

**ADDING SOME BABY TEETH TO U.S.  
PARTICIPATION IN THE INTER-  
AMERICAN HUMAN RIGHTS SYSTEM: A  
U.S. COROLLARY TO HERNÁN GULLCO’S  
OBSERVATIONS**

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I. INTRODUCTION

For a U.S. scholar, two points jump out from Hernán Gullco’s description of Argentine debates over how decisions by the Inter-American human rights system should be treated by Argentine courts.<sup>1</sup> First, after hearing the debate over Argentina’s relationship with the Inter-American Court of Human Rights (Inter-American Court) and the Inter-American

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1. Hernán Gullco, *The Clash of Constitutional and International Law in Argentinean Case Law*, 27 SW. J. INT’LL. 315 (2021).

Commission on Human Rights (Inter-American Commission), I cannot help but note how far away the United States is from incorporating decisions of international bodies into its domestic law compared with Argentina and much of the Americas, where the trend is towards treating the American Convention on Human Rights as having constitutional hierarchy and decisions of the Inter-American Court as domestically enforceable.<sup>2</sup> The United States, if anything, has been moving in the opposite direction. Aside from constitutional problems with U.S. courts setting aside *res judicata* federal judgments because of an order from an international tribunal or commission, the U.S. Supreme Court in *Medellin v. Texas*,<sup>3</sup> in 2008, prevented even a minimal level of respect for an international judgement. The Court refused to give effect to a decision of the International Court of Justice (ICJ) that only required a limited review of State death penalty

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2. Alejandro Chehtman, *International Law and Constitutional Law in Latin America*, THE OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA (forthcoming Feb. 2022) (manuscript at 2), <https://ssrn.com/abstract=3207795> (developing “the trend to constitutionalize international human rights law, and in particular, to give decisions of the Inter-American Court of Human Rights. . . a pedigree often not even reserved to national high courts,” using Argentina, Colombia, and Mexico as case studies); Antonio Moreira Maues et al., *Judicial Dialogue between National Courts and the Inter-American Court of Human Rights: A Comparative Study of Argentina, Brazil, Colombia, and Mexico*, 21 HUM. RTS. L. REV. 108, 111 (2021) (noting the constitutionalization of Inter-American human rights law in Argentina, Colombia, and Mexico); Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1592 (2011). *See also* Robert S. Barker, *Inverting Human Rights: The Inter-American Court versus Costa Rica*, 47 U. MIAMI INTER-AM. L. REV. 1, 3-4 (2016) (noting that the Constitution of Costa Rica provides that treaties prevail over statutes and the Constitutional Chamber of the Costa Rican Supreme Court has held both that the Inter-American Court is the definitive interpreter of the Convention and that the Court’s interpretations bind Costa Rican courts); Courtney Hillebrecht, *The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System*, 34 HUM. RTS. Q. 959, 983-84 (2012) (noting paradoxically that Brazil has been questioned for noncompliance with Inter-American Court decisions even under progressive governments, but the country amended its Constitution in 2004 to allow Congress to elevate international human rights treaties to the same level as the Constitution, Emenda Constitucional No. 45, de 30 de Dezembro de 2004 (Braz.), which added Constituição Federal [Constitution] tit. II, ch. I, art. 5, LXXVIII, § 3 (Braz.), though this has not yet been done for the American Convention on Human Rights); *see also* Antonio Moreira Maues et al., *supra*, at 111, 113-15, 121, 127-29 (discussing the tendency to the Brazilian Supreme Federal Tribunal to sometimes elevate the American Convention above ordinary legislation and to pay special respect to Inter-American Court decisions, but only in a scattered fashion or show resistance); Marcia Nina Bernardes, *Inter-American Human Rights System as a Transnational Public Sphere: Legal and Political Aspects of the Implementation of International Decisions*, 8 SUR INT’L J. HUM. RTS. 131, 136, 138 (2011). *But cf.* Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights*, 44 CORNELL INT’L L.J. 493, 494-495 (2011) (analyzing the difficulty that the Inter-American Court has had in getting prosecutors and judges to actively comply with its decisions, particularly when it calls for prosecutions.)

3. 552 U.S. 491 (2008).

decisions by State judges,<sup>4</sup> instead applying a restrictive understanding of when courts should treat treaties as self-executing,<sup>5</sup> and blocking the President's attempt to implement the ICJ's decision.<sup>6</sup> Moreover, the United States' reluctance to treat decisions of international bodies as binding and self-executing applies with particular strength to the Inter-American system.<sup>7</sup>

Second, U.S. scholars will be struck by the fascinating indispensable party problem that Professor Gullco sets out. Inter-American Court decisions have taken an expansive approach toward its remedial powers, including sometimes requiring domestic measures that affect the rights of individuals not before the Court. As Professor Gullco indicates, this has occurred not only in the criminal context, where the Court has required the setting aside of applicable statutes of limitation and judgments that benefitted criminal defendants,<sup>8</sup> but also implicitly in *Atala Riffo v. Chile*,<sup>9</sup> a child custody dispute, where the Court questioned a decision of the Chilean Supreme Court that ended a mother's custody and that awarded custody to the father because of the mother's same-sex relationship.<sup>10</sup> As Professor Gullco points out, both in the cases involving the rights of victims of criminal violence and that of a same-sex couple to equal treatment, the problem is not that the rights of the complaining petitioners did not merit respect, but that the Court never heard

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4. *Id.* at 497-99.

5. *See id.* at 505-10; *see also, e.g.*, John O. McGinnis, *Medellin and the Future of International Delegation*, 118 YALE L.J. 1712, 1730-31 (2009); David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 135, 162 (2012).

6. 552 U.S. at 526.

7. *See infra* pp. 353-54.

8. Gullco, *supra* note 1, at 315, 318-19 (2021) (discussing *Bulacio v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 10 (Sept. 18, 2003)). It is important to note that this indispensable party issue is not in the context of crimes against humanity, where there is no statute of limitations under international law, and hence, the absent criminal defendant is not deprived of a right of repose. As an example, see the *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (May 14, 2001).

9. *Atala Riffo v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

10. Gullco, *supra* note 1, at 339-40 (discussing *Riffo*, Inter-Am. Ct. H.R. (ser. C) No. 239). The Inter-American Court in *Riffo* did not determine custody between the mother and the father, *Riffo*, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 66, which would have been especially problematic given the Inter-American Court's decision to exclude the father from the proceedings, *id.* ¶ 9. However, the Inter-American Court clearly repudiated the Chilean Supreme Court's decision in a way that one would expect would impact future proceedings, finding that the Chilean Supreme Court's decision contained multiple elements that violated the mother's right to equality and constituted discriminatory treatment based on her sexual orientation, *id.* ¶ 146. The Chilean Supreme Court decision was horrific, but that does not answer the question of why the father was not permitted to participate in the Inter-American Court's proceedings.

arguments that might have been presented by the absent party, since only the State appears before it as a defending party.<sup>11</sup>

Professor Gullco, looking at the situation of a country like Argentina that incorporates international human rights law directly into its Constitution, essentially calls for treating the Inter-American Court like a supervising appellate court for exceptional human rights cases, while also recognizing its shortcomings. He would treat Argentine cases as subject to reopening by the Inter-American Court, setting aside any domestic *res judicata* effect; however he also criticizes the Inter-American system for its failure to allow either the previously successful criminal defendant or the father awarded custody to appear before it in addition to the petitioner who lost domestically and the State. If the Commission and the Court act with the powers of an appellate tribunal and not merely as tribunals awarding compensation against the State, then all the parties must be heard.

Yet Professor Gullco never implies that the Argentine debates have relevance for U.S. practice—and he cannot, at least if one is to pay any heed to existing U.S. case law and its understanding of U.S. treaty obligations. As will be seen, even the most progressive U.S. courts have refused to treat the Inter-American human rights system as creating domestically enforceable treaty obligations for the United States, given that it has not ratified the American Convention on Human Rights.<sup>12</sup>

Nevertheless, there is a cost to the United States' arms-length approach towards the Inter-American human rights system and there are ways to minimize this cost. In her book, *Constitutional Engagement in a Transnational Era*, Vicki Jackson describes a spectrum of attitudes of domestic courts toward the transnational system. The spectrum runs from the resistance toward international influences that one sees in conservative judges and scholars in the United States<sup>13</sup> to the desire for convergence that one sees in Argentina's incorporation of diverse international human rights instruments as enjoying domestic constitutional status.<sup>14</sup> Lying in between is what Jackson calls "engagement," the idea that interpretation of national

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11. Gullco, *supra* note 1, at 337. The question of an indispensable party is underdeveloped in international human rights law. The European Court of Human Rights has not dealt with the indispensable party problem in the context of absent private parties, *see* Beatrice Bonafè, *Indispensable Party*, MAX PLANCK ENCYCLOPEDIA OF INT'L PROC. LAW ¶¶ 24-30 (Hélène Ruiz Fabri ed., 2018), perhaps because it has not gone as far as the Inter-American Court in developing remedies that might affect absent parties. The doctrine has been developed by the International Court of Justice and arbitral tribunals. *Id.* ¶¶ 10-19.

12. *See infra* pp. 349, 351, 354.

13. VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 8 (2010).

14. *Id.* at 8-9.

fundamental law can be improved through engagement with transnational norms.<sup>15</sup> Engagement, the position favored by Jackson, carries advantages in managing U.S. legal relations within the international legal environment.<sup>16</sup> Failure by U.S. courts to give respectful consideration to transnational legal sources “may impose subtle costs.”<sup>17</sup> Foreign perceptions of the United States’ indifference to international standards may lead to backlash,<sup>18</sup> likely make it harder for the United States to have influence on other states,<sup>19</sup> and “over time the Court’s failure to consider the approaches of international instruments, or of other constitutional systems, on analogous constitutional questions may appear less a matter of ignorance, and more a deliberate affront.”<sup>20</sup> She concludes that “[w]e have no choice but to influence and be influenced by others, and doing so consciously enables us to have greater control over what we choose to be influenced by, the accuracy of our understandings, and how our actions are perceived.”<sup>21</sup>

Jackson does not offer specific practical steps to increase engagement; her book is part of the broad intellectual debate over the different jurisprudential positions that scholars have taken toward use of foreign and international law in constitutional interpretation.<sup>22</sup> However, Hernán

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15. *Id.*

16. *Id.* at 107. See also Tom Ginsburg, *Substitutes, Complements, and Irritants*, 87 U. CHI. L. REV. 2357, 2365-73 (2020) (developing the concept of “engagement” in the context of a U.S. case examining a decision of the Inter-American Commission).

17. JACKSON, *supra* note 13, at 123.

18. *Id.* at 124.

19. *Id.* at 118.

20. *Id.* at 123.

21. *Id.* at 129.

22. See e.g., *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519 (2005) (Justices Scalia and Breyer set out some of the basic issues of the debate); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57 (2004); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1 (2006); Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335 (2007); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82 (2004); Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 U. ILL. L. REV. 637 (2007). Interestingly, this literature, which is prescriptive and U.S.-focused, has almost no overlap with the literature on constitutional transplants, which is largely descriptive. For an overview of that literature, see Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations*, in OXFORD HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW (M. Rosenfeld & A. Sajo, eds., Oxford University Press, 2012). The debate about use of foreign and international law by U.S. courts in constitutional interpretation essentially asks prescriptively whether it is

Gulco's focus on Argentina's respect for the Inter-American system brought out a personal experience for me that illustrates what at the very least is a cost to the United States' prestige when its courts fail to interact with the Inter-American system. In a death penalty case that I have worked on for many years on behalf of an Argentine citizen on death row in Texas, the perception conveyed by much of the Argentine press is that the failure of the United States to immediately remove our client from death row openly violates its obligations to the Inter-American Commission, and that international law binds the United States to comply.<sup>23</sup> It is a position that stands far away from U.S. case law; yet perhaps there are steps that the U.S. government can engage in to start to bridge the gap.

On occasion, the U.S. State Department has used a Statement of Interest to convey the Executive's foreign affairs concerns to domestic courts, and this approach might also sometimes be used for conveying recommendations of the Inter-American Commission. If done at least occasionally when the Commission has either developed a clear line of decisions in an area that can cause the United States international embarrassment, or in cases that are not *res judicata* where the Commission has issued recommendations, then the State Department can attenuate some of the international cost to the United States. While at present, U.S. judicial decisions largely ignore the Commission, in spite of the efforts of litigants, the U.S. State Department has an interest in promoting greater engagement by U.S. courts with the Inter-American system, and a Statement of Interest is a brief that judges typically respond to in their opinions, even if they decide differently. A more proactive approach toward filing Statements of Interest is needed because existing approaches leave the United States far more disengaged from the Inter-American human rights system than other countries in the Americas, the disengagement carries at least some costs, and engagement through a Statement of Interest should lead to increased dialogue between U.S. courts and the Inter-American system and would not represent a significant departure from existing State Department practice.

This essay will progress in three stages. First, after briefly explaining the Inter-American Commission's functions, it will show how the United States presently fails to give even minimal domestic respect to the Commission's decisions even though U.S. State Department lawyers regularly appear before the Commission to defend U.S. conduct. Second, it will use an ongoing death penalty case to show the enormous gap between

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appropriate for the United States to engage in the ongoing international process of constitutional transplants, borrowing and migration that the legal transplants literature describes.

23. See *infra* pp. 354-60.

Argentine and U.S. perceptions of the Commission's role, and the cost of lack of engagement for the United States. Third, it will describe how increased use of Statements of Interest may serve to increase the dialogue between U.S. courts and the Commission, an attempt that Harold Koh began while Legal Advisor at the U.S. Department of State, and why Koh's precedent needs expansion.

## II. THE UNITED STATES FAILS TO ENGAGE DOMESTICALLY WITH THE INTER-AMERICAN HUMAN RIGHTS SYSTEM EVEN THOUGH IT TRIES TO ENGAGE INTERNATIONALLY

International human rights advocates use a variety of tools at international institutions to challenge U.S. practices. They may offer comments on periodic reports that the U.S. government offers to various treaty organs, such as the United Nations (UN) Human Rights Committee or the Committee Against Torture,<sup>24</sup> they may try to influence advisory opinions by the International Court of Justice<sup>25</sup> or the Inter-American Court of Human Rights,<sup>26</sup> they may often seek to influence multilateral treaty negotiations,<sup>27</sup> or they may provide information to rapporteurs of many types, named either by the UN Secretary General, the UN Human Rights Council, different treaty mechanisms, or the Inter-American Commission on Human Rights.<sup>28</sup>

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24. See e.g., THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2013); AMNESTY INT'L, *USA Should Use UN Hearing to Address 'Shocking Accountability Gap' on Torture*, (Nov. 12, 2014, 12:00 AM), <https://www.amnesty.org/en/latest/news/2014/11/usa-should-use-un-hearing-address-shocking-accountability-gap-torture/> (highlighting recent violations perpetrated by the United States, published in the week when the United States was scheduled to appear before the UN Convention Against Torture).

25. Statute of the International Court of Justice arts. 65-68, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 (providing the process by which the "Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request").

26. Organization of American States, American Convention on Human Rights art. 64, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (allowing a member State to request opinions from the Court "regarding the compatibility of any of its domestic laws" with the rules of the Organization's instruments); Inter-Am. Comm'n H.R., Rules of Procedure of the Inter-American Court of Human Rights arts. 70-75 (2013), <http://www.oas.org/en/iachr/mandate/Basics/RulesIACHR2013.pdf> [hereinafter IACHR Rules of Procedure] (providing guidelines for the types of advisory opinions produced by the Court as well as procedural rules for request and delivery of opinions).

27. Katharina Rietig, *The Power of Strategy: Environmental NGO Influence in International Climate Negotiations*, 22 GLOBAL GOVERNANCE 269 (2016) (analyzing the effectiveness of NGO demonstrations, media coverage, and lobbying efforts)

28. Surya P. Subedi, *Protection of Human Rights Through the Mechanism of UN Special Rapporteurs*, 33 HUM. RTS. Q. 201 (2011) (describing the role of UN Special Rapporteurs as "one

Helpful reports receive media attention, are used in lobbying efforts, and sometimes get invoked in amicus briefs. But the Inter-American human rights system offers U.S. litigants something more: a right of individual petition and a process that can conclude with a merits decision, in which the Commission, with a detailed analysis of the case, offers findings on whether human rights have been violated and, where necessary, offers recommendations to the U.S. government to cure the violation. Yet, while the process has significant procedural sophistication, while the U.S. State Department will usually brief significant cases and appear at a hearing before the Commission,<sup>29</sup> and while the Commission will often hand down very detailed decisions, the domestic impact of Commission decisions in the United States is much more limited than one would expect from the efforts of the parties and the Commission. Even progressive U.S. judges not only consistently treat the Commission's decisions as lacking any domestic legal effect but fail to treat Commission decisions as something with persuasive authority or as offering ideas they should engage with. This is an anomaly that the U.S. State Department can change through judicious use of a Statement of Interest in the same fashion that it brings U.S. foreign policy interests to the attention of courts when foreign governments are involved.

The United States has consciously avoided participation in any individual petition process when it has ratified international human rights treaties, as well as specifically provided that the treaties shall be treated domestically as non-self-executing. For example, in the case of both the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the U.S. has accepted the need to present periodic reports to the UN Human Rights Committee and the Committee against Torture respectively,<sup>30</sup> but has not accepted the competence of the Committees to

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of the main mechanisms employed by the United Nations to protect and promote human rights worldwide”).

29. For examples of fairly typical U.S. responses to the Commission, see Case No. 10.573 (Salas), 2018 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 7, §D(2), at 283; Petition No. P-1010-15: José Trinidad Loza Ventura, 2019 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 7, §D(3), at 253. For fairly typical prepared remarks by the United States at appearances before the Commission, see TPS & DACA Hearing, U.S. Presentation, 2018 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 7, §D(2), at 301-05; Guns Hearing, U.S. Presentation, 2018 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 7, §D(2), at 297-301; Puerto Rico Hearing, U.S. Presentation, 2018 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 7, §D(2), at 305-09.

30. See, e.g., Comm. Against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention Pursuant to the Optional Reporting Procedure, Third to Fifth Periodic Reports of States Parties Due in 2011, United States of America, CAT/C/USA/3-5 (Aug. 12, 2013); Hum. Rts. Comm., Consideration of Reports Submitted by States Parties under Article

hear complaints brought by individuals.<sup>31</sup> Furthermore, the Senate ratification resolutions in both cases specifically provide that the treaties shall be deemed non-self-executing.<sup>32</sup> The litigants in a domestic court in the United States can only cite implementing legislation as a legal obligation—not the treaty itself. However, in some ways, the U.S. participation in the Inter-American human rights system is more robust than with other human rights mechanisms.

The Inter-American human rights system consists of two bodies, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, with the Commission predating the Court. The Inter-American Commission is a product of the Charter of the Organization of American States (OAS).<sup>33</sup> Article 53 of the Charter lists the Commission as a subsidiary organ of the Organization,<sup>34</sup> and Article 106 first notes the creation of the Commission, then establishes that its “principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters,”<sup>35</sup> and then states that “[a]n Inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.”<sup>36</sup> The United States is a party to the OAS Charter, but, unlike almost all of the countries of Latin America, the United States only signed, but never ratified, the American Convention on Human Rights, the human rights convention that Article 106 anticipates.<sup>37</sup>

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40 of the Covenant, Fourth Periodic Report, United States of America, CCPR/C/USA/4 (Dec. 30, 2011).

31. S. Res. 136, 101st Cong., 136 CONG. REC. 36193 § III(2) (1990) (enacted) (provides that the United States only “recognizes the competence of the Committee against Torture to receive and consider communications” between State Parties); S. Res. 138, 102d Cong., 138 CONG. REC. 8071 § III(3) (1992) (enacted) (provides that the United States “accepts the competence of the Human Rights Committee to receive and consider communications” between State Parties).

32. S. Res. 136, 101st Cong., 136 CONG. REC. 36193 § III(1) (1990) (enacted) (“the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing”); S. Res. 138, 102d Cong., 138 CONG. REC. 8071 § III(1) (1992) (enacted) (“the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing”).

33. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324 [hereinafter OAS Charter].

34. *Id.* art. 53.

35. *Id.* art. 106.

36. *Id.*

37. See *Signatories and Ratifications, American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32)*, ORG. OF AM. STATES, [http://www.oas.org/dil/treaties\\_B-](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm)

32\_American\_Convention\_on\_Human\_Rights\_sign.htm (last visited Aug. 7, 2021) for the OAS table listing the member states that have ratified the Convention.

The failure of the United States, Canada, and a small group of English-speaking Caribbean countries to ratify the Convention means that there are two different tracks used for the protection of human rights in the Americas. In the countries that have ratified the Convention, which creates the Inter-American Court of Human Rights, the parties are bound to protect the many individual rights established in the Convention, and individual petitioners who have exhausted their domestic remedies may bring their cases to the Commission, which issues findings and may refer cases to the Inter-American Court.<sup>38</sup> (The Defending States upset with Commission findings may also appeal their cases to the Court,<sup>39</sup> but this rarely happens.) The Court then has the authority after hearing the case to issue a judgment that the state parties obligate themselves to comply with.<sup>40</sup> In the case of the countries like the United States, that have not ratified the Convention, only the Statute of the Inter-American Commission on Human Rights comes into play. The Statute, approved as a resolution of the OAS General Assembly in 1979, with later 1990 amendments, states that in the countries that have not ratified the Convention, the human rights protected by the Commission should be understood as those of the American Declaration of the Rights and Duties of Man<sup>41</sup> (a human rights declaration adopted at the same meeting that adopted the Charter of the OAS, which includes a variety of fundamental rights plus a selection of social and economic rights—as well as listing of a variety of obligations that individuals owe to the state and the community<sup>42</sup>). The seven-member Commission is charged with examining petitions from parties

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38. American Convention on Human Rights, *supra* note 26, arts. 44-51 (Article 44 provides that “[a]ny person... may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party;” Article 46 sets out the requirement that the petitioner must have first “pursued and exhausted” any “remedies under domestic law;” and Articles 48-51 outline the procedures by which the Commission issues its findings).

39. *Id.* arts. 51, 61.

40. *Id.* arts. 62-67 (Article 62(3) provides that “[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement,” while Article 67 continues that “[t]he judgment of the Court shall be final and not subject to appeal”).

41. Org. of Am. States [OAS], G.A. Res. 447 (IX-0/79), Statute of the Inter-American Commission on Human Rights art. 1(2), Oct. 31, 1979 [hereinafter IACHR Statute], <http://www.oas.org/en/iachr/mandate/basics/statuteiachr.asp> (“[f]or the purposes of the present Statute, human rights are understood to be: (a) [t]he rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto; (b) [t]he rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states”).

42. Inter-American Commission on Human Rights, *American Declaration of the Rights and Duties of Man*, OAS (May 2, 1948), <http://www.oas.org/en/iachr/mandate/Basics/declaration.asp> (chapter 1 provides a list of fundamental rights, followed by a list of state duties in chapter 2).

that have exhausted domestic legal procedures, asking the relevant government for information, and “to make recommendations to it, when it finds this appropriate, in order to bring about the more effective observance of fundamental human rights.”<sup>43</sup> The Commission has developed extensive rules of proceedings for hearing individual petitions, which include the possibility of precautionary measures, submission of evidence by the parties, on-site investigations and hearings before the issuance of a report.<sup>44</sup> While the Commission formally only issues “recommendations” to states that have not ratified the American Convention on Human Rights, the Commission will sometimes flatly describe the failure of a state to comply with its recommendations as a violation of international law.<sup>45</sup> Regardless of whether or not the United States as a matter of its own constitutional law considers that Commission decisions must receive domestic effect, the fact is that the United States is today part of a regional human rights system that hears individual cases brought by private petitioners.

However, while the Commission has issued recommendations in final merits decisions against the United States in over forty cases since 1987, it is extremely likely that no Commission decision has ever influenced the result of a U.S. judicial proceeding. Certainly, activists and scholars have made the most out of Commission decisions as moral or international legal support for their causes.<sup>46</sup> Broadly, throughout the Americas, some of the most important impacts of the Inter-American human rights system have been political rather than legal.<sup>47</sup> But the fact remains that the domestic judicial impact in the United States has been nil. Tom Ginsburg recently described a decision by

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43. IACHR Statute, *supra* note 41, art. 20.

44. IACHR Rules of Procedure, *supra* note 26, arts. 23-57.

45. *See* *Mortlock v. United States*, Case No. 12.534, Inter-Am. Comm’n. H.R., Report No. 63/08, ¶ 50 (2008) (noting that the alleged victim was “a person whose rights are protected under the American Declaration, the provisions of which the State is *bound to respect* in conformity with the OAS Charter, Article 20 of the Commission’s Statute and Article 49 of the Commission’s Rules of Procedure” (emphasis added)). The Commission’s position in *Mortlock*, implying a binding nature to its decisions, is cited and rejected in *Flores-Nova v. Att’y Gen. of U.S.*, 652 F.3d 488, 493 (3d Cir. 2011).

46. For example, the Commission’s decision in *Dann v. United States*, Case 11.140, Inter-Am. Comm’n. H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 (2003), involving the usurpation by the U.S. government of Native American lands, became the subject of multiple articles by scholars and activists seeking to politically advance the rights of Native Americans. *See, e.g.*, S. James Anaya, *Keynote Address: Indigenous Peoples and Their Mark on the International Legal System*, 31 AM. INDIAN L. REV. 257, 264-65 (2006); Brian D. Tittmore, *The Dann Litigation and International Human Rights Law: The Proceedings and Decision of the Inter-American Commission on Human Rights*, 31 AM. INDIAN L. REV. 593 (2006); Francisco Rivera, *Inter-American Justice: Now Available in a U.S. Federal Court Near You*, 45 SANTA CLARA L. REV. 889 (2005).

47. *See* Alexandra Huneeus, *Constitutional Lawyers and the Inter-American Court’s Varied Authority*, 79 L. & CONTEMP. PROBS. 179, 180-81 (2016).

Judge Diane Wood, a progressive appellate judge,<sup>48</sup> as showing “engagement” with international law in a decision that held that the Commission’s decisions do not create a binding legal obligation for the United States, since she at least fully considered the issue,<sup>49</sup>—and to date, that is as internationalist as the U.S. courts have gotten.

Approximately a dozen U.S. court decisions have rejected attempts by litigants to invoke rulings of the Inter-American Commission.<sup>50</sup> A progressive Ninth Circuit panel, in *Mitchell v. United States*,<sup>51</sup> recently summed up three reasons for these rejections. First, the OAS Charter is a non-self-executing treaty, at least with respect to any obligation to respect decisions of the Commission, so that even if the creation of the Commission as an organ of the OAS created an obligation of the United States internationally to respect its decisions, without implementing legislation from Congress, its decisions lack domestic legal force.<sup>52</sup> Second, the human rights obligations that the Commission’s statute creates for countries that have not ratified the American Convention on Human Rights are those of the American Declaration on the Rights and Duties of Man,<sup>53</sup> which is not a treaty, but a resolution of the General Assembly of the OAS, and, therefore, creates no binding treaty obligations for the Commission to interpret.<sup>54</sup> And finally, in the case of the countries that have not ratified the Convention, the

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48. See Neil A. Lewis, *Potential Justice Offers Counterpoint in Chicago*, N.Y. TIMES (Mar. 11, 2009), <https://www.nytimes.com/2009/05/12/us/politics/12wood.html>.

49. Ginsburg, *supra* note 16, at 2365-73 (2020), uses the term “engagement” from the framework proposed by VICKI JACKSON, *supra* note 13, to describe Judge Wood’s opinion in *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001).

50. The first rejection by the United States of a Commission request for domestic enforcement appears in the context of the very first case that the Commission decided against the United States, *Roach & Pinkerton v. United States*, Case No. 9647, Inter-Am. Comm’n H.R., Report No. 3/87, OEA/ser.L/V/II.71, doc. 9 rev. 1, ¶¶ 46-49 (1987). The Fourth Circuit was unwilling to stay the execution during the Commission’s consideration of the case. *Roach v. Aiken*, 781 F.2d 379, 380-81 (4th Cir. 1986). For other rejections of the Commission’s authority, see *Garza v. Lappin*, 253 F.3d 918, 924-26 (7th Cir. Ind. 2001) (offering the first thorough analysis of the rejection of the Commission’s authority); *Flores-Nova v. Att’y Gen. of U.S.*, 652 F.3d 488, 493-95 (3rd Cir. 2011); *Mitchell v. United States*, 971 F.3d 1081, 1084 (9th Cir. 2020). See also, e.g., *Tamayo v. Stephens*, 740 F.3d 991, 997 (5th Cir. 2014); *Ex parte Medellín*, 280 S.W.3d 854, 857-58 (Tex. Crim. App. 2008); *Reno v. Davis*, No. CV 96-2768 CBM, 2017 WL 486307, at \*56 (C.D. Cal. Aug. 15, 2017).

51. 971 F.3d 1081 (9th Cir. 2020). The Ninth Circuit panel was a progressive one, including two Obama Administration appointees, Morgan B. Christen and Andrew D. Hurwitz.

52. *Id.* at 1084 (citing to the District Court decision, *Mitchell v. United States*, No. CV 20-8217-PCT-DGC, 2020 WL 4940909, at \*5 (D. Ariz. Aug. 22, 2020), which offers a full analysis).

53. IACHR Statute, *supra* note 41, art. 20.

54. For a fuller decision of the lower court, see 971 F.3d at 1084.

Commission's Statute only provides that it can issue "recommendations,"<sup>55</sup> hardly language that grants authority to issue binding rulings. Limiting the Commission to "recommendations" would seem to be required by the limited powers of the General Assembly, since resolutions of the General Assembly of the OAS do not generally create binding legal obligations in themselves, and the Statute is merely a resolution of the General Assembly.<sup>56</sup>

While the U.S. Supreme Court has never considered whether the Commission's decisions constitute binding law, the consistent lower court case law, as well as the Supreme Court's own refusal in *Medellín v. Texas* to treat a decision of the International Court of Justice (ICJ) as judicially enforceable,<sup>57</sup> leave little doubt that the Court would take a similar approach in the case of the Commission's decisions. In *Medellín*, the Supreme Court indicated that all ICJ decisions are non-self-executing and therefore lacking in obligation for U.S. courts.<sup>58</sup> Moreover, in the *Medellín* decision, unlike in the Inter-American context, there was a specific treaty conferring jurisdiction on the International Court of Justice to hear the case, and a clear obligation under the UN Charter to give effect to the ICJ's decisions.<sup>59</sup>

Some portions of the U.S. government and U.S. civil society treat the Inter-American Commission as a body with relevance, just not the courts. As noted, the U.S. State Department invests significant effort in representing the United States before the Inter-American Commission. Further, there are at least forty U.S. law school clinics that, to some extent, focus on international human rights,<sup>60</sup> nineteen of which expressly note that they bring cases before

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55. *Id.* (citing to the District Court decision, *Mitchell v. United States*, No. CV 20-8217-PCT-DGC, 2020 WL 4940909, at \*5-6 (D. Ariz. Aug. 22, 2020), which references the IACHR Statute, *supra* note 41, arts. 18, 20).

56. *See* OAS Charter, *supra* note 33, art. 54 (on the powers of the General Assembly); *id.* art. 106 (providing that a future treaty would establish the "structure, competence and procedure" of the Commission—which implies a limited role for the General Assembly given the need for the treaty).

57. *Medellín*, 552 U.S. at 491, 506-14.

58. *See id.* at 508-09.

59. *Compare Medellín*, 552 U.S. 491 with IACHR Statute, *supra* note 41, (authorizing the Commission to issue "recommendations," not being a treaty itself).

60. This list of law school clinics with an international human rights focus is based on a review of their websites and is likely incomplete, but the following forty clinics appeared in the search: International Human Rights Law Clinic, AM. U. WASH. COLL. LAW, <https://www.wcl.american.edu/academics/experientialedu/clinical/theclinics/ihrcl/> (last visited Dec. 18, 2021); International Human Rights Practicum, B.C. L. SCH., <https://www.bc.edu/bc-web/schools/law/academics-faculty/experiential-learning/clinics.html> (last visited Dec. 18, 2021); Human Rights and Atrocity Prevention Clinic, CARDOZO SCH. LAW, <https://cardozo.yu.edu/human-rights-and-atrocity-prevention-clinic> (last visited Dec. 18, 2021); Human Rights and Gender Justice Clinic, CUNY SCH. LAW, <https://www.law.cuny.edu/academics/clinics/hrj/> (last visited Dec. 18, 2021); Human Rights Clinic, COLUM. L. SCH., <https://www.law.columbia.edu/academics/experiential/clinics/human->

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rights-clinic (last visited Oct. 15, 2021); International Human Rights Policy Advocacy Clinic, CORNELL L. SCH., <https://kalantry.lawschool.cornell.edu/international-human-rights-policy-advocacy-clinic/> (last visited Dec. 18, 2021); International Human Rights Clinic, DUKE U. SCH. LAW, <https://law.duke.edu/humanrightsclinic/> (last visited Dec. 18, 2021); Human Rights Institute, GEO. SCH. L., <https://www.law.georgetown.edu/human-rights-institute/> (last visited Dec. 18, 2021); International Women's Human Rights Clinic, GEO. SCH. LAW, <https://www.law.georgetown.edu/experiential-learning/clinics/international-womens-human-rights-clinic/> (last visited Oct. 23, 2021); International Human Rights Clinic, HARV. L. SCH., <https://hls.harvard.edu/dept/clinical/clinics/international-human-rights-clinic/> (last visited Dec. 18, 2021); International Human Rights Center, LOY. L. SCH., <https://www.lls.edu/academics/centers/internationalhumanrightscenter/> (last visited Dec. 18, 2021); Center for Human Rights and Global Justice, N.Y.U., <https://www.law.nyu.edu/centers/chrhj-center-for-human-rights-global-justice> (last visited Dec. 18, 2021); Human Rights (area of study and specialized clinics), NEW ENG. L. BOS., <https://www.nesl.edu/academics-faculty/concentrations/international-law> (last visited Dec. 18, 2021); International Human Rights Advocacy, NW. PRITZKER SCH. LAW, <https://www.law.northwestern.edu/academics/curricular-offerings/coursecatalog/details.cfm?CourseID=627> (last visited Dec. 18, 2021); Bluhm Legal Clinic of International Human Rights, NW. PRITZKER SCH. LAW, <https://www.law.northwestern.edu/legalclinic/humanrights/index.html> (last visited Dec. 18, 2021); Human Rights at Home Litigation Clinic, ST. LOUIS U. SCH. LAW, <https://www.slu.edu/law/experiential-learning/legal-clinics/human-rights.php> (last visited Dec. 18, 2021); Immigration and Human Rights Clinic, ST. MARY'S U. SCH. LAW, <https://law.stmarytx.edu/academics/special-programs/clinics/> (last visited Dec. 18, 2021); International Human Rights Clinic, SANTA CLARA U. SCH. LAW, <https://law.scu.edu/ihr/> (last visited Dec. 18, 2021); International Human Rights Clinic, SEATTLE U. SCH. LAW, <https://law.seattleu.edu/academics/curriculum/courses-library/course-offerings-i#INTL402> (last visited Dec. 18, 2021); Immigrant's Rights/International Human Rights Clinic, SETON HALL U. SCH. LAW, <https://law.shu.edu/clinics/immigrants-rights-international-human-rights.cfm> (last visited Dec. 18, 2021); International Human Rights Clinic, STAN. L. SCH., <https://law.stanford.edu/international-human-rights-and-conflict-resolution-clinic/> (last visited Dec. 18, 2021); Human Rights and Indigenous Peoples Clinic, SUFFOLK U. L. SCH., <https://www.suffolk.edu/law/academics-clinics/clinics-experiential-opportunities/clinics/human-rights-and-indigenous-peoples> (last visited Dec. 18, 2021); International Human Rights Clinic, U.C. BERKELEY SCH. LAW, <https://www.law.berkeley.edu/experiential/clinics/international-human-rights-law-clinic/> (last visited Dec. 18, 2021); Refugee and Human Rights Clinic, U.C. HASTINGS L. SCH., <https://www.uchastings.edu/academics/experiential-learning-opportunities/clinical-programs/refugee-human-rights-clinic/> (last visited Dec. 18, 2021); International Human Rights Clinic, U.C. IRVINE SCH. LAW, <https://www.law.uci.edu/academics/real-life-learning/clinics/ihr.html> (last visited Dec. 18, 2021); International Human Rights Clinic, UCLA SCH. LAW, <https://law.ucla.edu/academics/clinical-education/clinics/international-human-rights-clinic> (last visited Dec. 18, 2021); Global Human Rights Clinic, U. CHI. L. SCH., <https://chicagounbound.uchicago.edu/ihr/> (last visited Dec. 18, 2021); Asylum and Human Rights Clinic, U. CONN. SCH. LAW, <https://www.law.uconn.edu/academics/clinics-experiential-learning/asylum-human-rights-clinic> (last visited Dec. 18, 2021); International Human Rights Clinic, U. ILL. CHI. L., <https://law.uic.edu/experiential-education/clinics/international-human-rights/> (last visited Dec. 18, 2021); Human Rights Clinic, U. MIAMI SCH. LAW, <https://www.law.miami.edu/academics/clinics/human-rights-clinic> (last visited Dec. 18, 2021); Immigration and Human Rights Clinic, U. MINN. L. SCH., <https://www.law.umn.edu/course/7842/immigration-and-human-rights-clinic> (last visited Dec. 18,

the Inter-American Commission.<sup>61</sup> Vibrant, U.S.-headquartered non-governmental organizations (NGOs), like the Center for Justice and International Law (CEJIL), focus on advocacy and litigation in the Inter-American system.<sup>62</sup> However, U.S. judicial engagement is non-existent. The lack of judicial engagement does not go unnoticed abroad and, at least in the Argentine context, the enormous gap between the way both the judiciary and the media respect the Inter-American system and the complete lack of U.S. judicial regard for the Commission's decisions leaves the United States looking like a scofflaw, regardless of the clarity of U.S. case law.

### III. THE UNITED STATES AS A SCOFFLAW BEFORE THE ARGENTINE PUBLIC

Perhaps unsurprisingly, a counterpart to Argentine respect for the Inter-American system is to regard as a scofflaw any country that fails to respect it. My personal experiences with Argentine media offer a corollary to the Argentine legal debates that Professor Gullco analyzes. Since the late 1990s,

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2021); Transnational Legal Clinic, U. PA. L. SCH., <https://www.law.upenn.edu/clinic/transnational/> (last visited Dec. 18, 2021); Frank C. Newman International Human Rights Law Clinic, U.S.F. SCH. LAW, <https://www.usfca.edu/law/professional-skills/law-clinics/international-human-rights> (last visited Dec. 18, 2021); International Human Rights Clinic, U.S. CAL. GOULD SCH. L., <https://gould.usc.edu/academics/experiential/clinics/ihr/> (last visited Dec. 18, 2021); Human Rights Clinic, U. TEX. AUSTIN SCH. LAW, <https://law.utexas.edu/clinics/human-rights/> (last visited Dec. 18, 2021); Human Rights Program, U. VA. SCH. LAW, <https://www.law.virginia.edu/academics/program/human-rights-program?section=clinic> (last visited Dec. 18, 2021); International Human Rights Clinic, U. WYO. COLL. LAW, <http://www.uwyo.edu/law/experiential/clinics/intl-law-clinic.html> (last visited Dec. 18, 2021); International Human Rights Clinic, W. NEW ENG. U. SCH. LAW, <https://www1.wne.edu/law/experiential/clinics.cfm> (last visited Dec. 18, 2021); Lowenstein International Human Rights Clinic, YALE L. SCH., <https://law.yale.edu/schell/lowenstein-international-human-rights-clinic> (last visited Dec. 18, 2021).

61. The following law school clinics describe themselves as working in the Inter-American system: International Human Rights Practicum, B.C. L. SCH., International Human Rights Clinic, HARV. L. SCH., International Human Rights Center, LOY. L. SCH., Human Rights at Home Litigation Clinic, ST. LOUIS U. SCH. LAW, International Human Rights Clinic, SANTA CLARA U. SCH. LAW, Immigrants' Rights/International Human Rights Clinic, SETON HALL L. SCH., International Human Rights Clinic, STAN. L. SCH., Human Rights and Indigenous Peoples Clinic, SUFFOLK U. L. SCH., International Human Rights Law Clinic, U.C. BERKELEY L. SCH., International Human Rights Clinic, U.C. IRVINE L. SCH., International Human Rights Clinic, UCLA L. SCH., International Human Rights Clinic, U. ILL. CHI. L., Human Rights Clinic, U. MIAMI L. SCH., Transnational Legal Clinic, U. PA. L. SCH., Frank C. International Human Rights Clinic, U.S.F. SCH. LAW, International Human Rights Clinic, U. S. CAL. GOULD SCH. LAW, Human Rights Clinic, U. TEX. AUSTIN SCH. LAW, Human Rights Program and Clinic, U. VA. SCH. LAW, Lowenstein International Human Rights Clinic, YALE L. SCH., sources cited *supra* note 60.

62. See CTR. FOR JUST. & INT'L L., <https://cejil.org/en/> (last visited Dec. 18, 2021).

I have represented, in various capacities, Víctor Saldaño, an Argentine citizen on death row in Texas. I have often found myself struck by the sharp difference between Argentine and U.S. views of the Commission's role and of each country's view of obligations owed to the Commission. In the *Saldaño* case, some of the difference in perceptions originated from Juan Carlos Vega, the media-savvy attorney of Víctor Saldaño's mother, Lidia Guerrero, who emphasized the United States' misconduct and failure to adhere to international norms.<sup>63</sup> However, that is to be expected in many contentious cases. What is remarkable is the Argentine media's acceptance of Vega's narrative when compared with U.S. judicial attitudes. As a result, the United States is branded as a scofflaw.

Victor Saldaño's case is unquestionably an embarrassing one for the United States. During the penalty phase of a capital case, which follows the initial finding of guilt for murder, Texas law requires a unanimous jury finding on the special issue of future dangerousness, that is, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."<sup>64</sup> To prove future dangerousness at Saldaño's 1996 trial, the prosecution presented the testimony of Dr. Walter Quijano, a former chief psychologist and director of psychiatric services of the Texas prison system,<sup>65</sup> who stated he had testified in approximately seventy death penalty cases.<sup>66</sup> Quijano testified that Saldaño's Hispanic ethnicity was a factor indicating future dangerousness, because Hispanics were over-represented in the Texas prison system.<sup>67</sup> Defense counsel did not object. Instead, he asked on cross-examination whether, given that the bulk of the U.S. Hispanic population was of Mexican and Puerto Rican origin, it was correct to classify Saldaño as Hispanic for the purpose of the future dangerousness correlation, as he was an Argentine, so

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63. Paula Lugones, *Tratan en Washington el caso del argentino condenado a muerte en EE.UU.*, CLARÍN (Oct. 10, 2015), [https://www.clarin.com/mundo/tratan-washington-argentino-condenado-eeuu\\_0\\_S1xBIzYv7l.html](https://www.clarin.com/mundo/tratan-washington-argentino-condenado-eeuu_0_S1xBIzYv7l.html), (describing a press conference of Juan Carlos Vega, attorney for Lidia Guerrero, after his meeting with the Commission and asking that the United States be held to have violated its international obligation).

64. TEX. CODE CRIM. PROC. ANN. art. 37.071 (West, Westlaw through 2021 Regular and Second Called Sessions of the 87th Legislature).

65. Transcript of Record at 61, *Texas v. Saldaño*, No. 199-80049-96 (199th Dist. Ct., Collin County, Tex. July 12, 1996).

66. Transcript of Record, *supra* note 65, at 68.

67. *Id.* at 75-76; *see also* *Saldaño v. Cockrell*, 267 F. Supp. 2d 635, 638 (E.D. Tex. 2003).

his “blood lines” were different.<sup>68</sup> Not surprisingly, the witness answered that Spanish-speaking South Americans are Hispanics.<sup>69</sup>

After the Texas Court of Criminal Appeals found no reversible error,<sup>70</sup> the Texas Attorney General, John Cornyn, admitted error before the U.S. Supreme Court, recognizing that “the prosecution’s introduction of race during the penalty phase, as a factor for determining ‘future dangerousness,’ constituted a violation of Saldaño’s rights to equal protection and due process.”<sup>71</sup> The U.S. Supreme Court accordingly returned the case to Texas in light of the confession of error.<sup>72</sup> However, on remand, the Texas Court of Criminal Appeals insisted that the Texas Attorney General’s admission of error was improper given defense counsel’s failure to object at trial,<sup>73</sup> and that counsel insisting that Saldaño’s “blood lines” did not make him Hispanic was a trial tactic and hence did not constitute ineffective assistance of counsel.<sup>74</sup>

Ultimately, Saldaño was awarded a new trial due to a new confession of error by the Texas Attorney General during the federal habeas corpus proceeding.<sup>75</sup> Nevertheless, thanks to the Texas Court of Criminal Appeals’ decisions and an attempted intervention by local prosecutors during federal habeas corpus,<sup>76</sup> eight years passed from the time of Saldaño’s first trial to when he finally received a new capital trial in 2004.<sup>77</sup> After eight years on death row, strong evidence indicates that he had suffered a severe psychiatric decline.<sup>78</sup> Saldaño’s second trial, held exclusively to consider the application of the death penalty, was focused on “future dangerousness” and evidence relevant to mitigation of punishment. Saldaño presented a bizarre figure, very

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68. The term “blood lines” is used by the defense counsel. *See* Transcript of Record, *supra* note 65, at 127, 129, 131-32; *see also* Saldaño v. Cockrell, 267 F. Supp. 2d at 638.

69. Transcript of Record, *supra* note 65, at 127, 129, 131-32.

70. Saldaño v. State, No. 72, 566, 1999 Tex. Crim. App. Unpub. LEXIS 2 (Tex. Crim. App. Sep. 15, 1999).

71. Response to Pet. for Writ of Cert. at 1, Saldaño v. Texas, 530 U.S. 512 (2000) (No. 99-8119).

72. Saldaño v. Texas, 530 U.S. 1212 (2000).

73. Saldaño v. State, 70 S.W.3d 873, 889-91 (Tex. Crim. App. 2002).

74. *Id.* at 885-86.

75. Saldaño v. Cockrell, 267 F. Supp. 2d 635, 640 (E.D. Tex. 2003).

76. *See* Saldano v. Roach, 363 F.3d 545 (5th Cir. 2004) (dismissing the District Attorney’s appeal on denial of his right to intervene).

77. Jury selection for the second trial began on October 4, 2004. Individual Questioning of Prospective Jurors, Texas v. Saldaño, No. 199-80049-96. Saldaño’s first trial concluded with a death sentence on July 15, 1996. Transcript of Record, *supra* note 65, at 309.

78. An excellent summary appears in an affidavit by Valeria M. Gonzalez Posse, Deputy Consul General of the Consulate of Argentina in Houston, which appears in Petitioner Victor Hugo Saldaño’s Petition for Writ of Habeas Corpus, Exhibit K. Petitioner Victor Hugo Saldaño’s Petition for Writ of Habeas Corpus, Saldaño v. Thaler, No. 4:08cv193 at 342-62.

different from the way he appeared during the first trial, where the record shows no abnormal conduct. At the second trial, he insisted on wearing prison clothing, rocked in his chair, laughed inappropriately, read magazines, yawned, masturbated on four occasions, and after being trussed in restraints, suddenly stood up so that the jury saw his shackles.<sup>79</sup> Moreover, most of the State's evidence on future dangerousness consisted of similar bizarre behaviors by Saldaño, for example his tendency to throw urine and feces while in severe isolation,<sup>80</sup> an environment that Texas established for all death row inmates starting in early 2000.<sup>81</sup>

Yet, the Fifth Circuit Court of Appeals held that the trial judge could rely on defense counsel's assertions that Saldaño had been examined by experts who had found him competent for trial,<sup>82</sup> even though no details regarding the examinations were in the record other than defense counsel's assertion that they had occurred.<sup>83</sup> Reviewing courts had no issue with the prison guards' future dangerousness testimony about Saldaño's misconduct while he was suffering from the effects of severe isolation in a ten-foot by six-foot cell.<sup>84</sup> Given the conditions of death row in Texas and Saldaño's long history of psychiatric hospitalizations,<sup>85</sup> his conduct in isolation and at trial would all point to severe mental deterioration. However, the Fifth Circuit insisted that his decline did not provide a constitutional claim that would prevent the second penalty trial.<sup>86</sup> There is little doubt that Saldaño's case, with its combination of racist testimony at the first trial and severe mental decline during eight years on death row, had exceptional potential to discomfit the United States internationally.

Starting in 1998, Lidia Guerrero turned to the Commission on behalf of her son, first with an unsuccessful case against Argentina where she argued

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79. *Saldaño v. Davis*, No. 16-70025, 701 F. App'x 302, 312-13 (5th Cir. 2017).

80. Petitioner Victor Hugo Saldaño's Petition for Writ of Habeas Corpus, *Saldaño v. Thaler*, No. 4:08cv193 at 157-59.

81. See HUM. RTS. CLINIC, UNIV. TEXAS SCH. LAW, DESIGNED TO BREAK YOU 5 (2017), <https://law.utexas.edu/wp-content/uploads/sites/11/2017/04/2017-HRC-DesignedToBreakYou-Report.pdf>.

82. *Saldaño v. Davis*, 759 F. App'x 276 (5th Cir. 2019).

83. *Saldaño v. Davis*, No. 16-70025, 701 F. App'x at 315.

84. The Court of Appeals rejected arguments that mental deterioration short of incompetency could justify blocking a second death sentencing proceeding or the future dangerousness testimony based on death row misconduct. *Id.* at 310-11. The cell is described in Petitioner Victor Hugo Saldaño's Petition for Writ of Habeas Corpus. Petitioner Victor Hugo Saldaño's Petition for Writ of Habeas Corpus, *Saldaño v. Thaler*, No. 4:08cv193 at 168.

85. See Petitioner Victor Hugo Saldaño's Petition for Writ of Habeas Corpus, *Saldaño v. Thaler*, No. 4:08cv193 at 344, 355 (emphasizing Exhibit K, Declaration of Valeria M. González Posse, Deputy Consul General of the Consulate of Argentina in Houston).

86. See *Saldaño v. Davis*, 759 F. App'x 276 (5th Cir. 2019).

that Argentina did not act with sufficient force internationally on Saldaño's behalf.<sup>87</sup> But Guerrero found success in a case on behalf of Saldaño against the United States,<sup>88</sup> which I assisted with during its early stages. What is truly remarkable, however, is not the Commission decision—the Commission could hardly have ruled for the United States—but the response of the Argentine media to the case, regardless of political inclination.

Saldaño's case had long received regular attention in the Argentine press, which is not surprising given Saldaño's quarter-century on death row and his status as the only Argentine citizen on death row during this entire time.<sup>89</sup> There is even a film documentary about the case,<sup>90</sup> and the Pope met with Lidia Guerrero twice to express his concerns and offer support.<sup>91</sup> But the focus of coverage on the role of the Commission has been especially striking. Some articles used the headline *Horas decisivas para Saldaño, el Argentino condenado a muerte en Estados Unidos* (Decisive hours for Saldaño, the Argentine condemned to death in the United States),<sup>92</sup> not to describe a key domestic judicial proceeding, but to refer to a hearing before the Commission for consideration of his petition. The implicit assumption was that the Commission could make an important difference in Saldaño's fate.

Just as interesting as the Commission's report in Saldaño's case, is its coverage in Argentina. In an extensive report, the Commission issued recommendations that concluded that the United States had violated Saldaño's right to life, right to equal treatment, right to a fair trial, right to

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87. Saldaño v. Argentina, Petition, Inter-Am. Comm'n H.R., Report No. 38/99, OEA/Ser.L./V/II.106, doc. 6 rev. ¶ 12 (1999).

88. Saldaño v. United States, Case 12.254, Inter-Am. Comm'n H.R., Report No. 24/17, OEA/Ser.L./V/161, doc. 31 (2017).

89. See Jordan S. Rubin, *Argentina Backs Texas Death Row Prisoner at U.S. Supreme Court*, BLOOMBERG L. (OCT. 23, 2019, 1:50 AM), <https://news.bloomberglaw.com/us-law-week/argentina-backs-texas-death-row-prisoner-at-u-s-supreme-court>.

90. SALDAÑO, EL SUEÑO DORADO (El Desencanto Films SRL 2014); *Llega a los cines la historia de Víctor Hugo Saldaño, el argentino condenado a muerte en Texas* [The Story of Víctor Hugo Saldaño, the Argentine Condemned to Death in Texas, Arrives in Theaters], TELAM DIGITAL (Apr. 28, 2015, 11:17 AM), <https://www.telam.com.ar/notas/201504/103149-la-historia-de-saldano-el-argentino-condenado-a-muerte-en-texas-llega-a-los-cines.html>.

91. Marisa Iatí, *Why Pope Francis and the Texas Bishops are Trying to Save a Man on Death Row*, WASH. POST (Sept. 5, 2019), <https://www.washingtonpost.com/religion/2019/09/05/why-pope-francis-texas-bishops-are-trying-to-save-man-death-row/>.

92. *Horas decisivas para Saldaño, el argentino condenado a muerte en Estados Unidos*, EL PATAGÓNICO (Oct. 6, 2015), <https://www.elpatagonico.com/horas-decisivas-saldano-el-argentino-condenado-muerte-estados-unidos-n1295521>; *Horas decisivas para el argentino condenado a muerte en Estados Unidos*, EL ANCASTI (Oct. 7, 2015), <https://www.elancasti.com.ar/nacionales/2015/10/7/horas-decisivas-para-argentino-condenado-muerte-estados-unidos-275421.html>; see also Lugones, *supra* note 63.

protection from arbitrary arrest, and right to due process—given the racism of the first death penalty trial, the mental decline that he exhibited during the second death penalty trial, the harsh conditions of his confinement, and the extraordinarily long time on death row and its impact on his mental health.<sup>93</sup> It is hardly surprising that the Commission called for a halt to any threat of execution, a commutation of his sentence to life imprisonment, Saldaño's removal from death row to more humane conditions of confinement, and for adequate mental health treatment.<sup>94</sup> The decisions of the Commission in the case naturally received extensive Argentine coverage,<sup>95</sup> but much more striking is that the leftist newspaper, *Página 12*, the centrist *Voz del Interior* (the principal newspaper of Córdoba, Argentina, Saldaño's birthplace), *Télam* (Argentina's government-owned news agency), and the business journal *BAE Negocios*, all refer to the Commission as the "única posibilidad" (only possibility) for saving Saldaño's life, when discussing appeals to the U.S. Supreme Court.<sup>96</sup> The Argentine media see a decision by the Commission as the key to ending Saldaño's torture on death row.<sup>97</sup>

Certainly part of the focus on the Commission was initiated by Juan Carlos Vega, the lawyer representing Saldaño before the Commission. Vega

93. *Saldaño v. United States*, Case 12.254, Inter-Am. Comm'n H.R., Report No. 24/17, OEA/Ser.L/V/161, doc. 31 ¶ 268 (2017).

94. *Id.* ¶ 269.

95. See e.g., Gabriela Origlia, *Caso Saldaño: la CIDH intima a Pompeo para sacarlo del corredor de la muerte*, LA NACION (Jan. 18, 2019, 12:52 AM), <https://www.lanacion.com.ar/sociedad/caso-saldano-cidh-intima-pompeo-sacarlo-del-nid2211907/>; *Piden a EE.UU. bajar la pena de Víctor Saldaño, el argentino condenado a muerte*, LA NACION (Jan. 20, 2017, 10:52 AM), <https://www.lanacion.com.ar/sociedad/piden-a-eeuu-que-baje-la-pena-de-victor-saldano-el-argentino-condenado-a-muerte-nid1977524/>; *Piden a EE.UU. que conmute la pena de Saldaño*, LA VOZ (Jan. 20, 2017, 12:51 AM), <https://www.lavoz.com.ar/ciudadanos/piden-eeuu-que-conmute-la-pena-de-saldano/>.

96. *Víctor Saldaño: Argentina presentó un recurso en la Corte Suprema de EE.UU.*, PÁGINA 12 (Aug. 16, 2019, 7:40 PM), <https://www.pagina12.com.ar/212561-victor-saldano-argentina-presento-un-recurso-en-la-corte-sup>; *Caso Saldaño: en noviembre ejecutarían al cordobés que está condenado a pena de muerte hace 24 años en EE.UU.*, LA VOZ (Apr. 19, 2019, 12:31 AM), <https://www.lavoz.com.ar/ciudadanos/caso-saldano-en-noviembre-ejecutarian-al-cordobes-que-esta-condenado-pena-de-muerte-hace-/>; *La Argentina presentó un "Amicus Curiae" a la Corte Suprema de EE.UU.*, TELAM (Aug. 15, 2019, 5:45 PM), <https://www.telam.com.ar/notas/201908/384846-argentina-presento-un-amicus-curiae-a-la-corte-suprema-de-eeuu-por-el-caso-saldano.html>; *El Gobierno reclama la suspensión de la pena de muerte a un argentino en EE.UU.*, BAE NEGOCIOS (Aug. 15, 2019, 5:05 PM), <https://www.baenegocios.com/sociedad/Argentina-reclama-la-suspension-de-la-pena-de-muerte-a-un-argentino-en-EE.UU.-20190815-0022.html>.

97. See Sol Amaya, *Caso Víctor Saldaño: audiencia clave ante la Comisión Interamericana por el cordobés sentenciado a muerte en los EE.UU.*, LA NACION (Oct. 7, 2015, 4:15 PM), <https://www.lanacion.com.ar/el-mundo/caso-victor-saldano-audiencia-clave-ante-la-comision-interamericana-por-el-cordobes-sentenciado-a-muerte-en-los-eeuu-nid1834510/>.

publicly questioned the value of seeking judicial remedies in the United States that did more than refer to the Commission's decision once it had spoken.<sup>98</sup> But the mainstream press took seriously not only Vega's demands that the United States comply with the Commission's recommendations,<sup>99</sup> but also his demands that the Commission now order the United States to pay \$10 million in compensation.<sup>100</sup> Given that the courts in the United States have consistently treated Commission recommendations as lacking domestic legal authority, the gap between what the Argentine press focused on and the realities within the United States borders is tragicomic in the death penalty context.<sup>101</sup>

#### IV. THE STATEMENT OF INTEREST AS AN OPPORTUNITY FOR ENGAGEMENT

The United States has a foreign policy interest in maintaining a high reputation on international human rights issues. Scholars have written a great deal about the importance of reputation in international relations, including

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98. See Gabriela Origlia, *La defensa de Víctor Saldaño juega su última carta en los Estados Unidos para evitar la ejecución*, LA NACION (July 17, 2019, 11:40 AM), <https://www.lanacion.com.ar/seguridad/la-defensa-victor-saldano-juega-ultima-carta-nid2268503/>.

99. E.g., “*EEUU no quiere cumplir con la CIDH*,” dijo el abogado de Saldaño tras decisión de la Corte Suprema, TELAM (Nov. 19, 2019, 1:32 PM), <https://www.telam.com.ar/notas/201911/409869-saldano-estados-unidos-pena-de-muerte-cidh-corte-suprema.html>; Paula Lugones, *Piden sacar a Víctor Saldaño del corredor de la muerte y enviarlo a un psiquiátrico*, CLARÍN (Mar. 18, 2017, 6:35 PM), [https://www.clarin.com/policiales/piden-sacar-victor-saldano-corredor-muerte-enviarlo-psiquiatri-co\\_0\\_rJdtBpqig.html](https://www.clarin.com/policiales/piden-sacar-victor-saldano-corredor-muerte-enviarlo-psiquiatri-co_0_rJdtBpqig.html); see also Juan Carlos Vega, *Las lecciones del caso Saldaño*, LA NACION (Jan. 30, 2019), <https://www.lanacion.com.ar/opinion/las-lecciones-del-caso-saldano-nid2215511/> (an op ed emphasizing the Commission addressing itself to U.S. Secretary of State Michael Pompeo to require the United States to comply with the Commission's recommendations).

100. *El abogado de Víctor Saldaño pidió que EE.UU. lo indemnice con 10 millones de dólares*, CLARÍN (June 18, 2021, 12:37 PM), [https://www.clarin.com/sociedad/abogado-victor-saldano-pidio-ee-uu-indemnice-10-millones-dolares\\_0\\_6iiv9t47B.html](https://www.clarin.com/sociedad/abogado-victor-saldano-pidio-ee-uu-indemnice-10-millones-dolares_0_6iiv9t47B.html); see, e.g., Gabriela Origlia, *Piden indemnizar a Víctor Saldaño con US\$10 millones por sus 24 años en el “corredor de la muerte” en Texas*, LA NACION (June 18, 2021, 12:01 AM), <https://www.lanacion.com.ar/seguridad/piden-indemnizar-a-victor-saldano-con-us10-millones-por-sus-24-anos-en-el-corredor-de-la-muerte-en-nid18062021/>; *El cordobés Saldaño pidió que EE.UU. lo indemnice con US\$ 10 millones por tenerlo en el “corredor de la muerte”*, LA VOZ (June 17, 2021, 5:28 PM), <https://www.lavoz.com.ar/ciudadanos/corredor-de-la-muerte-el-cordobes-victor-saldano-pidio-que-eeuu-lo-indemnice-con-us-10-millones/>.

101. In practice, the only body for whom a decision of the Commission might have even theoretical relevance in Saldaño's case is the Texas Board of Pardons and Parole, which has the power, by majority vote, to recommend commutation of a death sentence, which then the Governor can approve. TEX. CODE CRIM. PROC. ANN. art. 48.01 (West, Westlaw through 2021 Regular and Second Called Sessions of the 87th Legislature).

reputation in the human rights field.<sup>102</sup> It would seem intuitive that countries will prefer to ally with states that share and effectuate their most important values, since values-based frictions will diminish, and states can count on more easily sharing responses to common challenges. International public opinion polls show that the reputation of the United States has slumped on the question of whether the United States respects the personal freedoms of its people. In 2018, less than half of the populations of France, Germany, Spain, and the United Kingdom indicated favorable perceptions of the United States in respecting personal freedoms compared to strong majorities showing favorable perceptions five years earlier.<sup>103</sup> While the image of the United States has recently improved under President Biden, many foreigners continue to have doubts about the United States as a successful democracy.<sup>104</sup>

Obviously, Saldaño's case is a minuscule piece of any reputational drop for the United States. Yet, the huge difference between the judicial realities in the United States and the assumptions of Argentine media about how the United States should treat Commission decisions forms part of the problem. Further, the contradictions are all the sharper given the activism of the U.S. law school clinics and NGOs before the Commission. While the United States' judicial practice regarding Commission decisions is limited by the present state of the case law, it behooves the U.S. State Department to consider ways to limit perceptions of the United States as a human rights scofflaw with respect to the Inter-American system. One small step could be for the State Department to use Statements of Interest to support Commission decisions.

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102. Reputation has many facets, from reputation for resolve and consistency, to reputation as a good ally and reputation for upholding shared values. Discussion on the role of reputation is central to international relations literature. See generally Mark J.C. Crescenzi et al., *Reliability, Reputation, and Alliance Formation*, 56 INT'L STUD. Q. 259 (2012) (offering a useful overview of the role of reputation on alliances); George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95 (2002) (arguing that reputation consequences are area specific); Alex Weisiger & Keren Yarhi-Milo, *Revisiting Reputation: How Past Actions Matter in International Politics*, 69 INT'L ORG., 473 (2015) (offering an overview of debates about the importance of resolve and consistency). In the human rights area, arguments for compliance tend to focus on reputational benefits from shared values that strengthen alliances with like-minded countries. See Harold Hongju Koh, *Restoring America's Human Rights Reputation*, 40 CORNELL INT'L L.J. 635, 650 (2007).

103. Richard Wike et al., *U.S. Image Plummets Internationally as Most Say Country Has Handled Coronavirus Badly*, PEW RES. CTR. (Sept. 15, 2020), <https://www.pewresearch.org/global/2020/09/15/us-image-plummets-internationally-as-most-say-country-has-handled-coronavirus-badly/>.

104. Richard Wike et al., *America's Image Abroad Rebounds with Transition from Trump to Biden*, PEW RES. CTR. (June 10, 2021), <https://www.pewresearch.org/global/2021/06/10/americas-image-abroad-rebounds-with-transition-from-trump-to-biden/>.

Statements of Interest are statutorily authorized<sup>105</sup> and used in a variety of contexts. Sometimes the Department of Justice files them to defend the federal government's property or contractual interests without intervening as a party to a lawsuit.<sup>106</sup> More recently, the government has used these statements as a strategic tool, rather like an amicus brief in a civil rights context, to express its preferred legal position.<sup>107</sup> But they are probably best known for their use in foreign affairs cases. A recent student note found approximately 156 filings dealing with foreign affairs from 1925 through 2016.<sup>108</sup> In dicta in *Sosa v. Alvarez-Machain*,<sup>109</sup> the Supreme Court noted the need for "case-specific deference to the political branches" when a Statement of Interest is filed in an action with foreign affairs implications, and noted that "[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."<sup>110</sup> Dozens of lower court decisions have quoted the Supreme Court's language on case-specific deference to a Statement of Interest.<sup>111</sup>

There is certainly no legal impediment to the State Department filing a Statement of Interest through the Department of Justice when it would be appropriate to comply with a Commission decision.<sup>112</sup> In Saldaño's case, the State Department under the Obama administration did something similar, if not quite as definitive, which serves at least as a partial precedent should the Biden administration or any future administration wish to show a deeper engagement with the Commission. What was done likely owed much to the progressive internationalism of Harold Hongju Koh, the State Department's Legal Adviser at the time, and a former dean of Yale Law School. He is also a leader of what is called the "New Haven School of International Law," which focuses on international law as the internalization of the norms of a broad range of international actors and not merely the product of power politics.<sup>113</sup> The approach naturally lends itself to broad international

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105. 28 U.S.C. § 517.

106. Victor Zapana, Note, *The Statement of Interest as a Tool in Federal Civil Rights Enforcement*, 52 HARV. C.R.-C.L. L. REV. 227, 232 (2017).

107. *Id.* at 233-43.

108. *Id.* at 233.

109. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

110. *Id.* at 733 n. 21.

111. *See, e.g., Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354 (D.C. Cir. 2007); *Sarei v. Rio Tinto, PLC.*, 456 F.3d 1069, 1081 (9th Cir. 2006); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1177 (C.D. Cal. 2005).

112. The Supreme Court emphasized the centrality of the U.S. State Department's role in indicating the official immunity of foreign government officials. *See Samantar v. Yousuf*, 560 U.S. 305, 323-24 (2010).

113. Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301, 310-11 (2007).

engagement, since actors gain advantages in the development of a particular legal culture that they cannot simply impose or even necessarily develop through negotiations.

Koh wrote a letter addressed to Thomas E. Perez, then the Assistant Attorney General leading the Civil Rights Division of the U.S. Department of Justice, for filing with the U.S. District Court hearing Saldaño's habeas corpus petition.<sup>114</sup> The letter did not make a request of the District Court or take an explicit legal position, but instead merely explains the international importance of the case to the Court and notes the U.S. government's representations to the Commission that there would be a thorough habeas corpus review of Saldaño's case.<sup>115</sup> The letter referenced a hearing before the Commission on November 3, 2009, at which the United States stressed that the federal habeas corpus proceedings would provide a venue to address Saldaño's allegations that his death sentence violated his human rights.<sup>116</sup> The letter noted that the Commission had requested that the U.S. government file an amicus brief on Saldaño's behalf, and stressed that "[t]he United States "would like to respond to the Commission as favorably as possible" and "recognizes the Commission as an important mechanism for the promotion and protection of human rights in the Americas, in other states as well as our own."<sup>117</sup> Without specifically asking for anything, the letter further noted that the case would also become a focus of United Nations human rights bodies,<sup>118</sup> and explains that:

The unusual facts of this case—that Petitioner is a foreign national whose original death sentence was vacated as tainted by admitted unconstitutional racial bias during his initial penalty hearing and who now alleged that he has suffered severe mental deterioration during his lengthy confinement on death row—set against the international community's broader concerns regarding discriminatory application of the death penalty in the United States, provides a strong additional basis for the Department of State to demonstrate to those UN bodies that the United States has taken every available step to address Petitioner's claims of violations of his constitutional (and human) rights.<sup>119</sup>

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114. Letter from Harold Hongju Koh, Legal Adviser, U.S. Dept. of State, to Thomas E. Perez, Assistant Att'y Gen., Civ. Rts. Div., U.S. Dept. of Just. (May 10, 2010), <https://2009-2017.state.gov/documents/organization/179245.pdf>.

115. *Id.*

116. *See id.*

117. *Id.*

118. *Id.*

119. *Id.*

The letter expresses strong sentiments of wishing to engage with the Commission and more broadly with UN human rights bodies—but at the same time, does not ask the Court to do or hold anything, as an amicus brief or a Statement of Interest typically would. The letter did not offer a position to respond to. In fact, the U.S. Attorney who filed the letter described it as “redundant of what the Court would be reviewing in the habeas petition,” and stated that the Department of Justice “takes no position” on whether Saldaño should receive an evidentiary hearing on his habeas petition, though “the State Department would be very glad if the Court did convene such a hearing.”<sup>120</sup> At least implicitly, the U.S. Attorney appeared perplexed by the lack of a formal request for any action from the Court, which made it a very atypical filing. In the end, the District Court made no reference to the filed letter in its ruling against Saldaño’s habeas petition.<sup>121</sup>

The Saldaño case offers a guide for the future, however. A future State Department Legal Adviser could certainly pick up where Koh left off and ask a court to take specific steps in response to a recommendation from the Commission. Not all cases that the Commission resolves have equal international importance, and because the Commission’s Statute requires exhaustion of domestic judicial remedies before petitioners may file a case,<sup>122</sup> many petitioners in exhausting their domestic remedies will also face the limitation that their cases are *res judicata*. Domestic rules of *res judicata* mean that sometimes the executive and legislative branches are the only possible interlocutors for the Commission. But at least in some cases, engagement between U.S. courts and the Commission should be possible, whether because later litigations can invoke an earlier Commission decision, or because the Commission, as in *Saldaño*, was willing to hear a death penalty case before the federal habeas corpus proceeding had concluded.<sup>123</sup> In today’s rarified political climate, it is conceivable that some state court judges might take offense at a progressive administration calling for respect for a recommendation by the Commission. Nevertheless, when an opportunity presents itself before the right U.S. court, and when the intervention could be productive, a progressive administration has no excuse not to take U.S. international engagement a small step further, by going beyond what Koh did in Saldaño’s case and actively supporting a position taken by the Commission. A Statement of Interest should lead judges to

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120. Letter from John M. Bales, U.S. Att’y, E. Dist. of Tex., to Richard Schell, U.S. Dist. J., E. Dist. of Tex. (June 2, 2010).

121. *Saldaño v. Director*, No. 4:08-cv-193, 2016 WL 3883443, \*1 (E.D. Tex. July 18, 2016).

122. IACHR Statute, *supra* note 41, art. 20.

123. *See Saldaño v. United States*, Case 12.254, Inter-Am. Comm’n H.R., Report No. 24/17, OEA/Ser.L/V/161, doc. 31 ¶¶ 80-83 (2017).

respond to the U.S. government and thereby toward a process of engagement with the Commission.

#### V. CONCLUSION

Right now, the United States pays a price for its lack of engagement with the Inter-American Commission. It might not be a high price, but as the Saldaño case shows, it is part of broader conceptions that the United States is a scofflaw. Our constitutional system, unlike Argentina's, does not presently allow treatment of Commission decisions as domestic legal obligations. But that does not rule out greater engagement of the U.S. courts with the Commission, and if a progressive administration wishes to encourage that engagement, the U.S. government's participation in key cases through a Statement of Interest or an amicus brief offers a natural path.