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International Human Rights Law Perspective on Grutter and Gratz

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INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVE ON *GRUTTER* AND *GRATZ*

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There is an international human rights law aspect to *Grutter v. Bollinger*[1] and *Gratz v. Bollinger*[2] that might be missed by many lawyers and scholars who rarely consider any legal domain beyond the limits of the U.S. Constitution. Indeed, *Grutter* and *Gratz* reflect a trend in Supreme Court opinions to use international human rights sources in interpreting the Constitution.

Justice Ginsburg's concurring opinion in *Grutter* relies upon international human rights law in noting that

> [t]he Court's observation that race-conscious programs must have a logical end point, accords with the international understanding . . . of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994 . . . instructs [that affirmative action measures] "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."[3]

In *Grutter* Justice Ginsburg also cited Article 4(1) of the Convention on the Elimination of All Forms of Discrimination against Women,[4] which provides for affirmative action, but limits such spe-

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1. 539 U.S. 306 (2003). As discussed in detail by other contributors to this symposium: After being denied admission to the University of Michigan Law School, Grutter, a white student, sued on the basis that she had been discriminated against on the basis of her race. The case challenged the validity of the school's affirmative action program in admissions. The Court found that the law school's program did not violate the Fourteenth Amendment guarantee of equal protection and that diversity was a sufficiently compelling interest that permitted the use of race in admissions programs of the type used by the law school.

2. 539 U.S. 244 (2003). *Gratz* involved a challenge to the affirmative action program for the undergraduates at the University of Michigan. The Supreme Court found that the program was not narrowly tailored to the compelling interest in diversity and therefore violated the Fourteenth Amendment's guarantee of equal protection.

3. *Grutter*, 539 U.S. at 344.

4. Convention on the Elimination of All Forms of Discrimination against Women,

cial measures to the length of time required to achieve the goal of de facto equality. Furthermore, in her dissenting opinion in *Gratz*, Justice Ginsburg referred to her use of international law in *Grutter*. In distinguishing between invidious and remedial discrimination, she states that "[c]ontemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate *de facto* equality."[5]

In supporting affirmative action, Justice Ginsburg appropriately relied upon the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention),[6] which has been ratified by the United States and 168 other nations, that is, over three quarters of the countries in the world. By ratifying the Race Convention the United States has committed itself under Article 5 "to prohibit and to eliminate racial discrimination in all its forms"[7] and to provide under Article 2 for affirmative action so long as such special measures are required.[8] The Race Convention authorized the Committee on the Elimination of Racial Discrimination (Race Committee) to review compliance with the treaty's provisions. The Clinton Administra-

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G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.

5. *Gratz*, 539 U.S. at 302.

6. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969. The Race Convention was signed by President Lyndon Johnson in 1966, submitted to the U.S. Senate by President Jimmy Carter in 1978, subject to the advice and consent of the Senate on June 24, 1994 (140 Cong. Rec. S7634-02 (daily ed., June 24, 1994)), and ratified by the United States on October 21, 1994, with three reservations, one understanding, one declaration, and one proviso. Justice Ginsburg may have been responding to an amicus brief submitted on behalf of Human Rights Advocates and the University of Minnesota Human Rights Center urging the Court to consider such international sources. Brief of Amici Curiae, Human Rights Advocates and the University of Minnesota Human Rights Center in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241); Gratz v. Bollinger, 539 U.S. 244 (No. 02-516) (2003) *available at* http://www1.umn.edu/humanrts/center/delavega.pdf.

7. Race Convention, *supra* note 6, Art. 5.

8. *Id.* Art. 2(2): " States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." The World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance called upon "States to establish, on the basis of statistical information, national programmes, including affirmative or positive measures, to promote the access of groups of individuals who are or may be victims of racial discrimination to basic social services, including primary education, basic health care and adequate housing." Programme of Action 25, 43 ¶100 *in* U.N. Doc. A/CONF.189/12 (2001). *See also* Marc Bossuyt, *The Concept and practice of affirmative action*, U.N. Doc. E/CN.4/Sub.2/2002/21 (2002).

tion submitted[9] and the Bush Administration presented[10] the first U.S. report to Race Committee in which the U.S. identified several federal statutes and regulations that provide for affirmative action. In its concluding observations on the U.S. report the Race Committee "emphasize[d] that the adoption of special measures by States parties, when the circumstances so warrant, such as in the case of persistent disparities, is an obligation stemming from article 2, paragraph 2 of the Convention."[11]

Justice Ginsburg could also have referred to the International Covenant on Civil and Political Rights,[12] by which the U.S. and 150 other nations have pledged to "prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race . . . ."[13] The Covenant established the Human Rights Committee, which reviewed the first U.S. report and concluded, *inter alia*:

> The Committee emphasizes the need for the Government to increase its efforts to prevent and eliminate persisting discriminatory attitudes and prejudices against persons belonging to minority groups and women including, where appropriate, through the adoption of affirmative action. State legislation which is not yet in full compliance with the non-discrimination articles of the Covenant should be brought systematically into line with them as soon as possible.[14]

Lest one gets the impression that Justice Ginsburg is the only justice of the Supreme Court that is aware of these international legal sources, one should also refer to the learning process reflected by the Court's experience in regard to discrimination against homosexuals. In *Bowers v. Hardwick*[15] the Supreme Court held that the U.S. Constitution does not protect the right

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9. United States, Initial Report to the Committee on the Elimination of Racial Discrimination (Sept. 2000), http://www.state.gov/www/global/human_rights/cerd_report/cerd_report.pdf (visited Jan. 18, 2004).

10. Michael E. Parmly, Principal Deputy Assistant Secretary for the Bureau of Democracy, Human Rights, and Labor, Remarks to the Committee on the Elimination of All Forms of Racial Discrimination, Geneva, Switzerland, Aug. 3, 2001, http://www.state.gov/g/drl/rls/rm/2001/4485.htm (visited Jan. 18, 2004).

11. Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, U.N. Doc. CERD/C/59/Misc.17/Rev.3 (2001), para. 20.

12. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

13. *Id.* Art. 26.

14. Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/79/Add.50 (1995) 5, ¶39.

15. Bowers v. Hardwick, 478 U.S. 186 (1986).

to engage in consensual, adult, homosexual conduct. In a concurring opinion, Chief Justice Burger explained:

> Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law and the Western Christian Tradition.... To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.[16]

The Supreme Court failed in *Bowers* even to cite *Dudgeon v. United Kingdom*[17] in which the European Court of Human Rights had five years earlier held that an individual's fear of prosecution for male homosexual conduct constituted an unjustified interference with his right to respect for his private life. On June 26, 2003, the Supreme Court in *Lawrence v. Texas*[18] reversed *Bowers* and Justice Kennedy, writing for the majority, corrected Chief Justice Burger's statement:

> The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.... Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981) par. 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in

16. *Id.* at 196-97.

17. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (Ser.A) (1982), 4 Eur. H.R. Rep. 149 (1981).

18. Lawrence v. Texas, 123 S. Ct. 2472 (2003). International human rights law issues with respect to the right to privacy for consensual homosexual conduct were brought to the attention of the Supreme Court by Brief of Amici Curiae, Mary Robinson, Amnesty International U.S.A., Human Rights Watch, Interights, the Lawyers Committee for Human Rights, and Minnesota Advocates for Human Rights in support of Petitioners, Lawrence v. Texas, 123 S. Ct. 2472 (No. 02-1020) (2003), http://www.lchr.org/media/lawrence_texas_amici.pdf (last visited Jan. 16, 2004).

> *Bowers* that the claim put forward was insubstantial in our Western civilization.[19]

Another recent example of how international law and practice can be relevant to at least some justices can be found in the Supreme Court's June 20, 2002, decision in *Atkins v. Virginia*.[20] In holding that executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment, Justice Stevens supported the decision of six justices by noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." Justice Rehnquist, joined by Justices Scalia and Thomas, dissented observing, "I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."[21]

Another positive example can be found in *Thompson v. Oklahoma*,[22] in which a four-judge plurality of the Supreme Court ruled that the death sentence for an offender who was 15 at the time of the crime constituted cruel and unusual punishment proscribed by the Eighth Amendment. In the opinion, Justice Stevens cited international authorities in reasoning that the death penalty would "offend civilized standards of decency."[23] Justice Stevens' plurality opinion and Justice O'Connor in a separate decision referred to international treaties ratified or signed by the U.S. that explicitly prohibit juvenile death penalties, including the Covenant on Civil and Political Rights, the

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19. *Lawrence*, 123 S. Ct. at 2481.

20. Atkins v. Virginia, 536 US 304 (2002). International human rights law issues with respect to the execution of retarded persons were brought to the attention of the Supreme Court, Brief of Amicus Curiae the European Union, Atkins v. Virginia, 536 U.S. 304 (No. 00-8727) (2002). http://www.internationaljusticeproject.org/pdfs/emccarver.pdf (last visited Jan. 18, 2004).

21. Atkins, 536 U.S. at 316 n. 21. The dissenting opinion continued, "While it is true that some of our prior opinions have looked to 'the climate of international opinion,' Coker v. Georgia, 433 U.S. 584 (1977) (in which the Supreme Court found the death penalty for rape to be cruel and unusual punishment), to reinforce a conclusion regarding evolving standards of decency, see Thompson v. Oklahoma, 487 U.S. 815, 830 (1988) (plurality opinion); Enmund v. Florida, 458 U.S. 782 (1982); Trop v. Dulles, 356 U.S. 86, 102-03 (1958) (plurality opinion); we have since explicitly rejected the idea that the sentencing practices of other countries could "serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people." [citing the Supreme Court's decision in Stanford v. Kentucky, 492 U.S. 361, 369 n. 1 (1989)] (emphasizing that "American conceptions of decency... are dispositive") (emphasis in original); Atkins, 536 U.S. at 325 (Rehnquist, J. dissenting).

22. *Thompson*, 487 U.S. at 815. *See* Brief of Amicus Curiae Defense for Children International-USA, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169).

23. *Thompson*, 487 U.S. at 830.

American Convention on Human Rights,[24] and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.[25]

One year after *Thompson*, however, the Supreme Court concluded in *Stanford v. Kentucky*[26] that the death penalty for a crime committed at 16 or 17 years of age does not constitute cruel and unusual punishment. Writing for the five-judge majority, Justice Scalia rejected the relevance of international law and practices of other countries as a guide to construing the Eighth Amendment. The Court noted that where "the practices of other nations . . . can be relevant to determining whether a practice . . . occupies a place . . . in our Constitution, . . . they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people."[27]

So as one can see from this exchange, there is a difference of opinion on the Supreme Court of the United States as to the relevance of international law and practice in deciding Eighth Amendment cases, but one can say at least that when the Court is disposed to accept an Eighth Amendment argument, it has used whatever international law and practice might support its view. Looking at these cases more broadly from *Bowers* through *Grutter* one can see that the Supreme Court has haltingly developed a practice of referring to pertinent international human rights law when their attention is drawn[28] to the relevance of international principles and practice. The justices of the Supreme Court evidently do not like to find that the U.S. approach to human rights issues is different from the prevailing view in the world. Justice Ginsburg explained her perspective in *Grutter* and *Gratz* when she noted that some of the justices of the Supreme

24. American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 *entered into force* July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.71 doc.6 rev.1 at 25 (1988).

25. Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, Art. 68, *entered into force* Oct. 21, 1950.

26. Stanford v. Kentucky, 492 U.S. 361 (1989). *See* Briefs of Amici Curiae Amnesty International and the International Human Rights Law Group, Wilkins v. Missouri, *aff'd sub nom.* Stanford v. Kentucky, 492 U.S. 361 (1989) (Nos. 87-5765, 87-6026). *But see* Brief of Amicus Curiae Kentucky et al., Stanford v. Kentucky, 492 U.S. 361 (1989) (Nos. 87-5765, 87-6026) (opposing use of international law). The U.S. Supreme Court has decided to re-consider this issue. *See* note **Error! Bookmark not defined.** and related text, *infra.*

27. *Stanford*, 492 U.S. at 369 n.1.

28. The Supreme Court received amicus curiae briefs relating to human rights issues in *Atkins*, *Grutter*, *Gratz*, and *Lawrence*, but apparently not in *Bowers*. See *supra* notes 5, 17, 19.

Court are "becoming more open to comparative and international law perspectives."[29]

As Justice O'Connor has observed,

> Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts.... While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.[30]

Similarly, Justice Breyer said:

> Judges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances, for example in respect to multi-racial populations, growing immigration, economic demands, environmental concerns, modern technologies, and instantaneous media communication. Thus, it is not surprising to find that the European Court of Human Rights has issued decisions involving, for example, campaign finance laws and free expression or that the Supreme Court of India has written extensively about "affirmative action."[31]

While the Court and individual Justices talk about their increasing willingness to use international law as a tool for interpreting broad or vague principles such as "equal protection," "due process," "affirmative action," and "cruel and unusual pun-

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29. Ruth Bader Ginsburg, Address to American Constitution Society National Convention, Aug. 2003. While the Supreme Court did not mention international law in its opinion in Brown v. Board of Education, 349 U.S. 294 (1954), historians who interviewed the judges and lawyers in the case tell us that the Court was particularly motivated by the international embarrassment the United States Government had suffered in the early 1950s when ambassadors from African nations had been excluded from restaurants, restrooms, and other places of public accommodations in the Washington, D.C. area. The justices of the Supreme Court were persuaded by those publicized incidents that they must begin the process of ending racial segregation in the United States. *See* MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DIPLOMACY (2000); AZZA LAYTON, INTERNATIONAL POLITICS AND CIVIL RIGHTS POLICIES IN THE UNITED STATES 1941-1960 (2000); Doug McAdam, *On the International Origins of Domestic Political Opportunity Structures*, *in* SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS 251-67 (Anne Costain & Andrew McFarland eds.,1998).

30. Sandra Day O'Connor, *Keynote Address Before the Ninety-sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y INT'L. L. PROC. 348, 350 (2002).

31. Stephen Breyer, *The Supreme Court and the New International Law, Address Before the Ninety-seventh Annual Meeting of the Society of International Law* (Apr. 4, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html (last visited Nov. 18, 2003).

ishments," that interpretive approach could be more forcefully sustained by Article VI of the U.S. Constitution which says that treaties, together with federal statutes are the "the supreme Law of the Land."[32] Accordingly at least in principle, an earlier federal statute, a state constitutional provision, or a state law must yield to an inconsistent treaty.

The U.S. Supreme Court has sought to integrate treaties into the domestic legal order. For example, the Supreme Court has consistently held that "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."[33] Further, in *The Paquete Habana,*[34] the Supreme Court has addressed the power of courts to enforce customary international law. In invalidating the wartime seizure of fishing vessels as contrary to the law of nations, the Court observed: "International law is part of our law, and must be ascertained and administered by the courts."[35] Where no treaty or other legal authority is controlling, resort must be had to the customs of nations.

Nonetheless, U.S. judges have, with a few exceptions, generally exhibited great reticence in applying Article III's Supremacy Clause to treaties[36] and in making more general use of international standards in their decisions and have even appeared ignorant as to the application of international law. Former Supreme Court Justice Harry Blackmun criticized the Court's opinions of his time as showing "something less than a decent respect to the opinions of mankind" and that "at best, the Supreme Court enforces some principles of international law and some of its obligations some of the times."[37]

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32. U.S. CONST. Art. VI, cl. 2.

33. [Murray v. Schooner] The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804), *quoted in* Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); *see also* Ma v. Reno, 208 F.3d 815, 830 (9th Cir. 2000) ("we generally construe Congressional legislation to avoid violating international law." (citing Weinberger v. Rossi, 456 U.S. 25 (1982))), *affirmed sub nom.* Zadvydas v. Davis, 533 U.S. 678 (2001).

34. The Paquete Habana, 175 U.S. 677 (1900).

35. *Id.* at 700.

36. It is beyond the scope of this brief article to discuss the excuses courts have developed to avoid applying treaties; for example, courts often find that treaties are not self-executing.

37. Harry A. Blackmun, *The Supreme Court and the Law of Nations: Owing a Decent Respect to the Opinions of Mankind*, ASIL NEWSL. (American Society of Int'l Law, Wash., D.C.), Mar.-May 1994 1, 6. One example of such a failure was Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993) in which the Court upheld an executive order authorizing the summary return of boat people to Haiti and found that the order did not violate Article 33 of the U.N. Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* Oct. 4, 1967. Another example was Breard v. Greene, 523 U.S. 371 (1998), in which the Supreme

Judicial reluctance to use or ignorance about international human rights standards is inconsistent with the status of the United States as a powerful and influential nation, which at the beginning of the twenty-first century has become the world's sole Superpower. The economic and political influence of the United States has inspired other governments and peoples to emulate its democracy, its economic system, and its methods for protecting human rights. Its prominent position in the world community and dominance of the world's media have made the U.S. both the most visible nation—even as to its human rights problems—and at the same time has allowed it to ignore most international criticism.

While the U.S. encourages universal standards and resists arguments for cultural relativism from Asian and Islamic sources, it relies upon U.S. particularities in explaining its use of the death penalty (even for juvenile offenders), the large percentage of the U.S. population in prison, the profuse distribution of small arms in the population, many homeless living in the streets of U.S. cities, the failure of the U.S. to become a State party to such broadly ratified human rights treaties as the Convention on the Rights of the Child, the attempt by the U.S. to withdraw its signature from the Statute of the International Criminal Court (ICC), the campaign by the U.S. against the application of the ICC in other countries, the prolonged detention and ill-treatment of detainees suspected of terrorism, and military actions against other nations inconsistent with UN Charter and other provisions of international law.

The advent of a new willingness by the Supreme Court to consider international human rights law is in the process of being tested as this article goes to press in August 2004. During its 2003-04 term the Court granted *certiorari* on several highly controversial cases in which there could be significant international legal issues and applicable international norms. In the most visible of those cases, *Rasul v. Bush*,[38] the Supreme Court held that the *habeas corpus* statute, 28 U.S.C.A. § 2241, provided jurisdic-

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Court failed to comply with the International Court of Justice provisional measures to delay executions of accused who had not been accorded their right to be informed of consular assistance under the Vienna Convention on Consular Relations, 596 U.N.T.S. 261, *entered into force* March 19, 1967. On March 31, 2004, the International Court of Justice decided that the United States had similarly breached its obligations under the Vienna Convention in the case of 51 Mexican nationals who had been tried and sentenced to death without having been informed of their right to consular assistance. Avena and other Mexican Nationals (Mexico v. United States of America), March 31, 2004, 43 I.L.M. 581 (2004).

38. 124 S. Ct. 2686, 2686 (2004).

tion for twelve Kuwaiti citizens and two Australian nationals captured in Afghanistan to challenge their detention at the Guantánamo Bay Naval Base in Cuba. The Court avoided any constitutional or international law issues at stake in the case.

In *Sosa v. Alvarez-Machain*[39] the Supreme Court was compelled to refer to international human rights law in construing 28 U.S.C. § 1350, which gives the district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Court relied upon § 702 of the Restatement (Third) of Foreign Relations Law of the United States (1987) which provides that a state policy of "prolonged arbitrary detention" violates customary international law.[40] Even though the "arbitrary arrest" claim in the *Alvarez-Machain* case failed, the Court indicated that § 1350 would sustain claims for "violations of any international law norm with [a] definite content and acceptance among civilized nations . . . ."[41]

The Court decided in *Hamdi v. Rumsfeld*[42] that procedural due process under the Constitution required that a United States citizen originally captured in Afghanistan cannot be detained indefinitely by the U.S. Government on the ground that he is an "enemy combatant" without a meaningful opportunity to contest his detention before a neutral decisionmaker. The Supreme Court has also decided to consider the indeterminate detention of Mariel Cubans[43] as well as whether the execution of juveniles who committed murder at age 16 or 17 violates the prohibition of "cruel and unusual punishments" in the Eighth Amendment.[44]

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39. 124 S. Ct. 2739 (2004). In United States v. Alvarez-Machain, 504 U.S. 655 (1992), the Supreme Court narrowly construed an extradition treaty between the United States and Mexico, so as to permit the prosecution in California of a Mexican doctor who had been kidnapped from his country and transported to the U.S. by Mexican police acting in cooperation with U.S. Drug Enforcement Agency (DEA) agents. The Court refused to interpret the treaty in light of customary international law, which prohibits the action of one state on the territory of another state. Instead, it concluded that the kidnapping violated neither U.S. law nor the U.S.-Mexico extradition treaty. In the subsequent criminal trial the doctor was found not guilty and he then sued the U.S. and Mexican authorities in U.S. courts under the Alien Torts Claims Act, 28 U.S.C. 1350.

40. *Id.* at 2745.

41. *Id.* at 2766.

42. 124 S. Ct. 2633 (2004).

43. Benitez v. Wallis, 337 F.3d 1289 (11th Cir. 2003), cert. granted, 124 S. Ct. 1143 (2004) (No. 03-7434).

44. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, Roper v. Simmons, 124 S. Ct. 1171 (U.S. Jan 26, 2004) (No. 03-633).