



Volume III

Spring 2003

Number 1

Brett Holmgren *University of Wisconsin*
Saudi Arabia's Tacit Support For Terrorism

Beth A. Lauck *University of Notre Dame*
The Logic of Argentine Collective Action: The Transformation of a Group of Ordinary Women into a Human Rights Movement

Lucas Morgan *University of Wisconsin*
A Comparative Analysis of Codified v. Common Law Legal Systems in Relation to European Integration and the European Court of Justice

Daniel Shean *University of Virginia*
Garbage Wars: Problems and Solutions Concerning the Interstate Transport of Waste in America

Roland D. McKay *Macalester College*
Vienna Consular Treaty Obligations: The Consequences of US Non-Compliance

Published By
Purdue University Pi Sigma Alpha
Political Science Honorary

Daniel Patrick Kensinger
Editor-in-Chief

The American Undergraduate Journal of
Politics & Government

Spring 2003

Volume III

Number 1

Fifth Edition

Daniel Patrick Kensinger
Editor-in-Chief

Cory Thomas Driver
Deputy Editor-in-Chief

Cory Thomas Driver
Director of Electronic Media

Rosal ee A. Clawson
William McLaughl an
Faculty Advisors

Editorial Board Selection Committee

Lara Booher	Chris Bowman
Lauren Bruno	C. Travis Bunner
William Drinkwater	Jonathan Todd Estes
Michelle Ann Fosnaugh	Clifford C. Pederson
Brian Mattes	Heather Sherwood
Shaina Smith	Jason Starling

Advisory Board Selection Committee

Dr. Kevin Anderson	Dr. Aaron Hoffman
Dr. William McLaughl an	Dr. Leigh Raymond
Dr. Eric N. Wal tenburg	Nikita Desai
Jean-Gabriel Jolivet	Mariya Omel icheva
Matthew A. Wavro	

Published By
Purdue University Pi Sigma Alpha Political Science Honorary
Beering Hall I of Liberal Arts and Education
100 N. University St.
Purdue University
West Lafayette, IN 47907-2098

The American Undergraduate Journal of Politics & Government is published bi-annually by the Delta Omega Chapter of Pi Sigma Alpha, Beering Hall of Liberal Arts and Education, 100 N. University St., Purdue University, West Lafayette, Indiana 47907-2098.

The *Journal* welcomes submissions from undergraduates of any class or major and from any college or university. A call for manuscripts can be found at www.purdue.edu/americanjournal. If you would like to subscribe to the *Journal*, please contact us at journal@polsci.purdue.edu.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the written permission of the Editorial Board of *The American Undergraduate Journal of Politics & Government*.

The American Undergraduate Journal of Politics & Government is copyrighted by the Delta Omega Chapter of Pi Sigma Alpha. The content of all papers is copyrighted by the respective authors. Purdue University cannot and will not be held liable for the actions of *The American Undergraduate Journal of Politics & Government*.

All assertions of fact and statements of opinion are solely those of the authors. They do not necessarily represent the views of the Editorial Board, Purdue University, or its faculty and administration.

COPYRIGHT © 2004 PURDUE UNIVERSITY PI SIGMA ALPHA. ALL RIGHTS RESERVED.

Contents

Volume III Number 1 Spring 2003

Brett Holmgren <i>University of Wisconsin</i> Saudi Arabia's Tacit Support For Terrorism	1
Beth A. Lauck <i>University of Notre Dame</i> The Logic of Argentine Collective Action: The Transformation of a Group of Ordinary Women into a Human Rights Movement	9
Lucas Morgan <i>University of Wisconsin</i> A Comparative Analysis of Codified v. Common Law Legal Systems in Relation to European Integration and the European Court of Justice	16
Daniel Shean <i>University of Virginia</i> Garbage Wars: Problems and Solutions Concerning the Interstate Transport of Waste in America	24
Roland D. McKay <i>Macalester College</i> Vienna Consular Treaty Obligations: The Consequences of US Non-Compliance	37

Editor's Preface to the Spring 2003 Edition

The American Undergraduate Journal of Politics & Government provides a unique opportunity for outstanding undergraduate papers to be published in a competitive, bi-annual platform. Now in its fifth edition, the *Journal* has established itself and the work it publishes, and we hope to continue bringing the best in undergraduate research in politics and government to the academic community.

No such publication comes about without the contributions of an invaluable support staff. First, I thank the Editorial Board, who have put in countless hours of work to produce a *Journal* of the highest quality. We would like to thank the Advisory Board, a collection of political science professors and graduate students, who have provided invaluable recommendations to this publication. We appreciate the support we have received from the National Pi Sigma Alpha Office, and the encouragement from the Purdue University Department of Political Science, especially from department head Dr. William Shaefer. Special thanks are given to Michelle Conwell and Traci Emerson for their constant assistance, and to our Faculty Advisors, Dr. Rosie Clawson and Dr. William McLauchlan, without whom this publication would not be possible.

Thank You.

Daniel Patrick Kensinger
Editor-in-Chief

Submission of Manuscripts

Submissions for the *Journal* are received on a rolling basis from undergraduates of any class or major from institutions across the nation. Submitted papers must be fewer than 30 pages of typed, double-spaced text with tables and charts numbered consecutively and on separate pages. Submissions must be in the form of a Microsoft Word document and have endnote citations in accordance with the Chicago Style Manual. All documents must be accompanied by a 150 word abstract to be considered for publication. Please include name, university affiliation, contact details, and complete works cited information. Subscriptions are available through Purdue Pi Sigma Alpha, but each edition can also be purchased individually. The *Journal* has launched a web site at www.purdue.edu/americanjournal, which is presently being renovated. To make a submission to the next edition or to contact the Editor-in-Chief, e-mail *The American Undergraduate Journal of Politics & Government* at journal@polsci.purdue.edu.

Saudi Arabia's Tacit Support for Terrorism

Brett Holmgren
University of Wisconsin

For the past 40 years, Saudi Arabia's direct and indirect connection with international terrorism has been indisputable. Since the events of September 11th, 2001, the facts of this association have been more frightening than ever. Osama bin Laden is a native of Saudi Arabia who lived there nearly half his life. Fifteen of the 19 9/11 hijackers were Saudi nationals. And in January, Riyadh – Saudi Arabia's capital – confirmed that more than half of the alleged al-Qaeda prisoners at Guantanamo Bay were Saudi citizens.¹ Abd al-Rahim al-Nashiri, a top al-Qaeda official responsible for the USS Cole attack that killed 17 U.S. sailors in October 2000,² was a Saudi native. These facts have led some to insist that "Saudi Arabia has produced some of the most murderous militants in recent history."³

Introduction

An extensive review of the Kingdom of Saudi Arabia's religious and educational culture, and a review of Saudi funding for terrorist organizations, reveals three fundamental factors that explain why large numbers of terrorists come from Saudi Arabia and how public and private actors within the state implicitly and explicitly support international terrorism. In this essay, each are examined in turn. First is a discussion of how Wahhabism, the Kingdom's state religion, serves as the impetus behind the principles of certain terrorist organizations, most notably al-Qaeda, and why the Saudi government has been unable to crack down on this particularly virulent form of Islam. Next is how Saudi support for *madrassas*, Islamic schools in the region that serve as breeding grounds for future terrorists, is inflammatory to Muslims and non-Muslims alike. The institutional failure of the Saudi educational system is also discussed. This paper concludes with an examination of the financial support given to terrorist organizations by the government and individuals from within the Kingdom, and a description of how this support has provided the crucial funding that allows terrorists to function outside state borders.

Saudi Arabia and Wahhabism: A History of Wahhabism in Saudi Arabia

The 1744 alliance between the Arabian Prince Muhammad ibn Saud and a religious zealot, Muhammad ibn abd al-Wahhab, founder of the Wahhabi movement, effectively linked the Arabian Kingdom with the Wahhabi form of Islam. Preaching a strict form of Islam, al-Wahhab urged Muslims everywhere to return to the basics practiced by the Prophet Muhammad in the seventh century. To combat those who did not adopt his stringent form of Islam, he cited Quranic scriptures that apparently "justified a crusade like war in the name of restoring the true faith"⁴ against the idolatrous and unbelievers. In other words, violence against all non-Wahhabis was justified in the name of Islamic fundamentalism.

As the Wahhabi movement gained popular support throughout the region, Muhammad ibn Saud realized the strategic importance of aligning his regime with al-Wahhab in order to expand his rule throughout the Arabian Peninsula. Hence, an ambitious prince and an aggressive reformer combined forces and invaded cities throughout a large portion of the peninsula, eventually conquering Medina and Mecca, the two holiest cities in the Islamic world. By this time, the success of their movement had received the attention of the powerful Ottoman Empire, and by the early nineteenth century, an Egyptian led force backed by the Empire had put down the Wahhabi uprising and had driven the Saud clan into exile.⁵

However, in the early twentieth century, Abd al-Aziz ibn Saud (1879-1953) rose to power and began to reclaim portions of the peninsula that had been lost to the Ottoman Empire. Ibn Saud realized that, in order to reclaim the land, the Saud family would have to realign with the ruling Wahhabi elite who controlled the region and had the support of its people. The Saud family again joined forces with the Wahhabi sect, which enabled it to justify its conquest based on the understanding that the holy cities – Medina and Mecca – would be ruled by a strict interpretation of Islam.⁶

The creation in 1932 of the Kingdom of Saudi Arabia as an official state laid the foundation for a central government controlled by the Saud monarchy. Islamic symbolism was skillfully used to create a united community of believers, and *Sharia*, Islamic law, became the official law of the land. The Saudi

flag poignantly symbolizes this alliance between the monarchy and Wahhabism: it has “the Muslim profession of faith written across it along with two crossed swords representing the allied strength of the houses of Saud and Wahhab.”⁷

Over time, the relationship between the ruling Saudi monarchy and the powerful Wahhabi clerics has remained surprisingly strong. As descendants of the Wahhabi legacy, members of the religious establishment continue to play a large role in the public arena as the champions of “pure” Islamic faith and values. Wahhabi clerics are continually appointed as “well-paid public employees functioning as official advisors to the King, educators, administrators of mosques and other social welfare agencies and judges (all personal and criminal law cases are handled by the religious courts).”⁸ Additionally, members of the House of Saud regularly marry members of the al-Shaykh family, the descendants of Ibn Abd-Wahab. This intimate relationship between the ruling elites of the religious and political establishments underscores the influence that Wahhabism has, and will continue to have, on Saudi culture.

Wahhabism and Extremism

Wahhabism, an austere form of Islam and the state religion of Saudi Arabia, has been labeled by some as “the extreme form of Islam, a movement hostile to modernity and the West.”⁹ Moreover, experts on Islamic extremism in the Middle East, referring to Wahhabism as the state religion, have said that “rogue states – Iraq, Libya, etc. – are less important to the radicalization of Islam than is Saudi Arabia. Adding to these claims, nations like the United States, Great Britain and Russia have questioned the role that such a severe and intolerant form of Islam, and the infrastructure the country has built around it, has played in the rise of extremists within the Kingdom.”¹⁰

Why do non-Wahhabis, especially those in the West, view Wahhabism in this way? To begin with, certain dominant teachings of Wahhabism are, to some extent, literally violent. For instance, *Bid'a*, a fundamental principle of Wahhabism, condemns all types of innovation and rejects the views of those who insist that innovations can be good or praiseworthy.¹¹ Those who are associated with innovation – specifically the West – should be labeled infidels and resisted by force.¹² Another dominant teaching of Wahhabism called *takfir*, or “charge of unbelief,” states that mere affiliation with Islam is not enough to be considered pure, and that one who claims to be pure but is actually a “polytheist, as defined by Wahhabis, should be denounced as an infidel and killed.”¹³ One American diplomat who lived in Saudi Arabia for years has described the violent tendency of Wahhabi teachings as a “message that Judaism and Christianity are full of lies, that Islam is under siege by impure, unclean infidels and that all Muslims are obliged to unite against the enemy [the West, Americans, Jews and Christians].”¹⁴

Even within the Islamic world, “the word ‘Wahhabism’ has become synonymous with militant, puritanical Islam.”¹⁵ This can in part be attributed to the actions of Ibn Saud who, in order to gain popular support from the faithful Wahhabis, “indoctrinated them with militant Wahhabism so as to identify the expansion of his rule with the expansion of Wahhabism.”¹⁶ In essence, the foundation of Wahhabism within Saudi Arabia was established by the Wahhabi clans’ violent invasions of the peoples of the Arabian Peninsula, undertaken in order to secure more power for Ibn Saud and his regime. It is clear, then, that “the most important legacy of Wahhabism is its religious zeal, its militancy to spread the mission and cement Saudi dominion.”¹⁷

Another significant aspect of Wahhabism is its ability to spread beyond Saudi Arabia and influence radical movements and terrorist groups based in other countries. The growth and popularity of Wahhabism in radical Islamic movements can be directly attributed to Saudi support, which has enabled it to spread across the Muslim world.

One of the most significant effects of the spread of Wahhabism is the Taliban. The Taliban became the ruling party in Afghanistan in 1994, with the goal of restoring Islamic order in the country. Funded primarily by Saudi Arabia, Pakistan and the United States (through the CIA), the Taliban was led by the infamous Mullah Omar, who recruited scores of *mujaheddins* – holy warriors or “soldiers of God” – to fight the Soviet threat and establish Islamic law throughout the Muslim world. Upon receiving aid and guidance from Saudi Arabia, the Taliban immediately implemented Wahhabism and the rule of *Sharia*.

Prior to the implementation of Wahhabism as the Taliban’s guiding form of Islam, Islamic extremism had never flourished in Afghanistan.¹⁸ However, by declaring Wahhabism its official religious practice, the Taliban created a new form of Islamic extremism that rejected all accommodations with the West and Muslim moderates.¹⁹ Although the Taliban’s sudden adoption of anti-American and anti-Western

views was not solely because of Wahhabism – America’s abandonment of the Taliban once the Soviet Union pulled out had left many *mujaheddins* with bitter feelings towards the U.S. – clearly Wahhabism influenced the Taliban’s agenda and inspired a younger generation of Islamic militants and terrorists. One needs to look no further than the genesis of al-Qaeda to establish this link.

Wahhabism Versus Mainstream Islam

Critics of fundamentalist Islam unfortunately tend to label the entire religion as violent, oppressive and intolerant. On the contrary, proponents argue that those statements could not be further from the truth. To them, Islam is a religion that promotes peace and tolerance. However, just as certain branches of Christian fundamentalism have manipulated literal translations of biblical text in order to incite or promote violence as a legitimate means of practicing their faith, Wahhabists have distorted and perverted certain phrases found in the Quran regarding the use of force in order to feed their religious platform. One verse from the Quran typically taken out of context refers to martyrdom. The Quran states that, “Eternal life lies in embracing martyrdom while fighting in the way of Allah.”²⁰ Although martyrdom in the name of Allah is one of the greatest honors a Muslim can attain, suicide and the killing of innocents (non-combatants, women and children) is strictly forbidden in Islam and is not considered a legitimate characteristic of martyrdom. Even so, Wahhabists affirm that “suicide bombings are permissible as a form of fulfilling the individual duty of *jihād*” in order to legitimize support for suicide bombings in the name of martyrdom.²¹

Furthermore, when Wahhabis call on their followers to rebel against the apostate rulers, they are in fact violating the principle of “Islamic Reciprocity,” which calls on all Muslims to obey their Muslim rulers even if they do not always agree with them.²² This underscores the fact that Wahhabism is not a complete representation of Islam, just as Christian fundamentalism is not an absolute representation of the Christian faith.

Wahhabism and the Saudi Royal Family

The Saudi royal family and Wahhabism were established with an understanding of their mutual dependence - each relied on the other for its legitimacy. Historically, “The alliance provided Wahhabism with needed support and protection and offered Ibn Saud the ideological platform and recruits needed to affect his designs. More importantly, Wahhabi teachings justified and consolidated Saudi rule over Arabia.”²³ In spite of international criticism, much of which has come from the West, the alliance between the Saudi royal family and the clergy has remained stable. This is not to say that the House of Saud always agrees with the views or rulings of the *ulemas*, but it is slow to show any opposition. Apparently, the primary reason for this ambiguous relationship has been the continued need to legitimize the ruling regime.

The Saudi elite, who are primarily made up of *ulemas*, “enjoy more power and prestige than (the elite) in any other Sunni state. They are the key element in bestowing legitimacy on the Saudi regime.”²⁴ This has resulted in a tendency to avoid violent showdowns with Wahhabi radicals in the Kingdom. Effectively shielded against threats, Wahhabism has ascended beyond the control of the state.²⁵ Although the Saudi royal family has not always supported all aspects of Wahhabism within the state, the Wahhabi clerics’ increasing ability to control and exert power in order to preserve the monarchy’s legitimacy has remained intact.

Wahhabism and Terrorism

Terrorists and Wahhabi clerics use similar rhetoric when preaching their beliefs about Islam, the West, and the use of violence. Jerry Farrell, a former Foreign Service officer who lived in Saudi Arabia for several years, has said, “The depiction of U.S. culture in Saudi religious [Wahhabi] discourse is similar to the way bin Laden portrays it in his rhetoric.”²⁶ While bin Laden himself does not seek to be a religious leader, he uses Islam – more specifically, Wahhabism – to strategically attract a large following of young Muslim men who are willing to cooperate as long as their cause serves Islam. Bin Laden is “a product of traditional Saudi Wahhabism.”²⁷ He has integrated his Wahhabi-fundamentalist legacy into his teachings and rhetoric.²⁸ Indeed, bin Laden uses Wahhabi language to attract an inspired and faithful following of terrorists, “crossing national boundaries through a bridge of Islamic brotherhood and a hatred of the United States and its allies.”²⁹

Often, much of the rhetoric used by terrorist organizations like al-Qaeda is drawn from the heart of Wahhabi doctrine. For instance, al-Qaeda bases its “grander view of an Islamic struggle against the United States and its influences,” on the doctrine of *bid’a*, which rejects Western innovation.³⁰ This doctrine is fundamental in the Wahhabi faith. These ideological similarities between Wahhabism and certain terrorist organizations have produced a rich environment for the growth of future terrorists.

Saudi Arabia’s Educational Cul ture

Much has been said about Saudi Arabia’s educational system and its alleged ties to the exportation of terrorism. Critics of Saudi Arabia argue that Osama bin Laden remains very much a product of Saudi Arabia’s educational and cultural environment.³¹ It is evident that the institutional failure of the educational system to produce well-rounded students and the indoctrination of Wahhabism primarily through regional *madrassas* have been the fundamental reasons for extreme forms of education which engender militant ideologies.³²

Probl ems with the Saudi Education System

A recent United Nations report on human development gave Saudi Arabia the lowest “freedom score” in the world based on research done in the late-1990s. The report highlighted the Kingdom’s miniscule spending on scientific research and technological development as an impediment to the production of well-rounded, successful students.³³ As a result, it is difficult for secondary or university school students to find work after graduating. Moreover, basic primary and secondary school curricula are “devoted to Quranic memorization, while relatively little time is spent on science and mathematics.”³⁴ By focusing exclusively on Wahhabism and neglecting other areas of study, Saudi Arabia is failing to provide adequate numbers of jobs and livelihood that could serve as alternatives to Wahhabi-driven extremism.

At the collegiate level, Saudi Arabia’s five Islamic universities are currently “churning out thousands of clerics – many more than will ever be hired to work in the mosques and religious institutions in Saudi Arabia.”³⁵ Consequently, many of the clerics end up endorsing and spreading the Kingdom’s strict brand of Wahhabi Islam domestically and internationally, often using violent rhetoric.³⁶ This institutional failure within Saudi Arabia’s educational system has allowed increasingly radical Wahhabi teachings to expand and burgeon throughout the region with no viable alternatives to counterbalance limited and constricted education.

Saudi Education and Wahhabism

Saudi Arabia’s effort to spread Wahhabism is evident in many areas of Saudi culture. The educational realm is no exception. Educational policies implemented by the Ministry of Education clearly reflect the Kingdom’s goals: “The education policies stated by the Saudis reflect the government’s desire to develop materially and yet retain Wahhabism as the guiding ideology, to create a young generation of Wahhabis versed in Islam and Wahhabi fundamentalism...”³⁷ A majority of the Saudi educational networks exist in a neo-fundamentalist, Wahhabi inspired context. The content of the teaching is based “entirely on the reformist fundamentalism specific to the Salafists and Wahhabis.”³⁸ Again, the lack of alternative schooling choices for young Saudi students prevents them from pursuing tracks of education unrelated to Wahhabism. As long as the Kingdom does not provide a sufficient alternative to pro-Wahhabi education, which is often taught by graduates who preach a “rejection of modernity” and the West, young Saudis will enjoy limited opportunities to explore forms of education that are not hostile to Western culture.³⁹

Saudi Support for Madrassas

Saudi Arabia’s external support for *madrassas*, Islamic boarding schools, is a relatively new phenomenon. Saudi Arabia did not become actively involved in supporting *madrassas*, which were “located on the Pakistani side of the Afghan border,” until after the Soviet-Afghan war.⁴⁰ During the war, “Saudi money went to the fundamentalist Pakistani academies known as *madrassas*, which have served as

fruitful recruiting grounds for Osama bin Laden.”⁴¹ To be sure, Saudi Arabia was not the only country actively involved in supporting these schools. The United States and Pakistan, in a strategic effort to counter Soviet forces, funded radical Islamists in the *madrassas* during the mid-1980s. There is little doubt that the Islamic *madrassas* supported by all three countries, “proved to be fertile ground for [Taliban] recruits.”⁴²

It is evident, however, that the Saudis continued to support these hostile schools long after the United States had ceased to do so and Soviet forces had withdrawn from Afghanistan. Many *madrassas*, currently funded and supported by Saudi Arabia, that promote Wahhabism have served as “centers of indoctrination and motivation,” for militant Islamists.⁴³ In addition, numerous Saudi-funded *madrassas* “are used as centers for the recruitment of young soldiers to fight for the cause of Islam” and violently-oriented *jihad*. Much of this support can be credited to the many pro-Wahhabi elements associated with the Saudi government.⁴⁴ Intentional or not, Saudi support for these *madrassas*, which “call for a fight against Western decadence rather than Muslim rulers,” has clearly fed the spirit of terrorist organizations like al-Qaeda.⁴⁵

Saudi Arabia’s Financial Support for Terrorism

The Saudi royal family’s alleged financial support of two of the 9/11 hijackers has raised questions regarding the Kingdom’s financial ties to terrorism.⁴⁶ A new report released by the Council on Foreign Relations “concluded for the first time that Saudi Arabia is the single largest source of terrorist financing.”⁴⁷ Although not all reports indicate that Saudi Arabia is allegedly financing terrorism to hurt the West, other “reports allege that the Saudi royal family has channeled hundreds of millions of dollars to Osama bin Laden and his al-Qaeda network in hopes of co-opting those who have advocated revolutions” in the country.⁴⁸ Although the nature and extent of Saudi financial support for terrorism have yet to be fully determined, it is difficult to discount the Kingdom’s direct and indirect support of these movements.

Evidence of Saudi Financial Support for Terrorism

Much of this support has come from the private sector. For example, Ramzi Yousef, the mastermind of the Feb. 26, 1993, bombing of the World Trade Center in New York City, apparently received private contributions, albeit small ones, from sources within Saudi Arabia.⁴⁹ Incidentally, pre-9/11, “militant businessmen from Gulf states, including Saudi Arabia were collectively giving an average of at least \$1.6 million every single day to Islamist coffers.” These assets were directly tied to individual terrorists connected to bin Laden’s al-Qaeda organization.⁵⁰ Well-known terrorist organizations in the West Bank have also reportedly received large amounts of aid from Saudi cells: “The Islamic Resistance Movement, or Hamas, operates primarily from the West Bank and Gaza Strip and draws its financial support from Palestinian expatriates, Iran, and private benefactors in Saudi Arabia, according to officials.”⁵¹

Despite numerous accusations of a docile Saudi attitude towards private sector funding of terrorists, the Kingdom continues to deny any association with these sources. Regardless, Riyadh’s inability to close down internal funding has indirectly allowed terrorist organizations to thrive.

While a lack of resources may explain Saudi Arabia’s inability to crack down on such private sector funding, there is a widespread belief that Hamas has directly received money from Saudi Arabia in order to appease hostile Islamic movements based in the Kingdom.⁵² During a series of raids in the region, the Israeli Defense Force (IDF) uncovered incriminating evidence that directly linked the Saudi government to the support of terrorists, specifically suicide bombers, in the West Bank. Records indicate that “the Saudi Committee for the Support of the Intifada al-Quds (“Jerusalem” in Arabic) has paid \$5,300 in bonuses to the families of at least 102 Palestinian terrorists, including eight involved in ‘suicide operations.’”⁵³ Also, the committee, which is controlled by Saudi Interior Minister Prince Nayef bin Abdul Aziz, “raised \$109 million dollars last April (2002) in a Jerry Lewis-style telethon for ‘Palestinian martyrs.’”⁵⁴ The Israeli government claims that:

The captured documents demonstrate that the Saudi support was not only of a humanitarian religious nature, as Saudi spokesmen in the U.S. claim. The documents clearly reveal that Saudi Arabia transferred, inter alia, large sums of money in a systematic and ongoing manner to families

of suicide terrorists, to the Hamas Organization and to persons and entities identified with the Hamas. According to the captured documents, the Saudi Committee for Support of the Intifada was aware that the funds it transferred were paid to families of terrorists who perpetrated murderous attacks in Israeli cities, in which hundreds of Israelis were killed and wounded. An American woman was also killed in one of these attacks.⁵⁵

The West Bank is not the only area where Saudi Arabia has concentrated its funding of terrorist organizations. For example, in another attempt to spread Wahhabism, “Saudi money, it is now clear, also supports Muslim fighters in such places as Kashmir, the Philippines, Bosnia, Chechnya, Somalia, Kosovo and Croatia, as well as the terrorist activities of al-Qaeda, Islamic Jihad and Hamas.”⁵⁶ Thus, it is evident that financial support for terrorism and militant Islamic movements has come directly from the government in order to satisfy Wahhabi extremists within the Kingdom who threaten to undermine the regime.

Saudi Support of Charities and Islamic Organizations that Finance Terrorism

As the world’s richest Muslim nation, Saudi Arabia is responsible for giving the largest amounts of yearly contributions to Islamic charities. These contributions are based on *zakat*, an annual Islamic monetary gift that urges all Muslims to give a small percentage of their wealth to charitable causes.⁵⁷ This sheds light on the enormous amounts of money constantly pouring into Islamic charities from the Kingdom. Consequently, “for years charities based in Saudi Arabia have been the most important source of funds for al-Qaeda, and for years Saudi officials have turned a blind eye to this problem.”⁵⁸ Though not always by choice, Saudi Arabia has often been a source of funding for fundamentalist networks that are conservative as well as violently anti-Western.⁵⁹ While the government was under the impression that *zakat* was supporting charitable Muslim causes, not all the funds were distributed for humanitarian purposes. American officials believe that this has been the result of the phenomenon of “leakage, with money channeled to extremist causes and terrorist groups.”⁶⁰

For example, when an upsurge of violence involving Muslims broke out in 1992, one Saudi charity, the Al-Haramin Foundation, increased twentyfold in size and distributed hundreds of millions of dollars to schools and refugee camps in what officials of the group say are strictly humanitarian missions.⁶¹ Ostensibly, millions of those dollars were siphoned off by rogue financial elements within the Kingdom that distributed the money to terrorist organizations like al-Qaeda and Hamas.

Additionally, because of the United States’s pre-9/11 willingness to ignore the proliferation of anti-Western, Wahhabi-inspired Islamic organizations, Saudi Arabia has created and financially sponsored numerous pan-Islamist associations, such as the Organization of the Islamic Conference.⁶² The conference strives to coordinate the activities of other organizations like the Muslim Brotherhood in Egypt, which was the backbone for the genesis of Hamas. Recently, another Saudi charity, “the International Islamic Relief Organization, gave \$280,000 to 14 Palestinian groups, including Hamas-identified committees and bodies.”⁶³ This helps to explain why Saudi charities’ vulnerability to manipulation has served as the financial base for Islamic terrorist organizations.

Conclusions

It is clear that certain Islamic terrorist organizations have developed significantly because of specific aspects of Saudi culture. Even though Wahhabism appears to have greatly influenced the agenda of some terrorist organizations, a branch of religion is not the lone stimulus for an increasingly active terrorist culture in the state. Rather, it is the combination of religion, a lack of non-religious education and external support to Wahhabi-inspired *madrassas*, and direct and indirect financial support by the Saudis for terrorist groups that best explains this phenomenon.

According to a former U.S. State Department official, “It is absurd to suggest that the Saudi government intentionally supports terrorism. But what you do have is a really serious command and control problem” regarding various elements within the Kingdom.⁶⁴ As this paper has shown, the problem extends far beyond simple Saudi state policies; it is rooted in fundamental characteristics of Saudi society. As long as these conditions persist, the country’s connection with terrorism will undoubtedly remain strong.

-
- ¹ Doug Bandow. "Befriending Saudi Princes," *Policy Analysis*. 20 March, 2002. 4.
- ² CNN article, Available from World Wide Web at:
<[http://www.cnn.com/2002/US, 11/22/alqaeda.capture/index.html](http://www.cnn.com/2002/US/11/22/alqaeda.capture/index.html)>.
- ³ Eric Boehlert. "Friends Like These," 28 September 2001, Available from <<http://www.salon.com>>.
- ⁴ Lawrence Davidson. 1998. *Islamic Fundamentalism*. (Westport, Connecticut: Greenwood Press), 50.
- ⁵ Davidson, 50.
- ⁶ Eric Black. "U.S. Alliance with Saudi Arabia is Awkward Fit." *Minneapolis Star Tribune*. November 11, 2001.
- ⁷ Davidson, 51.
- ⁸ Ibid., 54.
- ⁹ Bandow.
- ¹⁰ James F. Hoge, Jr., Gideon Rose and F. Gregory Gause III. 2001. *How Did This Happen? Terrorism and the New War*. (Oxford: Public Affairs), 122.
- ¹¹ Ayman al-Yassini. 1985. *Religion and State in the Kingdom of Saudi Arabia*. (Boulder, Colorado: Westview Press), 29.
- ¹² Ibid., 28.
- ¹³ Ibid., 28.
- ¹⁴ Black.
- ¹⁵ Godfrey Jansen. 1979. *Militant Islam*. (London: Pan Books Ltd.), 87.
- ¹⁶ Al-Yassani, 57.
- ¹⁷ Mahmud A. Faksh. 1997. *The Future of Islam in the Middle East*. (Westport, CT: Praeger Publishers), 90-91.
- ¹⁸ Ahmed Rashid. 2000. *Taliban*. (London: Yale University Press), 85.
- ¹⁹ Ibid., 93.
- ²⁰ S.K. Malik. 1991. *The Quranic Concept of Power*. (Pakistan: Progressive Publishers), 373.
- ²¹ David Zeidan. "The Islamic Fundamentalist View of Life as a Perennial Battle," *Middle East Review of International Affairs*, 5 December 2001, 45.
- ²² Faslur Rahman. 2000. *Revival and Reform in Islam* (Oxford: Oneworld Publications), 160.
- ²³ Al-Yassini, 30.
- ²⁴ Dilip Hiro. *Holy Wars*. (New York: Routledge, Chapman & Hall, Inc.), 119.
- ²⁵ Adam Garfinkle. 2002. "Weak Realpolitik," *The National Interest*. (Spring).
- ²⁶ Black.
- ²⁷ Zeidan, 40.
- ²⁸ Ibid., 46.
- ²⁹ Benjamin Orbach. "Usama bin Laden and al-Qaeda: Origins and Doctrines," *Middle East Review of International Affairs*, no. 4, December 2001, 58.
- ³⁰ Orbach, 66.
- ³¹ Hoge, 109.
- ³² Peter W. Wilson and Douglas F. Graham. 1994. *Saudi Arabia: The Coming Storm*. (New York: M.E. Sharp, Inc.), 257.
- ³³ Shibley Telhami and Fiona Hill. "Does Saudi Arabia Still Matter? Differing Perspectives on the Kingdom and Its Oil," *Foreign Affairs*. November/December 2002.
- ³⁴ Wilson, 257.
- ³⁵ David B. Ottaway and Robert G. Kaiser. "After Sept. 11, Severe Tests Loom for Relationship." *The Washington Post*. 12 February 2002.
- ³⁶ Ottaway.
- ³⁷ Al-Yassani, 113.
- ³⁸ Olivier Roy. 1994. *The Failure of Political Islam*. (Cambridge: Harvard University Press), 105.
- ³⁹ Husain Haqqani. "Islam's Medieval Outposts," *Foreign Policy*, November/December 2002, 64.
- ⁴⁰ Neamatollah Nojumi. 2002. *The Rise of the Taliban*. (New York: Palgrave), 122.
- ⁴¹ Bandow, 1.
- ⁴² Peter Marsden. 2002. *The Taliban*. (London: Zed Books Ltd.), 42.
- ⁴³ Haqqani, 63.
- ⁴⁴ Ajay Darshan Behra. "The Supporting Structures for Pakistan's Proxy War in Jammu & Kashmir." *Strategic Analysis*. 20 March 2002.

⁴⁵ Haqqani, 62.

⁴⁶ CNN, Available from World Wide Web at:

<<http://www.cnn.com/2002/US/11/25/saudi.money.trail/index.html>>.

⁴⁷ Jeff Gerth and Judith Miller. "Report Says Saudis Fail to Crack Down on Charities That Finance Terrorists," *The New York Times*, 17 October 2002, A14.

⁴⁸ Black.

⁴⁹ Simon Reeve. 1999. *The New Jackals*. (Great Britain: Andre Deutsch), 245.

⁵⁰ Reeve, 208.

⁵¹ Maxim Kniazkov. "US Congress Leaders Push for Military Action Against Hezbollah, Hamas," *Agence France Presse*, 17 November 2002.

⁵² Ziad Abu-Amr. 1994. *Islamic Fundamentalism in the West Bank and Gaza*. (Indianapolis: Indian University Press), 88.

⁵³ Deroy Murdock. "Is Regime Change in Order for Ershwhile Ally Saudi Arabia?" *Insight on the News*, 9 September 2002, 46.

⁵⁴ *Ibid.*, 46.

⁵⁵ Israel Defense Forces. Documents Captured by the IDF (Israel 2002). Available from:

<http://www.idf.il/saudi_arabia/site/english/main_index.stm>.

⁵⁶ Jac Wilder VerSteege. "A Crude Alliance: The U.S. and Saudi Arabia," *The Palm Beach Post*, 18 November 2001.

⁵⁷ Gerth, A14.

⁵⁸ *Ibid.*, A14.

⁵⁹ Roy, 117.

⁶⁰ Douglas Jehl. "A Nation Challenged: Saudi Arabia," *The New York Times*, 27 December 2001, A1.

⁶¹ *Ibid.*, A1.

⁶² Davidson, 56.

⁶³ Murdock, 46.

⁶⁴ Jehl, A1.

The Logic of Argentine Collective Action: The Transformation of a Group of Ordinary Women into a Human Rights Movement

Beth A. Lauck
University of Notre Dame

Between 1976 and 1983 an authoritarian regime existed in Argentina under which tens of thousands of people disappeared, were held as political prisoners under extremely inhuman conditions, or were tortured. Demanding the truth about what had happened to the disappeared was viewed by the military as a form of dissent and was risking becoming one of the disappeared. However, a group of women emerged, who became known as Las Madres de La Plaza de Mayo, that was able to defy the authoritarian regime and act as a counterweight to the state. This paper attempts to analyze the emergence and transformation of Las Madres de la Plaza de Mayo from a group of ordinary women into a cohesive social movement and, based on theoretical and qualitative analysis, argues that new social movement theory explains their transformation. This paper also argues that Las Madres success expounds upon the basic theories of social movements, specifically on Charles Tilly's "repertoires of collective action" and, thus, the organization of las Madres also enhances social movement theory.

Introduction

"We do not demand anything more than the truth," was the statement Las Madres de la Plaza de Mayo (The Mothers of the Plaza de Mayo), a grassroots movement and eventual human rights non-governmental organization (NGO), published in their first advertisement.¹ During the authoritarian regime that existed in Argentina from 1976 until 1983, the practices of the Argentine military made it essential that the truth of their actions be demanded. As Allison Brysk notes, tens of thousands of people "disappeared" under Argentina's military dictatorship and ten thousand more were held as political prisoners under extremely inhumane conditions and were often tortured. Even pregnant women were detained and tortured until they gave birth. Their children were often taken and illicitly adopted by friends and relatives of the torturers while the mothers were killed.² However, asking for the truth about what had happened to the "disappeared" was interpreted by the military and government officials as questioning and challenging their practices and also as a form of dissent. Merely asking for the truth was taking the chance of becoming one of the "disappeared," those abducted, tortured, and murdered.

On Saturday, April 30, 1977, a group emerged that was able to defy the state of fear that the military had created. Las Madres, as they came to be known, a group which started out as fourteen members but came to include several hundred, was composed of middle-aged women who had been looking for their disappeared children for months. They were tired of going to the military and government headquarters and receiving no answers. The mothers' gatherings at the Plaza de Mayo in the center of Buenos Aires, Argentina, began as a way for the mothers to commiserate together and exchange stories about their missing children. However, their weekly gatherings beginning on that April morning transformed them into a major human rights movement, which acted as a counterweight to the state and a challenge to the authoritarian regime. The emergence of Las Madres evokes the fundamental question: Why was a group of ordinary women able to defy the state of fear that existed during authoritarian rule and challenge the human rights practices of the regime?

Based on theoretical and qualitative analysis, this paper argues that social movement theory, specifically new social movement theory, explains the transformation of an ordinary group of women into a successful contender of the authoritarian regime. Through collective action, Las Madres were able to *legitimately* defy the state of fear that existed in Argentina during the military dictatorship. Their symbolic protests and conscious-raising techniques, fundamental characteristics of new social movement theory, legitimized their actions while simultaneously serving to discredit the authoritarian regime and hold the state accountable for its human rights abuses. Through this process, Las Madres were also able to reconstruct the human rights norms in Argentine society.

Relevance of the Study of Human Rights Movements in Argentina

On September 16, 1977, at 1:30pm, four armed civilians and one person in uniform came to the home of David Horacio Varavsky, an eighteen-year-old student preparing to enroll in the school of engineering in Buenos Aires. The men identified themselves as police, and after searching the house, took David with them. When asked by his family members why they were taking the boy, they replied it was "routine" and that they were merely taking him in for interrogation. When the family asked where they were taking him, the men responded that they should look for him at the Dorrego y Baez command post at 9 o'clock. When his mother arrived there she learned that it was a military post and was informed that there were not detainees there. She was told to go to the Ministry of the Interior. She went to all of the military posts throughout the regime asking for the same information and obtained the same results. "There are no detainees here was the common reply."³

The story of David Horacio Varavsky recorded by the Inter-American Commission on Human Rights was just one of the tens of thousands of accounts of disappearances that occurred during the military junta in Argentina between 1976 and 1983. In order to legitimize their rule and institutionalize their regime, the military junta created a culture of fear and state of terror. Political parties, unions, and other organizations were disbanded, and protests, strikes, and demonstrations were forbidden. People that were seen as potential threats to the regime "disappeared." The country desperately needed a contender to emerge that would investigate and challenge the practices of the regime, but the majority of citizens were too afraid of the repercussions of questioning the military's actions. As a result, human rights abuses including disappearances, tortures, abductions, and murders became the norm in Argentine society. However, Las Madres were able to emerge as a legitimate contender to the government. Although they appeared as a prominent opposition force, except for the disappearances of nine of their members, Las Madres remained unscathed by the military junta. Their unprecedented success in challenging the existing practices and evoking national and international awareness of the human rights condition is deserving of examination.

Analysis of Social Movement Theory

Social movement theory can help explain how an ordinary group of women was able to transform into a human rights movement and act as a major contender to the authoritarian regime. As defined by Robert A. Goldberg, a social movement is "a formally organized group that acts consciously and with some continuity to promote or resist change through collective action."⁴ Goldberg dissects this definition, explaining that a social movement is an "organized group" in the sense that it must consist of leadership, a coherent internal structure, membership, a written statement of purpose, and a legitimate ideological purpose. A movement's "consciousness" consists of its ideology and stated purpose. A commitment to a shared ideology unites a group of people and enables the group to act with intent and continuity. The cohesiveness of a group is increased by formal membership, which prevents the group from becoming a tenuous association. The final component of a social movement is its goal of "promoting or resisting change." A social movement contends for power in the political arena, attempting to influence decision-makers towards the ideology of the movement.

As implied by Goldberg's definition, social movements, with their commitment to a certain ideology and collective action, have the power to be very influential in promoting policies or legislation or even acting as a counterweight to a state and a challenge to an existing regime. However, not all social movements are viewed as beneficial and promoters and instigators of positive change. The Ku Klux Klan, Fascism, and Nazism fit the definition of social movements, in that they were organized groups of people who shared a commitment to specific beliefs and challenged the existing governments and practices in order to promote and institutionalize their ideology. Yet, few would argue that the racism, violence, hatred, and bigotry that these groups represented were beneficial and a positive challenge to the states in which these groups lived. Social philosopher Eric Hoffer analyzed the negative impact of mass movements. He found that oftentimes people participate in social movements not out of a logical pursuit of a stated objective or goal, but rather as a result of feelings of inadequacy. Association with a social movement gives the person a sense of meaning and identity; it "attracts and holds a following not by its doctrine and promises but by the refuge it offers from the anxieties, barrenness and meaninglessness of an individual

extiende.”⁵ Hannah Arendt's analysis of the participants in mass movements is similar to Hoffer's, stating that a typical recruit to a social movement is "without any other social ties to family, friends, comrades, or even acquaintances and derives his sense of having a place in this world only from his belonging to a movement, his membership in the party."⁶ The collective identity they gain as a result of belonging to the movement replaces their autonomy and instead they come to represent the ideology of the group. However, as Goldberg notes, this view of social movements contrasts with political and conventional political action, and participants are unconcerned with real community problems and tensions.⁷ They join the group in order to form an identity or express their hostility and resentment towards the existing society, but are unconcerned with remedying the actual tensions and issues that exist. It can be dangerous when the members take on the group identity to the extent that they lose the ability to think for themselves. From this traditional view in which social movements are thought to contain the unruly and erratic, the participants risk becoming caught up in the group's actions to the extreme level that even when the group is engaged in violence, these hostile actions seem justified to the participants.

The traditional view of mass movements as a form of deviancy derives from feelings of inadequacy and resentment was challenged beginning in the 1960s when it became evident that not all groups share equal access to decision-makers and thus can not influence policy, legislation, and regimes in the same way. The approach that emerged became known as "resource mobilization theory" and is viewed in economic terms. Dissenters are seen as rational actors who calculate the marginal utility of collective action, weighing the costs and benefits of different forms of protest in securing their political preferences.

Sociologist and historian Charles Tilly explains the mobilization model in terms of three central players in the struggle for power: the government, members of the polity, and challengers.⁸ Tilly describes the government as an organization that controls the principal concentrated means of coercion within the population, and the challengers and member of the polity as contenders who are groups that apply pooled resources to influence the government. A member of the polity is a contender who has routine, low -cost access to resources controlled by the government, and a challenger is someone whose access to government resources is more limited and has a more difficult, but not impossible, time influencing the government. The government has the power to accept or reject the contenders' proposals and thus, in trying to influence the government, contenders must be aware of the interests they are trying to pursue in relation to the current state of their society. In trying to influence the government, contenders often act within their "repertoires of collective action," the means which are most familiar to the group, as well as the most appropriate and efficient in the context of their society.⁹ Tilly notes that a collective group will usually repeat the means of collective action it has used in the past; however, gradual change can occur through imitation or innovation. For example, if a group sees that strikes have been effective for a particular group in exerting their demands and influencing the government, a group may switch for their usual technique of protest to strike in hope that the government will be responsive to their means of collective action.

As Brysk notes, the resource model suggests that powerless people who feel excluded from the current political system actually have hidden resources, and if they are able to organize to acquire more resources and deploy them effectively and strategically, they will be able to voice their political preferences.¹⁰ However, some groups are so powerless, especially under certain governments, that they completely lack material resources to mobilize. These truly powerless embody the new social movement theory. In contrast to the resource mobilization theory, which focuses on the organization of interests and mobilization based on bargaining, new social movement theory focuses on the importance of consciousness-raising and symbolic protest for the formation of a collective identity. New social movements seem linked to legitimacy crises and lack of conventional political resources and arise as challenges to the norms and values in a society. As Escobar and Alvarez note, the identity-centered New Social Movement Theories "emphasize the processes by which social actors constitute collective identities as a means to create democratic spaces for more autonomous actions."¹¹ As a result, the New Social Movements promote the autonomy of civil society from the state, empowerment for groups, and democratic norms and values.¹²

The Transformation of Las Madres into a Human Rights Movement

On April 30, 1977, Las Madres de la Plaza de Mayo was unofficially formed when a group of fourteen middle-aged women gathering at la Plaza de Mayo in the center of Buenos Aires, Argentina.¹³ All of the women were mothers whose children had disappeared and had met each other at the Interior

Ministry office when they had continuously inquired about the whereabouts of their children. The gathering at la Plaza de Mayo was instigated by Azucena Villaflor de Vicenti, who was frustrated by the lack of answers they received at the Interior Ministry office, and insisted that the women go to the government house situated across the street from la Plaza and talk to President Videla directly.

Las Madres did not begin with the intention of becoming a human rights movement and did not foresee the impact they would have on human rights norms in Argentina. Their initial goal was simply to discover the truth of what had happened to their children. However, from the beginning, las Madres defied the state of fear that the military regime had instilled in the country. After a successful military coup, one of the first objectives of those who have undemocratically seized power is to close the political system to opposing parties and organizations. In order to maintain their illegitimate authority, exclusion is enforced and dissenters are eliminated. Once systems of collective support are destroyed, individuals feel isolated and, as Faucher and Fitzgibbons note, "mistrust and fear set in destroying all social networks in their progress."¹⁴ Although many times the citizens do not support or condone the practice of the regime, they are afraid of the repercussions of defying it and do not act in any manner that challenges the authority. Members of left-wing organizations or other types of social networks that continue to exist and attempt to challenge the legitimacy of the regime become targets of the security forces and often mysteriously "disappear." Solidarity groups, concerned by the human rights practices and demanding information from the military, try to organize, but they also become the targets of intimidation and outright repression by security forces. They are viewed as a form of opposition and are seen by government officials as a "social cancer" that must be eliminated in order to restore peace and tranquility.¹⁵ This intimidation prevents citizens from challenging the security forces and government in any manner. Afraid of the repercussions, they accept the abuses, including human rights violations, as a normal way of life.

However, las Madres did not succumb to the fear and intimidation that the authoritarian regime in Argentina attempted to instill in society. They were aware that protests and gatherings of more than two people were illegal, but, refusing to accept the human rights abuses their children had inevitable suffered, they agreed to meet in La Plaza de Mayo, one of the most conspicuous sites in Buenos Aires.¹⁶ To citizens of a democratic regime, las Madres' actions of gathering in a public place and commiserating does not seem provocative or dangerous. Under the authoritarian regime, they were risking their actions being interpreted as conspiracy. However, not wanting to remain apathetic to the abuses, they defied the law.

After their first meeting, they agreed to meet the following Thursday at 3:30pm. They strategically choose this time because it was the time banks closed and thus there would be substantial onlookers. They continued to meet on Thursdays and, as the weeks passed, their membership grew and a social movement was conceived.¹⁷ Although there was no requirement for membership other than attendance, no fees, and no official organization (though Azucena was informally recognized as the leader), the group was cohesively united by their commitment to discovering the truth about the whereabouts of their children and atrocities of the regime.

Las Madres in Relation to New Social Movement Theory

Las Madres can be seen in the framework of new social movement theory and new social movement theory explains the success and effectiveness of the actions of the Argentine women. Upon seizing power in March of 1976, the military junta announced the "National Reorganization Process", in which it assumed all executive, legislative, and constitutional powers. This elimination of independent institutions allowed the authoritarian government to act clandestine and not be held accountable for its unlawful activities. The security forces were able to claim impunity, and when stories of the "disappeared" did emerge, citizens were forced to believe that those who had been abducted, tortured, and even murdered had deserved their castigation. Thus, it seems that Tilly's resource mobilization model is not the most appropriate to understand las Madres' movement, since his theory implies that powerless people who feel excluded from the current political system actually have hidden resources and, if they are able to organize to acquire more resources and deploy them effectively and strategically, they will be able to voice their political preferences.¹⁸ Under the the "National Reorganization Process" the military did not allow for civilians to questions its authority and did not respond to civilian demands. Las Madres' lack of success in receiving responses from government officials about the whereabouts of their children demonstrates how they were completely powerless and closed off from the typical channels of influencing the government.

Instead, in order to discredit the regime and evoke change, las Madres engaged in symbolic protest and consciousness-raising, the two fundamental characteristics of new social movement theory. They

developed a group emblem: white baby diapers wrapped around their heads. This symbol embodied the paradox of their movement: simple and innocent, yet dangerous and provocative. The Argentine women became aware that they were dangerous by defying and challenging the regime, yet their manner of defiance, nonviolent protests and actions and the goal of demanding accountability, was interpreted by the public as legitimate. The most significant expressive strategy was their weekly protests at La Plaza de Mayo in which they silently circled the plaza each Thursday and personalized the disappeared by carrying their photographs. Las Madres also put paid advertisements and photos of the disappeared in newspapers, demanding information and truth from the government.¹⁹

By defying the state of terror and fear that the military had created, Las Madres were able to challenge Argentina's norms concerning human rights practices. By seeking the truth about what happened to their children, Las Madres challenged the norm that disappearances, abductions, and tortures were justified. The expressive strategies Las Madres used raised the consciousness among the public to the clandestine activities of the military junta and made people realize that those who had disappeared were victims and not deserving recipients of abuse.

Las Madres evoked awareness of the human rights abuses domestically as well as internationally and were influential in creating a worldwide response. As Keck and Sikkink note, human rights were officially placed on the international agenda in 1948 with the creation by the United Nations of the Universal Declaration of Human Rights.²⁰ During the 1960s and 1970s, with the increasing reports of abuses in countries such as Uruguay, Argentina, Chile, Greece, and Uganda, and the formation of NGOs dedicated to human rights including, Amnesty International in the 1960s, the Lawyers Committee on Human Rights in 1979, Washington Office on Latin America in 1973, and Human Rights Watch, human rights became a salient issue. Argentine domestic human rights organizations, including Las Madres de la Plaza de Mayo, began to develop external contacts in order to publicize the human rights situation, to fund their activities, and to help protect themselves from further repression by their government.²¹ Members of Las Madres visited the United States, Canada, and France in 1978, and sent delegates to the United Nations, the Catholic Church's Puebla Conference, and the Organization of American States.²² Las Madres received substantial funding from Dutch Churches and the Norwegian Parliament. In 1980, they received the Nobel Peace Prize. The international response and support they evoked helped to legitimize their cause and increase their success. Especially for economic reasons, including trade, government leaders in Argentina did not want to be perceived negatively by the international community, and the international response put pressure on the military to stop its heinous actions.

By decreasing the legitimacy of the military junta domestically and internationally, Las Madres were influential in promoting regime change and democratization. During the transition to democracy, Las Madres and other human rights movements were instrumental in promoting and establishing institutional reforms. The movements especially had success in the judiciary.²³ Since judges also serve as investigators in Argentina's legal system, the majority of the demands for investigation into the abuses were directed at the judiciary. The trials of the military officers responsible for the repression held during the transition to democracy were the culmination of the human rights successes and the manifestation of their goal of achieving accountability and truth. As the assistant prosecutor during the trials, Luis Moreno Ocampo states, "without the human rights organizations there would not have been a trial."²⁴ Thus, the human rights movement was fundamental in promoting justice

Why were Las Madres Successful ?

Las Madres were obviously dissenters and challengers of the military junta, which evokes the question: why were Las Madres successful and able to avoid becoming targets and victims of the regime? New social movement theory also helps to answer this question. The collective action of Las Madres in protesting for their own, as well as other people's children served the function of revealing the clandestine state and promoting a shared rendition of the hidden atrocities of the government regime. As cliché as the statement "there is power in numbers" seems, this is exactly what allowed for the success of Las Madres. Acting individually, Las Madres ran the risk of becoming targets of the military junta, because the military could easily cause one or two of Las Madres to disappear, without evoking unnecessary publicity. Also, if there had only been a limited number of testimonies, the truth about the military junta would not have been as obvious to the public; it is possibly the public would have simply thought that the individuals were hysterics and fabricating the stories, which is what the military wanted the public to believe. However, the

excessive number of testimonies that las Madres collectively presented made society stop and begin to question the authenticity and legitimacy of the military junta.

The positive international response also helped validate and strengthen their movement. Once the international community made human rights a priority and acknowledged the grave human rights abuses that were occurring in Argentina, pressure was put on the military to stop such atrocities. For economic and political purposes, Argentine leaders did not want to be viewed negatively in the eyes of the United States and countries in Western Europe.

As Brysk notes, las Madres' use of collective action, symbolic politics, and testimonies "helped to establish a pattern of state responsibility reinforcing the human rights claim for accountability."²⁵ In establishing accountability, las Madres decreased the legitimacy of the regime, while simultaneously increasing the legitimacy of their movement. The decreasing power and support for the regime as a result of the testimonies by las Madres and other human rights organizations, both national and international, became obstacles for a military response to the movement. Subverting las Madres and causing them to "disappear" would only have increased the illegitimacy of the regime by serving as further proof that las Madres testimonies of disappearances and atrocities were true.

The organization of las Madres expounds upon Charles Tilly's "repertoires of collective action" theory. In many ways, las Madres defied their "repertoires of collective action" by using means of action, protests, and gatherings, that at the time were illegal and acting outside of the traditional role of women in Argentine society. Since at the time, protests and gatherings of more than two people were not allowed, the actions of las Madres were highly illicit, and thus, the means they used to influence the government would not be predicted to be effective. If Tilly's theory applied, given the current political conditions, it would be expected that las Madres would be jailed or "disappeared" for their actions. Also, at that time in Argentina, women were not typically activists and political movers, but homemakers and mothers. Thus, it was not expected that the Argentine women would organize at all, and their actions were unusual.

However, it can be argued that because las Madres acted outside of their "repertoires of collective action," they were successful. If the mothers had not engaged in protests and gatherings, they would not have had the ability to shake the Argentine public and make them aware of truth. Also, the traditional perception of women and their role in society prevented las Madres from appearing as an eminent threat to the military. If men had protested in la Plaza de Mayo, military officials and security forces would have immediately subverted their activities. But the traditional view of women and mothers as being pristine and nonthreatening aided in the survival of their movement. It is evident that Tilly's "repertoire of political action" theory existed in the minds of Argentines; the military had preconceived notions of how las Madres would act based on their gender and the given circumstances, and thus did not feel threatened by their organization. However, las Madres defied society's expectations and acted outside of their "repertoires of political action," making them a highly successful movement. Thus, the organization of las Madres expounds upon Tilly's theory and enhances social movement theory.

Conclusion

It can be concluded that the success of Las Madres de la Plaza de Mayo was a result primarily of two factors: collective defiance of the regime, and conscious-raising and symbolic protest, which legitimized their movement while simultaneously discrediting the military junta. Since these factors are both fundamental characteristics of social movements, social movement theory, especially new social movement theory, is intrinsic to understanding their success.

However, Las Madres' success also expounds upon the basic theories of social movements, especially on Tilly's "repertoires of collective action." If Las Madres had acted within their "repertoires of collective action," they would have remained inactive since means of collective action including protests and gatherings were illegal at the time and Argentine women were not typically political activists. It is only by defying their "repertoires of collective actions" that those women were successful and able to act as contenders to the State. Thus, it can also be concluded that not only does social movement theory help to explain the effectiveness of the Las Madres, but the specific social movement of Las Madres also enhances social movement theory.

-
- ¹ Allison Brysk. 1994. *The Politics of Human Rights in Argentina*. (Stanford: Stanford University Press), 48.
- ² Statistics on those disappeared, tortured, and murdered taken from: Brysk, 1.
- ³ Organization of American States: Inter-American Commission on Human Rights. *Report on the Situation of Human Rights in Argentina*. 11 April 1980, 71.
- ⁴ Robert Goldberg. 1991. *Grassroots Resistance: Social Movements in Twentieth Century America*. (Belmont, California: Wadsworth Publishing Company), 2-3.
- ⁵ Eric Hoffer. 1951. *The True Believer: Thoughts on the Nature of Mass Movements*. (New York: Harper and Row), .39.
- ⁶ Hannah Arendt. 1966. *The Origins of Totalitarianism*. (New York: Meridian), 323-324.
- ⁷ Goldberg, 5-6.
- ⁸ Charles Tilly. 1978. *From Mobilization to Revolution*. (Massachusetts: Assison-Wesley), 52-55.
- ⁹ *Ibid.*, 153.
- ¹⁰ Brysk, 8.
- ¹¹ Arturo Escobar and Sonia E. Alvarez. 1992. "Introduction: Theory and Protest in Latin America Today." *The Making of Social Movements in Latin America: Identity, Strategy, and Democracy*. eds. Arturo Escobar and Sonia E. Alvarez. (Boulder: Westview Press), 5.
- ¹² Brysk, 9.
- ¹³ Description of las Madres first meeting taken from: Iain Guest. 1990. *Behind the Disappearances*. (Philadelphia: University of Pennsylvania Press), 52-56.
- ¹⁴ Phillipe Faucher and Kevin Fitzgibbons. 1989. "Dissent and the State in Latin America." *Dissent and the State*. ed. C.E.S. Franks. (Toronto: Oxford UP), 138-155.
- ¹⁵ *Ibid.*, 149.
- ¹⁶ Guest, 52-56.
- ¹⁷ *Ibid.*, 54.
- ¹⁸ Tilly, 52-55.
- ¹⁹ Brysk, 11.
- ²⁰ Margaret Keck and Kathryn Sikkink. 1998. *Activists Beyond Borders: Advocacy Networks in International Politics*. (Ithaca: Cornell UP), 80.
- ²¹ *Ibid.*, 105.
- ²² Brysk, 52
- ²³ *Ibid.*, 74
- ²⁴ *Ibid.*, 77-78
- ²⁵ *Ibid.*, 1.

A Comparative Analysis of Codified v. Common Law Legal Systems in Relation to European Integration and the European Court of Justice

Lucas Morgan
University of Wisconsin.

This paper explains the legal systems from the United States and countries in Western Europe, and compare and contrast those codified (civil) and common law legal systems. Its intention is to uncover which system more erodes state sovereignty, and looks specifically at how judicial review and constitutional courts are used in those systems. The author presents case studies on Germany, France, Great Britain, and the United States, and concludes that the flexibility and constant evolution within the common law causes that system to erode state sovereignty more than the relatively static and strictly-enforced codified system. He further argues that the element largely responsible for this phenomenon is the mechanism of judicial review, and factors in the developing authorities of the European Union and the European Court of Justice.

This paper will be a comparative analysis examining the different types of legal systems in the countries of Western Europe and the United States. It will examine the significance of codified (civil) versus common law legal systems, as well as the specific role that constitutional courts and judicial review play in those legal systems. The goal of this paper is to determine whether a common law or codified system plays a role in the diminishing of state sovereignty. Since it examines legal systems and philosophies, this paper will not contain detailed information pertaining to the criminal justice system nor facts or references concerning the general makeup of the lower courts in the various nation states. It will, however, include a number of case studies on such countries as Germany, France, Great Britain, and the United States. Several arguments will be made. First, that common law legal systems erode state sovereignty more than codified legal systems do because in most codified systems the laws are pre-existing rooted in ancient moral code, seldom changing and stiffly enforced. The common law system, however is constantly changing, leaving it open to new interpretation, which allows the system to be a living and evolving entity. Second, while it will be argued that the flexibility to evolve is a desirable characteristic for any constitution or legal system, it may also lead to a greater occurrence of the erosion of state sovereignty. Third, it will be argued that the common law system does contribute to the loss of sovereignty, but the fact that other factors may contribute to that loss, mainly the implementation of judicial review, will not be ruled out.

These different types of legal systems will be examined in order to establish the necessary foundation needed to answer the critical question of this paper. What kind of power, if any, will the European Court of Justice (ECJ) have over the affairs of the European Union (EU) member states, in relation to the erosion of state sovereignty? Will that power ever rival that of the U.S. Supreme Court, why or why not? These questions are important because, as the EU expands and integrates, the question of state sovereignty becomes more and more important. If the ECJ can establish itself as a real force in the judicial politics of Europe, member states could face a decline in domestic judicial power, as well as a loss of state sovereignty.

To begin the analysis, a brief history and explanation of the different types of legal systems to be dealt with are given.

The countries of continental Europe are all influenced by the legal tradition of ancient Rome where code law prevailed. Great Britain deviates from this pattern in having a tradition of common law, where judges continually reinterpret old precedents in the light of new circumstances. Code law, by contrast is characterized by complex bodies of categories and subcategories that give the courts limited discretion in handling particular cases. The classical code law is the Napoleonic code system, which Napoleon introduced in France after the Great Revolution and which under French revolutionary influence spread to the other countries of the continent. The Napoleonic codes were conceived as positive legal commands that judges were

strictly obligated to obey. One did not wish a government of judges. As Alec Stone puts it: “The judges role was a subservient and bureaucratic one; he was required to verify the existence and applicability of statutory norms to a case at hand, but he could investigate the work of the legislature no further.”¹

As one may see, a codified legal system does not appear to threaten state sovereignty, due in part to the strict guidelines the judges are made to follow. The judge’s role as a subservient bureaucrat does not diminish the legislature’s power as it does in a common law system; rather it reinforces that power by preventing the erosion of state sovereignty from within. The common law system gives judges far more power than the in the codified system. In the common law system, a judge is almost a kind of supreme legislator, for he has the power to interpret the laws of the legislature and, based on past precedents, accept or reject those laws that have been decided upon by the representatives of the people. Thus, in the common law system, judges’ decisions may trump the will of the people; this must be seen as an erosion of state sovereignty. The incidence of this happening was considerably low however, until a loophole called judicial review was implemented in the United States. Judicial review and its implications will be discussed in much greater detail throughout the remainder of this paper. However, until then, one important point must be made before continuing. This paper will examine the legal systems of the common law countries of Great Britain, and the United States, as well as the codified systems of France and Germany. Each of these countries has a national constitution that gives the state its legitimacy and structure and is ultimately the reason these countries have legal systems at all. Case studies will be performed on these four countries in order to gain a more in depth analysis of the codified and common law systems. The common law systems of Great Britain and the U.S. are first.

The British system is unusual in comparison to the other countries. Great British is one of only a handful of countries without a written constitution. However, they have one of the oldest common law systems in the world, dating back to 1215 and the Magna Carta. A constitution is “simply the rules, whether statutory or not, regulating the powers of government and the rights and duties of the citizen;” then, although Britain does not possess a written document with all their rights and privileges explicitly laid out for them, “Britain, like any other civilized states, has always possessed a constitution.”² Where then do the British courts get their power? There are certain written documents that have become the basis of British law. These documents are “The Magna Carta, The Bill of Rights, The Act of Settlement and The Parliament Acts, which all contain a good deal of the British Constitution, in the sense of providing norms for the regulation of government activity and the rights of citizens.”³ The British therefore very much so follow the common law legal system. Since the judges do not have one specific written document to follow, they have the ability to interpret cases and make decisions based mostly on past precedent concurrent to the changing times.

The common law is a law defined in terms of past judicial decisions. The resulting methodology is such that the common law perpetually is in flux, always in a process of further becoming, developing, and transforming, as it cloaks itself with the habits of past decisions, tailored to the lines of the pending situation. The common law evolves with the ongoing derivation of legal standards from prior judicial decisions, but it is defined by continuous motion. This means that the common law is that which cannot be crystallized, frozen or ever entirely captured. It is fluid, with a suppleness that resides in its inseparability from each discrete, concrete set of facts, the facts of the lived experiences which formed the basis of the litigation that led to the prior relevant court adjudications.⁴

Some might argue that, without a constitution, the government and the courts would be allowed to do whatever they wanted and thus possibly exploit their citizens. However, this is not the case for Great Britain, because as Jurg Steiner states:

The British system is based on a very different philosophy of government. In Great Britain, the main task of the voters is to elect Parliament, which alone has the legitimate right to express the will of the people. Because people give full power to Parliament, it would be illogical—according to British tradition—for a high court to check the actions of Parliament. These checks are made by the people in the next election.⁵

Therefore, the courts in Britain play a small roll in law making, a role that they leave to the people. Since the British lack a traditional constitution, they have no need for constitutional courts or judicial review to preserve the integrity of their constitution. This being the case, Britain is kind of an exceptional case in so far as the British common law system allows room for more interpretation and flexibility while also preserving state sovereignty. This preservation of state sovereignty is a result of the people having put their trust in the legislature, while at the same time denying the courts the authority over the legislature, which a common law system can encourage. When the British common law system is contrasted with the American common law system, one of the most important differences between the two is the tool of judicial review. The American common law system spawned judicial review, which gives judges a sort of authority over the legislature, which will soon be seen to have some major implications.

The American legal system is based upon a written constitution framed in 1787 by state delegates at a convention in the city of Philadelphia. The delegates laid down the foundation of the American political system, which has survived for more than 200 years. How does a document written more than two centuries ago remain largely unaltered and still have as great an impact on a country as this Constitution has? The key is that the U.S. Constitution is a “living document,” which adapts and evolves in conjunction with the state. The U.S. Supreme Court has done its part to breathe life into the constitution through judicial review. Judicial review is the power of the courts to declare a law unconstitutional, making it null and void.

Judicial review is defined as any judicial action that involves the review of an inferior legal norm for conformity with a higher one, with the implicit possibility that the reviewing court may invalidate or suspend the inferior norm if necessary or desirable. This definition of judicial review includes both review of legislatively enacted statutes as well as review of administrative and executive decrees for compliance with constitutional principles.⁶

Judges gained this power in the landmark U.S. Supreme Court case of *Marbury v. Madison* in 1803. Chief Justice John Marshall declared that, “a legislative act contrary to the constitution is not law.”⁷ The significance of Marshall’s decision has had profound and long lasting effects on the American judicial system. The federal courts gained a great deal of power through this decision, most notably the power to strike down laws created by the legislature, thus becoming lawmakers in their own right. An ongoing debate has emerged surrounding the original intention of the framers in regards to judicial review. Many claim that the framers of the constitution had no such ideas in mind. One of them was Chief Justice Roger Taney, who wrote, “The Constitution should speak out not only in the same words but in the same meaning for all time.”⁸ Taney was arguing against the Court’s ability to reinterpret and change legislative laws. He believed that the courts had no such power to void laws passed by the legislature, because these laws represented the will of the people.

On the other hand, a case can be made in support of judicial review. One such argument had been made that:

...the founding fathers had been brought up in the British tradition of judicial power to interpret statutes and, more significantly to apply incrementally an evolving conception of the common law. In other words, although the constitution ought remain the fundamental basis to which disputes over the allocation of powers or the defense of individual rights should be referred, its meaning, like coral, could grow gradually in response to contemporary needs.⁹

Thus, “the Supreme Court, through the process of judicial review and the convention of judicial supremacy, fulfils the necessary function of adaptation.”¹⁰ Judicial review grants great power to the judicial branch of the government, allowing it to exceed its expressed powers, which leads to a corrosion of state sovereignty for the individual states within the nation state of the U.S. This same argument was present in the British case study and was cited as a reason the courts stayed out of the law making process. However state supreme courts have often attempted to declare federal laws unconstitutional, thus giving them arbitrary power over the larger entity and in turn erode nation state sovereignty. Nevertheless, this power has consistently been rejected by the U.S. Supreme Court.

As seen so far, constitutions seem to be the basic foundations upon which most legal systems are built. However, judicial review seems to be a major player in the erosion of state sovereignty. Up to this point, two cases where common law legal systems exist have been explained. The case of Great Britain

shows the vulnerability of those common law systems where judges are given a lot of power. However, the judges in Britain have opted to leave the law making up to the legislature, preventing abuses of their power and keeping state sovereignty intact. One thing to keep in mind however is that the judges in Great Britain do not have the power of judicial review, which the American system shows to give judges far greater power. This leads to our second case study, where the British system was contrasted with that of the United States. The American common law system seems to pose a greater risk to state sovereignty than does the British system. One reason for this difference is Britain's lack of a written constitution, as well as its lack of judicial review. This may indicate that the type of legal system itself may not be the most influential aspect in the reduction of state sovereignty. The presence of a written constitution and judicial review seem to be major contributing factors to this phenomenon. This is yet to be determined, however, and thus, must be investigated further. The codified (civil) legal systems of Germany and France will be examined so as to determine whether the legal system itself is the culprit in the deterioration of state sovereignty.

German legal theorist Hermann Kantorowicz once stated that "the law is not what the courts administer but the courts are the institutions which administer the law."¹¹ This is a fitting reflection of the German judicial ideology that prevails in the civil law legal culture of the day. "The civil-law court begins with the general, universal legal norm that applies to the particulars, such that a case is defined as 'a particular state of affairs falling under a rule.'"¹² In a civil law system, the codes enacted by the legislature are seen as directions to the judiciary for use in administering decisions in all cases that may arise, or in other words "...a particular state of affairs falling under a rule... The foundational principle of the civil-law system has been the supremacy and sovereignty of the legislature, which traditionally has been considered to be the purest expression of the collective will."¹³ The codes therefore represent the broad population and thus the courts do not take into consideration specific events or individual human experiences when handing down judicial decisions because they have a specific legal recipe already in place to lead them to the appropriate end result. This system of civil law had a drastic effect on judge's power. Unlike in the common law system where judges are allowed to interpret the laws and make their own decisions based off of past precedents, the civil law judge is only an administrator of law, not a creator of it. "The judge's first and only duty under the traditional German doctrine of separation of powers was to enforce the laws as written."¹⁴

The civil-law judiciary was constrained in its activity by the use of comprehensive codes and by the absence of a system of precedent. Because virtually the entire corpus of the civil law was contained within comprehensive codes, the opportunities for civil-law judges to exercise independent law-creating authority were limited.¹⁵

The result of the civil-law system is a judiciary comprised of administrative "robots" that enforce the law, rather than apply it. "In the words of one modern scholar, the ideal civil-law judge was a "skilled mechanic operating a syllogism machine."¹⁶ However, the German state is starting to become more open to ideas of interpretation as the notion of judicial review took center stage in the creation of the current German constitution in 1949, called the Basic Law.

In content and style the Basic Law follows a pattern of constitutions adopted by other liberal democracies. It establishes the constitution as the supreme law of the land, enumerates the rights of persons, creates a political system of separate and divided powers, provides for an independent judiciary capped by a high court of constitutional review, sets forth special rules....¹⁷

Two unusual cases have been discussed; the first being Great Britain which uses the common law legal system, but almost contrarily to the fundamentals of the system, by not having judicial review, and second, the case of Germany where the same situation is true. The Germans use the civil law system, which does not really have room for judicial review, yet they have squeezed it into their system nonetheless. With civil law countries adopting judicial review and having the power to override legislative laws, it is slowly becoming clear that common and civil law legal systems may not be the major contributing factors in the loss of state sovereignty. As the studies of Germany and Great Britain have shown, the blame cannot be passed on to the common law system alone, but should be shared with the doctrine of judicial review. The last case study will illustrate how the codified system of France fits into this mix.

France has had a turbulent time creating its constitutions. Between 1791 and 1815, France had eight different constitutions. In the twentieth century France has been able to form a more stable constitution, living under the constitution of the Fifth Republic since 1958.

The common law is a formalized undertaking to institute Herder's idea of understanding the general by listening to the particular, by listening to the individual, and by trying to feel as the "other" does in the environment in which the "other" dwells. A civil code, on the other hand, in the words of Portalis, the chief drafter of France's Civil Code, "governs everyone; it considers men en masse, never as individuals ... Were the situation otherwise, ... individual interests would besiege legislative power; at each instant, they would divert its attention from society's general interests."¹⁸

So as the civil law legal system plays a large role in Germany, so too does it play a role in France. The code civil, as it is called in France, is an important step in guarding state sovereignty. However, France also has the power of judicial review, but the French version of judicial review is far different than that of the other countries seen thus far. France practices abstract judicial review, which means that the French constitutional courts are like the last line of defense in the legislative law making process. The court has the last word on any particular bill.¹⁹ The French constitutional court must determine whether the bill is constitutional before it will be allowed to pass. This means the courts make rulings based on abstract laws that are not really laws at the time.

Abstract review is initiated by politicians, who refer legislation directly to the court. Abstract review therefore functions to extend what would otherwise be a concluded legislative process. The court undertakes, so to speak, a final reading of a bill. In doing so, decision making of the judges is closer to legislative decision making than when they apply the constitution to concrete litigation.²⁰

The judicial review that France has implemented does not pose a substantial risk to state sovereignty, because the constitutional court acts as a third chamber to the legislature and does not really have the power to impede on state sovereignty. This paper has looked at the common law systems of Great Britain and the United States, as well as the civil law systems of Germany and France. Next, it will concentrate on how the different types of legal systems will affect the ECJ, since the ECJ is a supranational organization, which represents various nation states and legal systems.

It has been shown how common law and civil law legal systems are practically contradictory ideas. The common law system favors precedent and interpretation, while the civil law system favors strict rules and administration. Also, a state can possess qualities of both systems by means of the use of, or the lack of, judicial review, as evidenced in the cases of Germany and Great Britain. That a single system can possess qualities of both common law and codified systems makes integrating the two systems easier, as models of this sort have already displayed. "The progression towards legal uniformity is spawning a hybrid, homogenized legal culture from the systems of the civil and the common law that encounter each other in the new Europe."²¹ However, will this hybrid of the two systems threaten EU members state sovereignty? To answer this question, some background information on the European Court of Justice (ECJ) is necessary.

As seen in other countries, the court systems of most states do not exist without some form of a constitution. The ECJ is no different, in the sense that it has guidelines and written texts that make up a quasi-constitution. These texts come from a number of places, but mainly they come from the treaties that established the European Union (formally called the European Community). "The three founding Treaties plus the Treaties and Acts supplementing and amending the founding Treaties constitute the so-called primary legislation of the community. They may also be regarded as making up the Community's written constitution."²² The criteria of having a constitution, seen in all the case studies up to this point, is thus fulfilled. A hybrid common and civil law system is necessary for the ECJ to be successful. It just so happens that, in recent years, the ECJ has come to realize this and has started to blend together the two styles of law for the purpose of further integrating the EU member states. "It is, rather, a civil-law twist on common-law methodology that we are seeing today in the European Union. The common-law recognition of precedents as a binding source of law is blending with the civil-law custom of norm-formation for general prospective deductive application."²³ Typically, in the common law legal system, judges are given

more room to maneuver and to interpret the laws as they personally see fit, although, in civil law systems where some form of judicial review exists, judges are given virtually the same power. This application of judicial review among the civil law cultures has had a positive affect on the integration of the two systems, making them more compatible. "The ECJ steadily advanced the process of integration by judgments establishing the supremacy of community law, thereby increasing the penetration of the community into the domestic systems of the member states."²⁴ This paper argues that the ECJ's hybrid combination of the common and civil law legal systems, has an effect on the erosion of state sovereignty. Eventually, however, it is the ECJ's dominance as the supreme law of the land in the European legal framework, as well as its use of judicial review, that will contribute most to the erosion of state sovereignty. Neill Nugent blames this erosion on gaps in EU law, blaming the newness of the community, as well as weak legislation resulting from compromise and the slow speed of change in some spheres of the EU community. These gaps subsequently need to be filled, and the ECJ has been the one to step forward and do it by creating new laws by means of a quasi form of judicial review. "The court, therefore, inevitably and frequently goes well beyond merely giving a technical and grammatical interpretation of the written rules. It fills in the gaps in the law, and by so doing, it not only clarifies the law, but it creates new law."²⁵ The growing superiority of EU law has diminished individual member states' sovereignty, because the EU requirement submission to EU law, which can at any time trump individual state law, takes away from the importance of domestic laws.

The ECJ's work was.... extremely important in consolidating the status of the new legal system, particularly by bringing about a situation in which domestic courts accepted the ECJ's role as the ultimate interpreter of and arbiter of Community law. Given the supremacy of European Community law in the event of possible clashes with domestic legislation, this was of crucial significance.²⁶

This sudden strengthening of EU law stems from a 1964 case involving Italy. The court in that case held that, "Community law took precedence over subsequent conflicting national legislation."²⁷ As has been seen, the power of judicial law making has had an affect on state sovereignty, which in turn has contributed to the supremacy of EU law. It has limited member states and made them susceptible to a supranational authority. "The claim to legal supremacy in the interpretation, application, and adjudication of these laws constitutes a central element of the supranational character of the Community. This has necessarily involved the states in surrendering some of their sovereignty."²⁸ The loss of state sovereignty through the courts is not a desirable situation for many EU members, who already fear the profound affect of further EU integration as a result of the European Monetary Policy.

Through its rulings, the Court has gradually defined the boundaries of Community and Member State powers. That supranational decision-making processes can bring about institutional and societal change in the EU, even if some governments object, implies that the Member States have lost direct control over their creation. It also explains why certain governments have been less than eager to continue with the European integration process through the Community method since it implies giving up direct control and veto powers.²⁹

The ECJ has developed numerous powers and is slowly establishing the legitimacy it requires to rival the U.S. Supreme Court. The two courts are similar in a few ways. Both are the supreme law of their respective lands and settle disputes between their respective member states. They both have a form of judicial review allowing them to assert a great deal of influence within the legal framework of their systems. Both bring together states in a sort of federal court system. Moreover, both contribute to the erosion of state sovereignty, although the ECJ to a lesser extent. This is because, if an EU member state feels that it is giving up too much of its sovereignty, that nation state is free to leave the EU and no longer be in the jurisdiction of the ECJ. This not the case in the U.S. however, because if an individual state within the U.S. feels threatened by the Supreme Court, it does not have the luxury of leaving the nation state or escaping the jurisdiction of that Court. All in all, the ECJ has come a long way, but it does not yet have the power to rival the U.S. Supreme Court. With further integration based its rulings and other EU measures, the ECJ will only get stronger as the EU member states and their laws become more unified.

In conclusion, it has been shown how the common law legal system leaves room for interpretation by allowing judges more freedom in applying the laws. As functions like judicial review become

important, judges become lawmakers as well as interpreters. The idea of judicial review is not just a common law feature; Great Britain does not have it while France and Germany do. The migration of judicial review to the civil law legal system has allowed for easier integration of the rival systems. After analyzing these case studies, it is clear that the legal system to which a state subscribes has little affect on the erosion of state sovereignty. The role of judicial review is the key factor that determines whether trespasses on state sovereignty will occur. This was evidenced in a number of case studies where courts were given the power to make laws based on facts and past precedents, in turn allowing for the nullification of state laws based on constitutionality. Judicial review is somewhat of a common law feature, but it has steadily been creeping into the civil law system and reeking the same havoc. That state sovereignty has been encroached upon in both systems suggests that judicial review plays more of a role than originally thought. However, in the case of the European Union, the blame lies in the supremacy of EU law, which has been furthered by strong rulings in the ECJ, by ways of judicial decision-making. Also, the fact that the EU member states have not vehemently objected to the ECJ impingement on state sovereignty has also been a contributing factor. The ECJ has been developing real judicial authority over the EU nations and, with further integration and cohesiveness, the ECJ could become a sort of Supreme Court of Europe in due time.

-
- ¹ Jurg Stiener. 1998. *European Democracies: Fourth Edition*. (New York: Longman), 97.
- ² Policy Studies Institute. 1988. *Constitutions in Democratic Politics*. (Brookfield, Vermont: Gower Publishing Company), 53.
- ³ *Ibid.*, 55.
- ⁴ Vivian Grosswald Curran. 2001. "Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union." *Columbia Journal of European Law* 63 (Winter), 74.
- ⁵ Stiener, 98.
- ⁶ David Lundsgaard and Robert Utter. 1993. "Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective." *Ohio State Law Journal* 559 (Summer), 561-2.
- ⁷ Robert von Moschzisker. 1971. *Judicial Review of Legislation*. (New York: Da Capo Press), 81.
- ⁸ Policy Studies Institute, 79.
- ⁹ *Ibid.*, 79.
- ¹⁰ *Ibid.*, 80.
- ¹¹ Grosswald Curran, 97.
- ¹² *Ibid.*, 93.
- ¹³ Lundsgarrd, et al, 563.
- ¹⁴ Donald Kommers. 1989. *The Constitutional Jurisprudence of the Federal Republic of Germany*. (Durham: Duke University Press), 6.
- ¹⁵ Lundsgarrd, et al, 564-65.
- ¹⁶ *Ibid.*, 564.
- ¹⁷ Kommers, 36.
- ¹⁸ Grosswald Curran, 89.
- ¹⁹ Alec Stone. 1992. *The Birth of Judicial Politics in France*. (New York: Oxford University Press), 37.
- ²⁰ Stiener, 97-98.
- ²¹ Grosswald Curran, 64.
- ²² Neill Nugent. 1989. *Government and Politics of the European Community*. (Durham: Duke University Press), 143.
- ²³ Grosswald Curran, 73.
- ²⁴ Michael Newman. 1996. *Democracy, Sovereignty and the European Union*. (New York: St. Martin's Press), 31.
- ²⁵ Nugent, 150.
- ²⁶ Newman, 31.
- ²⁷ Stuart Scheingold. 1971. "The Law in Political Integration." *Occasional Papers in International Affairs* 27 (June), 10.
- ²⁸ Nugent, 164.
- ²⁹ Youri Devuyst. 2000. "The European Union's Constitutional Order? Between Community Method and AdHoc Compromise." *Berkeley Journal of International Law* 1, 11-12.

Garbage Wars: Problems and Solutions Concerning the Interstate Transport of Waste in America

Daniel Shean
University of Virginia

The waste management situation is a complex combination of environmental policies, economic motivations, and differing state policies. After a comprehensive description of the interstate transport issue, the author makes the case that large-scale interstate trash transport is neither practical nor environmentally sound. The situation in Virginia, the second leading garbage importer, is used as a case study to examine the motivations behind this phenomenon, and is compared to the European Union's own policies. Of the 5.4 million tons of this imported waste, the vast majority comes from Maryland, New York, and the District of Columbia. The reasons for this mass transportation are outlined and explained, and those legislative efforts that have been undertaken are discussed. The differences between Virginia's waste management programs and the minimization system exercised by the European Union are put into context, and are used to create suggestions for application in the United States. The author concludes by investigating the application of these policy changes that aim to correct an increasingly costly waste management problem in the United States.

Introduction

Every year, when the Virginia Department of Environmental Quality (DEQ) releases its Solid Waste Report, citizens, public officials and local media sources throughout the commonwealth bemoan the state's growing reputation as the nation's second-leading trash importer. While state leaders, interest groups, and even some Congressional representatives often pledge to stop the trend of waste importation in Virginia, little actual progress has been made to deal with the issue. Unfortunately, debate over interstate trash transport is most often reduced to emotionally charged and ill-informed pleas to keep out all out-of-state garbage of Virginia. To grasp a better understanding of what can be done to improve the waste management situation in Virginia and the United States, it is necessary to gain a comprehensive understanding of the interstate trash transport issue. It may also be helpful to step back and look at this dilemma as indicative of a larger national problem- perhaps Americans are producing too much waste.

This paper will make the case that while interstate trash transport can be appropriate in several instances, large-scale interstate trash transport (i.e., New York to Virginia) makes neither practical nor environmental sense. While solutions to this micro-level problem of garbage transport from New York into Virginia are possible, it is also helpful to look at waste management issues from a macro-level perspective, borrowing policies and ideas from the European Union and communities across America, as well. A variety of policy ideas and solutions are obtainable from a closer examination of the interstate trash transport problem in America and also from an examination of waste management practices in the European Union.

The Virginia Trash Transport Controversy

Virginia, the United States's second-leading garbage importer, accepted 5.4 million tons of solid waste from out-of-state locales in 2002. Most of this waste came from Maryland (38%), New York (27%) and the District of Columbia (21%). The amount of solid waste imported into Virginia has steadily increased over the last several years.¹ Many public officials consider this solid waste management trend to be a problem, and state and federal officials have attempted to take legal measures to stop this trend.

To gain a better understanding of the problem, it is necessary to discuss several waste management statistics from Virginia, and its two largest garbage exporters, Maryland and New York. New York generated about 36.3 million tons of solid waste in 1999², and Maryland generated around 11 million tons of solid waste in 2001.³ Virginia solid waste management facilities received a total of 22.9 million tons of solid waste for disposal in 2002, with 17.5 million tons originating in the commonwealth.⁴ Virginia does not require its solid waste management facilities to report the amount of waste exported every year and

therefore has no figures on the total amount of solid waste generated in-state in 2002. However, it can be assumed that Virginia residents generated under 18 million tons of solid waste in 2002.⁵

States and localities may choose to manage solid waste in a variety of ways: portions of solid waste that are not recycled, composted, landfilled or incinerated in-state can be shipped out-of-state for disposal. In 2002, Virginia disposed of 17.5 million tons of its own solid waste in in-state landfills.⁶ In 2001, Maryland managed 73% of its total solid waste load via recycling or composting, landfilling, or incineration, and disposed of 3.7 million tons of solid waste in its own in-state landfills.⁷ In 2000, New York disposed of 9.3 million tons of solid waste in its own in-state landfills.⁸

New York and Maryland are major exporters of solid waste, while Virginia is a major importer. New York exported 5.6 million tons of solid waste in 2000.⁹ Over 75% of this exported waste load originated from New York City.¹⁰ Maryland exported 1.9 million tons of solid waste to out-of-state areas in 2001.¹¹ Virginia imported 5.4 million tons of solid waste in 2002, with 38% coming from Maryland, 27% from New York, and 21% from Washington, D.C. While solid waste consists of several different types of wastes, including municipal solid waste (MSW), construction and demolition debris, incineration ash, and industrial waste, it is MSW that is most frequently transported across state lines. For example, of the 5.4 million tons of solid waste exported to Virginia in 2002, 4.5 million tons of that was MSW.¹²

Municipal solid waste is most often disposed of in sanitary landfills. Virginia has 65 active sanitary landfills that accept MSW, with an estimated 251.8 million tons of remaining capacity for MSW.¹³ Its largest landfills are concentrated in the southeastern and south central regions. Privately owned or operated landfills, which are usually of the largest capacities, provide 78% of this total available capacity. New York has 27 active sanitary landfills that accept municipal solid waste,¹⁴ with the majority of all such facilities clustered in the western leg of the state. New York's sanitary landfills have an estimated 93.3 million tons of remaining capacity, with an additional 89.7 million tons of capacity under proposal.¹⁵ Privately owned or operated sanitary landfills provide around 44% of the total available capacity in New York. Maryland has 22 sanitary landfills that accept municipal solid waste, which are evenly distributed throughout the state. All but one of Maryland's sanitary landfills are operated and owned by their respective county or city. Maryland sanitary landfill capacity data is not available via its website, but only through a Public Information Act request (which was not completed in the course of this research). No new landfills have been proposed for construction in Maryland.

Expl anations: Why Does Virginia Get So Much Out-of-State MSW?

For one, Virginia has an abundance of capacity for municipal solid waste. Its wealth of relatively cheap, rural land and open space makes it a perfect breeding ground for large mega-fills, constructed to withstand massive daily flows of garbage from in-state and out-of-state. Since Virginia has such a large capacity for MSW, and because it is so convenient and cost effective for bordering states to dump in the commonwealth, this trend of waste importation will continue. But aside from these obvious reasons, there are several other factors that make Virginia attractive for waste-hauling companies from Maryland and New York.

Maryland has only one privately owned or operated sanitary landfill.¹⁶ According to Ed Dexter, Solid Waste Program Administrator for the Maryland Department of the Environment, all other county or city owned and operated sanitary landfills are restricted to accepting waste that is generated within the respective county or city. If a county or city landfill does not have adequate facilities to accept the burden of waste generated, it must revert that waste to the one private sanitary landfill in-state, or ship it downstate to Virginia. Virginia is close by and has a much larger market for municipal solid waste. Consequently, much of Maryland's MSW goes to Virginia every year.

While proximity is the main reason Virginia accepts so much solid waste from Maryland, a host of other factors can explain why New York ships so much waste into Virginia every year. New York's largest landfill, and New York City's former dumping ground, Fresh Kills landfill, closed in 2001. The closure drastically reduced New York's landfill capacity and is a main reason why so much of its waste is diverted to out-of-state locales.¹⁷ However, a host of other less obvious factors help explain why it is more convenient, less risky, and cost-effective for New York to export a large amount of waste to Virginia and other states.

It costs about half as much to construct a liner system in Virginia compared with New York, and the cost range for capping a landfill is also much lower in Virginia. According to Jeff Kocian, a district manager for Waste Management, Inc. in New York, it costs an average of \$500,000 per acre (with a range of \$250,000 to \$700,000) to construct a liner and \$150,000 to cap a landfill in New York. According to Mike Deiter, Waste Regulations and Program Consultant for the Virginia DEQ, cost estimates for a single liner system range from \$90,000 to \$208,000 per acre, and estimated costs for capping range from \$113,640 to \$138,000 per acre in Virginia. When asked for the reasons behind these substantial differences in cost, neither public nor industry officials in either state could provide a definitive reason. However, the difference in cost most likely arises from the difference in state regulations. The New York Department of Environmental Conservation's (DEC) sanitary landfill regulations are more stringent and extensive than the Virginia DEQ's in several key aspects of sanitary landfill design. These differences in required landfill design may contribute substantially to the difference in cost. The primary difference in design is that New York requires a double composite liner system,¹⁸ while Virginia requires only a single composite liner system.¹⁹ New York also requires a secondary leachate management system, whereas Virginia requires only one leachate collection system. More resources, time and money must be devoted to landfill construction and daily operation in New York because of these regulatory differences, which substantially drive up the cost to build and maintain such facilities.

Not only does it cost more to construct a landfill in New York, it costs more to operate one. Local property taxes, which privately owned or operated sanitary landfills must pay, are substantially higher in New York than they are in Virginia. According to the New York Office of Real Property Services, the mean real property tax in New York is 2.89%. The real property tax rate is so high in New York because there is no personal property tax in the state. Consequently the tax is of major importance as the largest single revenue source for the support of municipal and school district services.²⁰ According to the Virginia Department of Taxation, the mean real property tax in Virginia is 1.05%. This large difference in real property tax rates is a major one, considering privately owned or operated sanitary landfills would be assessed at millions of dollars. This disparity in average local property tax rates may in turn create a difference in need. Because real property taxes are an important source of revenue for local school district services, localities that have high rates may already have well-funded schools and localities that do not have high rates or high property values may be compelled to allow mega-fills to be built because of the tax revenue source they would provide. Charles City County, home to one of Virginia's mega-fills, collected enough tipping fees and taxes in the 1990s to pay off the cost of debt on 3 of its schools and was able to cut its tax rate 44%.²¹ Poorer localities like Charles City County may initially have inadequately funded schools, but large mega-fills can provide an all-important source of revenue to fund school and municipal services. Property taxes are already so high in New York, landfills would provide less of a financial incentive compared with Virginia. In Virginia, some communities cannot afford to pass up hosting a mega-fill because of the potential revenues such facilities provide.

New York may not need any landfills from a financial standpoint, but the state certainly needs additional facilities in order to meet its in-state waste disposal needs. Waste industry executives and the DEC realize this, and almost 90 million tons of additional sanitary landfill capacities are currently proposed, mostly for western New York. Residents in this section of the state have caught wind of these proposals and have either successfully blocked construction, or are currently attempting to stop such construction. According to Concerned Citizens of Cattaraugus County, a community-based anti-landfill environmental group, citizens and local governments in Allegany, Lewis, and Erie counties have successfully blocked landfill proposals. Proposals for new facilities or expansions are under review and facing fierce opposition in Cattaraugus, Orleans, Oneida, Seneca, Erie and Orange counties.²² Community resistance is particularly strong in many areas of New York and may be a significant underlying reason why New York exports such large quantities of waste to Virginia and other states.

So, in addition to the closing of Fresh Kills landfill and consequential lack of capacity in New York, differences in regulations, costs, property taxes, and local community resistance are all factors that make Virginia so susceptible to accepting large quantities of New York's trash.

Should the Public Care?

The inundation of large landfills in Virginia and elsewhere has allowed large amounts of municipal solid waste to be deposited in the best available state-of-the-art waste management facilities. So

should the public even care about the size of the Virginia mega-fills or the transport of trash into these large facilities? Interstate trash transport will inevitably continue and invariably create controversy between importing and exporting states. A crop of lobbying groups and politicians often attack interstate trash transport practices regardless of where the trash originated. But as many within the waste industry may point out, interstate trash transport can make practical, economical and environmental sense. When only an arbitrary state boundary line separates the nearest waste management facility from a locality or trash hauler with disposal needs, it would not make sense for the garbage to be sent to a more distant in-state facility. Additionally, interstate trash transport seems appropriate when one state does not have enough land capacity to provide for all its own solid waste. Such is the case in the relatively small and heavily urban areas of Maryland and the District of Columbia, both of which rely on Virginia to provide disposal capacity. Thus, interstate trash transport can certainly be a practical and efficient practice between neighboring states.

However, large-scale interstate trash transport (i.e., New York City to southeastern Virginia) is problematic for several reasons. Trucks shipping trash down the interstate are serious safety hazards for drivers and carry potentially serious environmental hazards for communities. No records are kept by trash hauling companies, transportation departments, or state environmental agencies concerning the number of interstate trips made by trash haulers each year. But such figures are discernable using several sources of information.²³ Approximately 70,300 trips were made by trucks hauling garbage from New York to Virginia in 2002. Consider this: it is roughly 370 miles from New York City to the Charles City County mega-fill that accepts out of state waste. Assuming trash haulers must make the trip down to Virginia and back up to New York for one load of about 16 tons of trash- a total of 740 miles is driven for this disposal. Even more astonishing: approximately 52,031,250 miles are driven every year by these dangerous and polluting vehicles all along the Eastern seaboard, all to dump a little over 1 million tons of New York's garbage.

So why should the frequency of trips by trash haulers from New York to Virginia be a matter of concern? Diesel engines on trash hauling trucks emit large quantities of particulate matter and nitrogen oxides (NO_x), both of which contribute to public health problems in the U.S. According to the U.S. Environmental Protection Agency, particulates and nitrogen oxides can cause premature mortality, aggravation of respiratory and cardiovascular disease, aggravation of existing asthma, acute respiratory symptoms, chronic bronchitis, and decreased lung function.²⁴ Emissions of nitrogen oxides combine with hydrocarbons in sunlight to form smog, which not only provides an aesthetically unpleasant cloud of pollution around affected areas, but also creates significant respiratory problems. Diesel powered vehicles emit a combined 50% of all nitrogen oxides and almost 70% of all particulate matter arising from transportation in the U.S.²⁵ Thus, with the knowledge that diesel powered mobile sources contribute significantly to air quality degradation and health problems, it is hard to make the case that trash transport from New York to Virginia (in the neighborhood of over 52 million miles per year) is not making some type of negative impact upon air quality and public health in Virginia and other states along the east coast.

Trash haulers are a risk to public health for reasons other than air pollution, as well. These large vehicles obviously create major safety hazards for drivers along the nation's highways. According to *The Washington Post*, Virginia state and federal records indicate that over a dozen of the trash hauling trucking companies that operate from out of state have safety records much worse than the national average. For example, KC Transport, Inc., a New Jersey based hauler that trucks trash into Virginia, had its trucks ordered off the road 57% of the time they were inspected over two years in the late 1990s. Trucks owned by KC Transport have frequently been cited for falsified or incomplete logbooks, bad tires, and faulty brakes.²⁶

In addition to the problems with transporting trash via truck, train lines carrying exported trash run the risk of derailment, which could also create serious environmental hazards for wildlife and humans. Garbage barges may keep trash hauling trucks off the road, but are grave threats for boat traffic and carry the potential of deleterious environmental risks for marine life and water quality. The Virginia General Assembly banned garbage barging in 1998 after a leakage incident on the James River, but barging has recently been re-permitted by the Virginia DEQ.²⁷

Transporting waste to Virginia from New York is obviously problematic and impractical. Yet, once waste is disposed of in Virginia's landfills, new dilemmas invariably arise. According to Shawn Davis, Solid Waste Compliance Coordinator for the Virginia Department of Environmental Quality, all mega-fills in Virginia are inspected at least quarterly by the DEQ, and sometimes monthly if possible. The most commonly cited problems with landfills in 2002 related to financial responsibility, compaction and

cover, unauthorized waste control, decomposition gas, operations plans and groundwater monitoring. While Virginia's state-of-the-art mega-fills are among the most technologically advanced waste management facilities in the country, they certainly are susceptible to threats from unauthorized disposal of hazardous and non-permitted wastes. Medical and industrial wastes have arrived in Virginia illegally and have slipped through the cracks with loads of regular MSW.

State records show that untreated syringes, tubes with blood, even red bags with biohazard symbols repeatedly have arrived from New York City at the Gloucester and Sussex mega-fills, and at Brunswick from Durham. At other sites, state records show, a low-level radioactive device was buried, as were more than 10 tons of hazardous lead paint wastes. At Gloucester alone, state DEQ records show, biohazard bags were spotted at least 50 times in the last year. At Sussex, three sightings of medical waste occurred in one day last fall. Medical waste also turned up, although less often, in Amelia, Charles City and King and Queen counties, records show.²⁸

Suffolk County's regional landfill also received a scare last year, when a gallon of hazardous methyl ethyl keton solvent in Kentucky was mistakenly mixed in with a ton of non-hazardous waste, incinerated at a Portsmouth waste-to-energy incinerator and then spread over the Suffolk landfill as cover material. Although the potential effects of this mistake are unknown, the landfill has had to remove hundreds of tons of cover dirt, quarantine the suspect dirt in a separate mini-landfill and petition the federal government for relief.²⁹ These incidences show that MSW mega-fills are susceptible to deposits of hazardous, medical and industrial wastes, especially when such wastes originate from out of state locales. Because transport of municipal solid waste reduces the level of accountability in waste management, it is easier for non-permitted waste to slip through the cracks and be deposited with the regular loads of MSW.

And although these state-of-the-art, environmentally engineered mega-fills are meant to minimize the environmental impact of garbage, their liners are by no means infallible. Amelia County's mega-fill and Charles City County's mega-fill have both shown signs of faltering. Both landfills have identified elevated levels of contaminated substances in groundwater tests, suggesting the possibility of liner leakages.³⁰ The regional landfill in Suffolk County has been leaking leachate regularly, and DEQ inspectors suspect the landfill is leaking lead, cobalt, and beryllium into groundwater supplies beneath the landfill.³¹

Along with the threats of possible liner leakage and unauthorized deposition of non-permitted waste, landfills emit large quantities of landfill gas, which is primarily composed of methane, carbon dioxide, and smaller amounts of non-methane organic compounds. The fraction of landfill gas composed of non-methane organic compounds (NMOCs) contains organic hazardous air pollutants, greenhouse gases, and other compounds linked to stratospheric ozone depletion. Emissions from landfills are restricted to some extent by gas control systems, but NMOC emissions at landfills with control systems still occur (efficiency ratings typically range from 60-85%).³² Considering the size of some of the states' mega-fills, it is a reasonable conclusion that many waste management facilities are contributing to the degradation of local air quality. Atlantic Waste Disposal's Sussex County landfill boasts a total area of 1,350 acres and a disposal area of 374 acres (roughly the size of 400 football fields for the disposal area alone). Allied Waste's Brunswick County landfill touts an even larger disposal area of 429 acres. The Virginia DEQ Air Quality Division keeps records of air emissions for all landfills that meet the applicability threshold for monitoring. The range of emissions of non-methane organic compounds for all sanitary landfills monitored by the DEQ was from 3.3 to 615.78 tons per year in 2002, with the average among these landfills being slightly over 100 tons per year.

Additionally, people in localities (i.e., upstate New York and New York City) that export their garbage may never think to mitigate the amount of waste they produce, because it is shipped away to other states. Wide scale garbage exportation significantly detaches people from the impacts of their day-to-day environmental decisions, especially when those decisions affect persons far away. Exporting communities have reduced incentives to minimize waste and recycle when it is so cheap to simply send all garbage to out-of-state landfills.

Finally, an examination of the statistical dichotomy between communities with landfills and those without landfills is worth noting. The interstate transport of trash from New York to Virginia has no *direct* relationship to financial and racial disparities between landfill and non-landfill counties; but without the daily influx of waste from so many out-of-state sources, many mega-fills would not reap the profit they do today. For example, comparing Virginia localities that host privately owned or operated sanitary landfills with the Virginia state-wide average: the localities with privately owned or operated sanitary landfills have

a higher percentage of blacks (33% vs. 20%), lower median household value (\$95,325 vs. \$125,400), a lower per capita income (\$19,462 vs. \$23,975), a higher poverty rate (11% vs. 10%),³³ and lower per pupil spending in public schools (\$7,489 vs. \$7,652)³⁴ (even with the extra boost such mega-landfills give to per pupil spending, it is still lower than the statewide average).

Comparing New York counties with privately owned or operated landfills with New York counties without landfills, there was a higher percentage of blacks (7% vs. 4%), a lower median household value (\$89,917 vs. \$142,743), a lower per capita income (\$19,830 vs. \$24,946), a higher poverty rate (12% vs. 11%),³⁵ lower per pupil expenditures (\$9,039 vs. \$9,470).³⁶ The statistical comparison within Maryland is not mentioned in this paper because there is only one privately owned or operated sanitary landfill in the state.

While it is not reasonable to postulate that these Virginia mega-fill counties are specifically targeted because of these statistics, it is probably reasonable to assume that much more organized and fierce opposition to a mega-fill would come from richer localities that lack the tax-base needs for such facilities. Although the introduction of mega-fills to certain counties in Virginia has allowed these localities to fund school projects and drastically cut taxes, the above comparisons are worth mentioning because, at most, they raise fairness questions concerning who is dumping on whom.

The large-scale transport of trash between states is an undeniable matter of concern because of the potential transportation and safety risks, the environmental hazards associated with disposal accountability and landfill fallibility, and fairness issues concerning landfill siting and locations. Because the interstate trash trade has exploded in recent years and trends are likely to continue, the above problems could all be aggravated. Before such problems become a crisis, it is necessary to re-examine the practice of interstate trash transport to see how it can be refined to mitigate some of these aforementioned dilemmas.

Legislation: What Is Being Done?

The exchange of waste between states has become a hot topic across the East Coast in recent years. Public officials in importing states have raised objections to the practice, while public officials in largely exporting states have defended the practice. Numerous states have attempted to mitigate the amount of trash they import through legislation, but such efforts have always been struck down as unconstitutional. Waste and waste management services fall under articles of commerce according to numerous federal court interpretations of the Commerce Clause of the U.S. Constitution (Article I, Section 8, clause 3). Consequently, state or local governments cannot place restrictions on interstate shipment of waste without the expressed authorization of Congress. Legislation allowing such restrictions has been considered in every Congress since 1990.³⁷

Organized support for legislation allowing states to restrict the interstate transport of municipal solid waste became especially strong upon the approaching closure of Fresh Kills landfill in 2001. A hearing was held August 1, 2001, before the House Subcommittee on Environment and Hazardous Materials, in which many representatives testified in support of such bills.³⁸ However, no legislation has been passed, and no hearings are scheduled for this session of Congress. Several such bills have been introduced in 2003, but face strong opposition within Congress from representatives of exporting states.

The Solid Waste Empowerment and Enforcement Provision Act of 2003 (H.R. 1123), introduced by Rep. Jo Ann Davis (VA), and The Solid Waste Interstate Transportation Act of 2003 (H.R. 1730), introduced by Rep. James Greenwood (PA), both authorize a state to limit, place restrictions on, or otherwise regulate out of state MSW received at each landfill or incinerator in state. Rep. Davis has also introduced the Safe Waste Disposal Act of 2003 (H.R. 2581), which would require truck, barge, and train transporters hauling waste across state lines to carry a cargo manifest that would both certify the waste is transported and being disposed of in compliance with state and federal laws. The manifest must also identify the state of origin of the solid waste and the type of waste being transported, and the landfill must annually aggregate the information and report it to the Governor. In the Senate, Sen. George Voinovich (OH) has introduced the Interstate Transportation and Local Authority Act of 2003 (S.431), which allows states to establish limits on the amounts of imports and impose surcharges on the processing of out-of-state MSW. S.431 would not allow for local control of the movement of MSW, or flow control.

It appears unlikely that any positive action will be taken in either the House or the Senate with respect to interstate waste shipments. In addition to facing strong opposition from many legislators and lobbying groups, many legislators diverge on the specifics of such potential bills. Disagreement exists

regarding the degree of state versus local primacy to be granted, the types of facilities and wastes to be subject to such legislation, and also over how to deal with communities and landfills that have current host-community agreements.³⁹

The above information in this paper serves to flesh out the complexity of the issues surrounding interstate trash transport (especially between New York and Virginia). A better understanding of the actual problems associated with interstate trash transport affords greater opportunity to provide realistic and beneficial solutions. As mentioned in the introduction of this paper, although interstate trash transport is problematic in many instances, the current waste management problem in Virginia and many other states could also be approached from a macro-level perspective. A detailed examination of waste management statistics, legislation, and policy in the European Union may provide a helpful source of information for approaching the current problem in the United States.

Waste Production and Management: the European Union Versus the United States

At first glance, it appears that Americans produce much more waste per capita than do Europeans. According to the European Commission, each European produces one kilogram (2.2 pounds) of trash per day, while the U.S. Environmental Protection Agency (EPA) reports that Americans produce roughly 4.4 pounds per person per day.⁴⁰

However, different countries and environmental agencies record their respective environmental data in dissimilar ways. Once adjusted for comparability, Europeans still appear to produce less waste than do Americans. The average American produces 1.6 times as much trash (598 kg p/capita) as the average European (384 kg p/capita). One could hypothesize that Americans produce more trash simply because they are more affluent. Yet using GDP and population data from the World Bank, in several high-income EU nations like Belgium, Denmark, Germany, Iceland, Norway, Sweden, and the Netherlands, GDP per capita is similar or even exceeds that in the U.S., yet waste generation per capita is substantially lower. Higher waste production levels in the U.S. cannot be attributed simply to greater affluence.⁴¹

Comparing recycling rates in the EU and the U.S. also reveals that Europeans recycle more on average than do Americans. Granted, these averages are subject to wide ranging variations between European countries and among U.S. localities. Nevertheless, the average recycling rate for paper products in EU countries (plus Norway) in 1996 was 49%, while it was 42% in the U.S. in 1997. The discrepancy is larger when comparing glass recycling rates in the EU (plus Norway) in 1996 (55%) with such rates in the U.S. in 1997 (28%). Recycling rates for plastics were relatively similar: 7% in the EU (plus Norway) in 1996, versus 5% in the U.S. in 1997.⁴²

Although all of the above figures involve estimations on the part of the European Environmental Association and EPA, it is hard to dispute that, even with educated deductions to assure comparability in measurement, Americans produce a substantially larger amount of waste and recycle less than their European counterparts. Should Americans aspire to attain similar waste production and recycling figures? One could argue that large-scale waste minimization, recycling, and reuse efforts are not nearly as necessary in America, where there is much more available land for waste management facilities and much lower population densities. Granted, many European countries have had no choice but to cut back on waste production and implement innovative waste management strategies, but why wait until there is no choice but to do so in the U.S.? Why not aspire to reduce waste production levels and increase recycling in the U.S. before current waste problems become crises?

Learning from Example: Waste Minimization Case Studies in the European Union

The European Union places waste management and prevention at the top of its waste management hierarchy, followed by recycling, energy recovery, and finally disposal (a.k.a. landfilling). The European Council Directive 75/ 442/ EEC on waste requires all member countries to “encourage firstly the prevention or reduction of waste productions and its harmfulness”⁴³

When regional level mandates, such as the European Council Directive 75/ 442/ EEC on waste, are imposed, actions must be taken in member nations to meet the legislative requirements. Many European countries have implemented unique waste minimization policies to comply with the European Council

Directive 75/ 442/ EEC on waste. Ten EU countries have initiated landfill taxes, which are meant to motivate consumers to recycle or prevent waste generation in the first place. EEA analyses of landfill taxes in Denmark and Austria have proven that such taxes have significantly minimized waste production. The Austrian landfill tax has reduced the landfill rate for household waste from 63% to 32% and has also caused recycling rates to increase.⁴⁴

Landfilling waste is the European Union's least preferred waste management option, largely because landfill capacities are decreasing (current average capacity in eight EEA countries is less than ten years) and landfills emit substantial greenhouse gases into the air and leachate into the groundwater. The European Council's directive 1999/ 31/ EC on the landfill of waste sets targets for the reduction of landfilling of biodegradable municipal solid waste (i.e., paper, food, and organic wastes), a major source of greenhouse gas emissions. In order to comply with the directive, several countries have initiated efforts to divert biodegradable municipal waste (BMW) from landfills, while others (Belgium, Denmark, Italy, Norway) have introduced bans on the landfilling of BMW.⁴⁵

Several EU countries have initiated producer responsibility schemes, which delegate organizational and economical responsibilities to producers (i.e., companies) for specific waste streams. Under these schemes, the producers must organize and finance large parts of the collection and treatment procedures for the waste that is produced from their respective goods. Such schemes give firms incentives to minimize the waste they produce, and often allow recycling and prevention targets to be reached that could not be attained under a publicly run or funded waste management program. The most common type of waste targeted with producer responsibility schemes is packaging waste, and all but five EEA member nations have such schemes in effect.⁴⁶ Although such producer responsibility programs should not be compulsory in the United States, localities and states could create incentives for industries and businesses to adopt similarly designed schemes to help minimize the production of waste.

Informational programs can also be an effective way to encourage waste prevention. Promoting waste minimization to firms as a way to cut costs has proven to be an excellent way to curb industry waste production. The United Kingdom's Envirowise program has helped firms realize the financial benefits of waste minimization; as of September 2000, the program had helped U.K. businesses save a total of EUR 200 million (almost \$2.3 million) per year by reducing the use of raw materials and production of waste.⁴⁷ Making firms realize the real financial benefits of minimizing waste in the production and packaging process could be an excellent method of minimizing waste in the United States. For example, imagine how much waste could be minimized and how much money grocery chains could save if they stopped wantonly distributing complimentary plastic bags for customers for grocery transport. Grocery chains in Europe do provide plastic bags for customers, but only at an additional charge. Consequently, most shoppers arrive at the grocery store with re-usable cloth bags to do their shopping. Even in the U.S., discount super stores such as Costco Wholesale Corporation are able to cut costs and minimize waste by providing customers not with complimentary plastic bags, but with re-used, discarded cardboard packaging to take home their purchased items. Such an idea is just one simple example of how industries could cut costs and waste could be minimized at little or no inconvenience to the consumer.

Finally, some European countries have implemented weight-based collection schemes for household wastes in order to comply with the European Council Directive 75/ 442/ EEC on waste. Some communities in Denmark have begun to execute a weight based household trash collection scheme, charging residents for waste collection based on a per-kilogram fee. The garbage can is weighed when it is collected, with a special electronic tag automatically identifying the garbage can and household and charging the applicable rate to the household's account. The average Dane household in a pay-per-kilogram neighborhood generates 592 kg p/year of municipal waste, while the average in a non-pay per kilogram neighborhood is 876 kg p/year. Since recycling is not charged, the amount of recycled waste has also risen significantly. The total fee per household in Denmark ranges between EUR 150- 230 (currently \$170 to \$260) per year.⁴⁸ It should be noted that garbage collection services are always paid for one way or the other, whether through local taxes (as in the U.S.) or via weight-based pricing. Instead of charging one tax to all households for garbage collection regardless of the amount of waste produced, charging a fee based on the amount of waste produced would be a way of rewarding those who minimize waste production and encouraging those who do not to change their ways.

Not Just the EU: Similar Waste Minimization Efforts in the U.S.

One might argue that waste minimization policies in Europe are irrelevant because they are not necessary in the United States, or maybe because they would not work in our country due to the different economic, social and environmental circumstances. But as a wealth of informational resources provided by the U.S. Environmental Protection Agency indicate, effective and successful waste minimization policies similar to those discussed above are in operation across the U.S.

The EPA reports that nearly 2,000 communities across the country have implemented pay-as-you-throw (PAYT) programs to date, from the town of Poquoson, Virginia to the large metropolis of San Jose, California. Although each PAYT is unique, the concept in all PAYT communities is similar to the concept used in Denmark's weight-based collection program: rather than paying for trash collection services indirectly (via local taxes), residents are asked to pay solely for the waste they generate. Although results vary community to community, waste reductions of 25% to 35% typically result from PAYT programs.⁴⁹

Large cities like San Francisco, Seattle, Austin, Oklahoma City, Portland, Oakland, Sacramento, and parts of Los Angeles have initiated various types of PAYT schemes in recent years.⁵⁰ That PAYT programs have been successful in these cities proves that such a program is feasible in a place like New York City, and could be a realistic goal for many urban areas across the country. To the extent that Virginians and public officials feel too much waste is arriving in Virginia mega-fills, Virginia residents and businesses could do their parts by reducing the amount of waste they produce, via PAYT schemes or other efforts.

One concern with PAYT programs is that they can create unlawful diversion problems, with people dumping trash in illegal areas to avoid paying the set fees. A study conducted by Duke University's School of the Environment on 4,032 PAYT programs across the country revealed that illegal diversion was not as big of a problem as initially anticipated for many communities. Forty-eight percent of the cities and towns saw no change in illegal diversion, while 6% felt it declined after PAYT was implemented. Just 19% felt it increased (27% had no information). Communities often implement aggressive but fair enforcement policies that punish illegal diversion alongside the PAYT programs. In tandem with enforcement, communities typically report that public education and outreach can help to prevent illegal diversion from becoming a problem, as well.⁵¹

In addition to PAYT programs, product stewardship programs (most similar to extended producer responsibility schemes in the EU) have been put into practice in the U.S. Product stewardship calls on all those in the product life cycle--manufacturers, retailers, users, and disposers--to share responsibility for reducing the environmental impacts of products.⁵² Businesses, or the initial producers, can contribute to product stewardship by reducing the use of toxic substances, designing for reuse and recyclability, or even creating take-back programs. Retailers are next down on the chain, and can contribute by preferring businesses with firms that offer the best environmental stewardship in production, or enabling consumer return of products for recycling (i.e., many grocery stores take back plastic bags to be recycled). Consumers come into the picture by making environmentally responsible consumption decisions, and reusing and recycling materials to the extent possible after initial use. According to the EPA, a few states have incorporated product stewardship objectives into their solid waste master plans, and launched cooperative efforts with industry to encourage recycling of their products. Some states have also developed product stewardship-like legislation for selected products. Evidence of product stewardship participation is further proof that the aforementioned waste minimization examples in Europe are certainly feasible for the U.S. Localities all across the eastern seaboard, where waste disposal has become problematic, could certainly look to innovative waste minimization methods in the EU and within the U.S. to alleviate some problems.

Looking to the European Union for Legislative Ideas

While looking to European and American waste minimization case studies to illustrate the possibilities for waste reduction in New York and Virginia is useful, it is also beneficial to look to Europe for legislative ideas with respect to waste transport and management. The ideas behind such policies and laws in the EU could provide a helpful framework for potential policies in the U.S.

Compiling this research and providing exact comparisons between states proved difficult at times because not every state provided data from the same years, and not every state calculated certain figures in uniform ways. For example, some of the most recent figures provided by the New York DEC were from

1999, while the Virginia DEQ provided all relevant information from calendar year 2002. Although a general understanding of the situation and relatively valid comparisons between states were possible, it is reasonable and feasible to aspire to more uniform waste management accounting practices across the United States. The European Union recently mandated the Council Regulation on Waste Management Statistics in 1999. The regulation aims to encourage better monitoring of effective implementation of EU policy on waste disposal by requiring regular, comparable, current and representative data on the production, recycling, re-use and disposal of waste in member nations.⁵³ The EPA could similarly mandate yearly solid waste management reports and plans for states to complete by a certain date every year or every other year. The EPA could also provide uniform methods for calculating certain figures (i.e., recycling rates) or even precise definitions for what should be included under certain terms (i.e., solid waste). Such an improvement would allow for perfectly valid comparisons to be made on at least a bi-annual basis and would also allow public officials to better identify specific problems when they arise.

The EU recognizes that the standards and costs for landfilling differ across member nations, but also realizes that allowing waste originating from a country where environmental standards are high to one where standards and costs are lower is not a sustainable option. The EU recommends that the transport of waste be minimized in order to reduce the risk of accidents and save resources. According to the 1999's *EU Focus on Waste Management*, "EU policy lays down that, within Europe, waste should be disposed of as close as possible to where it is produced (the proximity principle)."⁵⁴ 1993's Council Regulation 259/93/EEC on the supervision and control of shipments of waste within, into, and out of the European Community provides specific guidelines for the shipments of waste depending on the type of waste and its ultimate destination. Wastes destined for recovery (recycling) cannot be restricted under normal circumstances, because they are considered goods. Wastes destined for disposal can be prohibited by member states. Waste is distinguished as either for disposal (landfill or incineration) or for recovery (recycling). In the event that a member state is shipping waste to another member state, a compulsory notification system is required in which the producing nation forms an agreement with the accepting nation. The accepting nation must also provide a certificate verifying the shipment was disposed of in an environmentally sound manner. All member nations are also required to take necessary steps to inspect, sample, and monitor waste shipments.⁵⁵

The European proximity principle could be integrated, to some extent, into federal legislation on interstate trash transport. As previously mentioned, numerous bills have been introduced in the Senate and the House giving states the authority to regulate interstate waste shipments under the Commerce Clause of the Constitution. Most of these bills have focused on simply stopping or reducing interstate trash transport regardless of the state of origin. However, it is important to remember that the interstate exchange of municipal solid waste can be a practical and relatively environmentally sound practice in many cases. When only an arbitrary state boundary line separates the nearest waste management facility from a locality or trash hauler with disposal needs, it does make sense for the garbage to be sent to a farther away in-state facility. Additionally, interstate trash transport seems appropriate when one state does not have adequate land capacity to provide for all its own solid waste, as is the case in the relatively urban areas of Maryland and the District of Columbia. However, large-scale interstate trash transport from New York to Virginia does not make practical or environmental sense. Not only does New York have closer available land to suit its disposal needs, such transport creates many aforementioned pollution, health, and safety problems. Therefore, legislation that can restrict this specific type of trash transport is needed from Congress.

Integrating the proximity principle into federal law, Congress could allow states to restrict the flow of waste exports by means of discriminatory taxes. A relatively minimal 'good-neighbor-tax' (ranging from \$0.10-\$0.75 per ton) could be assessed against exporting border states. For example, trash haulers from Maryland, the District of Columbia, West Virginia, North Carolina, Kentucky, and Tennessee would be assessed this smaller tax if they wanted to export MSW to Virginia. Such a tax might not significantly reduce the incoming waste streams, but could provide a substantial source of funding for solid waste management programs on waste reduction or recycling. In addition to the 'good-neighbor tax' for bordering states, importing states could be allowed to assess a substantially larger discriminatory tax (ranging from \$25 to \$75 per ton) upon non-border exporting states. Such a tax would drastically reduce the incentives for states like New York to transport trash into Virginia and would perhaps encourage exporting states to provide more of their own disposal capacity. Each state could set the standards for these discriminatory taxes, and the revenue from such taxes could feed directly into community solid waste management programs. Although this policy idea is obviously a brief skeleton of a concept to alleviate a current problem, the principle behind it is one that reaches a compromise between two sides of the debate. Granted,

not all trash transport between states is bad. Bordering states should be able to exchange garbage at relatively low additional costs. Large-scale interstate trash transport, between non-bordering states, hardly ever makes environmental or practical sense. States should be able to keep out this trash because of the numerous environmental complications that arise from transporting such waste. Such a bill could be initially limited to municipal solid waste and sanitary landfills, but could be amended in later years to include construction and demolition or other types of waste depending upon the results of such a measure and the expressed public concern for such an action.

As stated in the *EU Focus on Waste Management*, the EU realizes that allowing waste to be shipped from a nation with stringent environmental standards into a nation with lower environmental standards and lower landfilling costs is not a sustainable option. Consequently, EU legislation prohibits member nations from transporting wastes for disposal into nations that are not members of the Organisation for Economic Cooperation and Development.⁵⁶ New York, a state with relatively stringent environmental standards for sanitary landfills, ships its waste to Virginia, a state with less stringent environmental standards for sanitary landfills and lower landfilling costs. Virginia could combat this unsustainable influx of New York trash by revising its landfill regulations to make them more comparable with the relatively stringent requirements in New York. Amendments would not apply to existing waste management facilities, but to all proposals for new facilities or expansions. The harsher requirements may prevent landfillers from considering adding capacity in Virginia for more out of state trash. Even if these requirements did not prevent new facilities from being built, at least the new facilities would have the highest quality, state-of-the-art technological and environmental components built in to ensure better protection of the environment.

Virginia could also amend its regulations to provide for DEQ trash inspectors to inspect mega-fills more frequently than other public landfills. Currently, Virginia landfills must be inspected at least quarterly, and DEQ officials report that inspectors try to get out to the mega-fills more frequently. However, requiring more frequent inspections at the states' largest landfills could decrease the possibility of environmental mishaps in Virginia landfills. Harsh fines and repercussions could be mandated for out-of-state trash haulers who bring any unauthorized or hazardous waste for disposal at a sanitary landfill. Such a measure might encourage out-of-state haulers to be more careful when accounting for the types of waste it disposes of at importing landfills.

Conclusions

To say that the long-distance transport of trash is problematic (especially in the case of New York to Virginia) would be an understatement. As this report has shown, shipping trash via truck between far-away states creates numerous environmental problems and makes neither practical nor environmental sense. It is certainly unclear what, if any, benefits arise from the practice of long-distance trash transport.

A variety of public officials and interest groups have either attacked or defended the practice of interstate trash transport in recent years. Many ideas and policies have been introduced to combat the problem. But as indicated by this report, the "problem" can be approached in a combination of ways. If one subscribes to the view that Americans comparatively are producing too much waste, or at least could reduce the amount of waste they produce, then waste minimization efforts could certainly reduce the streams of waste flowing within and between American states. As previously explained, a variety of waste minimization programs within the EU and in the U.S. could prove helpful in both small towns and large cities to reduce waste at the source. Perhaps if less waste was produced, less waste would have to be exported, and states might be able to accommodate their own disposal needs better. One could also look to the EU's proximity principle and related legislation on transport of waste to come up with a reasonable framework for federal legislation on the topic of interstate waste shipments. Finally, improvements at the state level could be made to discourage the problematic long distance transport of waste. Thus, a variety of policy ideas and solutions are attainable by borrowing legislative ideas and policies from the EU, and also from communities within the U.S.

-
- ¹ Virginia Department of Environmental Quality. 2003. *Solid Waste Managed in Virginia During Calendar Year 2002*. 6th ed. Richmond.
- ² New York State Department of Environmental Conservation. 2002. *New York State Solid Waste Management Plan 2001/2002 Update*. rev. ed. Albany.
- ³ Maryland Department of the Environment. 2002. *Solid Waste Managed in Maryland Calendar Year 2001*. rev. ed. Baltimore.
- ⁴ Virginia Department of Environmental Quality.
- ⁵ In 1998's "State of the Nation's Waste," *Biocycle* magazine lists the top ten waste exporters in the U.S., and the number ten state (North Carolina) exported 330,000 tons of solid waste. Since Virginia was not included in the list of top exporters, it is reasonable to assume the state did not export more than 500,00 tons in 2002, thereby generating less than 18 million tons of solid waste <www.zerowasteamerica.org/MunicipalWasteManagementReport1998.htm>.
- ⁶ Virginia Department of Environmental Quality.
- ⁷ Maryland Department of the Environment.
- ⁸ New York State Department of Environmental Conservation.
- ⁹ *Ibid.*
- ¹⁰ New York State Legislative Commission on Solid Waste Management. 2001. *Where Will the Garbage Go? 2001*. rev. ed. Albany.
- ¹¹ Maryland Department of the Environment.
- ¹² Virginia Department of Environmental Quality.
- ¹³ *Ibid.*
- ¹⁴ New York State Department of Environmental Conservation.
- ¹⁵ New York State Department of Environmental Conservation. 2002. *Capacity Date for Landfills and Waste to Energy Facilities*. <www.ccarchive.homestead.com/files/NY_2002_Capacity_Draft.XLS>.
- ¹⁶ Maryland Department of the Environment.
- ¹⁷ New York State Legislative Commission on Solid Waste Management. 2001. *Where Will the Garbage Go? 2001*. rev. ed. Albany.
- ¹⁸ New York State Department of Environmental Conservation Division of Solid and Hazardous Materials. *Solid Waste Management Facilities Regulations*. 6 NYCRR Part 360-2.
- ¹⁹ Virginia Waste Management Board. *Solid Waste Regulations*. 9VAC20-80-250.
- ²⁰ New York State Office of Real Property Services. 2003. *Real Property Tax Primer*. <<http://www.orps.state.ny.us/primer/index.htm>>. Albany.
- ²¹ Erik Lipton. 11/12/98. "Taking in the Trash." *The Washington Post*.
- ²² Concerned Citizens of Cattaraugus County. 2003. *Local Solid Waste Issues*. <www.homestead.com/concernedcitizens>.
- ²³ According to several representatives with Waste Management, Inc., the average capacity for solid waste on a tractor-trailer ranges from 10 to 21 tons. Virginia imported 1.5 million tons of solid waste from New York in 2002. All of this waste was transported via truck or rail. The Virginia DEQ does not keep records concerning the frequency of waste transportation methods, but Mike Deiter, Waste Regulations and Program Consultant for the DEQ, estimates that around 75% of all trash is transported in Virginia via tractor-trailer. Therefore it should be reasonable to assume that 1.125 million tons of solid waste was transported via truck into Virginia in 2002. Dividing this figure by 16 tons, the median of the range for solid waste capacity on a trash hauler, derives the figures discussed in the body of this paper.
- ²⁴ United States Environmental Protection Agency. 2001. *Control of Air Pollution From New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements; Final Rule*. Washington, D.C.
- ²⁵ Union of Concerned Scientists. 2003. *Diesel Engines and Public Health*. <http://www.ucsusa.org/clean_vehicles/trucks_and_buses/page.cfm?pageID=238>.
- ²⁶ Lipton.
- ²⁷ Griff Witte. 7/26/03. "Va. Sets Terms For Trash Bargaining; Waste Panel's Approval of Standards, Fees Criticized by Environmentalists." *The Washington Post*.
- ²⁸ Lipton.
- ²⁹ Scott Harper. 8/20/02. "A Gallon of Solvent Causes a Huge Mess." *The Virginian Pilot*.
- ³⁰ Lipton.

- ³¹ Scott Harper. 2/14/03. "Virginia Environmental Quality Officials Warn of Leakage from Suffolk Landfill". *The Virginian Pilot*.
- ³² United States Environmental Protection Agency. 1995. *Compilation of Air Pollutant Emission Factors, AP-42: Stationary Point and Area Sources*. 5th ed. Washington, D.C.
- ³³ United States Census Bureau. 2000 Data. *State and County Quick Facts*. <www.census.gov>.
- ³⁴ Virginia Department of Education. 2001. *Superintendent's Annual Report for Virginia: Sources of Financial Support for Expenditures, Total Local Expenditures for Operations, and Total Per Pupil Expenditures for Education*. rev. ed. Richmond.
- ³⁵ United States Census Bureau. 2000 Data. *State and County Quick Facts*. <www.census.gov>.
- ³⁶ New York State Education Department, Elementary, Middle, Secondary and Continuing Education. 2001. *Database of District Profile Information*. rev. ed. Albany.
- ³⁷ James McCarthy. 2000. "Solid Waste Issues in the 106th Congress." *Congressional Research Service Reports*.
- ³⁸ United States House of Representatives Subcommittee on Environment and Hazardous Materials. 8/1/2001. "Perspectives on interstate and international shipments of municipal solid waste". 107th Congress.
- ³⁹ McCarthy.
- ⁴⁰ United States House of Representatives Subcommittee on Environment and Hazardous Materials. 8/1/2001.
- ⁴¹ Ibid.
- ⁴² Ibid.
- ⁴³ European Environment Agency. 2002. *Case Studies on Waste Minimisation Practices in Europe*. Copenhagen, Denmark.
- ⁴⁴ Ibid.
- ⁴⁵ Ibid.
- ⁴⁶ Ibid.
- ⁴⁷ Ibid.
- ⁴⁸ Ibid.
- ⁴⁹ United States Environmental Protection Agency. 1997. *Pay-As-You-Throw Success Stories*. Washington, D.C.
- ⁵⁰ United States Environmental Protection Agency. 2003. *Pay-As-You-Throw*. <<http://www.epa.gov/epaoswer/non-hw/payt/index.htm>>. Washington, D.C.
- ⁵¹ Marie Miranda. 1996. *Unit Pricing of Residential Solid Waste: A Preliminary Analysis of 212 U.S. Communities*. Duke University School of the Environment.
- ⁵² United State Environmental Protection Agency. 2003. *Product Stewardship*. <<http://www.epa.gov/epaoswer/non-hw/reduce/epr/index.htm>>. Washington, D.C.
- ⁵³ European Commission. 2003. *Waste Management Legislation*. <<http://europa.eu.int/scadplus/leg/en/s15002.htm>>.
- ⁵⁴ European Commission. 1999. *EU Focus on Waste Management*. rev. ed. Luxembourg. (http://europa.eu.int/comm/environment/waste/publications/eufocus_en.pdf).
- ⁵⁵ European Commission. 2003.
- ⁵⁶ European Commission. 1999.

Vienna Consular Treaty Obligations: The Consequences of U.S. Non-compliance

RoI and D. McKay
Macal ester College

Are foreign nationals being denied their right to a fair trial in the United States? How far does U.S. authorities' obligation to inform foreign consulates of their nationals' detention extend? What are the consequences and/or benefits of bringing international law to bear on domestic criminal jurisprudence? In this paper, the controversy over foreign governments' use of the Vienna Convention on Consular Relations (VCCR) to secure the interests of their nationals abroad, especially with regard to the death penalty, is explained. Why and how nations are abandoning traditional tools of diplomacy in favor of pursuing their interests through international legal bodies such as the International Court of Justice and Inter-American Court of Human Rights is discussed, as well. Lastly, a model for more effective U.S. consular notification and caution of the reciprocal damage that U.S. interests may suffer abroad due to continued VCCR non-compliance at home is proposed.

Introduction¹

Since the discovery made by a recent law school graduate in 1991 that the Vienna Convention on Consular Relations (1963) (referred to hereafter as the "VCCR" or the "treaty") was a valid criminal defense tool in the practice of municipal law,² considerable attention has been drawn to the ramifications of such a maverick litigation strategy on a variety of domestic and international actors. Article 36 of the treaty, which guarantees consular officials access to detained nationals and binds all signatory nations to inform "without delay" detained foreign nationals of their treaty rights, is being invoked in domestic courts by a growing number of attorneys representing foreign nationals detained for a broad range of crimes. It has become evident in a number of high profile court cases and independent surveys³ that the VCCR rights of detained foreign nationals are routinely violated by U.S. state and federal authorities. What has emerged since the treaty surfaced from relative obscurity is a complex juridical and political landscape of conflicting U.S. state⁴ and federal government policies, uncertainty regarding the jurisdiction of the Permanent International Court of Justice (ICJ), and increasing foreign government involvement in domestic criminal proceedings.

How does one account for these developments and how does one make sense of them in the broader context of international law and politics, criminal jurisprudence, and U.S. foreign policy? The recent body of technical literature dealing with Article 36 of the VCCR has largely been divided into three domains: strategic advocacy by practicing attorneys (Sims and Carter 1998; Babcock 2001; Drinan 2002; Aceves 2003), procedural instruction by the U.S. state and federal governments (reflected in the recent plethora of "consular notification" manuals), and public diplomacy by foreign governments. Although the national press and numerous domestic court rulings have repeatedly called attention to the possible consequences of continued non-compliance on consular protection of U.S. citizens detained abroad, the case has never been made empirically that such a link exists. Furthermore, there is a dearth of material in the study of jurisprudence examining the innovative use of international law in American courtrooms. International relations and international law, two disciplines that historically have maintained some distance between them, have not satisfactorily examined the political linkages in the latest brand of antagonistic diplomatic activism exhibited by such "friendly" countries as Germany, Paraguay, and Mexico in the context of a perceived U.S. unilateralism in the international arena. The purpose in this paper, then, is to provide an overview of the importance of the VCCR and propose a research agenda that places the treaty at the center of changes in the normative dimensions of international law. These changes are reflected in a more emphatic manifestation of U.S. unilateralism in the international diplomatic arena and subtle though not insignificant changes in the means of diplomacy and domestic criminal jurisprudence. The following arguments will be advanced:

- that U.S. foreign policy has steered a course away from international institutions and treaties;

- that this trend is manifested in the inadequate effort put forth by the Department of State to prevent states from executing foreign nationals whose VCCR treaty rights were violated and in the U.S. Government's disregard for ICJ and Inter-American Court of Human Rights (ICHR) decisions;
- that, while legally tenable and viable in the short-term, use of Article 36 of the VCCR as a litigation strategy in municipal law does not constitute an adequate long-term means of enforcing U.S. treaty compliance;
- that, while much of the spirit of international law is obfuscated by the realities of power politics, the VCCR is one instance in which the letter of international law acts as an equalizer of states' relative power; governments' abilities to protect their nationals abroad is reliant upon their own compliance with the treaty;
- that successfully invoking Article 36 rights in U.S. courts as a means of private enforcement may lead to a new direction in U.S. criminal jurisprudence, allowing individuals to *defensively* claim broader, more amorphous individual rights under other international agreements;
- that the increase in foreign governments' direct involvement in criminal proceedings in which the VCCR is being raised represents an exasperation with the conventional tools of diplomacy (formal diplomatic protests, international courts, and bilateral negotiations) and a recourse to non-traditional means that carries profound implications for the normative dimensions of international law; and,
- that continued U.S. treaty non-compliance sets an international legal precedent with wide-ranging consequences for U.S. consular protection of its nationals abroad; by placing a low priority on domestic treaty compliance, the U.S. negates the possibility of claiming in a foreign or international court that the failure of consular notification abroad should result in a judicial remedy.

First, the history of the treaty as a codification of long-standing practice and, more recently, as a tool in criminal proceedings will be discussed, providing a model for understanding nations' relative diplomatic activism in protecting their nationals' Article 36 rights. Second, some of the conflicting legal arguments about the nature of treaty obligations will be examined. Third, U.S. case law before the potentially explosive *LaGrand* decision rendered by the ICJ will be outlined. Fourth, a brief account of international court VCCR rulings will be given, with special attention to the future of criminal jurisprudence in the U.S. Fifth, the complex relationship between actors involved in treaty enforcement will be described, demonstrating the complexities of total compliance. Sixth, two trends, foreign governments' recourse to non-traditional means of diplomacy to secure the welfare of their nationals and the increase in appeals to international law in U.S. criminal proceedings will be illustrated, as reflections of U.S. unilateralism in the international arena. Last, the effect of continued non-compliance on the normative dimensions of international law and on U.S. strategic goals will be reflected upon, highlighting the political linkages implicit in Article 36 violations, in order to propose a research agenda based on the paper's policy recommendations.

Background of the Vienna Convention

Though some nations contradict both frequently and publicly some aspects of international law, it remains clear that the system of international agreements pioneered by the United Nations has had widespread success in governing the mundane, if not the spectacular, interaction of nations. Treaty-making conventions organized by the United Nations have codified much of customary international law, and the revival of the World Court, or ICJ, theoretically has instituted an enforcement mechanism and added structure to the supposedly anarchic international order.⁵ Much of the content of universalist agreements, such as the Vienna Convention on the Law of Treaties (VCLT), the Vienna Convention on Diplomatic Relations (VCDR), and the VCCR, was previously found in treaties of "Friendship, Commerce, and Navigation" and more recently in existing bilateral consular conventions.⁶ New global migration trends

and patterns since the 1960s have resulted in a dramatic increase in foreign nationals abroad, evident in both increased rates of temporary residency and international tourism.⁷ The VCCR is an expression of the increasing complexity of adapting government bureaucracies to the demands of globalization. Bilateral, country-specific treaties defining acceptable conduct between nations and their citizens abroad that sufficed in the past have given way to an all-encompassing treaty applicable to all nations.⁸ Thus, the VCCR is a means of facilitating commerce and tourism between nations by establishing uniform rules governing the execution of consular duties.

Consular functions usually involve the protection of the “sending” nation’s interests within the “receiving” nation at a level below that of embassy officials, who usually concern themselves with political and economic affairs in the capital. Within this definition falls the task of “safeguarding the interests of nationals,” the most complex and problematic aspect of this being consular intervention in the judicial and penal systems of receiving nations. Article 36 of the treaty addresses consular officials’ essential need for direct and unobstructed access to nationals:

- (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
- (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner [...]
- (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange his legal representation [...]⁹

The access detailed above, including the ability of consular officials to “converse and correspond with him and to arrange his legal representation,” is of paramount importance in receiving a fair trial. Because of the “differing constitutional and social systems” of the signatory nations addressed in the preamble of the VCCR,¹⁰ consular officials offer unique aid to nationals by guiding them through widely varying judicial systems around the world. Assistance can include contacting relatives of the detained and seeking adequate legal representation.¹¹ More specifically and pertinent to demonstrating prejudice in the case of an Article 36 violation, consular officials are in a unique position in the pre-trial stages of a trial to investigate a defendant’s mitigating circumstances or provide depositions demonstrating good character from the national’s community of origin, two factors whose omission preclude a fair trial similar to one afforded a U.S. citizen.

Until the early 1990s, the treaty was the sole domain of diplomats and their foreign ministries. Now it has become the source of legal arguments in U.S. city, state, immigration, district, and appeals courts, as well as international tribunals. While the treaty has been used successfully as a strategy in all sorts of criminal proceedings, the most salient and precedent-setting cases have been those involving the death penalty. The first such case was that of a Canadian national, Joseph Stanley Faulder, sentenced to death in Texas for a 1975 murder conviction. Sandra Babcock, the attorney who took up his case in 1991, advised by Canadian consular officials of the existence of the VCCR, constructed an original litigation strategy that sought a judicial remedy for defendants whose treaty rights had been violated.¹² In order to convince judges unaccustomed to the nuances of international law of the validity of claiming individual rights under international agreements, Babcock had to prove that treaties ratified by the United States at the national level were enforceable in domestic courts. This differed sharply with the U.S. Department of State’s stance that diplomatic channels were the only available means of enforcing the treaty; in short, an official apology was the most a foreign government reasonably could expect to receive for the violation of its nationals’ rights.

The VCCR received even wider publicity with the case of Angel Breard, a Paraguayan national on death row in the Commonwealth of Virginia. The year 1998 saw the first intersection of international law and American municipal law in direct conflict with one another. The United States Court of Appeals for the Fourth Circuit ruled that, while the U.S. had in fact violated Mr. Breard’s treaty rights by failing to inform him of his right to contact the Paraguayan consulate, Breard’s sentence “could not be overturned based on the treaty violation.”¹³ Paraguay, in an innovative approach which has been emulated by Germany and Mexico, took the case to the ICJ, which called upon the U.S. to prevent the execution of Mr. Breard. In 2001, Germany followed suit in the case of two German nationals on death row in Arizona, Karl

and Walter LaGrand; again the ICJ found that the U.S. had “breached its obligations to Germany and to the LaGrand brothers under Article 36, paragraph 1, of the [VCCR].”¹⁴ To protect the welfare of three of its nationals, Mexico filed a suit in the ICJ in February 2003. The court ruled that the U.S. “must take all measures necessary to prevent the execution.”¹⁵ In all three cases, the states proceeded with the executions.

A number of foreign governments, acting with varying interests in mind and at different stages in the respective trials, have challenged VCCR violations beyond the customary diplomatic protests to Washington. The following model helps one to understand nations’ consular affairs in the U.S. with regard to the VCCR. Nations vary their diplomatic activism along the following lines:

- the stage of the trial they involve themselves in, either directly (negotiating with prosecutors, state attorneys-general, and clemency boards) or indirectly (through the national’s counsel): pre-trial, post-conviction, or (in capital cases) clemency deliberations;
- the level to which they are willing to contest U.S. Government pronouncements; and,
- the support they are able institutionally to provide to their nationals (size of consular staff, funding available for private counsel, special programs for consular notification).

Their involvement is based on:

- the size and composition of their expatriate population residing in the U.S.;
- the prominence of an activist international human rights agenda; and,
- the nature of political linkages to bilateral relations with the U.S.

With little exception, the larger a nation’s national population in the U.S., the more likely it is to provide extensive consular services. Nations or inter-governmental organizations (IGOs) with a prominent human rights agenda that opposes use of the death penalty, such as the European Union, Mexico, or Canada, are more likely to take great lengths to protect their nationals against capital punishment. The last factor, political linkages, is more complex. Nations with very close economic and political ties to the U.S., such as the United Kingdom or Australia, are less likely to pursue “antagonistic” consular policies. Nations can choose to accept or contest to varying degrees the U.S. State Department’s stubbornly held posture that, owing to the constitutional mechanism of federalism, the federal government cannot intervene by decree to prevent state executions of foreign nationals, and is therefore relegated to mere formal supplications to governors and state attorney generals. Mexico, for example, has gone to great lengths to explore the exact role of federalism vis -à-vis the executive’s power over states when foreign relations are at stake.

The level of consular intervention of some governments may be obvious using the standards described above. The differences in the respective consular policies of such nations as the United Kingdom and Mexico may be less clear, however. For example, due to the size of the Mexican national population in the U.S. and the increasing political impact of these expatriates on Mexican domestic politics, the Mexican Foreign Ministry (Secretaria de Relaciones Exteriores, or SRE) has been the most active in seeking an expansion of Article 36 rights. Both sides are still assessing the impact of this new direction in diplomacy on Washington-Mexico City relations. The United Kingdom, which also maintains a large expatriate community in the U.S., has consistently conducted a more detached consular policy, refusing to intervene in the pre-trial stages of criminal proceedings.¹⁶ It is possible that, owing to the historic constancy of bilateral relations with the U.S., the United Kingdom views action in domestic courts as excessively interventionist and action before the ICJ as overly antagonistic. This is only a cursory examination of consular practice in the U.S.; the political linkages of VCCR enforcement are given fuller treatment in subsequent sections.

Sources of U.S. Treaty Compliance: Differing Interpretations

The relevance of an international treaty relies upon all parties’ willingness to comply with the obligations set forth in the text; international law lacks a system of enforcement similar to that of municipal law.¹⁷ The Vienna Convention on the Law of Treaties (1963) (VCLT), signed (but not ratified) by the U.S., states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”¹⁸ Most treaties deal with areas of nation to nation interaction that rarely impinge on each other’s domestic affairs. Treaty obligations are routinely violated in minor ways and resolved through low-key diplomatic channels. Thus, the international legal community, composed of governments, transnational

consulting firms and attorneys, international courts, and supranational organizations, has been slow to adopt a consensus regarding the extension of treaty rights into domestic practice. The VCCR raises question fundamental to the law of treaties. What is the nature of compliance with treaty-based international law? Do the rights set forth in a treaty apply to individuals or only to nations as a whole? The U.S. Government has consistently maintained that treaty violations do not offer judicial recourse. Many foreign governments and the domestic attorneys representing their nationals, on the other hand, have begun to argue that rights conferred by the VCCR may be privately enforced in the same way as constitutional rights established by *Miranda v. Arizona*.¹⁹ The statist *status quo* argument and the opposing individualist one are outlined below.

Article 36(2) of the VCCR states that the “rights [of Article 36] shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.” The U.S. Government, seeking to comply with Article 36(2), has instituted a number of internal regulations governing federal agencies and encouraged state and local authorities to follow suit. A Department of Justice code binds any “federal officer” to “inform the [detained] foreign national that his consul will be advised of the arrest unless he does not wish such notification to be given.”²⁰ Officers of the Immigration and Naturalization Service (INS) must do the same, although only for foreign nationals “detained in connection with administrative expulsion or exclusion proceedings.”²¹ California is the only state to have enacted a law requiring compliance with Article 36 by law enforcement authorities.²² The federal government largely has interpreted its role in treaty compliance to be an advisory one, sending booklets to state and local authorities; this effort has been intensified since 1998.²³ Thus, the U.S. Government interprets treaties solely as a matter between nations. This interpretation – the statist paradigm – excludes the domestic court system from being an adequate or legitimate means of ensuring treaty compliance.

Without fail, the U.S. Department of State has treated the issue of the VCCR differently externally than internally. Abroad and in relation to its own consular bureau, the Department has stated that Article 36 of the VCCR is “of the highest order and should not be dealt with lightly.”²⁴ Violations occurring in the United States, however, only merit “appropriate action.” The Department of State has limited its official action to requesting “the relevant facts from the detaining federal, state, or local authority; [discussing] the matter with the foreign government involved; [apologizing] on behalf of the government for a failure to provide consular notification; intervene to ensure that consular access is permitted; or [seeking] to work with the involved federal, state, or local detaining officials to improve future compliance.”²⁵ This perspective comes from a traditional understanding of international law that stems from the principle of *pacta sunt servanda*, or the binding nature of written agreements;²⁶ treaty violations are voluntary departures from an agreement which are best resolved bilaterally through the community of nations. The United States unsuccessfully argued this position before the Inter-American Court of Human Rights, claiming that Article 36 did not give rise to individual rights.

At issue is whether individuals have adequate legal standing to invoke their treaty rights in a court of law, which may lead to a remedy arising from a demonstration of prejudice. Given the historic segregation of international law from municipal law, domestic appeals courts have been hesitant and even hostile to the idea of enforcing rights under international law. The main support for claiming individual rights under the VCCR stems from Article 6 of the U.S. Constitution, the Supremacy Clause, and from the “self-executing” nature of the VCCR.²⁷ The Constitution states that “all Treaties made...under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”²⁸ Thus, rights given to foreign nationals by the VCCR in theory should be made the “Law of the Land,” since the treaty was ratified by the Senate as required by the Constitution. In reaction to a trend in the international community to codify individual rights,²⁹ the U.S. Senate has sought in the past to limit encroachment upon municipal law by making “reservations” to ratification.³⁰ Specifically, Senate committees have argued that many of the rights established by international documents are rendered superfluous and redundant by the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution.³¹ When it initially sought a Senate vote to ratify the VCCR, the Executive Branch stated that the treaty was “entirely self-executing [sic] and does not require any implementing or complementary legislation.”³² The self-executing nature of the VCCR precludes the possibility of raising Article 36 claims under state statutes in a civil lawsuit.

In summary, both the U.S. Government's strict statist interpretation of treaties and the opposing view that *individuals* have treaty rights concur in that detained foreign nationals must be informed of their Article 36 rights. They differ, however, on whether these rights apply only to the sending nation *en bloc* or also to individuals who can raise them defensively in criminal proceedings. Domestic court rulings and recent decisions by international courts provide a highly contested backdrop for future cases: no authoritative decision has been rendered by the U.S. Supreme Court, U.S. appeals courts have remained cautious on the issue, and international courts consistently have ruled in favor of individual rights. The VCLT, however, states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."³³ The nature of U.S. treaty obligations would remain contested throughout U.S. case law prior to the juridical watershed of *Germany v. United States*, or *LaGrand*.

U.S. Case Law Before LaGrand

This section outlines the collective ambivalence with which U.S. district and appeals courts have treated two aspects of Article 36 claims: the delegation of individual rights by the treaty's text and the availability of a remedy for treaty violations. A legal precedent largely has been established against providing post-conviction judicial remedies for the failure of U.S. authorities to provide consular notification. The existing case history is likely to change with three international court rulings; all judges are likely to reexamine the record when dealing with future cases because of the ICJ's decision in *Germany v. United States of America* (known as the *LaGrand* case), the case currently being deliberated, *Mexico v. United States of America*, and the 2000 Inter-American Court of Human Rights advisory judgment. Judges in cases following *Faulder v. Johnson* have examined treaty rights by considering the following factors: "the legislative history of...[treaty] ratification, historical application..., and the interpretation of the State Department."³⁴ Conclusions will be drawn about the two different judicial paradigms that have allowed for seemingly conflicting U.S. Court of Appeals decisions such as *United States v. Nai Fook Li* and the initial Ninth Circuit ruling in *United States v. Lombera-Camorlinga*.

The only instance of a defendant raising a VCCR claim in a domestic court prior to *Faulder v. Johnson* was an immigration charge (illegal re-entry after previous deportation) that reached a federal appellate court – *United States v. Rangel-Gonzalez*.³⁵ The U.S. Court of Appeals for the Ninth Circuit's ruling was unprecedented in several regards. Since the defendant was able to demonstrate prejudice, testifying that he "would have contacted his consulate if he had been aware of his right to do so," and that consular assistance would have resulted in his voluntary departure from the U.S. rather than the deportation that resulted in his arrest, the court reversed the immigration charges.³⁶ However, the request for such a remedy in *Faulder v. Johnson* was ultimately unsuccessful, although deliberations on the nature of Article 36 did result in several last-minute stays of his execution. Similar cases have all established that in order to receive a remedy (the suppression of evidence or reversal of the charges, for example), the defendant must demonstrate prejudice.³⁷ The U.S. Court of Appeals for the Ninth Circuit, in a ruling that has been widely cited by judges in subsequent cases, held that a foreign national must prove that he did not know of his right; he would have availed himself of the right had he known of it; and there was a likelihood that the contact [with the consul] would have resulted in assistance to him.³⁸

Domestic courts have repeatedly invoked the judicial doctrine of procedural default to justify discarding cases which seek to call upon "rights" established by the treaty. In post-conviction appeals, the defendant must avoid such a ruling, in which a state court may refuse to hear a case further because state procedural rules were violated, regardless of the merit of the cases. Defendants in VCCR cases may avoid such a trap, however, by calling upon the supremacy of international compacts over state laws and then explaining that international law does require a showing of prejudice.³⁹ This was made abundantly clear by the U.S. Supreme Court in *United States v. Pink* (1942):

We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes or judicial decrees. *And the policies of the States become wholly irrelevant to judicial inquiry when*

*the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.*⁴⁰ [emphasis added]

But as Sandra Babcock, an international law attorney, stated:

The courts have nearly uniformly held that there is no judicial remedy available for violation of the Vienna Convention. There are ... many different judicial doctrines that are invoked by the courts to prevent nationals from receiving any sort of relief for violations. The federal courts of appeals have held that the treaty itself does not provide for a remedy in its text and it doesn't rise to the level of a Constitutional right.⁴¹

There are notable differences in the handling of cases involving capital crimes and ones concerning lesser offenses. Judges have shown considerable respect for Article 36 rights in lower profile cases. However, capital cases are able to climb farther up the appeals ladder.⁴² U.S. Courts of Appeals are likely to maintain their hitherto ambiguous posture until either the U.S. Supreme Court takes a VCCR case or the U.S. Government decides clearly upon the nature of ICJ jurisdiction.

As a whole, courts have been careful to avoid stating *explicitly* that individual rights cannot be invoked defensively in criminal cases or that no remedy is available to defendants. Instead, they have outlined remedies that are *not* available under the VCCR, thus implying that individual rights are *limited*. Also, courts have sought to distinguish between treaty rights enforceable in criminal and civil proceedings.⁴³ Finally, judges have been cautious in extending the mandates of international law into their own courtrooms because of a perception that the principles involved are incompatible with those of municipal law.

Although previous VCCR cases such as the 1996 U.S. Court of Appeals for the Fifth Circuit's decision in *Faulder v. Johnson* did not provide a precedent for individual rights under Article 36,⁴⁴ they did, however, result in the proliferation of criminal cases that referenced treaty violations. Two cases are illustrative of this trend. Federal courts have rendered decisions in *United States v. Nai Fook Li*⁴⁵ and *United States v. Lombera-Camorlinga* that are highly relevant to future cases.⁴⁶ After counsel for a national from the People's Republic of China, Nai Fook Li, filed a motion asking for the dismissal and suppression of evidence in a charge of attempted smuggling of aliens into the U.S., the U.S. Court of Appeals for the Fifth Circuit decided to rule on the applicability of Article 36 to the case's merits, specifically "whether the Vienna Convention and the Bilateral Convention⁴⁷ create individual rights as to consular notification and access that are enforceable by individuals; and if so, whether there is a remedy for the past violations of these rights that can be invoked by a defendant in a criminal prosecution."⁴⁸ In 2000, four years after the original arrest, the court addressed the issue of remedy by declaring that the treaties were "facially ambiguous on the subject of whether they create individual rights at all, and do not even address whether those rights would justify suppression of evidence or the dismissal of an indictment." Suppression of key evidence in the case was denied and the court remained decidedly ambiguous, careful not to open the floodgates nor to seal them completely, holding that it would "infer neither an entitlement to suppression nor an entitlement to dismissal absent express, or undeniably implied, provision for such remedies in a treaty's text."⁴⁹ Following the U.S. Department of State's position that only the Executive Branch could provide a remedy for a treaty violation, the court warned of the dangers of expanding individual rights under international law:

There is an elaborate regime of practices and institutions by which the United States and other nations enforce commitments *inter se* or decide that, in the national interest, promises given by or to another sovereign should not be enforced in a specific case. Sometimes this is done purely for reasons of prudence, sometimes for convenience, or sometimes to secure advantage in unrelated matters. Incalculable mischief can be wrought by gratuitously introducing into this often delicate process court enforcements at the instigation of private parties.⁵⁰

In contrast to *Nai Fook Li*, the U.S. Court of Appeals for the Ninth Circuit initially ruled in *United States v. Lombera-Camorlinga*, a case involving a Mexican national charged with possession of approximately 40 kilograms of marijuana and who was not informed of his right to consular access, that the defendant's appeal to have statements to U.S. customs officers suppressed was indeed valid, reversing a lower court decision.⁵¹ An important precedent seemingly was established; although the burden of proof

was on the defendant to demonstrate prejudice resulting from inability to receive consular assistance in the pre-trial stages, the VCCR did indeed give rise to individual rights enforceable in court.

The U.S. Government, alarmed by the ruling, requested a review of the case by the full panel of judges in the Ninth Circuit. Stopping short of reversing itself completely in this subsequent decision, the Court instead declined to address the issue of individually enforceable Article 36 rights and limited itself to declaring that “exclusion of evidence in a criminal prosecution is not an available remedy for a Vienna Convention violation.”⁵² Thus, the court effectively differentiated between Constitutional rights and statutory or treaty rights. The influence of the U.S. Department of State’s interpretation of the treaty on the ruling is apparent in the court’s analysis that the Department “has historically enforced the Vienna Convention itself, investigating the reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary.”⁵³ This represented an apparent victory for the statist interpretation of treaty obligations.⁵⁴ Nonetheless, many lower courts still left an opening for further VCCR claims in criminal proceedings, all the while upholding the defendant’s responsibility of proving that a treaty violation had an effect on the outcome of the trial.⁵⁵

Charting New Territory: International Law Tribunals

The United States, along with many other nations, is a signatory to the Optional Protocol concerning the Compulsory Settlement of Disputes (referred to hereafter as the Optional Protocol) of the VCCR, which allows claims to be settled authoritatively by the ICJ, the world’s highest judicial organ.⁵⁶ Before *LaGrand*, as will be explained, the ICJ’s decisions were not binding and this provided room for continued U.S. treaty non-compliance. The Republic of Paraguay became the first nation to file an international suit against the United States for failure to comply with the VCCR in international court, as provided for in the Optional Protocol. This represented an obvious dissatisfaction with traditional U.S. Government remedies such as a diplomatic apology or pledge of future compliance. What follows is a fuller treatment of *Breard v. Greene (Paraguay v. United States)* than that provided in the ‘Background’ section above.

Angel Francisco Breard, a Paraguayan national residing in the Commonwealth of Virginia, was accused of the rape and murder of a Virginia woman in 1992. He took the witness stand and confessed to the crime against the advice of his court-appointed counsel. Before the U.S. Court of Appeals for the Fourth Circuit, Breard’s new, federal court-appointed counsel argued that, had he had the benefit of consular assistance, he never would have testified against himself.⁵⁷ In addition, the Republic of Paraguay intervened directly, suing the Commonwealth of Virginia in a civil suit that was eventually dismissed.⁵⁸ On 3 April 1998, Paraguay brought the case before the ICJ (only nations and not individuals have the right to institute proceedings) in order to “prevent the execution of a national who, the United States conceded, had been convicted and sentenced in violation of the provisions of the Vienna Convention on Consular Relations.”⁵⁹ Based on the initial merits of the case and before fully reviewing both sides’ arguments, the ICJ ordered the United States to “take all measures at its disposal to halt the execution.”⁶⁰ Because the ICJ’s provisional measures at the time were not legally binding, the U.S. Supreme Court deferred to the Governor of Virginia, James Gilmore, in deciding whether to execute Mr. Breard. The execution proceeded as scheduled on 15 April 1998, despite the pleas of U.S. Secretary of State Madeleine Albright to stay the execution.⁶¹ The Court continued with the case, noting the further breach of VCCR obligations implicit in the execution against the court’s order and clarifying its jurisdiction in relation to the VCCR, seeking to preempt any further U.S. claims to the contrary.⁶²

The fundamental question that Paraguay posed to the ICJ was whether international treaty rights superseded the municipal law doctrine of procedural default. The court ruled that the obvious had indeed occurred, with the United States violating the VCCR (the U.S. had conceded this much on its own), and further decided that:

[T]he conceded violation of the United States’ obligations under Article 36 of the Vienna Convention constitutes a clear breach of international law. Under the principle of *pacta sunt servanda*, the United States committed an internationally wrongful act for which it is responsible under international law...[and] [c]ontrary to the United States’ contention during the hearing on provisional measures, international law does not require a showing of prejudice before the offending State’s international responsibility is engaged.⁶³

While the court's "binding" order came too late to result in a reprieve for Mr. Breard, *Paraguay v. United States* charted valuable new territory for other VCCR disputes. While the case did not deal explicitly with the invocation of individual Article 36 rights and the possibility of obtaining a judicial remedy, the court held that "Paraguay is entitled to adequate reparation for the United States' violation of its international legal obligations and its international legal obligations, and it need not ground its request in any express authorization of a particular remedy in the text of the Vienna Convention."⁶⁴ Paraguay subsequently retracted the case because of Breard's execution.

In *Germany v. United States of America (LaGrand)*, the ICJ went one step farther, making history by establishing the legally binding nature of its provisional measures (the order to stay the execution until the case could be decided) and again declaring the U.S. in breach of its treaty obligations. On 2 March 1999, the Federal Republic of Germany instituted proceedings against the U.S. for failure to notify two German nationals residing in Arizona, Walter and Karl LaGrand, of their Article 36 rights. Similar to its previous plea in the pre-trial stages of *Paraguay v. United States*, the U.S. requested that "the Court...adjudge and declare that" a breach had occurred, but that an official apology and pledge to take "substantial measures aimed at preventing any recurrence" had already been provided, and the case be dismissed on such grounds.⁶⁵

The LaGrands, accused of murdering a manager in a failed bank robbery attempt and sentenced to death, were never informed of their right to contact a consulate, a fact that the U.S. claims was complicated by the brothers' demeanor and speech, which was "American[] rather than German[]."⁶⁶ Germany asked the court to resolve the "legal consequences arising from the non-observance on the part of the United States of certain of its provisions vis-à-vis Germany and two of its nationals,"⁶⁷ an issue that the *Paraguay* decision had left ambiguous. The court found most of Germany's submissions admissible by wide majorities and that, by equally wide margins, the U.S. had breached the "obligation incumbent upon it under the Order indicating provisional measures issued by the Court."⁶⁸ Most importantly, for the first time in history, the ICJ made its provisional measures legally binding. After *LaGrand*, the U.S. Supreme Court, based on advice from the U.S. Solicitor-General, would no longer be able to defer to individual states and would instead have to comply fully with ICJ decisions. Once again, the accused did not benefit from the ICJ's decision; the LaGrands were executed within a week of each other in early 1999 in Arizona.

By reversing, or at least clarifying, many of the positions taken by U.S. federal appellate courts, the *LaGrand* decision established that Article 36 did indeed give rise to individual rights, although it was silent as to whether they were privately enforceable in domestic courts. Second, the court made clear that "Article 36 stands for rights of the foreign national and the sending state that are distinct from rights accorded to the foreign defendant under domestic criminal law, such as the right of effective counsel."⁶⁹ Third and with the potential to affect future criminal proceedings involving foreign nationals, "[c]ourts...may not invoke procedural default rules to dismiss the case where the default itself is caused by an Article 36 violation."⁷⁰

There are a number of reasons why U.S. courts have largely avoided addressing the *LaGrand* decision. First, judges are hesitant to set any sort of precedent awaiting a definitive ruling by the U.S. Supreme Court. Second, they are limited to a certain degree by the arguments put forth by both sides of a dispute; awareness of the *LaGrand* decision has not permeated all levels of the criminal defense community.⁷¹ The U.S. Department of State has avoided adopting a definite position on the importance of the *LaGrand* decision, saying that "[w]e recognize that we have to provide consular notification to foreign nationals in the United States...[the Department is] undertaking a close and careful review" of the decision.⁷² The binding ICJ decision in *LaGrand* places increased importance on a pending case, *Mexico v. United States of America*, which raises similar VCCR concerns over the rights of three Mexicans currently awaiting capital punishment.

On 9 January 2003, Mexico joined Paraguay and Germany in resorting to the ICJ for disputes over U.S. compliance with the VCCR. While the case is currently under review and will likely remain so until 2004, it provides a crucial litmus test for U.S. compliance with provisional measures of the ICJ. A month after Mexico instituted proceedings against the U.S., the court indicated, in its unanimously adopted "Order indicating provisional measures", that the three Mexican nationals, Reyna et al., not be "executed pending a final judgment of the Court in the case" because "their execution would cause irreparable prejudice to any rights that may subsequently be adjudged by the court to belong to Mexico."⁷³ *Mexico v. United States of America* is different from past cases in two regards. First, the U.S. now has established a "pattern" of non-compliance with the court's past decisions. Second, for the first time, such provisional measures have

explicitly been stated by the court to be “legally binding.” Thus, the U.S. Solicitor-General will no longer be available to advise the U.S. Supreme Court that it may defer to the individual states regarding treaty compliance and execution stays.

In addition to the cases decided and pending before the ICJ, foreign governments have also turned to the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, both judicial organs of the Organization of American States (OAS). In 1997, Mexico requested from the Court of Human Rights an advisory opinion on individual rights under Article 36.⁷⁴ Since the United States does not recognize the jurisdiction of either body, the opinion would only strengthen future arguments before other courts and not be legally binding. Three years later, the court released its unanimous holding that Article 36 “confers specific legal and human rights on individual foreign nationals in the [United States] who were not informed after arrest of their right to seek consular assistance.”⁷⁵ With even more profound implications, the court opined 6-1 that the “execution of an individual whose VCCR rights have been violated is an ‘arbitrary’ deprivation of life, and violates international law.”⁷⁶ While the advisory decision did not address the question of judicial remedies, it went farther than both the previous ICJ decisions in criticizing U.S. behavior. The potential in such a judgment lies in future ICJ decisions, which are now legally binding, and not in domestic jurisprudence, since the United States does not recognize the court’s jurisdiction.

A Complex Relationship: Federal, State, and Foreign Governments

Before the VCCR was thrown into the spotlight by a series of high-profile death penalty cases involving the direct intervention of foreign governments, U.S. self-enforcement of its treaty obligations was limited to sporadic Department of State mailings about the VCCR to state and local authorities.⁷⁷ While a concerted effort to raise awareness of the treaty has been undertaken recently by federal and state agencies, the actual performance of the federal government has been highly contested. This section will demonstrate the complexities of achieving total treaty compliance.

The Mexican government recently claimed that none of its nationals on death row in the U.S. were read their right to consular assistance.⁷⁸ In response to a congressional inquiry, the U.S. Department of Justice stated in 2001:

Every detained alien is [...] informed that he or she may communicate with consular or diplomatic officers of the country of his or her nationality in the United States. In addition, the [Immigration and Naturalization Service] affirmatively notifies the consulates of countries that are signatories of the Vienna Convention on Consular Notification (*sic*) within seventy-two hours of the arrest or detention of one of their nationals.⁷⁹

A Human Rights Watch (HRW) survey documenting consular notification in the U.S. reports that “of the thirty detainees or former detainees interviewed [...] twelve (40 percent) said they were not informed of their right to contact consular officials at the time of the arrest or immediately after; six (20 percent) said that they were informed, and the remaining twelve (40 percent) either did not know or did not remember.”⁸⁰ Foreign governments have repeatedly issued protests to the U.S. Department of State regarding failure to be informed of detained nationals.⁸¹ The U.S. is far from achieving even partial compliance with its treaty obligations.

The main actors in this ineffectual model of self-enforcement are:

- state and local authorities (city and state police, sheriffs’ offices);
- federal agencies such as the INS, U.S. Border Patrol, and Federal Bureau of Investigation (FBI);
- the Departments of Justice and State;
- foreign consulates; and
- foreign ministries.

Each of these participants in the process will now be described, noting the institutional and procedural flaws of each. State and local authorities vary significantly across geographic lines as to their performance

in informing detained foreign nationals of their right to consular assistance. Here, non-compliance arises out of a lack of awareness, a problem that slowly is being countered by a renewed U.S. Department of State mailing campaign.⁸² Federal agencies such as the INS, Border Patrol, and FBI, all have internal regulations that require officers to notify detained foreign nationals of their right to consular access. These agencies have institutionalized the process by providing regular and effective training to officers and making available consular notification forms, facsimile copies of which are sent routinely to detained nationals' consulates. The Department of State, as mentioned, concentrates its domestic treaty compliance efforts on raising awareness in the law enforcement community rather than correcting past violations by offering actual remedies or intervening in the affairs of individual U.S. states.

Foreign consulates, according to the extensiveness of their resources and the nature of directions from their foreign ministries, act with varying degrees of activism when intervening in criminal proceedings. Some consulates limit their involvement to providing defendants with the names of private attorneys, while others, such as Mexico, have established elaborate programs to help detained nationals.⁸³ While few scholars have explored in any depth the actual practice of consular notification, even a cursory examination of the situation would reveal that many consulates are unequipped to receive consular notifications of the magnitude total compliance on the part of U.S. authorities implies. Many of them are also not capable of providing the meticulous assistance of the sort described by defendants who have demonstrated prejudice in a trial due to a failure of consular notification. That consular resources in the U.S. are overextended in many cases may provide substantial evidence in the future for the U.S. Government to present in court when it seeks to rebut a showing of prejudice, especially if the burden of proof is on the defendant.

Foreign Governments: Interference in Domestic Affairs or Diplomatic Activism?

In state courts, in meetings with prosecutors and state attorneys-general, and before clemency and parole boards, some foreign governments in the U.S. have increased the scope and nature of consular intervention in the past decade. The modern system of international law, embodied to some degree in the United Nations Charter (1945), emphasizes the "sovereign equality" of all nations and the principle of non-intervention in the domestic affairs of other nations.⁸⁴ The practice of modern diplomacy historically has relied upon time-tested means of avoiding open confrontation between nations. International treaty violations almost always have been handled between nations at the level of their respective foreign ministries, who issue formal diplomatic protests or arrange for bilateral negotiations. When intervention in criminal proceedings is necessary as a form of consular protection, it traditionally has been limited to arranging for adequate legal counsel or making clemency requests after sentencing to the receiving nation's foreign ministry. Even the European Union, which has been one of the most vocal opponents of the U.S. death penalty, refuses to intervene in pre-trial stages.⁸⁵ Prior to the 1990s, there was little precedent for direct interaction between states and foreign governments.

Due to the federal government's inability to "take steps sufficient 'to enable full effect to be given to the purposes for which the rights accorded under [Article 36 (1)] are intended,'" ⁸⁶ a number of nations have resorted to enforcing the treaty at the most basic level, suing states in federal district courts and/or engaging in negotiations with state legislators and agencies. This trend on behalf of a growing number of governments raises myriad questions. Is action taken in relation to the VCCR setting a precedent for foreign government to involve themselves in other aspects of domestic governance? Does private enforcement of the VCCR represent a paradigm shift in the practice of diplomacy from maintaining the status quo between nations to seeking real change through non-traditional means? Does federalism pose a fundamental threat to an effective foreign policy? The cases of Paraguay and Mexico are illustrative of this new brand of diplomatic activism.

When it was seeking to provide consular assistance to Angel Breard, the Republic of Paraguay first engaged in traditional diplomatic negotiations to attempt to secure a new trial for the defendant, whose treaty rights were violated. The Ambassador of Paraguay sent letters to the U.S. Department of State, which took issue with the legal positions of the Republic.⁸⁷ Further bilateral talks did not yield any tangible benefits and on 16 September 1996, Paraguay filed a civil action in the United States District Court for the Eastern District of Virginia against the state.⁸⁸ The case was rejected on procedural default because of the 11th Amendment to the U.S. Constitution, which states that the "Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or *prosecuted against one of the United*

States by Citizens of another State, or by Citizens or Subjects of any Foreign State."⁸⁹ [emphasis added]. A federal appellate court affirmed the ruling on 22 January 1997.⁹⁰

Mexico has been the most active at the local level, giving its consulates unprecedented negotiating authority to deal with local authorities and intervening in pre-trial criminal proceedings.⁹¹ Domestic attorneys representing Mexican nationals have had widespread success in engaging consular officials to write letters to prosecutors and state attorneys-general before a trial and drafting *amicus curiae* briefs during a trial. When defendants face the death penalty, Mexican consular authorities have held meetings with state governors and written diplomatic notes to state clemency and parole boards.⁹² In its preliminary statement in *Mexico v. United States of America* before the ICJ, Mexico argued that it had exhausted traditional diplomatic overtures and in numerous cases had "intervened in municipal judicial proceedings on behalf of its wronged nationals, initiated original actions in United States courts, and repeatedly lodged diplomatic protests with the United States Government in an effort to vindicate its rights and those of its nationals."⁹³ Federal courts consistently have held that this approach to seek remedies is not viable and that nations must pursue their claims through "diplomatic and political, not judicial, channels,"⁹⁴ yet foreign governments only have increased their involvement in judicial proceedings. The trend, then, is tripartite:

- some foreign governments have judged VCCR violations to be so important that they are willing to forego conventional diplomatic maneuvers and have devoted considerable effort to finding new methods of ensuring U.S. treaty compliance;
- efforts to enforce the VCCR privately in domestic courts have met with little success and this has led foreign governments to intervene through non-traditional means, manifested by the proliferation of private domestic attorneys contracted by foreign governments in consular operations;⁹⁵
- foreign governments actively have sought to legitimize individual rights under international treaty law by attempting to expand the jurisdiction of international courts and by attempting to form an international consensus around the notion of consular rights as fundamental to a fair trial by (1) organizing international coalitions to intervene in high-profile U.S. death penalty cases involving foreign nationals⁹⁶ and (2) passing a United Nations General Assembly resolution reaffirming consular rights.⁹⁷

International Agreements in Criminal Proceedings

Agreements such as the Universal Declaration of Human Rights,⁹⁸ the International Covenant on Economic, Social, and Cultural Rights,⁹⁹ and the International Covenant on Civil and Political Rights (ICCPR),¹⁰⁰ form what is known as the "International Bill of Rights."¹⁰¹ With the limited success of raising VCCR claims in domestic courts, attorneys in capital cases involving both U.S. citizens and foreign nationals have begun to raise claims under the "International Bill of Rights", seeking to prove that their defendants' rights under international law were violated by the U.S. Since the U.S. Supreme Court has repeatedly held that capital punishment does not violate the 8th Amendment of the U.S. Constitution, which prohibits "cruel and unusual punishment," litigation increasingly has focused on areas of international law that prohibit torture or state [national] killing.¹⁰²

Claims under "international human rights" are on even more unstable legal grounds than VCCR claims in municipal proceedings, however, since documents labeled "declarations" and "principles" are not binding in the same way as treaties.¹⁰³ Moreover, such agreements, even if ratified by the U.S. Senate and theoretically constituting the "Law of the Land," are not self-executing in the same way as the VCCR—that is, they require additional legislation for implementation. The main judicial support for such claims comes from a 1900 U.S. Supreme Court decision that recognized that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."¹⁰⁴ Especially relevant in challenging the use of the death penalty is the prohibition found in many of the international agreements against the state's [nation's] "arbitrary" taking of an individual's life. The ICCPR drafting convention suggested that "arbitrary" means: (1) fixed or done capriciously or at pleasure; (2) without adequate determining of principle; (3) depending on the will alone; (4) tyrannical; (5) despotic; (6) without cause

upon law; and (7) not governed by any fixed rule or standard.¹⁰⁵ Furthermore, the United Nations Human Rights Committee held that inappropriateness, injustice, and lack of predictability also embody the concept of arbitrariness.¹⁰⁶ Armed with that logic, recent litigation has centered on proving that states with the capital punishment exhibit such “arbitrary” behavior. So far, the U.S. Supreme Court has been reluctant to increase the scope of a criminal defendant’s rights to include those found in international agreements.¹⁰⁷

Reflections on U.S. Unilateralism and the Future of International Law

Much ink has been spilled on the subject of U.S. unilateralism with recent foreign policy actions such as the rejection of the Kyoto Protocols (international environment law), the failure to sign or ratify the Convention on Land Mines (international human rights law), the withdrawal from the Intercontinental Ballistic Missile Treaty (international arms agreements), and the refusal to ratify both the American Convention or the Convention on the Rights of the Child. It is one of the main objectives of this paper to demonstrate that continued U.S. non-compliance with the VCCR, manifested both in actual Article 36 violations by federal and state authorities and in the inadequate remedy provided to other nations whose nationals’ rights were breached, is representative of this aversion to international organizations and treaties.

International law has undergone a tremendous transformation since the inception of the United Nations in 1945, expanding its reach from restricted issues of commerce and territory to universal rights designed to protect “human dignity.” It is easy to see the positivist aspect of the former, with laws being mere “commands issued by sovereign [bodies],”¹⁰⁸ completely divorced from ethics or a presumed universal morality.¹⁰⁹ With the “International Bill of Rights,” however, one is forced to reconsider such accepted wisdom. International law has become so inclusive, both in the principles embodied and the actors involved, that it is difficult to speak of it purely as a system of arbitration between sovereigns. The trends highlighted above, the increasing involvement of foreign governments in the domestic affairs of other nations, and the new legal territory being charted by attorneys making claims in domestic courts under international agreements, the *internationalization of municipal law*, indicate significant departures from the previous normative dimensions of international law. Instead, the VCCR as a relatively inconspicuous subject of international law represents a fundamental challenge to the old boundaries of municipal and international law with far-reaching consequences for the effective practice of both.

The political linkages implicit in the execution of foreign nationals in the U.S. are numerous. Washington-Mexico City relations have already weakened as a result of U.S. treaty non-compliance. Mexican President Vicente Fox cancelled a visit to Texas as a protest against the U.S. execution of Mexican national Javier Suarez Medina, a case that created tremendous political pressure on the Executive Branch in Mexico. Consular rights received widespread attention after 11 September 2001 when the prolonged detention and lack of consular access afforded to foreign nationals detained by the INS and FBI counter-terrorism program resulted in widespread protests by the foreign diplomatic community in the U.S.¹¹⁰

The Imperative of U.S. Compliance: a Policy Model and Research Agenda

Three actors have stressed the importance of compliance with the VCCR, although for different purposes and in different contexts: federal appellate courts, the U.S. Department of State, and foreign governments. When urging compliance with the VCCR, U.S. courts have pointed to the document’s reciprocal nature as proof of the effect of even the smallest violation domestically on U.S. nationals abroad. The question is one of legal precedent, the “golden rule” of international diplomacy; the U.S. federal government cannot reasonably expect other nations to provide remedies to detained U.S. nationals who were not allowed consular access if it defers to the policies of its individual states in enforcing the VCCR. Starting with the high-profile *Faulder v. Johnson* and *Paraguay v. United States* cases, National Press Board editorials have repeatedly urged aggressive treaty compliance on the part of the federal government in order to secure the welfare of U.S. citizens who are tourists or residents in other countries. A 9 December 1998 *New York Times* editorial stated that “the failure of Texas officials to comply with the [Article 36] requirement sends a message to foreign governments that they need not take this obligation seriously either.”¹¹¹ The *Washington Post* argued that Mr. Breard “was arrested in a country where he had

good odds of getting a fair trial and due process, [but that] [t]here are plenty of countries where access to a U.S. diplomat can be, for an American, the difference between wrongful imprisonment, or worse, and freedom.”¹¹² The Council on Foreign Relations has also pointed out the potential for negative consequences for U.S. citizens abroad if the U.S. non-compliance at the local level continues without providing defendants with a adequate remedy to the satisfaction of their governments.¹¹³ The Brookings Institution, another think tank, said that the situation would lead to “real problems in foreign policy.”¹¹⁴

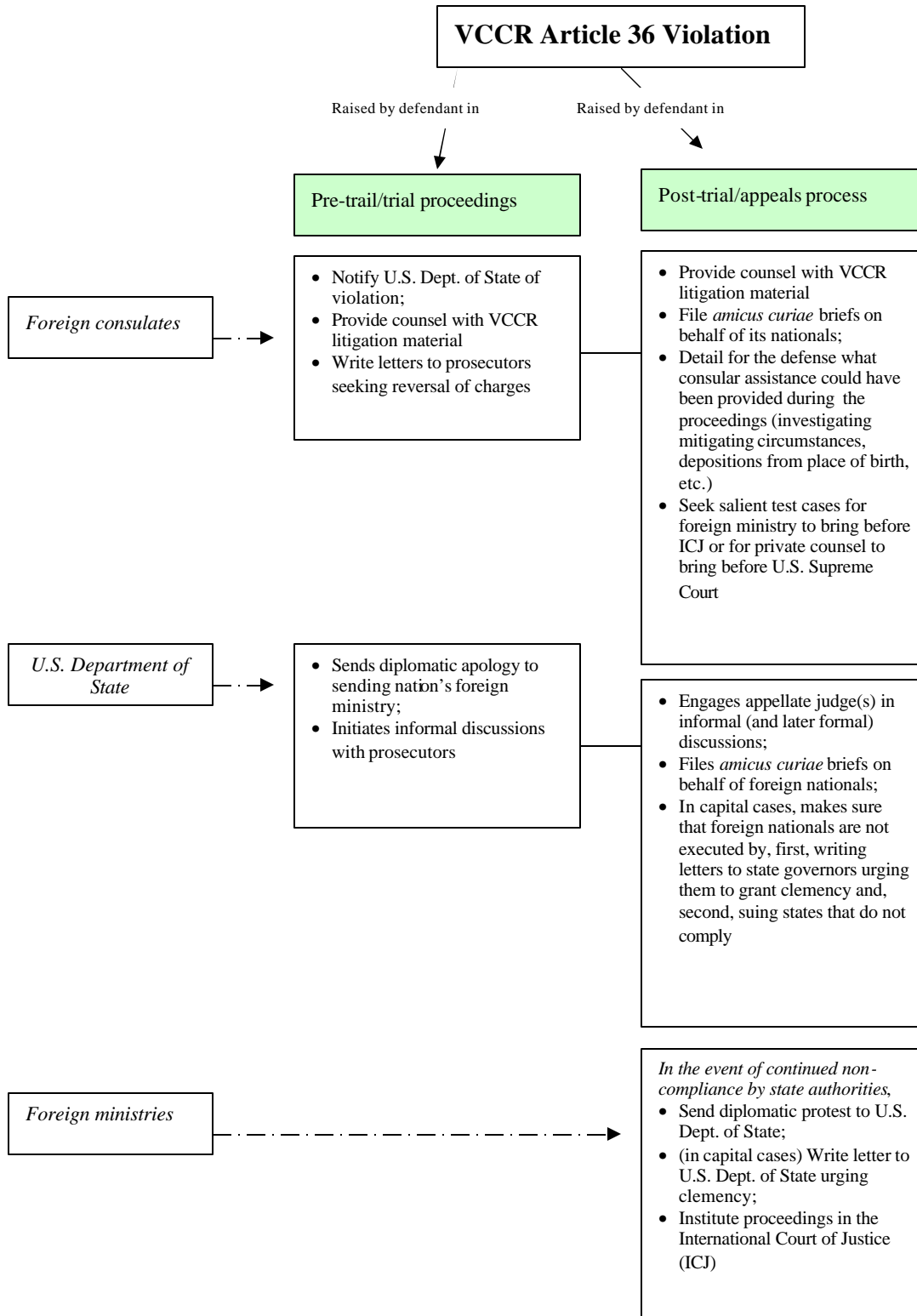
During the U.S. Department of State’s efforts to stay the execution of Mr. Breard, the Department spokesperson, James P. Rubin, stated that:

[O]ur embassies overseas spend an enormous amount of time in [consular assistance to detained U.S. nationals abroad]. Consular affairs, is, in many ways, the highest priority of the [U.S.] embassies abroad; namely the protection of American citizens. And, frankly, there are major problems with this Convention being complied with overseas. In many countries, in South America and other places around the world, there are serious problems and we regularly let governments know of the importance of living up to this Convention.¹¹⁵

Over 3,000 U.S. citizens are detained overseas annually, some 400 of them in Mexico. The imperative of domestic treaty compliance is high. Although there exists no empirical study linking recent U.S. actions with regard to the treaty to a reciprocal erosion of consular access for U.S. nationals abroad, a scenario easily can be constructed that illustrates the ways in which U.S. citizens abroad might be harmed by the international precedent being set by the U.S. The U.S. Department of State insists that it is taking the appropriate course of action in writing to state and local authorities to raise awareness of the VCCR and requesting that state governors “consider” providing clemency to foreign nationals sentenced to death.

The following course of action is proposed for the U.S. Department of State and foreign consulates to ensure treaty compliance while resolving two potentially harmful trends, the internationalization of municipal law and the increasingly interventionist consular policies of foreign governments in the U.S. (see Figure 1). While there should be no question that some sort of judicial remedy is available to defendants in post-conviction proceedings who can prove that consular assistance would have positively affected the outcome of their trials, suppression of key evidence against them under the Exclusionary Rule may be too drastic a solution. Domestic attorneys, working in concert with foreign consulates or independently to represent foreign nationals, no doubt will continue to invoke individual rights under Article 36. This may lead to a legal precedent permitting claims to be raised citing broader rights under other areas of international law, opening a virtual Pandora’s box of vague entitlements hindering the effective prosecution of criminals. For this reason, federal courts are unlikely to rule that treaty rights rise to the level of Constitutional rights. Thus, private enforcement of the VCCR does not constitute a practicable long-term strategy for foreign governments protecting the welfare of their nationals. Instead, they must continue to work aggressively through the ICJ, whose orders are now binding. Theoretically, violating an ICJ provisional measure or order is illegal and offenders can be sanctioned by the United Nations Security Council.

Figure 1



For its part, the U.S. Department of State must work more diligently towards total compliance domestically in order to secure consular operations in other countries, where U.S. embassies and consulates actively invoke the treaty in their daily operations. Thus far, Department action has been limited to a new booklet on consular access and notification and, in death penalty cases, writing ambivalent letters to state clemency boards and governors. Instead, the Department should intervene in judicial proceedings, converse with state prosecutors, and apply more informal pressure on state officials. *Amicus curiae* briefs may also be filed by the federal government in proceedings at all levels in support of foreign nationals. As a last resort, civil actions may be instituted against states that do not comply with the treaty.¹¹⁶ Future research by students of international law and politics must focus on the political linkages of VCCR treaty violations, the influence of expatriate communities on their home nations' politics, and the viability of addressing international human rights in domestic courts.

Conclusion

In this paper, the importance of the Vienna Convention on Consular Relations in both U.S. criminal jurisprudence and in the changing boundaries of international law has been demonstrated. The statist and individualist interpretations of treaty obligations have been summarized and the former largely has been shown to have won out in domestic case law before *LaGrand*. Moreover, how recent decisions by international law tribunals have been shown to possibly have a dramatic effect on future criminal proceedings in which Article 36 is invoked. Lastly, this paper has endeavored to place the seemingly minute issue of reading a detained foreign national his treaty rights into the framework of U.S. foreign policy, providing a model for ensuring the successful conduct of U.S. consular operations abroad. Continued U.S. non-compliance involves significant political linkages and should be viewed by the U.S. Department of State and the U.S. Supreme Court as an impediment to the implementation of many vital U.S. foreign policy objectives, including the attempt to build international coalitions in the war against global terror.

¹ This paper was researched in preparation for the Winchell Undergraduate Research Symposium, University of Minnesota, 26 April 2003. Special thanks to my advisor, Professor David L. Blaney. In addition, I am grateful to the Consulate of Mexico in Detroit for two consecutive summer internships, during which I assisted with some of the cases discussed herein, and to Sandra Babcock, Esq., Ambassador Eleazar Benjamin Ruiz y Avila, Consul-General Antonio Meza, and Consul Teresa Carpy, for the time they spent explaining their respective roles in the process.

² I will use the terms municipal and domestic law interchangeably; both are used as a contrast to international law.

³ Human Rights Watch. "United States, Presumption of Guilt, Human Rights Abuses of Post September 11 Detainees: V. Violation of Consular Rights." *Human Rights World Report 2002*. (New York: Human Rights Watch), 2002.

⁴ To avoid confusion between the states of the international community and the states comprising the United States of America, hereafter I shall refer to the domestic actors as "states" and to the international actors as "nations" or "foreign governments".

⁵ The near-universal membership of nations in the UN facilitated a trend toward codifying customary law; examples include the VCDR and the Vienna Convention on the Law of Treaties.

⁶ Department of State Publication. 1998. *Consular Access and Notification*. (Washington, D.C.: Government Printing Office), 42.

⁷ David Held, Anthony G. McGrew, David Goldblatt, and Jonathan Perraton. 1999. *Global Transformations: Politics, Economics, and Culture*. (Stanford, Ca.: Stanford University Press), 303.

⁸ Consular relations between the U.S. and many countries are governed in greater detail by bilateral treaties that mandate consular notification. However, all nations, even if they are not signatories, are covered by the VCCR because of customary law. (Department of State 1998, 51-57.)

⁹ Vienna Convention on Consular Relations, 24 April 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

¹⁰ *Ibid.*

¹¹ Mark Warren. 2001. *Consular Notification and Assistance: A Basic Resource Guide for Consuls*. (Ottawa: Human Rights Research), December.

¹² *Faulder v. Johnson*, 178 F.3d 741 (5th Cir. 1999); John Cary Sims and Linda E. Carter. "Representing Foreign Nationals: Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool." *The Champion*, September 1998, 1.

¹³ *Breard v. Pruett*, 134 F.3d 615, 620 (4th Cir. 1998). Cary Sims et al., 2.

¹⁴ International Court of Justice. *Press Release 2001/16: LaGrand Case (Germany v. United States of America)*: The Court finds that the United States has breached its obligations to Germany and the LaGrand brothers under the Vienna Convention on Consular Relations. (The Hague: International Court of Justice Registrar), 27 June 2001, 1.

¹⁵ *Avena and other Mexican Nationals (Mexico v. United States of America)* - Order - Provisional Measures [2003] ICJ 2 (5 February 2003).

¹⁶ Sandra Babcock. Interview by author, 15 April 2003.

¹⁷ Malcolm Shaw. 1997. *International Law*. (Cambridge: Cambridge University Press), 73.

¹⁸ Vienna Convention on the Law of Treaties (1963), Article 26.

¹⁹ The U.S. Supreme Court case *Miranda v. Arizona* established the precedent that authorities must read a detained person his or her Constitutional rights, including the right to remain silent and the right to have an attorney present during interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966)

²⁰ 28 C.F.R. §50.5(a).

²¹ Lawyers Committee for Human Rights. *Memorandum: Consular Notification and Access*. (New York: Lawyers Committee on Human Rights), 29 November 2001, 4.

²² California Penal Code § 834c.

²³ U.S. Department of State 1998.

²⁴ Arthur W. Rovine. 1973. *Digest of United States Practice in International Law*. (Washington, DC: U.S. Department of State).

²⁵ U.S. Department of State 1998, 22.

²⁶ *Black's Law Dictionary* (6th ed. 1990), 1109.

²⁷ Sandra Babcock. "International Law in Capital Cases." Paper presented as part of the International Law Seminar, Chicago, IL. July 2001.

²⁸ U.S. Constitution Article VI, Sec. 2.

²⁹ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)
International Covenant on Economic, Social, and Cultural Rights G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

International Covenant on Civil and Political Rights, 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, entered into force Mar. 23, 1976.

Although such documents are not binding on signatory nations, the United States has maintained that they "provide some evidence of what the [nations] voting for it regard the law to be...and if adopted by consensus or virtual unanimity, are given substantial weight." (Restatement [third] of the Foreign Relations Law of the United States, s103 c.t. c.)

³⁰ Babcock "International Law in Capital Cases."

³¹ *Ibid.*

³² S. Exec. Rep. No. 91-9, 91st Congress, 1st Session 2 & 5 (appendix) (statement by J. Edward Lyerly, Deputy Legal Adviser)

³³ Vienna Convention on the Law of Treaties, Article 27.

³⁴ William J. Aceves. 2003. "Litigating the Vienna Convention on Consular Relations: Two Approaches." *International Civil Liberties Report 2003*, 2.

³⁵ 617 F.2d 529, 532 (Ninth Circuit. 1980).

³⁶ Babcock, 4.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ ICJ 1998, 19.

⁴⁰ *United States v. Pink*, 315 U.S. 232, 233-34 (1942)

⁴¹ Babcock Interview.

⁴² Foreign governments have shown more willingness to involve themselves in capital cases because of the political linkage to global human rights; the U.S. remains one of only a few remaining nations to actively seek the death penalty for capital crimes, drawing the ire of many other Western industrialized nations.

⁴³ Aceves, 80.

⁴⁴ *Faulder v. Johnson*, 81 F.2d 515 (5th Circuit 1996)

⁴⁵ *United States v. Nai Fook Li*, 2000 WL 217891 (1st Circuit 2000).

⁴⁶ *United States v. Lombera-Camorlinga*, 170 F.3d 1241 (9th Circuit 1999)

⁴⁷ The People's Republic of China and the United States signed a bilateral consular treaty that mandates consular notification in case of detention. (Aceves, 1.)

⁴⁸ Aceves, 1.

⁴⁹ *Ibid.*, 2.

⁵⁰ *Ibid.*, 2.

⁵¹ *Ibid.*, 3.

⁵² *Ibid.*, 3.

⁵³ *Ibid.*, 3.

⁵⁴ The dissenting judges in the decision upheld the previous ruling. "Upon showing that the Vienna Convention was violated by a failure to inform the alien of his right to contact his consulate, the defendant in a criminal proceeding has the initial burden of producing evidence showing prejudice from the violation of the Convention. If the defendant meets that burden, it is up to the government to rebut the showing of prejudice." Furthermore, another panel member in the minority, Judge Thomas, argued, "when rights such

as the right to have a consulate notified without delay have been violated, our courts have long applied the exclusionary rule as the remedy of choice under our law.” (Aceves, 4.)

⁵⁵ *United States v. Miranda*, 65 F Supp. 2d 1002, 1007 (D. Minn. 1999): “[N]o remedy is warranted unless the defendant can demonstrate that the Convention violation resulted in some form of prejudice.”

United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1254-55 (D. Utah 1999): “By rejecting the remedy of suppression of such statements this court does not foreclose the possibility that other remedies may be available.”

⁵⁶ Paragraph 1 of the Statute of Court, Article I of the Optional Protocol

⁵⁷ *Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir.)

⁵⁸ On 16 September 1996, *Republic of Paraguay v. Commonwealth of Virginia*, a civil action in the United States District Court for the Eastern District of Virginia, was filed and subsequently dismissed on 27

November 1996. The dismissal was procedural, held on the grounds that “the [U.S. Constitution’s] 11th Amendment effectively forbids suits against state officials. (Goldman, article 6, 1.)

⁵⁹ International Court of Justice 1998, 5.

⁶⁰ *Ibid.*, 5.

⁶¹ Department of State spokesperson James P. Rubin described the government’s efforts at treaty compliance: “On Monday, Secretary Albright wrote to Governor Gilmore asking that the Governor stay the execution of Mr. Breard for murder. The Governor decided to allow the execution to take place as scheduled last night. In our federal system, that was his decision. [emphasis added] There is no doubt in our minds that Mr. Breard was guilty of the brutal crimes for which he was sentenced; however, he was not told that Paraguay’s consulate could be notified of his arrest as required by the Vienna Convention. That concerned the Department of State and his case was given careful attention.

⁶² “The Optional Protocol Gives this Court Jurisdiction over Any Dispute over Any Dispute Arising out of the Application or Interpretation of the Convention” (ICJ 1998, 13.)

⁶³ *Ibid.*, 19.

⁶⁴ The Court ordered as an appropriate remedy the following: “Paraguay is entitled to a declaration that the United States violated Paraguay’s rights under the Vienna Convention...Paraguay is entitled to an order of non-repetition...Paraguay was entitled to restitution in integrum [although this was clearly impossible due to Breard’s execution]...[and] Given the United States’ violation of the order, making restitution in integrum impossible, Paraguay is entitled to alternative reparation.” *Ibid.*, 34-37.

⁶⁵ ICJ 1999, 9.

⁶⁶ *Ibid.*, 9.

⁶⁷ *Ibid.*, 13.

⁶⁸ *Ibid.*, 39.

⁶⁹ Cara Drinan. “Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts after LaGrand.” *Stanford Law Review*. June 2002 v54 i6 p1303, 17 pps,1305.

⁷⁰ *Ibid.*, 1306.

⁷¹ *Ibid.*, 1310.

⁷² Paul Hofheinz. “Foreigners Awaiting Execution in U.S. Pursue New Trials: Lawyers Say They Weren’t Told About Embassy Help.” *The Wall Street Journal Europe*, 30 August 2001.

⁷³ ICJ 2003 press communiqué, 1-2.

⁷⁴ Mark Warren. *Foreign Nationals and the Death Penalty in the United States*. (New York: Death Penalty Information Center), 7 July 2002, 10.

⁷⁵ *Ibid.*, 10.

⁷⁶ OC-16/99, Inter-Am. Ct. H.R. (1 October 1999)

⁷⁷ Cary Sims et al., 2.

⁷⁸ *Ibid.*, 3.

⁷⁹ Daniel J. Bryant, assistant attorney general for the Office of Legislative Affairs, letter to Senator Russel D. Feingold, November 16, 2001.

⁸⁰ Human Rights Watch. 2002. “United States, Presumption of Guilt, Human Rights Abuses of Post September 11 Detainees: V. Violation of Consular Rights.” *Human Rights World Report 2002*. (New York: Human Rights Watch).

⁸¹ John Donnelly and Wayne Washington. “Diplomats Fault Lack of U.S. Notice on Many Detainees.” *The Boston Globe*, November 16, 2001.

⁸² Following *Paraguay v. United States of America*, the U.S. Department of State began mass mailings to all levels of authorities of a new booklet, *Consular Notification and Access* (1998), which details the nuances of the VCCR.

⁸³ Mexico funds a non-profit organization, the Mexican Capital Legal Assistance Program, which provided the attorneys representing Mexican nationals with legal advice on how to invoke Article 36 rights in criminal proceedings. In addition, many consulates maintain 24-hour “hotlines” for detained nationals to contact them.

⁸⁴ United Nations Charter. 1945. Chapter 1, Article 1.

⁸⁵ Babcock 2003.

⁸⁶ ICJ 2003, 2.

⁸⁷ ICJ 1998, 10.

⁸⁸ ICJ 1998, 9.

⁸⁹ U.S. Constitution, Amendment XI., ratified 7 February 1795.

⁹⁰ *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998).

⁹¹ Consul-General of Mexico Antonio Meza, Interview by author

⁹² See *Ohio v. Deitz* (1998)

⁹³ ICJ 2003, 2.

⁹⁴ *Ibid.*, 9.

⁹⁵ Many foreign governments, including Mexico, have privatized to a certain degree their consular corps, contracting domestic attorneys experienced with the finer points of municipal law to write amicus curiae briefs and motions in all both civil and criminal proceedings. (Aceves 2001, Babcock 2001, 2003).

⁹⁶ Thirteen nations joined Mexico in filing an amicus curiae brief before the U.S. Supreme Court, urging the Court to review the case of Javier Suarez Medina, a Mexican national. Similar efforts were mounted for Paraguayan and German nationals. (Babcock 2002)

⁹⁷ United Nations General Assembly. The only opposing vote came from the United States. (134-14-1)

⁹⁸ United Nations, 1945.

⁹⁹ ICESCR

¹⁰⁰ ICCPR, ratified by the U.S. on 8 June 1992

¹⁰¹ Babcock 2002, 2.

¹⁰² *Ibid.*, 2.

¹⁰³ Shaw, 60.

¹⁰⁴ U.S. Supreme Court, *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹⁰⁵ Babcock 2002, 7.

¹⁰⁶ *Van Alphen v. The Netherlands*, No. 305/1988, U.N. Doc. A/45/40, Vol. II, p. 108 [l.s.] 5.8

¹⁰⁷ *Domingues v. Nevada*, No. 98-8327, Orders in Pending Cases, 67 U.S.L.W. 3747 (8 June 1999).

¹⁰⁸ Shaw, 24.

¹⁰⁹ Edward H. Carr. 1939. *The Twenty Years' Crisis 1919-1939*. (London: MacMillan and Company Limited), 176.

¹¹⁰ Barbara Crossette. “Diplomats Protest Lack of Information.” *The New York Times*, 20 December 2001.

¹¹¹ *New York Times*. Editorial, 9 December 1998.

¹¹² Him Hoagland. “Justice for All.” *The Washington Post*, 19 April 1998.

¹¹³ Council on Foreign Relations 1998, <<http://www.cfr.org>>.

¹¹⁴ “Capital Punishment Crimps Foreign Policy: Mexico isn’t the only nation that has issues with the death penalty.” *Austin American-Statesman* (1998)

¹¹⁵ Department of State, Daily press briefing, 13 April 1998, <<http://www.secretary.state.gov/www/briefings/9804/980413db.html>>.

¹¹⁶ Babcock, 2003.

