The Supreme Court’s most recent use of foreign and international law

By Cindy G. Buys

In recent years, the Rehnquist Court has been engaged in a heated debate regarding the proper role of international law in the interpretation of the U.S. Constitution. This debate surfaced again most recently in the Supreme Court’s opinion earlier this month in *Roper v. Simmons*, 125 S.Ct. 1183 (2005). In *Roper*, the Supreme Court was called on to reconsider whether the Eighth Amendment’s prohibition on “cruel and unusual punishments” forbids the execution of a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime. This article briefly summarizes this debate and suggests some possible solutions.

Just 15 years ago, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), a divided Supreme Court upheld the ability of states to impose capital punishment on persons between the ages of 15 and 18. At that time, the Court determined that no national consensus existed sufficient to label such punishment cruel and unusual. In *Roper*, the Supreme Court held that enough states have now abolished the death penalty for juvenile offenders to warrant a finding of a national consensus against the execution of juvenile offenders. As a result, a 5-4 majority of the *Roper* court held that *Stanford* is no longer controlling.

The *Roper* decision is ripe with issues of proper constitutional interpretation. Of particular interest to readers of this newsletter is the use of international law by the Court. Section IV of the majority opinion is devoted to the topic of foreign and international law. There, the Court states that its decision “finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” The Court further states that “while this reality is not controlling,” the Court “has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition on ‘cruel and unusual punishment’ for almost 50 years. The Court goes on to cite several international treaties that ban the juvenile death penalty, including the U.N. Convention on the Rights of the Child, the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights, and the African Charter on the Rights and Welfare of the Child. Of seven other countries that have executed juveniles since the *Stanford* decision, the Court states that all of them have since abolished or disavowed the practice. As a result, the Court concludes, “it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.” The Court places especial emphasis on the fact that the United Kingdom has long since abolished the juvenile death penalty. The Court believes that the United Kingdom’s experience has particular relevance in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins (it is modeled on a parallel provision in the English Declaration of Rights of 1689).

Finally, the Court concludes that while the overwhelming opinion of the world community against the juvenile death penalty is not controlling, it does provide “respected and significant confirmation” for the Court’s conclusions.

Justice O’Connor dissents from the majority opinion for two reasons. First, she believes there is insufficient evidence of a national consensus against the juvenile death penalty. Second, she believes that even if most juveniles lack the same maturity as adults, at least some juveniles are sufficiently mature to warrant the application of the death penalty to their criminal conduct. She also discusses the appropriate use of foreign and international law. She states that because she believes there is lack of national consensus, she cannot assign a “confirmatory role to the international consensus described by the Court.” However, she states that reference to foreign and international law is relevant to the Court’s assessment of evolving standards of decency because of the special character of the Eighth Amendment, which draws its meaning directly from the maturing values of a civilized society. In this case, however, the existence of a global consensus cannot alter the fact that domestic consensus is lacking.

Justice Scalia also wrote a dissenting opinion, in which Justice Thomas and Chief Justice Rehnquist joined, once again attacking the use of foreign and international law by the majority. Justice Scalia accuses the majority of treating the views of U.S. citizens as “essentially irrelevant” while “the views of other countries and the so-called international community take center stage.” He points out that the President and the Senate, the political bodies charged with making and ratifying treaties, have specifically declined to join the Convention on the Rights of the Child and have entered a reservation to the ICCPR preserving the right to execute juveniles.

According to Justice Scalia, these facts suggest that our country has not reached a national consensus against the juvenile death penalty. He also takes the majority to task for not inquiring more deeply into whether foreign legal systems are sufficiently similar to that of the United States such that fair comparisons can be made. Most fundamentally, however, Justice Scalia rejects outright the idea that American law should conform to the laws of the rest of the world. In fact, he points out that when the practices of foreign nations do not conform to the views of the majority of the Court, those foreign practices are rejected. He cites to examples such as the Court’s establishment clause and abortion jurisprudence.

In considering the merits of the use of foreign and international law in U.S. constitutional interpretation, it is particularly important to consider how it is used. All of the justices agree that foreign law is not binding on the Court. International law may be binding, particularly if embodied in a...
treaty to which the U.S. is a party, such that it becomes part of the "Supreme Law of the Land" under Article VI of the Constitution. However, even in such cases, treaty law would not trump the U.S. Constitution.

The justices’ disagreement pertains to whether and when the Court should resort to foreign or international law to assist in understanding vague or ambiguous terms in the Constitution, such as the meaning of "due process" or "cruel and unusual punishments." At a minimum, the majority of justices appear to view foreign and international law as being useful to confirm the reasonableness of a constitutional interpretation they have already reached by other means. But if that is the only role of foreign or international law, it adds little of value.

The majority of justices also suggest, however, that foreign and international law can assist them in a substantive way in determining what the Constitution means. They believe this assistance is an appropriate role for foreign and international law in part because many words of our Constitution are taken from other legal systems and therefore were adopted into the U.S. Constitution with a particular understanding of their meaning. One might think that seeking the meaning of constitutional terms derived from foreign and international law would not bother an originalist such as Justice Scalia. The problem is that Justice Scalia would freeze the meaning of those words at the time of their adoption. He believes that the meaning of the Constitution itself does not change over time. Any new or expanded rights must obtain their recognition and protection through legislative enactments, not through judicial fiat. By contrast, the majority of justices are willing to take into consideration how the meaning of the words in the Constitution may have evolved over time. Justice Scalia may disagree with this method of constitutional interpretation, but it seems to be fairly well established after almost 50 years of use by the Court.

Accepting that the Court will likely continue to look for "evolving standards of decency," Justice Scalia has been most critical of the Court for its selectivity in consulting foreign and international law. He is correct that the Court has failed to clearly articulate standards as to when foreign or international law will be consulted. I briefly outline below some possibilities.

Even Justice Scalia is not opposed to all use of foreign and international law. Justice Scalia has stated that "foreign constructions of international treaties are "evidence of the original shared understanding of the contracting parties" and are therefore appropriately taken into account." *Olympic Airways v. Husain*, 124 S.Ct. 1221, 1232 (2004) (Scalia, J., dissenting). Justice Scalia also believes that it is appropriate for the Court to consult foreign or international law when directed by a federal statute to do so, such as the Foreign Sovereign Immunities Act. However, as a general rule, he would not allow foreign or international law to influence the determination of the substantive meaning of the words of the Constitution itself.

In response to Justice Scalia’s concern regarding the Court’s selective use of foreign and international law, Justice Breyer has proposed at least one way to view the issue. Justice Breyer suggests that the Court treat foreign and international legal materials like any other external source to which the Court might refer in attempting to ascertain the meaning of a vague or ambiguous constitutional or statutory term. The Court often refers to external sources, such as legislative history, dictionaries, scholarly writings, sociological studies, or other sources. These external sources are clearly not binding on the Court and are only used to the extent the Court finds them useful, probative and persuasive. Similarly, the Court can use foreign and international law in the same way, weighing the persuasive value of foreign and international law along with any other external sources the Court chooses to consult. The Court is well experienced in such an exercise and certainly is capable of performing this exercise with foreign and international sources just as it does with other sources that are external to the Constitution.

Certainly to the extent the United States is a party to an international treaty, the relevant provisions of that treaty would be appropriate to use in Constitutional interpretation to understand the evolving meaning of a vague or ambiguous term. The United States belongs to many international treaties touching on human rights, such as the United Nations Charter, the International Convention on the Elimination of All Forms of Racial Discrimination, and the ICCPR, all of which may be relevant to the resolution of a constitutional issue. Even if not "binding" on the U.S. Supreme Court in constitutional interpretation, those treaties may indicate the general direction in which the law is evolving. And because the President and Senate have agreed to join these treaties, the U.S. has, through the appropriate political bodies, expressed its general approval of and consent to the rights...
The Globe

set forth in those treaties. Thus, for example, when determining the content of the right of freedom of expression or freedom of religion under the First Amendment to the U.S. Constitution, relevant portions of the ICCPR may help to explain the current world and U.S. understanding of the contents of those rights. In fact, if the Court fails to take into account these legislative actions by the political branches, it may be argued that the Court is not giving the proper deference to the other branches of government and is thereby violating separation of powers principles.

Another standard the Court could adopt in determining when to resort to foreign and international law would be to treat the relationship between foreign and international law and the U.S. Constitution similarly to the relationship between state constitutions and the federal Constitution. The U.S. Constitution provides a floor for the protection of individual rights below which states may not go. States may provide more protection for individual rights pursuant to their own laws and constitutions, but not less. Foreign and international law could be treated similarly. The U.S. Supreme Court could refer to foreign and international law standards when they provide a higher level of protection for individual rights than the U.S. Constitution, but would never be forced to adopt a foreign or international law standard that is less protective than that of the Constitution. Using foreign and international law in this way could alleviate Justice Scalia’s concern that the U.S. might be forced to adopt foreign practices that are antithetical to our traditions.

Finally, to the extent that we as Americans want the world to listen to us and we want to have a positive influence on the world, we must in turn listen respectfully to what other countries are doing and saying. By doing so, we are likely to benefit from the experience of foreign courts and legislatures who have already dealt with certain issues and who can save us time and angst in experimenting with potential solutions. Thus, prohibiting the use of foreign or international law in U.S. Constitutional interpretation is not only contrary to the functions and duties of the Supreme Court, it also is counterproductive.

Cindy G. Buys is an Assistant Professor of Law at the Southern Illinois University School of Law where she teaches a variety of international law courses, as well as constitutional law. Prior to joining the SIU faculty in 2001, Professor Buys spent ten years in the public and private practice of international law in Washington, D.C. Professor Buys also is a section council member of the International and Immigration Law Section of the ISBA.

The snail-paced Doha Round agriculture negotiations

By Adrian Zeno

The WTO contained a package of over 20 multilateral agreements between developed, developing, and least-developed countries (LDCs). Such an agreement was groundbreaking for global policy and international law. There are currently 148 members with 32 entities, including Iraq and Afghanistan, enjoying observer status.

Although the WTO, in essence, is revolutionary to global policy, its promising mission has failed to cure all economic woes. Its members experience different ranges of economic distress and hold diverse and/or differing interests. In effect, common agreements between members have been difficult to achieve. A precise example of such international disagreement is illustrated by the ongoing Doha Round agriculture negotiations.

In early 2003 WTO members commenced intense negotiations and expectations were that a comprehensive draft of their commitments—namely agriculture—would be presented no later than the Ministerial Conference in Cancun. The lapsed January 1, 2005 deadline was set in order to reserve a new round to begin talks on other subjects. The failure of the “agriculture themed” conference can be attributed by the failure of Members to narrow differences during preliminary negotiations.

WTO’s Agriculture Agreement was negotiated in the 1986-99 Uruguay Round and began a significant step towards fairer competition and a less distorted sector. High-tariff barriers prevent market access, and billions of dollars in government handouts are provided to farmers to subsidize domestic sales and exports. Such practices seem to undermine fair trade. The high levels of support and protection have prolonged the snail-paced agricultural negotiations. In fact, Cancun has placed the Doha Round off track and has somewhat damaged international confidence in the WTO.

Since Cancun, members have been working towards an agreement on a framework for the negotiations—namely a common accord without numbers that would present parameters for the eventual outcome. Fortunately, on July 31, 2004, WTO members agreed and the WTO General Council adopted a decision to take action towards successfully concluding the Doha Round negotiations. The following step entails negotiations dealing with details necessary to reach final agreements (“modalities”), and individual commitments by WTO members (schedules) based on those modalities. These comprehensive negotiations address three main issues: 1) substantial improvement in market access, 2) reduction of, with a view phasing out, all forms of export subsidies, 3) substantial reductions in trade distorting domestic support (green box; amber box; blue box). Negotiations will also address special and differential treatment for developing and LDCs as well as non-trade issues.

LDCs and many developing countries call for wealthy members, namely United States, European Union, and Japan, to eliminate trade barriers to allow greater market access. The common form of government-imposed trade barriers are tariffs and quotas. These trade barriers protect domestic industries and have been argued to undermine fair trade principles. Governments especially impose trade barriers when there is a huge influx of imports or prices drop on certain goods.