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# Substitutes, Complements, and Irritants: *Garza v Lappin* and the Role of International Law in US Courts

Tom Ginsburg<sup>†</sup>

## INTRODUCTION

What is the relationship between US law and international law? This is the core question of the academic field of foreign relations law, but it is also a life-or-death issue for some people. In recent years, a series of cases involving death-row defendants has made its way to the federal courts, presenting a novel set of claims. This Essay discusses one such case, *Garza v Lappin*,<sup>1</sup> decided in 2001. The opinion by Judge Diane Wood is characteristically scrupulous, but is not among her best known, and was hardly controversial at the time.<sup>2</sup> Still, it is a useful case to illustrate the range of possible relationships between international human rights law and domestic courts, an issue of increasing importance around the globe.<sup>3</sup>

This Essay will examine Judge Wood's approach in light of other possible angles taken by various judges—both those working in the US and outside of it—in recent years. It first considers possible relationships between domestic law and international human rights law. It then examines the opinion in *Garza* in light

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<sup>1</sup> 253 F3d 918 (7th Cir 2001).

<sup>2</sup> See text accompanying note 104.

<sup>3</sup> See, for example, Gábor Halmai, *Domestic Courts and International Human Rights*, in Anja Mihr and Mark Gibney, eds, *The SAGE Handbook of Human Rights* 749, 763–65 (SAGE 2014); Michael Kirby, *Domestic Courts and International Human Rights Law – The Ongoing Judicial Conversation: The Hondius Lecture 2008*, 27 Neth Q Hum Rts 291, 303–07 (2009). See also David L. Sloss and Michael P. Van Alstine, *International Law in Domestic Courts*, in Wayne Sandholtz and Christopher A. Whytock, eds, *Research Handbook on the Politics of International Law* 79, 92–93 (Edward Elgar 2017) (examining courts' approaches to vertical and horizontal domestic law in comparison to transnational law); Karen Knop, *Here and There: International Law in Domestic Courts*, 32 NYU J Intl L & Polit 501, 535 (2000).

of these approaches, finding the opinion notable for taking international legal norms seriously and giving them their due weight. While they did not have an impact on the outcome of Juan Raul Garza's habeas petition, the international norms are framed as ultimately complementary of domestic regulation; they do not substitute for it.

## I. INTERNATIONAL LAW IN DOMESTIC COURTS

International law protecting human rights is generally considered by scholars to be an area in which normative development has exceeded enforcement capacity.<sup>4</sup> Courts and tribunals established to protect human rights are characterized as fairly weak, and lacking powerful mechanisms for enforcing their decisions.<sup>5</sup> But that statement must be qualified, as the efficacy of the international machinery is almost entirely a function of its interaction with national legal orders, which varies widely across countries. The power of international law generally, and human rights law in particular, depends on the specific receptivity of national governments to claims based on it. Surely, when a government is recalcitrant, there is little that an international court can do on its own to enforce its judgments. But there are many countries which do take seriously the rulings of international tribunals, and a growing number of jurisdictions in which human rights law is incorporated into national law as a matter of constitutional text or supreme court jurisprudence. In 2013, for example, the Mexican Supreme Court incorporated the American Convention of Human Rights into domestic law.<sup>6</sup> The Inter-American Court of Human Rights has articulated a doctrine known as "conventionality control," holding that the entire body of regional human rights law is binding on every court in the hemisphere, in some cases trumping national constitutional law.<sup>7</sup> And many national constitutions stipulate that international human rights law is directly binding on national courts interpreting rights provisions.<sup>8</sup> Constitutional

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<sup>4</sup> See, for example, Louis Henkin, *The Age of Rights* 22–24 (Columbia 1990).

<sup>5</sup> Eric A. Posner, *The Twilight of Human Rights Law* 96, 103–04 (Oxford 2014).

<sup>6</sup> See Karina Ansolabehere, *One Norm, Two Models. Legal Enforcement of Human Rights in Mexico and the United States*, 8 Mexican L Rev 93, 118 (2016).

<sup>7</sup> Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 Tex Intl L J 45, 49–50, 60–62 (2015).

<sup>8</sup> See, for example, S Afr Const Ch 2, § 39(1)(b) (requiring courts to consider international law when interpreting the South African Bill of Rights).

courts in many countries act accordingly, accepting the pronouncements of international bodies as binding and authoritative.

The United States is not such a country, at least with regard to human rights treaty norms. Instead, treaties are only held to bind domestic courts if they are “self-executing” or if they are incorporated into US law by statute.<sup>9</sup> Absent clear indication that the treaty is intended to create directly enforceable rights, US courts tend to hold that there must be a legislative act incorporating international norms before they can be relied on by individuals.<sup>10</sup>

Why might different countries take different stances with regard to the enforceability and application of international law? Why, to put the point sharply, are US courts so different from those of Mexico? A traditional answer might focus on something like legal culture. Traditions in the United States of self-reliance, exceptionalism, and independence from the rest of the world mean that there is little to be gained by subjecting ourselves to foreign tribunals and their judgments. Europeans tend to be more comfortable with international delegations and supranational government, perhaps because the close proximity of countries has produced a culture of interaction. Latin Americans have long led in articulating regional norms of human rights, perhaps because of their history of overbearing authoritarian governments which has engendered a culture of rights-claiming. And some Asian cultures, it is sometimes asserted, emphasize duties to the collective over individual rights,<sup>11</sup> partially explaining why the region lacks a human rights court.

Cultural explanations cannot really account for changes over time. Why did the Mexican Supreme Court change its stance in recent years? Why do some Asian jurisdictions look outward more than others? Why has the number of national courts expressing

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<sup>9</sup> Restatement (Fourth) of the Foreign Relations Law of the United States, § 310(1) (2018).

<sup>10</sup> See, for example, *Sosa v Alvarez-Machain*, 542 US 692, 735 (2004) (explaining that the International Covenant on Civil and Political Rights was ratified “on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts”).

<sup>11</sup> See Joseph Chan, *A Confucian Perspective on Human Rights for Contemporary China*, in Joanne R. Bauer and Daniel A. Bell, eds, *The East Asian Challenge for Human Rights* 212, 215 (Cambridge 1999) (noting the “common view” among some scholars of Confucianism that “Confucianism is incompatible with human rights”).

skepticism about international law begun to increase in recent years?<sup>12</sup>

Another way of answering the question of variation is to look at incentives. International relations scholarship has emphasized the importance of human rights treaties to “tie[] the hands” of governments without other means of making credible commitments.<sup>13</sup> One idea is that countries that are established democracies have less marginal utility for international human rights institutions, because they have domestic machinery that can effectively deliver credibility. Our own courts, the argument goes, are able to adjudicate rights claims, and so we don’t need external monitoring. In contrast, countries with weaker domestic enforcement machinery may not be able to make believable promises to their citizens, absent some external mechanism of holding government’s feet to the fire for violations. Furthermore, new democracies without a history of democratic governance will have a particular need for international human rights commitments, because their citizens will be unlikely to believe that their promises will be adequately protected by future governments who might revert to authoritarianism. It is no surprise that both the European Convention on Human Rights,<sup>14</sup> created by the Council of Europe, and the American Declaration of the Rights and Duties of Man,<sup>15</sup> issued by the Organization of American States, were promulgated in periods of fragile democracy in those respective regions.<sup>16</sup> These instruments were meant to secure human rights among states which had recent histories of authoritarianism. Mutual monitoring and external enforcement would help to prevent backsliding.

This approach seems to account for the United States’ resistance to international human rights law. Robust domestic

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<sup>12</sup> See Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 *Intl J L in Context* 197, 197 (2018).

<sup>13</sup> See, for example, Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *Intl Org* 217, 228 (2000).

<sup>14</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 (1950).

<sup>15</sup> American Declaration of the Rights and Duties of Man, OAS Off Rec, OEA/Ser L/V/II 23 Doc 21 (1948).

<sup>16</sup> For further discussion, see Alexandra Huneeus and Mikael Rask Madsen, *Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems*, 16 *Intl J Const L* 136, 139–41 (2018); Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* 49–51 (Oxford 2010).

traditions of rights protection, the argument goes, obviate the need for allowing international human rights institutions direct governance responsibility over US residents. To be sure, this claim belies the fact that in many areas, the rights enforcement of the federal courts is really fairly weak. Courts and Congress have constructed an array of doctrinal and procedural barriers to “ration[ ]” effective remedies, making it difficult to actually vindicate constitutional rights.<sup>17</sup> But in any case, my primary concern here is not to determine whether or why the United States is or is not exceptional.<sup>18</sup> Instead, it is to consider how different possible approaches might be pursued by jurists and constitutional designers in mediating the relationship between international and domestic norms.

## II. SUBSTITUTES, COMPLEMENTS, AND IRRITANTS

I like to think of the relationship between domestic and international law using a framework of substitutes, complements, and irritants.<sup>19</sup> This Part briefly lays out these concepts and provides some examples.

In economics, a “substitute” is a good that can be used in place of another, so that when the price of one good goes up, demand for its substitutes increases.<sup>20</sup> Applied to the field of governance, a substitute implies that one legal instrument can do the job as well as another and can be used alternatively. The famous 1920 case of *Missouri v Holland*,<sup>21</sup> in which an international treaty to protect migratory birds served to bypass constitutional limits on domestic legislation, illustrates the substitution dynamic.<sup>22</sup> In that case, Congress responded to a court decision striking down its

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<sup>17</sup> Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 *Duke L J* 1, 12–13 (2015).

<sup>18</sup> For an article that does engage in such a discussion, see generally Anu Bradford and Eric A. Posner, *Universal Exceptionalism in International Law*, 52 *Harv Intl L J* 1 (2011) (arguing that the United States, the European Union, and China all advance their own exceptionalist views of international law according to their particular interests).

<sup>19</sup> For prior work using this framework, see Tom Ginsburg, *Constitutions and Foreign Relations Law: The Dynamics of Substitutes and Complements*, 111 *Am J Intl L Unbound* 326, 328–29 (2017); Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 *Intl Rev L Econ* 107, 113 (2005); Rachel Brewster, *The Domestic Origins of International Agreements*, 44 *Va J Intl L* 501, 502–03 (2004) (arguing that treaties substitute for statutes).

<sup>20</sup> See David W. Pearce, ed, *The MIT Dictionary of Modern Economics* 414 (MIT 4th ed 1992).

<sup>21</sup> 252 US 416 (1920).

<sup>22</sup> *Id* at 430–32.

domestic legislation on migratory birds by ratifying a treaty with Canada that accomplished largely the same ends.<sup>23</sup> When the Supreme Court held that the treaty was effective and constitutional,<sup>24</sup> it set up a system of legal substitutes: one instrument effectively substituted for another. International law could do the job of domestic law, and the government had some flexibility in choosing which instrument to use.

In contrast, a “complement” is a good whose consumption enhances demand for the primary good.<sup>25</sup> When the price of a primary good increases, demand for complements falls. In the realm of governance, this refers to a relationship among instruments in which two can work together in conjunction, and in fact may be superior to either one pursued on its own. Protection of intellectual property rights, for example, may work well at a national level, but will be superior if there are international treaties that extend this protection to different markets.

Note that there may be an asymmetry at work, in that legal protection at one level might be more elastic to changes in the other than vice versa. Consider the intellectual property example. An international treaty to protect intellectual property will not be of much use if all the domestic systems are weak and fail to provide for protection, because most violations occur within the boundaries of nation-states. In contrast, a system of strong domestic protections without an international treaty may in fact handle most of the relevant violations, so that the “complementarity” benefit of international law to domestic law is not as great as the reverse, even though simultaneous protection at both levels is unambiguously better.

Focusing narrowly on the field of human rights, it is clear that most violations occur within nation-states. But international treaties can do several things which complement the domestic level. They can help to define relevant rules, allowing states to coordinate on common definitions. They can set up institutions to monitor national performance, providing resources for domestic interest groups, transnational bodies, and other governments to pressure states toward better performance. And they can adjudicate particular violations, providing clarity and credibility to the enforcement machinery. These are all functions that are complementary in character.

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 435.

<sup>25</sup> See Pearce, ed, *The MIT Dictionary of Modern Economics* at 73, 91 (cited in note 20).

Whether states view international law as complementary or substitutive may depend on their internal institutional structure, the need to make credible commitments, and the reputation of the government. As noted above, many new democracies have found great benefit in supplementing domestic rights promises with a degree of openness to the international community. Russia's Constitution of 1993 adopted a very open attitude toward international law, stating that it recognizes rights and freedoms in accordance with "universally recognized principles and norms of international law."<sup>26</sup> This made some sense in a moment when it looked like Russia might democratize. But constitutional amendments to extend the term of President Vladimir Putin modified the text to place the constitution above international law.<sup>27</sup> As Russia has become stronger and more authoritarian, the need for this signaling has become less important.

The Russia case allows us to turn to a third possible relationship between domestic and international law, namely that an international norm might be a kind of "irritant" to the domestic legal order. The term comes from Professor Gunther Teubner, the systems theorist who used an organic analogy to analyze how legal rules travel across borders.<sup>28</sup> Instead of the usual metaphor of legal rules being "transplanted" from one legal system to another, Teubner noted that when a foreign rule enters a domestic legal culture, it may not be accepted seamlessly. Instead, it can irritate the functioning of the law and the law's relationship with other social systems, triggering "new and unexpected events."<sup>29</sup> For a legal system like that of Russia today, the international human rights system is more of an irritant than a complement. While it may have been framed as complementary twenty years ago at the time of ratification, the fact that tens of thousands of litigants have challenged Russia before the European Court of Human Rights (ECHR) has led Russian judges to move away from the idea that ECHR judgments are directly enforceable.<sup>30</sup> Instead, each will be scrutinized for compatibility with the Russian Constitution.

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<sup>26</sup> Rus Const § 1, Ch 2, Art 17, cl 1.

<sup>27</sup> See Jonathan H. Hines, Jennifer A. Josefson, Vasilisa Strizh, and Alexander V. Marchenko, *Russia Adopts Major Amendments to Its Constitution* (Lexology, July 13, 2020), archived at <https://perma.cc/XZ57-4NYD>.

<sup>28</sup> See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 *Modern L Rev* 11, 12 (1998).

<sup>29</sup> *Id.*

<sup>30</sup> Lauri Mälksoo, *The European Court of Human Rights and Russia: Quo Vadis?*, (fifteeneightyfour, Nov 22, 2018), archived at <https://perma.cc/YD33-3TQF>. But see



My assertion in this Essay is that whether international human rights norms operate as complements, substitutes, or irritants is partly a function of framing by judges and other legal actors. If international norms are perceived as irritants, judges must do their best to repel them, and certainly not let them enter the host body of national law. Something like this can be seen in Justice Antonin Scalia's famous attack on Justice John Paul Stevens's opinion in *Thompson v Oklahoma*,<sup>31</sup> the case finding the application of the death penalty to juveniles constitutionally suspect.<sup>32</sup> In response to Justice Stevens's noting a trend away from capital punishment in other industrial democracies, Justice Scalia sharply retorted that "[w]e must never forget that it is a Constitution for the United States of America that we are expounding."<sup>33</sup> Other countries' judicial interpretations could only muddy the waters and pollute our law.

Justice Scalia's view is of a constitutional order that is or should be hermetically sealed from external influences in interpretation. While consistent with positivist accounts of law, his view has been challenged. Justice Stephen Breyer, for example, has forcefully articulated a defense of judicial engagement with foreign legal materials as being essential to the role of courts in an increasingly globalized world.<sup>34</sup> And scholars like Professors Eric Posner and Cass Sunstein have pointed out that it is often possible to learn from practices of other states.<sup>35</sup> Even within the United States, they note, state courts frequently cite each other's decisions, notwithstanding the fact that they have no value as binding law.<sup>36</sup> This vigorous debate contrasts those who see foreign law as complementary and those who accuse them of using

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Anatoly I. Kovler, *European Convention on Human Rights in Russia*, 374 L'Europe en Formation 116, 116 (Winter 2014) (noting that the Russian State Duma "sent a clear signal that . . . the Russian Federation recognizes the jurisdiction of the European Court of Human Rights as binding" when it ratified the Convention on Human Rights).

<sup>31</sup> 487 US 815 (1988).

<sup>32</sup> *Id.* at 838.

<sup>33</sup> *Id.* at 868 n 4 (Scalia dissenting). See also *Atkins v Virginia*, 536 US 304, 347–48 (2002) (Scalia dissenting) (dismissing as irrelevant "the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people"); *Roper v Simmons*, 543 US 551, 624 (2005) (Scalia dissenting) (stating that "the basic premise of the Court's argument—that American law should conform to the law of the rest of the world—ought to be rejected out of hand").

<sup>34</sup> See Stephen Breyer, *The Court and the World: American Law and the New Global Realities* 7 (Vintage 2015).

<sup>35</sup> Eric A. Posner and Cass R. Sunstein, *The Law of Other States*, 59 Stan L Rev 131, 171 (2006).

<sup>36</sup> *Id.* at 133–35.

it as a substitute for US law. Indeed, because of this threat of invasion of foreign material into the *corpus juris*, some of these writers frame foreign law as an irritant.

In a book-length exploration of the issue of how judges should engage with foreign and international law in the course of constitutional interpretation, Professor Vicki Jackson has called for a posture of cautious engagement with transnational materials.<sup>37</sup> She views this stance as a kind of middle ground between approaches like Justice Scalia's, which she characterizes as one of "resistance," and those who would argue for "convergence" of norms, without regard to national-level differences.<sup>38</sup> The latter may in some cases be required by constitutional or international law, and national courts have sometimes chosen to construe their domestic laws in accordance with international human rights law.

In Jackson's framework, judicial engagement with foreign materials has at least two modes.<sup>39</sup> One she calls deliberative engagement, which is focused "on the degree to which considering international or foreign material can aid the judge in a deeper, or better, appreciation of her own constitution and in attaining that distance from her own situation which may promote more impartial decision-making."<sup>40</sup> In this mode there is no obligation to consider foreign or international law, but it is seen as complementing domestic interpretation. The second mode is what she calls relational, in which there is either a legal or felt obligation to consider transnational sources. As she put it in an earlier work:

What is important here is that foreign and especially relevant international law must be considered, though not necessarily followed. On this view, elsewhere described as recognizing the "relational authority" of foreign courts' decisions on issues of domestic constitutional law, foreign and international law, especially on human rights, have a decided gravitational pull, if they concern parallel commitments and decisions and especially if they represent a consensus or decisive trend. This pull . . . demands consideration, though not necessarily convergence.<sup>41</sup>

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<sup>37</sup> Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* 255–56 (Oxford 2010).

<sup>38</sup> *Id.* at 8, 17.

<sup>39</sup> *Id.* at 72–73.

<sup>40</sup> Vicki C. Jackson, *Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement*, 35 *Fed L Rev* 161, 175 (2007).

<sup>41</sup> *Id.* at 175–76 (citation omitted).

In other words, judges should take international sources seriously but are under no obligation to adopt solutions adopted elsewhere. In this mode, the framing of law as an irritant is gone. Judges are perfectly capable of taking international norms seriously without risking the integrity of the constitutional order. The two levels are, in theory, complements.

Jackson looks at the problem from the perspective of national constitutional judges. International lawyers and judges tend to have a different perspective. Their concern is not whether to engage with domestic norms, for it is nearly always the case that effective international adjudication requires domestic actors to implement a decision. This means there is little choice in the matter. Some international judges respond by insisting on the normative primacy of international law, treating it essentially as a substitute for domestic lawmaking. The Inter-American Court's doctrine of conventionality control, referred to above, is an example.<sup>42</sup> However, international judges sometimes take a stance of more complementarity, as when they grant a degree of deference to national authorities. The ECHR, for example, has adopted the doctrine of the margin of appreciation, in which it will allow national actors some leeway in their interpretation of rights under the European Convention on Human Rights.<sup>43</sup> This approach is one which sees national systems of human rights protection and the international system as essentially complementary.

In short, when adjudicating claims that implicate the relationship between national and international law, judges have an array of possible approaches. These are, of course, sometimes determined by positive law, and the articulated relationship between international and domestic norms in law. Yet in their attitudes, judges also exhibit moods that frame the relationship, including attitudes of irritation, or of viewing the two levels as effective substitutes or complements. With these preliminaries out of the way, let us now turn to the *Garza* case.

### III. THE *GARZA* CASE

The petitioner, Juan Raul Garza, was sentenced to death by a Texas jury for each of three murders committed in furtherance

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<sup>42</sup> See text accompanying note 7.

<sup>43</sup> See generally Kathleen Cavanaugh, *Policing the Margins: Rights Protection and the European Court of Human Rights*, 4 *Eur Hum Rts L Rev* 422 (2006).

of a continuing criminal enterprise.<sup>44</sup> Facing the death penalty, he exhausted domestic remedies in the United States and then filed a petition with the Inter-American Commission on Human Rights (“Commission”), a body set up by the Organization of American States (OAS).<sup>45</sup> The OAS is an organization established in 1948, with thirty-five member states throughout the Western hemisphere.<sup>46</sup> The OAS has created several legal instruments related to human rights, of which the two most important are the American Declaration of the Rights and Duties of Man of 1948 (American Declaration), and the American Convention on Human Rights of 1969 (American Convention).<sup>47</sup> The American Declaration is a statement of human rights applicable in the region, though not explicitly legally binding.<sup>48</sup> The American Convention, on the other hand, is a binding treaty that also calls for the creation of an Inter-American Court of Human Rights.<sup>49</sup> Eventually established in 1978 when the American Convention entered into force, this body adjudicates cases of alleged human rights violations by state parties; it also issues advisory opinions interpreting primary legal texts at the request of the OAS itself, an OAS organ, or a member state.<sup>50</sup>

The OAS Charter calls for the creation of the Commission, with the role to “promote the observance and protection of human rights.”<sup>51</sup> Created in 1959, the Commission’s current role is to accept petitions asserting violations of the American Declaration. If the Inter-American Commission finds a violation, it can visit

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<sup>44</sup> *Garza*, 253 F3d at 919–20.

<sup>45</sup> *Id.* at 920.

<sup>46</sup> Organization of American States, *About Us*, archived at <https://perma.cc/6DUE-YB38>.

<sup>47</sup> The American Declaration was signed in Bogotá, Colombia, in April 1948, at the Ninth International Conference of American States. It was ratified on May 2, 1948, preceding the ratification of the United Nations’ Universal Declaration of Human Rights by seven months. See American Declaration at 1 (cited in note 15). The American Convention, also known as the “Pact of San José,” was adopted on November 22, 1969, in San José, Costa Rica. It entered into force in 1978 when an eleventh state acceded to the American Convention. See American Convention on Human Rights, “Pact of San José, Costa Rica,” 1144 UNTS 123, 144 (1969). In addition, in 1990 the OAS promulgated a Protocol to the American Convention on Human Rights to Abolish the Death Penalty. This Protocol was adopted on June 8, 1990, in Asunción, Paraguay. Inter-American Commission on Human Rights, *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition* \*4 n 6 (2011), archived at <https://perma.cc/WR6K-92H3>.

<sup>48</sup> See generally American Declaration (cited in note 15).

<sup>49</sup> American Convention, Art 33, 1144 UNTS at 153 (cited in note 47).

<sup>50</sup> American Convention, Arts 63–64, 1144 UNTS at 159–60 (cited in note 47).

<sup>51</sup> Organization of American States, *Charter of the Organization of American States* Part Two, Ch XV, Art 106, archived at <https://perma.cc/X85N-U2QM>.

member states and issue findings, or, if the country concerned is a state party to the American Convention, file a case before the Inter-American Court of Human Rights.<sup>52</sup> The Commission's rules call for the exhaustion of domestic remedies before a petition is admissible.<sup>53</sup>

Garza asserted several violations of his rights embodied in the regional instruments. Although both the American Declaration and the American Convention recognize a right to life, neither prohibits the death penalty. The American Declaration is silent, likely because of its age.<sup>54</sup> Article 4 of the American Convention provides certain limits on the death penalty for those countries that have not yet abolished it.<sup>55</sup> But Garza's main claim was a violation of his rights to due process and a fair trial under the American Declaration.<sup>56</sup>

The Commission heard Garza's petition and found a procedural violation in sentencing, namely that the government had introduced evidence of five murders Garza had allegedly committed in Mexico, in addition to the three he was being tried for. While this is perfectly legal under US sentencing law, the Commission found that it violated the American Declaration's guarantees of due process and a fair trial, and recommended that the United States commute Garza's sentence and reform its evidentiary laws.<sup>57</sup> Armed with the Commission's finding, Garza raised a petition for habeas corpus, which the district court denied; Garza then appealed to the Seventh Circuit for a stay of execution.<sup>58</sup>

The most complex issue before the court was a procedural question about jurisdiction.<sup>59</sup> The jurisdictional question involved

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<sup>52</sup> Organization of American States, *What Is the IACHR?*, archived at <https://perma.cc/B3U9-EGP2>.

<sup>53</sup> Organization of American States, *Rules of Procedure of the Inter-American Commission on Human Rights* Title II, Ch II, Art 31, archived at <https://perma.cc/8ECA-WWCB>; American Convention, Arts 46, 48–50, 61, 1144 UNTS at 155–57, 159 (cited in note 47).

<sup>54</sup> The European Convention on Human Rights, adopted in 1950, similarly did not abolish the death penalty, instead adopting an Optional Protocol decades later. See Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Council of Europe, ETS No 114, 22 ILM 538 (1983).

<sup>55</sup> American Convention, Art 4, 1144 UNTS at 145 (cited in note 47).

<sup>56</sup> See American Declaration, Art XVIII (cited in note 15) (guaranteeing the right to a fair trial); American Declaration, Art XXVI (cited in note 15) (guaranteeing the right to due process).

<sup>57</sup> *Garza v United States*, Case 12.243, Rep No 52/01, ¶ 39 (Inter-Am Ct Hum Rts 2000).

<sup>58</sup> *Garza*, 253 F3d at 920.

<sup>59</sup> See *id* at 920–24.

the intersection of 28 USC § 2255 and 28 USC § 2241, the two statutes that govern habeas challenges brought by prisoners. In general, federal prisoners who want to appeal their convictions or sentences must do so under § 2255, but Garza's application was brought under § 2241.<sup>60</sup> Second or successive petitions to challenge a conviction under § 2255 are prohibited without a court's permission; moreover, § 2255 specifically prohibits challenging convictions under § 2241.<sup>61</sup> However, § 2255 does carve out an exception to this latter prohibition in the form of its "savings clause," according to which a prisoner may bring a § 2241 petition if the § 2255 remedy "is inadequate or ineffective to test the legality of [the prisoner's] detention."<sup>62</sup> In her decision, Judge Wood concluded that Garza's case satisfied this savings clause exception.<sup>63</sup>

Garza's central argument was not that the American Convention was directly applicable under US law, a claim that would likely fail on its face. Instead, it was that an international treaty obligation was created by the Commission's report, which claimed that his execution violated international law.<sup>64</sup> Because of exhaustion requirements under the American Convention, there was no way this could have been obtained before his first habeas filing. It was the very act of issuing the report that created this judicially enforceable right, and before that act was performed on April 4, 2001, no such right existed.<sup>65</sup> It therefore would have been impossible for Garza to have argued in his initial § 2255 petition that his conviction violated any treaty obligation. The court concluded that this was sufficient grounds to satisfy the savings clause, and that Garza was thus entitled to a petition under § 2241.<sup>66</sup>

Having established its jurisdiction to hear the case, the court then considered the merits of Garza's petition for a stay of execution. In order to successfully obtain a stay of execution, a petitioner must establish that he has presented a "substantial ground" on which relief could be granted.<sup>67</sup> This in turn raised the question whether the Inter-American Commission Report cited by Garza created an enforceable and binding obligation on the United States. However, the court pointed out that, generally

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<sup>60</sup> *Id.* at 921.

<sup>61</sup> *Id.* at 920–21.

<sup>62</sup> *Garza*, 253 F3d at 921, quoting 28 USC § 2255.

<sup>63</sup> *Garza*, 253 F3d at 922.

<sup>64</sup> *Id.* at 923.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Delo v Stokes*, 495 US 320, 321 (1990).

speaking, international agreements can generate this sort of domestically enforceable private right if and only if such rights are explicitly contemplated in the agreement in question.<sup>68</sup> The court found that there was no evidence that the treaties cited by Garza created the sort of privately enforceable rights his petition required.<sup>69</sup> There were three operative documents in this case: the OAS Charter, ratified by the United States in 1951; the American Declaration, developed by the OAS; and the American Convention, also developed by the OAS, which the United States signed in 1978 but never ratified.<sup>70</sup> As noted above, the American Declaration is only an aspirational document, and thus does not by its own terms create enforceable obligations for OAS member states (which Garza himself admitted in his petition).<sup>71</sup> In contrast, the court recognized that the American Convention does obligate its member states to submit to the jurisdiction of the Inter-American Court and treat them as binding; however, the United States has not ratified the American Convention, so it fails to carry the full force of a binding treaty.<sup>72</sup>

The opinion is remarkable for its taking seriously the international instruments. Noting that “[n]o court of appeals has yet decided whether the Inter-American Commission’s decisions create obligations binding on the United States,” Judge Wood tackled the question by first looking at the instruments themselves.<sup>73</sup> The OAS itself recognizes the substantive difference between the obligations incumbent on member states that have ratified the American Convention and those (like the United States) that have not. According to the Statute of the Inter-American Commission, the Commission can only issue recommendations to the governments of OAS nonratifying member states, which are not binding by their own terms.<sup>74</sup> While member states, including the United States, that have not ratified the American Convention may still be addressed by the Commission,<sup>75</sup> they are subject only

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<sup>68</sup> *Garza*, 253 F3d at 924.

<sup>69</sup> *Id.* at 926.

<sup>70</sup> *Id.* at 924–25. See also Joseph Diab, *United States Ratification of the American Convention on Human Rights*, 2 *Duke J Comp & Intl L* 323, 324–26 (1992).

<sup>71</sup> *Garza*, 253 F3d at 925.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Statute of the Inter-American Commission on Human Rights, OAS Off Rec OEA/Ser P/IX 0.2/80, Art 20 (1979):

to the obligations created by the OAS Charter and the American Declaration; moreover, the Statute explicitly enumerates the powers that the Commission is granted with respect to these member states.<sup>76</sup> The court's readings both of this Statute and of the OAS Charter concluded that no judicially enforceable obligations were created.<sup>77</sup> The OAS Charter's references to the American Convention indeed imply that the Charter itself was not intended to serve the purpose of creating binding obligations on its signatories, instead deferring that power to another legal instrument altogether (namely, the American Convention).<sup>78</sup> In light of the extremely slim likelihood that this sort of nonbinding recommendation could create a judicially cognizable right in an individual, the court concluded that Garza's chances of success on the merits were not "substantial," and therefore denied his request for a stay of execution.<sup>79</sup> Garza's appeal to the Supreme Court for a stay was denied,<sup>80</sup> and he was executed on June 19, 2001.<sup>81</sup>

The Inter-American Commission reacted strongly, deploring "the failure of the United States and the state of Indiana to comply with [the] recommendation, an act which constitutes a violation of the [United States'] international human rights obligations under the Charter of the Organization of American States and related instruments as an OAS Member State."<sup>82</sup> The Commission thus read the opinion as failing to recognize its superior role in adjudicating this question; it sought to substitute its own views on procedural fairness for those of the US legal system.

The framing of the American Declaration as binding on the United States has been slowly creeping into the jurisprudence of

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In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers . . . (b) to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights.

<sup>76</sup> See *id.*

<sup>77</sup> *Garza*, 253 F3d at 925–26.

<sup>78</sup> *Id.* at 925 ("[T]he OAS Charter's reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members.").

<sup>79</sup> *Id.* at 926.

<sup>80</sup> *Garza v Lappin*, 533 US 924, 924 (2001).

<sup>81</sup> Death Penalty Information Center, *Executions Under the Federal Death Penalty*, archived at <https://perma.cc/SBV8-XLUT>.

<sup>82</sup> Inter-American Commission on Human Rights, *Follow-up Factsheet of Report No. 52/01 ¶ 8* (2018) ("Commission Follow-up Report").



the Inter-American Court as well. While acknowledging that the American Declaration is not a treaty, the Inter-American Court found that the Commission was empowered by Article 106 of the OAS Charter to protect those rights found in the American Declaration. Because the American Charter is a binding treaty, the court said, it has legal effect, and the fact that “the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect, nor that the Court lacks the power to interpret it” through the channel of the OAS Charter.<sup>83</sup> Although the Inter-American Court cannot exercise jurisdiction over states not party to the American Convention, the Commission nevertheless maintains that the American Declaration acquired legally binding force when the OAS Charter was amended in 1967 and provided for the creation of the American Convention. This amendment, combined with Articles 1(2)(b) and 20 of the Commission’s Statute, incorporated the American Declaration by reference into the OAS Charter, arguably elevating the normative status of the American Declaration’s contents to that of a treaty.<sup>84</sup> The Commission has further argued that member states are bound by the Vienna Convention on the Law of Treaties of 1969 to exercise good faith in complying with its recommendations.<sup>85</sup>

From the perspective of the OAS, Judge Wood was substituting US law for an international obligation. However, her own treatment of it was much more as a complement. Her handling of the habeas petition in the case illustrates Judge Wood’s scrupulous procedural fairness and rigor, and is uncontroversial in its statement of the status of the relevant international law in the

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<sup>83</sup> Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, *Advisory Opinion OC-10/89*, 29 ILM 379, 390 at ¶ 47 (Inter-Am Ct Hum Rts 1989). See also Commission Follow-up Report ¶ 11 (cited in note 82) (“[T]he American Declaration is recognized as constituting a source of legal obligation for OAS Member States, including in particular those States that are not parties to the American Convention on Human Rights.”).

<sup>84</sup> Thomas Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 Am J Intl L 828, 835 (1975) (“The human rights provisions of the American Declaration can today consequently be deemed to derive their normative character from the OAS Charter itself.”).

<sup>85</sup> Commission Follow-up Report ¶ 11 (cited in note 82). While the United States signed the Vienna Convention on the Law of Treaties in 1970, it has not ratified it. See US Department of State, *Vienna Convention on the Law of Treaties*, archived at <https://perma.cc/E7SZ-9MVD>. The US executive branch and courts generally treat the Vienna Convention provisions as embodying customary international law. See Stephen P. Mulligan, *International Law and Agreements: Their Effect upon US Law* 2 n 13 (Congressional Research Service, Sept 19, 2018).

United States. There is little doubt that the United States has consistently adopted the position that the American Declaration is an aspirational document.<sup>86</sup>

In her approach, she illustrated Professor Jackson's strategy of engagement with the relevant material. International law could not displace procedural rules in the United States but had to be carefully assessed in terms of its normative status. One might imagine a different jurist, Justice Anthony Kennedy perhaps, who would have noted that the United States is the only country in the OAS that retains and actually implements capital punishment.<sup>87</sup> But Judge Wood took international law on its own terms, examining the actual legal value of the relevant instruments.

To illustrate how distinct this approach is, let us engage in an exercise of "social-science fiction."<sup>88</sup> Suppose that the United States *had* ratified the American Convention and was thus obligated to obey the pronouncement of the Inter-American Court of Human Rights. Under the terms of the Convention, member states are obligated to implement the rulings of the Court.<sup>89</sup> Suppose further that the Inter-American Court ruled that Garza was entitled to a stay of execution. Judge Wood, ruling in 2001, would likely have found that the Inter-American Court had created a binding legal obligation on the United States, and that, as a matter of law, Garza had demonstrated a "substantial ground" upon which relief could be granted. One can very plausibly imagine the stay being granted for further proceedings, during which a US court would weigh the particular findings of the Inter-American Court in light of habeas law. Whether Garza would have ultimately prevailed is beside the point for present purposes. The point is that a change in the relevant status would make a difference in the analysis of any judge, not just one adopting a mood of considering international norms as complements.

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<sup>86</sup> See *Advisory Opinion OC-10/89*, 29 ILM at 381–82 ¶ 12 (quoting the US position in response to the Inter-American Court's assessment of the normative status of the American Declaration).

<sup>87</sup> The other thirteen "retentionist member states" have not enforced the death penalty in at least a decade, and most for much longer. See The Death Penalty Project, *Inter-American Commission Urges Retentionist Member States Within the OAS to Eliminate the Death Penalty* (Dec 19, 2019), archived at <https://perma.cc/B55R-TEBA>. See also Organization of American States, *IACHR Welcomes Abolition of Death Penalty in New Hampshire, United States* (Jan 17, 2019), archived at <https://perma.cc/3AP4-7LTZ>.

<sup>88</sup> For examples of social-science fiction, see generally Nelson Polsby, ed, *What If? Explorations in Social-Science Fiction* (Lewis 1982).

<sup>89</sup> See American Convention, Art 68, 1144 UNTS at 160 (cited in note 47).

This is not the approach the US Supreme Court has taken in recent years. Consider the series of cases involving death row inmates who have claimed that the United States has failed its obligations under the Vienna Convention on Consular Relations<sup>90</sup> (Vienna Convention) to provide notification of consular rights. Two of these cases ended up before the International Court of Justice (ICJ) in the Hague, the principal judicial organ of the United Nations with authority to review disputes under the Vienna Convention.<sup>91</sup> Under Article 36 of the Vienna Convention, foreign nationals arrested in the territory of a state party have the right to consular notification.<sup>92</sup> While the United States ratified the Vienna Convention in 1969, many US law enforcement agencies do not routinely provide notice of this right, and there is a lack of consensus among domestic courts in the United States as to whether Article 36 confers an individual right to consular notification.<sup>93</sup> However, the US Supreme Court, in three cases, has not decided the issue.<sup>94</sup>

The ICJ held that Article 36 did indeed confer an individual right to consular notification and held that the United States had breached its duty under the Vienna Convention. It called on the United States to review and reconsider convictions and sentences of the foreign nationals.<sup>95</sup> In *Medellin v Texas*,<sup>96</sup> the Supreme Court addressed the status of these ICJ rulings.<sup>97</sup> Of course, the United States had ratified the United Nations Charter establishing the ICJ and had thus agreed to comply with any adverse

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<sup>90</sup> Vienna Convention on Consular Relations, 596 UNTS 261, TIAS No 8638 (Apr 24, 1963, entered into force March 9, 1967).

<sup>91</sup> Case Concerning Avena and Other Mexican Nationals (*Mexico v United States*), 2004 ICJ 12 (*Avena*); LaGrand Case (*Germany v United States*), 2001 ICJ 466.

<sup>92</sup> Vienna Convention, Art 36, 596 UNTS at 292.

<sup>93</sup> Compare, for example, *United States v Emuegbunam*, 268 F3d 377, 394 (6th Cir 2001) (“[W]e hold that the Vienna Convention does not create a right for a detained foreign national to consult with the diplomatic representatives of his nation that the federal courts can enforce.”), with *Jogi v Voges*, 480 F3d 822, 831 (7th Cir 2007) (“We conclude that even though many if not most parts of the Vienna Convention address only state-to-state matters, Article 36 confers individual rights on detained nationals.”).

<sup>94</sup> *Medellin v Texas*, 552 US 491, 502–03 (2008); *Sanchez-Llamas v Oregon*, 548 US 331, 343 (2006); *Breard v Greene*, 523 US 371, 376 (1998) (stating that the Vienna Convention “arguably” confers an individual right to consular assistance).

<sup>95</sup> *Avena*, 2004 ICJ at ¶¶ 106, 121. The Inter-American Court has also held the right to be an individual one, in an Advisory Opinion. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, *Advisory Opinion OC-16/99*, § XIII, ¶ 1 (Inter-Am Ct Hum Rts 1999).

<sup>96</sup> 552 US 491 (2008).

<sup>97</sup> *Id* at 497–98.

rulings.<sup>98</sup> But in a 6–3 decision authored by Chief Justice John Roberts, the Court ruled that the UN Charter was not self-executing and thus created no binding obligations within US law.<sup>99</sup>

In dissent, Justice Breyer argued that the UN Charter was indeed self-executing, and thus “the supreme Law of the Land” under the Supremacy Clause of the Constitution.<sup>100</sup> His approach reflects his longstanding call for engagement. The judgments of international tribunals are not substituting for the American legal system, he might have argued. Instead they are complementing it, providing an authoritative interpretation of an international treaty on which domestic courts have not been able to come to a consensus. He would indeed have directly applied the ICJ judgment.

I cannot say how a Justice Wood would have come out in the case, though I suspect she would have been closer to Justice Breyer’s camp than Chief Justice Roberts’s. In a later habeas decision authored by Judge Richard Dickson Cudahy, the Seventh Circuit held that a failure of counsel to raise the consular notification issue was cognizable and potentially worthy of an evidentiary hearing to see if prejudice had arisen.<sup>101</sup> The Seventh Circuit noted that in *Sanchez-Llamas v Oregon*,<sup>102</sup> the Supreme Court had held that Article 36 claims might be raised as part of a Sixth Amendment ineffective assistance of counsel claim.<sup>103</sup> This is the paradigm of a complementary role. The international norms may not be directly binding, substituting for the domestic judgment. But they (i) can be given effect through domestic norms, and (ii) can inform our assessment of a procedural claim like ineffective right to counsel.

In short, an approach that does not reject international norms out of hand as an irritant, or does not accept international tribunals’ claims that they can substitute for the judgments of domestic courts, represents a kind of noble middle path for judges. Like Jackson’s concept of engagement, it calls on judges to exercise judgment about the proper relationship of international and domestic law.

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<sup>98</sup> UN Charter Art 94(1); *Medellin*, 552 US at 507–08.

<sup>99</sup> *Medellin*, 552 US at 508–09.

<sup>100</sup> *Id* at 538 (Breyer dissenting), quoting US Const Art VI, cl 2.

<sup>101</sup> *Osagiede v United States*, 543 F3d 399, 413–14 (7th Cir 2008).

<sup>102</sup> 548 US 331 (2006).

<sup>103</sup> *Osagiede*, 543 F3d at 407.

## CONCLUSION

The opinion in *Garza v Lappin* is not one of the more important in the Wood canon, and the issue we are focusing on—the status of international law—was hardly a tough call. One hundred and six courts have cited the case at the time of this writing, mostly for the analysis of the two habeas statutes, with a handful noting the analysis of self-executing treaties.<sup>104</sup> Yet the approach Judge Wood took in the case demonstrates many of her great virtues on the bench. The opinion is clear, nonideological, and impeccable in its analysis of procedural issues. She demonstrated great concern with fairness and took Garza’s arguments seriously. These arguments did not prevail on the merits because the law of the United States did not give the same weight to the Commission’s report that it was itself asserting. Our law is not as open to the pronouncements of international bodies as is the law of some other jurisdictions. But in treating domestic and international law as conceptually complementary, Judge Wood showed a good deal of good judgment.

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<sup>104</sup> See *Gross v German Foundation Industrial Initiative*, 549 F3d 605, 615 (3rd Cir 2008) (citing *Garza* for the self-executing doctrine); *Mora v New York*, 524 F3d 183, 193 (2d Cir 2008) (citing *Garza* for the proposition that “[w]hether a particular international agreement provides for private enforcement is a matter for judicial interpretation of the agreement”); *Dutton v Warden, FCI Estill*, 37 F Appx 51, 53 (4th Cir 2002) (citing *Garza* while explaining that the International Covenant on Civil and Political Rights is not self-executing and therefore denying habeas relief).