

8. MODEL BRIEF IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE OF UNADJUDICATED CRIMES DURING THE PENALTY PHASE OF A CAPITAL TRIAL

by: David Sloss and Derek Jinks*

In *Garza v. United States*, the Inter-American Commission on Human Rights (IACHR) held that the United States violated Articles XVIII and XXVI of the American Declaration of the Rights and Duties of Man by admitting evidence of unadjudicated crimes during the penalty phase of petitioner’s capital trial.¹

The IACHR’s decision in *Garza* inspired us to draft a model brief, reproduced below, which attempts to persuade the Missouri Supreme Court to adopt the holding and rationale of *Garza*. The brief is written as if it were an argument being presented to the Missouri Supreme Court on direct appeal from the circuit court decision in *State v. Gary Black*. In fact, Gary Black already lost his direct appeal.² However, we decided that the model brief would be most helpful if tethered to the facts of a real case, and we were able to obtain detailed records from the Gary Black case. In any event, the basic argument could easily be adapted for use in any case where the prosecution seeks to introduce evidence of unadjudicated crimes during the penalty phase of a capital trial.

We prepared the attached model brief as part of a broader, ongoing effort to encourage public defenders to utilize international human rights law in capital litigation in Missouri. Our long-range goal is to promote a transnational judicial dialogue between the Missouri Supreme

Court and the IACHR by submitting petitions to the IACHR on behalf of Missouri death row inmates, and by submitting briefs to the Missouri Supreme Court that draw on IACHR decisions in death penalty cases. The attached model brief is an initial step in that process.

QUESTION PRESENTED

Whether the State of Missouri violated United States treaty obligations when the Circuit Court of Jasper County admitted evidence of unadjudicated crimes during the penalty phase of Gary Black’s capital trial?

SUMMARY OF ARGUMENT

The United States is a party to the International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter, the “ICCPR” or “Covenant”]. The ICCPR obligates the United States to ensure that all criminal defendants in U.S. courts receive a fair trial before an impartial tribunal. *See* ICCPR, art. 14 (“All persons shall be . . . entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”). Under the Supremacy Clause of the Constitution, that treaty obligation is directly binding on the State of Missouri and enforceable in Missouri courts. *See* U.S. Const. art. VI, cl. 2 (“[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”) Mr. Black’s capital sentence should be reversed because the State of Missouri violated his right to a fair trial under article 14 of the ICCPR when the Circuit Court admitted evidence of prior unadjudicated crimes during the penalty phase of his capital trial.

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FACTUAL BACKGROUND

On Dec. 9, 1999, a Jasper County jury returned a guilty verdict in the case of State v. Black, finding the defendant, Gary W. Black, guilty of first degree murder. Transcript, pg. 1111. The very next day, on Dec. 10, 1999, the court conducted the sentencing phase of the trial. At the end of the sentencing phase (also on Dec. 10), the jury returned a verdict in favor of a death sentence. Transcript, pg. 1242.

During the penalty phase the prosecution introduced State’s Exhibit 24, which contains records from the Missouri Department of Corrections. Transcript, pg. 1150. Exhibit 24 contains hearsay statements by inmates alleging that Gary Black assaulted an inmate named Hogue. State’s Exhibit 24. It also contains a double-hearsay statement by a corrections officer indicating that he “heard from a reliable source” that Black had assaulted another inmate named Lacy Whitman. *Id.* If the prosecution attempted to introduce Exhibit 24 during the guilt phase of the trial, straightforward application of ordinary rules of evidence would have barred its admission. Even so, the court dispensed with the usual rules of evidence and admitted Exhibit 24 during the sentencing phase.

In his closing argument for the sentencing phase, the prosecutor referred to the unsubstantiated allegations in Exhibit 24 as if they were proven facts. Specifically, the prosecutor stated: “When he [Black] was in prison he committed assaults. He knifed somebody while he was in prison.” Transcript, pg. 1236. These allegations by the prosecutor, based on unsubstantiated hearsay, were highly prejudicial to the defendant.

ARGUMENT

The United States has been a party to the International Covenant on Civil and Political Rights (the “ICCPR”) since 1992. *See* 58 Fed. Reg. 45934 (1993). Under the

Supremacy Clause of the Constitution, the ICCPR is binding on the State of Missouri and enforceable in Missouri courts. *See* U.S. Const. art. VI, cl. 2 (“[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”) Mr. Black’s capital sentence should be reversed because the State of Missouri violated his right to a fair trial under article 14 of the ICCPR when the Circuit Court admitted evidence of prior unadjudicated crimes during the penalty phase of his capital trial.

I. Admission of State’s Exhibit 24 Was Contrary to the Plain Meaning of the ICCPR

Article 14 of the ICCPR obligates the United States to ensure that all criminal defendants in U.S. courts receive a fair trial before an impartial tribunal. *See* ICCPR, art. 14 (“All persons shall be . . . entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”). The ICCPR guarantee of a fair trial includes, *inter alia*, the following provision: “In the determination of any criminal charge against him, everyone shall be entitled . . . to examine, or have examined, the witnesses against him.” ICCPR, art. 14, para. 3(e).

During the penalty phase of Gary Black’s capital trial, the prosecution introduced State’s Exhibit 24, containing records from the Missouri Department of Corrections. Transcript 1150. Exhibit 24 contains statements by inmates alleging that Gary Black assaulted an inmate named Hogue. State’s Exhibit 24. It also contains a statement by a corrections officer indicating that he “heard from a reliable source” that Black had assaulted another inmate named Lacy Whitman. *Id.* The court allowed the prosecution to present these documents to the jury, but did not provide Mr. Black an

opportunity to cross-examine the individuals who made the statements contained in Exhibit 24. Since the ICCPR guarantees the right of a defendant to “examine, or have examined, the witnesses against him,” ICCPR, art. 14, para. 3(e), and since the State of Missouri did not allow Mr. Black to examine the witnesses whose statements were presented to the jury via Exhibit 24, it is evident from the plain meaning of the treaty that the State of Missouri violated article 14(3)(e) of the ICCPR.

Granted, the language of article 14(3)(e) is similar to the Sixth Amendment Confrontation Clause, which the U.S. Supreme Court has interpreted to permit introduction of hearsay evidence in criminal trials, provided that such evidence fits within a “firmly rooted” hearsay exception. *See, e.g., Ohio v Roberts*, 448 U.S. 56, 66 (1980). Assuming, *arguendo*, that article 14(3)(e) should generally be construed in accordance with the Confrontation Clause, a more stringent interpretation is necessary in the context of capital punishment because there is an “internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees” in capital punishment cases. Inter-American Court of Human Rights, Advisory Opinion OC-16/99, ¶ 135, *available at* www.corteidh.or.cr/serie_a_ing/index.html. Indeed, the Human Rights Committee (HRC), an international expert body that is responsible for supervising implementation of the ICCPR, has held: “in capital punishment cases, the obligation of States parties to observe rigorously all the guarantees of a fair trial set out in article 14 of the [ICCPR] admits of no exception.” HRC, *Champagnie, Palmer & Chisholm v. Jamaica*, Communication No. 445/1991, U.N. Doc. CCPR/C/51/D/445/1991 (1994), ¶ 9, *available at* <http://www.unhchr.ch>. Moreover, U.S. courts have stated that the HRC’s decisions “are recognized as a major source for interpretation of the ICCPR.” *United States v.*

Duarte-Acero, 208 F.3d 1282, 1288 (11th Cir. 2000).

In sum, this court should hold that the circuit court violated article 14(3)(e) of the ICCPR by admitting Exhibit 24 without allowing Mr. Black to examine the witnesses against him. Such a holding is consistent with the plain meaning of article 14(3)(e), and with the internationally recognized principle that, in capital punishment cases, the fair trial guarantees embodied in article 14 admit of no exceptions.

II. The Garza Case Supports the Conclusion that the State of Missouri Violated Mr. Black’s Right to a Fair Trial Under Article 14

In 1993, Juan Raul Garza was convicted and sentenced to death by a federal court in Texas for the drug-related murders of three victims. The Fifth Circuit affirmed his conviction and sentence on direct appeal. *See United States v. Flores*, 63 F.3d 1342 (1995). Mr. Garza subsequently challenged his capital sentence by filing a petition with the Inter-American Commission on Human Rights (IACHR).³ *See* IACHR, Report No. 52/01, *Garza v. United States* (2001), *available at* <http://www.cidh.org/annualrep/2000eng/TOC.htm>.

In his petition to the IACHR, Garza alleged that the United States violated his right to a fair trial under Article XVIII of the American Declaration and his right to due process of law under Article XXVI of the American Declaration. *See* IACHR, Report No. 52/01, *Garza v. United States*, ¶ 2. *See also* American Declaration, Article XVIII (“Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”); *id.*, Article XXVI (“Every person accused of an offense has

the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with preexisting laws.”). The thrust of Garza’s complaint was that the United States violated his rights by admitting evidence of unadjudicated murders during the penalty phase of his capital trial. The IACHR agreed with Mr. Garza; it held that the United States had violated Articles XVIII and XXVI of the American Declaration.⁴ IACHR, Report No. 52/01, *Garza v. United States*, ¶ 3. The IACHR recommended that the United States “review its laws, procedures and practices to ensure that persons who are accused of capital crimes are tried and sentenced in accordance with the rights under the American Declaration, *including in particular prohibiting the introduction of evidence of unadjudicated crimes during the sentencing phase of capital trials.*” *Id.* (emphasis added).⁵

A. The Black Case is Indistinguishable from Garza

The IACHR’s rationale in *Garza* applies with equal force to *Black* because the facts of the two cases are so similar. In the guilt phase of his trial, a jury found Mr. Garza guilty of three counts of killing in the furtherance of a continuing criminal enterprise. *United States v. Flores*, 63 F.3d 1342, 1351 (5th Cir. 1995). Similarly, in the guilt phase of his trial, a jury found Mr. Black guilty of first degree murder. Transcript, pg. 1111. Then, in the sentencing phase of *Garza*, the jury found that the prosecution had proven the presence of certain statutory aggravating factors. *See Flores*, 63 F.3d at 1366-67. Similarly, in the sentencing phase of *Black*, the jury found that the prosecution had proven the presence of certain statutory aggravating factors. Transcript, pg. 1242. In both cases, proof of statutory aggravating factors was a threshold requirement that permitted, but did not require, the jury to reach a death verdict.

In *Garza*, after the jury had concluded that statutory aggravating factors were present, “the jury was directed to determine whether the government had proven any of its non-statutory aggravators.” *Flores*, 63 F.3d at 1367. In this context, “the prosecution introduced evidence relating to four additional murders that Mr. Garza was alleged to have committed . . . [although] Mr. Garza was never previously charged or convicted of these crimes.” IACHR, Report No. 52/01, *Garza v. United States*, ¶ 103. The trial court allowed the jury to consider this evidence of unadjudicated crimes for the purpose of determining whether “Garza represented a continuing danger to the lives of others based upon his pattern of violent and brutal acts.” *Flores*, 63 F.3d at 1367.

In *Black*, like *Garza*, the court admitted evidence of assaults that Mr. Black allegedly committed while he was in prison, even though Mr. Black was never previously charged or convicted of those crimes. *See* Transcript, pg. 1150; State’s Exhibit 24. In *Black*, like *Garza*, the evidence of unadjudicated crimes admitted during the sentencing phase was not relevant to proving any statutory aggravating factor.⁶ In *Black*, like *Garza*, the prosecution used the evidence of unadjudicated crimes to persuade the jury that Mr. Black represented a continuing danger to the lives of others. *See* Transcript, pgs. 1222-24 (State’s closing argument).

In *Garza*, the IACHR held that the admission of evidence of unadjudicated crimes “during Mr. Garza’s sentencing hearing was inconsistent with several fundamental principles underlying Articles XVIII and XXVI of the [American] Declaration.” IACHR, Report No. 52/01, *Garza v. United States*, ¶ 105.

[A] significant and substantive distinction exists between the introduction of evidence of mitigating and aggravating factors concerning the circumstances of an offender or his or her offense . . . and an effort to attribute to an offender individual criminal

responsibility for violations of additional serious offenses that have not . . . [been] charged and tried pursuant to a fair trial offering the requisite due process guarantees. The State itself asserts that the purpose of a sentencing hearing is to determine the appropriate punishment for a defendant's crime, not to prove guilt. Yet proving Mr. Garza's guilt for the four unadjudicated murders so as to warrant imposition of the death penalty was, by the Government's own admission, precisely the intended and actual effect of its effort in introducing evidence in this regard during Mr. Garza's sentencing hearing. *Id.*, ¶ 109.

Similarly, in *Black*, proving Mr. Black's guilt for the unadjudicated assaults so as to warrant imposition of the death penalty was precisely the intended and actual effect of the State's introduction of Exhibit 24 during Mr. Black's sentencing hearing.

Moreover in *Black*, like *Garza*, the jury that tacitly found Mr. Black guilty of the unadjudicated assaults and sentenced him to death on that basis was not an impartial tribunal. As the IACHR explained in *Garza*:

In addition, it cannot be said that Mr. Garza was tried for these four additional murders before an impartial tribunal. Rather, the Commission is of the view that the jury that sentenced Mr. Garza could not reasonably have been considered an impartial tribunal in determining his criminal liability for the four unadjudicated murders in Mexico when the same jury had just convicted Mr. Garza of three murders. . . . In the Commission's view, it cannot reasonably be contended that the facts concerning these additional four murders were presented to an untainted, unbiased jury in a forum in which the full protections of the rights under the

American Declaration were afforded to Mr. Garza. To the contrary, presentation of evidence of prior criminal conduct is generally considered to be irrelevant and highly prejudicial to the determination of guilt for a current criminal charge. *Id.*, ¶ 107.

Consequently, the IACHR concluded that the admission of evidence of unadjudicated crimes "during Mr. Garza's capital sentencing hearing was antithetical to the most basic and fundamental judicial guarantees applicable in attributing responsibility and punishment to individuals for crimes." *Id.*, ¶ 110.

Similarly, this court should hold that the admission of evidence of unadjudicated crimes during Mr. Black's capital sentencing hearing was antithetical to the most fundamental judicial guarantees applicable in attributing punishment to individuals for crimes. Like the jury in *Garza*, the jury that considered State's Exhibit 24 in Mr. Black's sentencing hearing was not an impartial tribunal. That jury was predisposed to believe the allegations in Exhibit 24 accusing Mr. Black of committing assaults in prison because, on the previous day, the same jury had just convicted Mr. Black of murder. By permitting the jury that had just convicted Mr. Black of murder to consider unsubstantiated, hearsay allegations of other criminal conduct, the State of Missouri violated Mr. Black's right under Article 14 of the ICCPR to be sentenced by an impartial tribunal. *See* ICCPR, art. 14 ("All persons shall be . . . entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law").

B. Garza is Persuasive Authority for Interpreting Article 14 of the ICCPR

The IACHR's decision in *Garza* is not binding on this court. However, under the

Supremacy Clause of the Constitution, Article 14 of the ICCPR is binding on this court.⁷ See U.S. Const. art. VI, cl. 2 (“[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”) Moreover, the IACHR’s decision in *Garza* is strong persuasive authority for the proper interpretation of Article 14.

First, the language of ICCPR Article 14 is almost identical to the language of Article XXVI of the American Declaration, which formed the basis for the IACHR’s decision in *Garza*. Compare ICCPR, art. 14, para. 1 (“In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”) to American Declaration, art. XXVI (“Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with preexisting laws.”)

Second, the ICCPR created an international expert body, the Human Rights Committee (HRC), which is responsible for supervising implementation of the ICCPR. U.S. courts have stated that the HRC’s decisions “are recognized as a major source for interpretation of the ICCPR.” *United States v. Duarte-Acero*, 208 F.3d 1282, 1288 (11th Cir. 2000). The HRC’s decisions have established several important principles that apply generally to capital punishment cases. First, the right to life “is the supreme right from which no derogation is permitted.” General Comment 6, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994), available at www1.umn.edu/humanrts/gencomm/hrcom6.htm. Accordingly, “the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.” HRC, *Baboheram-Adin et al. v. Suriname*, Communication Nos. 148-154/1983, U.N. Doc. CCPR/C/24/D/148/1983 (1985), ¶

14.3, available at <http://www.unhchr.ch>. Additionally, the HRC has stated that “in capital punishment cases, the obligation of States parties to observe rigorously all the guarantees of a fair trial set out in article 14 of the [ICCPR] admits of no exception.” HRC, *Champagnie, Palmer & Chisholm v. Jamaica*, Communication No. 445/1991, U.N. Doc. CCPR/C/51/D/445/1991 (1994), ¶ 9, available at <http://www.unhchr.ch>.

The IACHR has embraced a similar set of interpretive principles for capital punishment cases; those principles established the framework for its analysis in *Garza*. See, e.g., IACHR, Report No. 52/01, *Garza v. United States*, ¶ 93 (stating that, even though the American Declaration does not abolish the death penalty, it “imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty”); *id.*, ¶ 100 (emphasizing “the fundamental significance of ensuring full and strict compliance with due process protections in trying individuals for capital crimes, from which there can be no derogation”).

This court should construe article 14 of the ICCPR in accordance with the IACHR’s decision in *Garza* because the language of article 14 is almost identical to the language of Article XXVI of the American Declaration, and because the HRC and the IACHR apply a similar set of interpretive principles in capital punishment cases. Accordingly, this court should hold that the admission of evidence of unadjudicated crimes during the sentencing phase of a capital trial violates article 14 of the ICCPR.

III. The Court Should Overrule *Christeson*

In *State v. Christeson*, this court said: “Evidence of a defendant’s prior unadjudicated criminal conduct is admissible during the penalty phase.” 50 S.W.3d 251, 269 (Mo. Banc 2001). The time has come to reconsider this ill-advised evidentiary rule. The

Christeson rule is incompatible with international human rights law and inconsistent with U.S. treaty obligations. As the IACHR so eloquently stated, the rule is “antithetical to the most basic and fundamental judicial guarantees applicable in attributing responsibility and punishment to individuals for crimes.” IACHR, Report No. 52/01, *Garza v. United States*, ¶ 110.

Decisions by other state supreme courts in the United States reinforce this conclusion. For example, the Supreme Court of Washington, when confronted with precisely the same issue, said:

To allow the jury which has convicted defendant of aggravated first degree murder to consider evidence of other crimes of which defendant has not been convicted is, in our opinion, unreasonably prejudicial to defendant. A jury which has convicted defendant of a capital crime is unlikely fairly and impartially to weigh evidence of prior alleged offenses. In effect, to allow such evidence is to impose upon a defendant who stands in peril of his life the burden of defending, before the jury that has already convicted him, new charges of criminal activity. Information relating to defendant’s criminal past should therefore be limited to his record of convictions. *State v. Bartholomew*, 654 P.2d 1170, 1184 (Wash. en banc 1982).

Other state supreme courts have reached similar conclusions. *See, e.g., State v. Bobo*, 727 S.W.2d 945, 952 (Tenn. 1987) (“to permit the State to present evidence sufficient to convince the jury . . . that the defendant had committed murders, for which he has not yet been convicted and before the very jury that has just returned a guilty verdict for first degree murder, violates the concept of fundamental fairness embodied in due process of law”); *State*

v. McCormick, 397 N.E.2d 276, 280 (Ind. 1979) (admission of evidence of unadjudicated crimes would mean that defendant would be tried on the previously unadjudicated crime “to a jury which has been undeniably prejudiced by having convicted him of an unrelated murder”); *Cook v. State*, 369 So.2d 1251, 1257 (Ala. 1979) (“Until the State proves him guilty of this charge in accordance with appropriate legal procedures Cook is presumed innocent. This fundamental tenet of our system of justice prohibits use against an individual of unproven charges in this life or death situation.”).

CONCLUSION

Mr. Black’s capital sentence should be reversed because the State of Missouri violated his right to a fair trial under article 14 of the ICCPR when the Circuit Court admitted evidence of prior unadjudicated crimes during the penalty phase of his capital trial.

Endnotes

¹ *See* IACHR Report No. 52/01, *Garza v. United States* (2001), available at <http://www.cidh.org/annualrep.2000eng/TOC.htm>

² *See State v. Black*, 50 S.W.3rd 778 (MO 2001).

³ The IACHR is an organ of the Organization of American States (OAS). Under Article 20 of its statute, the IACHR has the authority to entertain individual petitions alleging that OAS member states, including the United States, have failed to comply with their obligations under the American Declaration of the Rights and Duties of Man. *See* Statute of the Inter-American Commission on Human Rights, OAS Gen. Ass. Res. 447, 9th Sess., art. 20, available at <http://www.cidh.org/Basicos/basic15.htm>. The American Declaration is an international human rights instrument that contains fair trial guarantees that are substantially identical to the protections afforded by article 14 of the ICCPR. *See* American Declaration of the Rights and Duties of Man, May 2, 1948, OAS Res. XXX, available at

<http://www.cidh.org/Basicos/basic2.htm> [hereinafter, “American Declaration”].

⁴ The American Declaration was not originally drafted as a legally binding treaty. However, the Charter of the Organization of American States (OAS Charter) is a legally binding treaty. The United States has been a party to the OAS Charter since 1951. On February 27, 1967, the members of the OAS amended the OAS Charter by means of the Protocol of Buenos Aires, which the United States ratified on April 23, 1968. The Inter-American Commission on Human Rights has held that the American Declaration “acquired binding force” by means of the amendments to the OAS Charter adopted in 1967-68. *See* IACHR, Resolution 3/87, *Roach & Pinkerton v. United States*, ¶¶ 46-49, *reprinted in* *Inter-American Yearbook on Human Rights*, pg. 294-96 (1987).

⁵ The IACHR’s decisions are not legally binding on the United States. That is why the IACHR’s conclusion in *Garza* is framed as a recommendation, rather than a binding judgment.

⁶ The Missouri homicide statute includes, *inter alia*, the following statutory aggravating circumstance: “The offense was committed by a person . . . who has one or more serious assaultive criminal *convictions*.” Mo. Rev. Stat. § 565.032(2)(1) (emphasis added). However, the commission of an assault for which one has not been convicted is not a statutory aggravating circumstance.

⁷ When the United States ratified the ICCPR, it adopted a declaration stating that the substantive provisions of the treaty are “not self-executing.” *See* 138 Cong. Rec. 8070 (1992). Some commentators have mistakenly concluded that this declaration means that the ICCPR is not the “Law of the Land” under the Supremacy Clause. However, the Senate said that the purpose of the declaration was to make clear that the ICCPR “will not create a private cause of action in U.S. courts.” Senate Comm. on Foreign Relations, *International Covenant on Civil and Political Rights: Report*, S. Exec. Rep. No. 102-23, at 19 (1992). Thus, the declaration has no relevance to this case because the defendant is invoking the ICCPR as a defense to a criminal charge, not as the basis for a private cause of action. *See* *United States*

v. Duarte-Acero, 132 F.Supp.2d 1036, 1040 n.8 (S.D. Fla. 2001) (stating that the non-self-executing declaration is inapplicable “because Defendant is raising his ICCPR claims defensively”).