LaGrand was scheduled for 3 March 1999.³ Germany consequently brought suit against the United States in the ICJ on that day. The ICJ, acting pursuant to Article 41 of its Statute, issued a provisional measure, as a matter of great urgency, stating: “The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending a final decision in these proceedings”⁴ The German Government on the same day (March 3), and only two hours before Walter LaGrand’s scheduled execution, sought a preliminary injunction in the U.S. Supreme Court against the Government of the United States and the Governor of Arizona, but the Supreme Court refused to exercise jurisdiction in the case, based on “tardiness of the pleas and the jurisdictional barriers”.⁵ Walter LaGrand was executed on that very same day. The ICJ subsequently found that provisional orders issued under Article 41 of the Statute of the ICJ do have binding effect,⁶ that the United States had not complied with its order of 3 March 1999,⁷ and (by 13 votes to 2) that by failing to take all measures at its disposal to ensure that Walter LaGrand not be executed, the United States breached the obligation incumbent on it under the provisional order of March 3, 1999.⁸

Prominent American scholars agreed that provisional measures issued by the ICJ under Article 41 are binding, referring mostly to Article 94(2) of the U.N. Charter that speaks of “the obligations incumbent upon . . . [any party to

¹Alex Glashauser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, at 68-69 (2005).

²See Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 AM. J. INT’L L. 666, at 674-75 (1998); Carlos Manuel Vasquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT’L L. 683, at 684 (1998); Joshua J. Newcomer, *Messing with Texas? Why President Bush’s Memorandum Order Trumps State Court Procedure*, 79 TEMPLE L. REV. 1029, at 1035 (2006).

³Karl LaGrand was not to be executed on that day, because he was indisposed and had to be cured of his illness before he could be killed.

⁴*LaGrand Case (Germany v. United States of America) (Request for the Indication of Provisional Measures)*, 1999 I.C.J. 9, at par. 26 (3 March 1999).

⁵*Federal Republic of Germany v. United States* (n. 116). The Government of the United States enjoyed sovereign immunity and a foreign Government lacked standing to assert a claim against a state.

⁶*Germany v United States of America, supra* (n. 114) at pars. 102-09.

⁷*Id.*, at par. 115.

⁸*Id.*, at par. 128(5).

a case] under a judgment rendered by the Court”¹ One analyst stated the norm that applied to the provisional measure proclaimed by the ICJ in regard to the pending execution of Angel Breard in cautious diplomatic terms:

An executive order postponing the execution of Angel Breard would have fallen, in my view, well within a fair, even modest, understanding of the President’s authority to execute treaties, combined with his foreign affairs power.²

The ICJ also addressed the relevance of the procedural default rule which had been applied in the *Case of Breard*. It decided in essence that the rule did not as such violate Article 36 of the VCCR, but that its application in cases where the national authorities failed to inform the accused “without delay” of his rights under the Convention — thereby preventing him from seeking consular assistance and precluding Germany, on a timely basis, from retaining private counsel for the accused and otherwise assisting him in his defense — did constitute a violation of the Convention.³ Following the judgment on the merits, the U.S. federal Government requested the Governor of Virginia to grant a stay of execution. The Governor refused and Karl LaGrand was executed the following day (June 28, 2001).

In the *LaGrand Case*, Germany sought assurances that the United States will not in future repeat its unlawful acts of not informing a German national accused of a serious crime of his or her rights under the VCCR. The United States tendered its intention of complying with the Convention, and this was accepted by the ICJ as satisfying the German request.⁴ Efforts of the United States included the publication of a brochure in January 1998 entitled: *Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*. The United States also produced a small reference card designed to be carried by individual arresting officers. It testified in the *LaGrand Case* that 60 000 copies of the brochure and 400 000 copies of the pocket card had been distributed. The ICJ decided in this regard and in response to that assurance:

¹Charter of the United Nations, art. 94(2), 1976 Y.B.U.N. 1043; 59 STAT. 1031; T.S. No. 993; reprinted in 3 BEVANS 1153; and see Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT’L L. 679, at 680 (1998); Carlos Manuel Vasquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT’L L. 683, at 685 (1998); Malvina Halberstam, *LaGrand and Avena Establish a Rights, But is There a Remedy? Brief Comments on the Legal Effect of LaGrand and Avena in the U.S.*, 11 ILSA J. INT’L & COMP. L. 415, at 416 (2005).

²Vasquez (n. 132) at 689.

³*Germany v United States of America* (n 114) at pars. 90-91; and see also *id.* at par. 125 (the ICJ deciding that violations of Article 36 of the VCCR were caused “by the circumstances in which the procedural default rule was applied, and not by the rule as such”).

⁴*Id.*, at par.124.

that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b) of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.¹

Following the judgment of the ICJ in the Avena Case, President George W. Bush, on February 28, 2005, issued a *Memorandum for the Attorney-General*, proclaiming:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with the general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.²

However, shortly thereafter, President Bush announced that he will be cancelling ratification by the United States of the Optional Protocol. On March 7, 2005, Secretary of State Condoleezza Rice notified the Secretary-General of the United Nations of the United States' withdrawal from the Optional Protocol.

The *Memorandum for the Attorney-General* — it would seem — was prompted by the undertaking tendered by the United States in the *Le Grand Case* that non-compliance with Article 36 of the VCCR will not happen again. The Oklahoma Court of Criminal Appeals did actually respond positively to the *Memorandum*,³ but the Texas Court of Criminal Appeals, with the subsequent approval of the U.S. Supreme Court, treated it with contempt in the case of *Meddelin v. Texas*;⁴ that is, after the U.S. Supreme Court was confronted in *Sanchez-Llamas v. Oregon*; *Bustillo v. Johnson* with the question whether or not American courts were bound by the ICJ's interpretation in *Avena* of the United States' treaty obligations under the VCCR.⁵

Moises Sanchez-Llamas was one of the Mexican whose conviction and sentence (in Oregon) was in issue in *Avena*; Mario Bustillo, convicted in

¹*Id.*, at par. 128(7).

²*Memorandum for the Attorney General*, reprinted in 44 I.L.M. 964 (Feb. 28, 2005).

³*Torres v. Oklahoma*, 120 P.3d 1184 (Oklahoma C.C.A., 2005). Earlier, Osbaldo Torres, a Mexican national, in a petition for *certiorari* had raised the same issue as in *Breard*, but the U.S. Supreme Court refused to hear the case. *Torres v. Mullin*, 540 U.S. 1035 (2003).

⁴*Medellin v. Texas*, 128 S. Ct. 1346 (25 March 2008).

⁵*Sanchez-Llamas v. Oregon*; *Bustillo v. Johnson*, 548 U.S. 331 (28 June 2006).

Virginia, was a national of Honduras and not one of those Mexicans. Having procedurally defaulted, he argued that in his instance, too, American courts were bound, as a matter of federal law, to follow the ICJ's treaty interpretation in respect of the procedural default rule. The binding effect of the ICJ's judgment in *LaGrand* took center stage in the U.S. Supreme Court's decision in *Sanchez-Llamas*. The judgment turned in part on the binding effect of the ICJ's interpretation of the obligations of the United States as a State Party to the VCCR; the question whether or not the United States is *obliged* to comply with the VCCR *as interpreted by the ICJ*. The majority opinion answered the question in the negative and held instead that the ICJ's interpretation of those obligations merely deserves "respectful consideration" by American courts.¹ The court proceeded on the assumption that for treaties to be given effect under American law, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department."²

Following the Presidential *Memorandum for the Attorney-General* of February 28, 2005 and numerous procedural complexities, the question as to the binding effect of the judgment of the ICJ in *Avena* and of the President's instruction to Attorneys-General to comply with that judgment, culminated in the decisions of the U.S. Supreme Court in the case of *Medellín v. Texas*.³ The judgment of the Texas Court of Criminal Appeals and of the U.S. Supreme Court in that matter afforded a new twist to the issues at hand: Whether or not judgments of the ICJ are self-executing in the United States, and whether or not it was within the power of the President of the United States to instruct federal courts to uphold such judgments.

The U.S. Supreme Court decided in effect that the decision of the ICJ was not binding in the United States and that the President exceeded his constitutional powers by instructing Attorneys-General to comply with that decision. The Court noted that the exercise of jurisdiction by the ICJ is based on consensus, but decided that "submission to jurisdiction and agreeing to be bound are two different things."⁴ In terms of Article 94 of the U.N. Charter, each Member State of the United Nations "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party,"⁵ but this does not mean that judgments of the ICJ will have "immediate legal effect in domestic courts": The phrase "undertake to comply" (instead of "shall" or "must" comply with an ICJ judgment"), according to the majority opinion, entails a commitment for future action to comply.⁶ The fact that the exercise of jurisdiction of the ICJ is based on consent, and that the United States actually *agreed* that its dispute with Mexico over the meaning of Article 36 and the consequences of non-compliance with its provisions be adjudicated

¹*Id.*, at 353; and *see also Breard v. Greene* (n.116) at 375.

²*Sanchez-Llamas v. Oregon; Bustillo v. Johnson* (n. 140) at par. 353-54, with reference to *Marbury v. Madison*, 1 Cranch 137, at 177 (1803).

³*Medellín v. Texas* (n.139).

⁴*Id.*, at 1358.

⁵U.N.Charter (n. 132) art. 94.

⁶*Medellín v. Texas* (n.139) at 1358.

by the ICJ, seemingly did not count for anything. It also seemingly escaped notice of the plurality that the question is not whether a judgment of the ICJ is self-executing in the United States. The question is whether or not the United States is compelled to comply with its treaty obligations under the VCCR; and the substance of those treaty obligations can in the final analysis be determined by the ICJ, which the U.N. Charter proclaims to be “the principal judicial organ of the United Nations.”¹

The judgment of the U.S. Supreme Court in *Medellin v. Texas* (and in *Sanchez-Llamas*) will not go down in history as the acme of judicial excellence. The logic of differentiating between submitting oneself to the jurisdiction of a court of law and agreeing to be bound by its decision is beyond reasonable comprehension. One analyst (sympathetic to the Court’s reasoning) sought to explain the American schizophrenic dualism in relation to international/municipal obligations as follows: By consenting to have the ICJ resolve the nation’s international obligations, the United States did not cede control of the domestic application of treaties:

If the International Court, in a proper exercise of its jurisdiction, renders a judgment against the United States, failure to abide by it is a violation of international law. That does not mean, however, that U.S. courts are bound to obey judgments of the International Court.²

There are compelling reasons for believing that the U.S. Supreme Court’s position is not constitutionally defensible. Consider the following:

In virtue of the Supremacy Clause in the American Constitution, treaties entered into under the authority of the United States are (part of) “the supreme Law of the Land”³ and therefore self-executing in the United States. There are admittedly several exceptions to the rule, including one that applies to treaties which clearly do not create an immediate binding obligation but contemplate future action. To hold that the undertaking of Member States stipulated in Article 94 of the U.N. Charter to comply with judgments of the ICJ denotes future action of the kind that would render a treaty obligation that was in issue in the judgment non-self-executing, simply boggles the mind. As noted by Breyer, J. (dissenting), an undertaking to comply clearly means placing oneself under an obligation to execute the judgment.⁴ Affording to the Security Council the power to take a State Party to task for not complying with a judgment of the ICJ in a matter that involved that State Party as a litigant before the Court (as per Article 94(2) of the U.N. Charter), and confining the

¹U.N.Charter (n. 132) art. 92.

²Glashausser (n.124) (2005); and *see also id.*, at 74 (stating that the United States has never decided to have its federal courts bow to other courts “as to all matters of international law”).

³Constitution of the United States, art. VI, par. 2.

⁴*Medellin v. Texas* (n. 139) at 1384 (Breyer, J., joined by Souter and Ginsberg, JJ., dissenting); and *see* WEBSTER’S THIRD NEW WORLD DICTIONARY OF THE ENGLISH LANGUAGE (1966) (including in its circumscription of “undertake”, “to take upon oneself solemnly or expressly: put oneself under obligation to perform”).

jurisdiction of the ICJ to inter-State disputes (as per Article 35(1) of the ICJ Statute), have absolutely nothing to do with the American constitutional decree rendering treaties self-executing in the United States.

Nor, in virtue of the Supremacy Clause, ought one to confine the pertinence of ICJ judgments interpreting the treaty obligations of the United States to “respectful consideration”.¹ Justice Stevens was quite right in asserting that the U.S. Supreme Court is unfaithful to the Supremacy Clause “when it permits state courts to disregard the Nation’s treaty obligations.”² It has been said that in their relationship with international tribunals, municipal courts must act as “agents of the international order.”³ Publicist Louis Henkin has observed that “international agreements, whether concluded by treaty or by executive agreement, are binding on the states;”⁴ and it should be equally apparent that an “ICJ ruling is binding on the U.S. courts, state and federal.”⁵ The American *Restatement of the Law* stipulates that decisions of international tribunals adjudicating questions of international law “are persuasive evidence of what the law is.”⁶

Equally impugnable was the Plurality’s finding in *Medellin* that the President lacked the competence to issue a directive to state courts to execute an international obligation of the United States.⁷ The Constitution provides that that the President “shall take Care that the Laws be faithfully executed”;⁸ and the laws to be faithfully executed includes treaties entered into by the United States as part of the supreme law of the land.⁹ One analyst has noted that the President’s “authority to manage foreign affairs to the exclusion of state policy

¹See *Sanchez-Llamas v. Oregon; Bustillo v. Johnson* n. 140) at 353; and see also *id.*, at 382-83 (Breyer, J., joined by Stevens, Souter and Ginsburg, JJ., dissenting). See further *Cummings Inc. v. U.S.*, 454 F.3d 1361, at 1366 (Fed. Cir., 2006) (stating that the opinion of an international court “can be consulted for its persuasive value, if any”).

²*Torres v. Mullin* (n. 138) at 1036-37 (separate opinion of Stevens, J.).

³RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER*, 72 (1964).

⁴Henkin, (n. 132), at 681.

⁵Halberstam (n. 132) at 416; and see *Torres v. Mullin* (n. 138) at 1036 (Stevens, J. referring to the “authoritative interpretation” of Article 36 of the VCCR in the *LaGrand Case*).

⁶1 *Restatement of the Foreign Relations Law of the United States*, par. 103, comment b. (at 37).

⁷See *Medellin v. Texas* (n. 139) at 1372.

⁸Constitution of the United States, art. II, par. 3; and see *Newcomer* (n. 125) at 1044.

⁹Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, at 1567 (1984) (“There can be little doubt that the President has the duty, as well as the authority, to take care that international law, as part of the law of the United States, is faithfully executed”); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, at 1119 (1985) (“The President has a constitutional obligation to execute international law because it is the law of the land”); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, at 405 (1987) (referring to the President’s duty “to faithfully execute the laws—in this instance, international law”); Jordan J. Paust, *Medellin, Avena, the Supremacy of Treaties, and Relevant Executive Authority*, SUFFOLK TRANSNAT’L L. REV. 209, at 218 (2008) (referring to the constitutionally-based mandate under which “the President must faithfully execute . . . treaties of the United States”); *Newcomer* (n. 125) at 1045 (noting that the “faith execution” Clause empowered the President to enforce the treaty).

has been recognized in a long list of judgements,”¹ and concluded that, under current Supreme Court jurisprudence, President Bush did have the power to issue the *Memorandum for the Attorney-General* “as a stopgap measure to compel action by state courts pursuant to his foreign affairs power.”² It has been decided long ago that the power of the United States “is superior to that of the States to provide for the welfare or necessities of their inhabitants.”³

There are several other conspicuous blunders in the reasoning of the plurality in *Medellin*, for example referring to Article 59 of the ICJ Statute, which proclaims that decisions of the ICJ “has no binding force except between the parties and in respect of that particular case.” Article 59 was inserted in the ICJ Statute (upon insistence of civil law countries) to exclude application of the *stare decisis* rule to judgments of the ICJ.⁴ It has nothing to do with the application as part of “the supreme Law of the Land” of “Treaties made, or which shall be made, under the Authority of the United States” as proclaimed in the Supremacy Clause of the Constitution of the United States.⁵

Perhaps the most flagrant justification tendered by the plurality for its decision was the one based on Article 94(2) of the U.N. Charter, leaving it up to the Security Council in cases of non-compliance with an ICJ judgment to “make recommendations or decide upon measures to be taken to give effect to the judgment”;⁶ According to the majority judgment in *Medellin*, Article 94(2) of the U.N. Charter “confirms that the U.N. Charter does not contemplate automatic enforceability of ICJ decisions in domestic courts.”⁷ In case of non-compliance with a judgment of the ICJ, Article 94(2) leaves it up to the Security Council to make recommendations or decide upon measures to be taken to give effect to the judgment.⁸ The President and the Senate “were undoubtedly aware” of this “diplomatic — that is, nonjudicial remedy” when it

¹Newcomer (n. 125) at 1042, with reference, for example, to *American Ins. Assn. v. Garamendi*, 539 U.S. 396, at 425 (2003) (“The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield”); *United States v. Lara*, 541 U.S. 193, at 201 (2004) (confirming that the President is the legislative agent or rule-making authority in respect of treaties).

²Newcomer (n. 125) at 1054; and *see also id.*, at 1073 (noting that “President Bush’s Avena Order was justified as a necessary stopgap in a larger foreign policy program and dealt with the executive unique ability to deal with foreign affairs”); Paust (n. 159) at 217 (“The directive operates as part of treaty processes over which the President has relevant constitutional powers and, in a sense, operates as a treaty-executive directive”); *id.*, at 220-21 (“[T]he President had a duty to assure that there would be compliance with the judgment of the ICJ in the *Avena* case, ... and the President chose to faithfully execute that treaty-based obligation by issuing a presidential determination and directive to various states . . .”); *id.*, at 231 (“[T]he President’s determination and directive have primacy in view of his primary power to assure settlement of international disputes in accordance with treaty obligations, his power to execute treaty obligations, and his more general foreign affairs power”).

³*Sanitary District v. United States*, 266 U.S. 405, at 426 (1925).

⁴See 1 RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, par. 103, comment b. (at 36-37).

⁵Constitution of the United States, Section VI, Clause [2].

⁶*Medellin v. Texas* (n. 139) at 1359-60, with reference to U.N. Charter (n. 132) art. 94(2).

⁷*Medellin v. Texas* (n. 139) at 1359.

⁸U.N. Charter (n. 132) art. 94(2).

ratified the Optional Protocol to the VCCR, which affords to the United States “the unqualified right to exercise its veto of any Security Council resolution.”¹ According to David Bederman, applying “the probative impact of Senate ratification debates and understandings in creating a ‘legislative history’ for international agreements” was in itself “the most astonishing interpretative move in *Medellin*.”² What is even more astonishing is that which the U.S. Supreme Court derived from this norm of hermeneutics: telling us that submission of the United States to the compulsory jurisdiction of the ICJ was decided upon by the President and the Senate with the knowledge, and upon the understanding, that the United States can disregard judgments of the Court at will and without any adverse consequences. From a rule-of-law perspective, that is simply quite disgusting. It amounts to the advocacy of anarchy in international relations!

Concluding Observations

A few isolated, yet important, recent innovations by the U.S. Supreme Court must be applauded as initiatives that brought the United States closer to upholding generally accepted standards in its criminal justice system. Proclaiming juvenile executions³ and life sentences without the option of parole⁴ to be in violation of the “cruel and unusual” criteria of the Eighth Amendment was a step in the right direction, even though one must admit that the Court had to make a quantum leap to bypass the “unusual” prong of the Eighth Amendment to reach its admirable conclusion in the life sentence without parole decision. No less than 29 jurisdictions mandated life sentences without the option of parole for juvenile offenders, but noting differences that obtain in those jurisdictions, relating for example to minimum age requirements, whether the transfer of juvenile offenders to an adult court occurs automatically in the case of some offences or is left in the discretion of prosecutors, the U.S. Supreme Court declined to find that the laws applied by state courts meet the criterion of “usual” punishments.⁵

In the process, the U.S. Supreme Court used language that is in conformity with international standards of juvenile justice, referring for example to the “lesser culpability” and “greater capacity for change” of juvenile offenders,⁶ and the requirement of “individualized sentencing”.⁷ It emphasized that a basic basic precept of justice requires “that punishment for crime should be

¹*Medellin v. Texas* (n. 139) at 1359.

²David J. Bederman, *Medellin’s New Paradigm for Treaty Interpretation*, 102 AM. J. INT’L L. 529, at 534 (2008).

³*Roper v. Simmons* (n. 13).

⁴*Miller v. Alabama* (n. 15).

⁵*Miller v. Alabama* (n. 15) at 22-27.

⁶*Graham v. Florida* (n. 15), at 17, 23; *Miller v. Alabama* (n. 15) at 1.-2; and see also *Miller v. Alabama* (n. 15) at 7 (referring to “mismatches between the culpability of a class of offenders and the severity of a penalty”).

⁷*Miller v. Alabama* (n. 15) at 2.

graduated and proportioned,” and that individuals consequently have “the right not to be subjected to excessive sanctions.”¹ The U.S. Supreme proclaimed quite admirably that juveniles have “lessened culpability” and therefore “are less deserving of the most severe punishments.”² The “gaps between juveniles and adults” are threefold: “(a) lack of maturity and an underdeveloped sense of responsibility;” (b) vulnerability or susceptibility “to negative influences and outside pressures, including peer pressure”, and (c) the fact that “the character of a juvenile is not as well formed as that of an adult.”³

Such rhetoric is indeed admirable but will remain a voice calling in the dark as long as juveniles can be prosecuted and sentenced as though they were adults; or in general, as long as the United States declines to impose the basic norm of criminology that punishments must not only be determined by the gravity of the crime, the manner in which it was executed, its harmful consequences, and the means of perpetration by the convicted person, but should also take note of and accommodate the personal circumstances of the individual to be sentenced, such as his or her degree of intent,⁴ diminished mental capacity,⁵ or the individual circumstances of the accused, such as age, background, education, intelligence, and mental structure.⁶

¹*Roper v. Simmons* (n. 13) at 560; *Miller v. Alabama* (n. 15) at 6.

²*Graham v. Florida*, 560 *U.S.* at 17; *Miller v. Alabama* (n. 15) at 8;

³*Roper v. Simmons* (n. 13) at 569-70; and see also *Graham v. Florida*, 560 *U.S.* at 17; *Miller v. Alabama* (n. 15) at 8.

⁴RPE (n. 29) Rule 145(1)(c).

⁵*Ibid.*

⁶*Prosecutor v. Jean Kambanda (Judgment and Sentence)*, Case No. ICTR-97-23-S., par. 58 (4 Sept. 1998); *Prosecutor v. Radislav Kristić*, Case No. IT-98-33-A, par. 267 (19 April 2004).