INTERNATIONAL ATTENTION TO THE DEATH PENALTY: TEXAS AS A LIGHTNING ROD

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Although foreign governments have shown concern about capital punishment in the United States for some years, only in 2001 did they raise it to a high-priority foreign affairs matter. That summer, when President Bush made his first visit to Europe, he was questioned by European leaders about the United States' stance on capital punishment. Before he could broach the trade and security issues he wanted to raise, he was forced to defend the use of capital punishment in the United States.[1] One factor that heightened the concern of the European leaders was President Bush's decision not to intervene in the federal execution of Juan Raul Garza - a case that had drawn international attention.[2]

In the summer of 2002, President Bush and the United States again became the focus of attention over capital punishment when Texas executed a Mexican national in the face of international protest. Mexican President Vicente Fox had been invited by President Bush to visit at his Texas ranch, and President Fox had accepted the invitation. However, when the Texas execution was carried out President Fox explained his concern over the execution and made it clear publicly that he would not, for that reason, visit the ranch.[3]

I. INTERVENTION BY FOREIGN GOVERNMENTS

Capital punishment is not used extensively abroad. In the Western Hemisphere, capital punishment is practiced only in the United States and in several Caribbean island states. It has not been practiced for many years in Western Europe. The states of Eastern Europe currently seeking admission to European institutions have been pressured to abandon capital punishment as a sign of their adherence to the rule of law.[4]

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[1] *The Executions Continue*, Editorial, N.Y. TIMES, June 19, 2001, at A22.

[2] Jo Thomas, *Bush Rejects Clemency for Drug Lord Set to Die Today*, N.Y. TIMES, June 19, 2001, at A18.

[3] Reed Johnson, *Stays of Execution Sought for 51 Mexicans in US*, L.A. TIMES, Jan. 22, 2003, at 3.

[4] Carol Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 127 (2002).

Many states of the world, in addition to foregoing capital punishment themselves, have begun trying to discourage its use by other states. The Council of Europe, the Pan-European parliament, held a three-day symposium in 2001 aimed towards promoting a worldwide moratorium on executions.[5] Texas was present in at least two ways. A former Texas death row inmate spoke at the conference,[6] and Walter Schwimmer, Secretary General of the Council of Europe, criticized Texas Governor Rick Perry's veto of a bill outlawing the execution of the mentally retarded.[7] Also in Europe, a protocol has been adopted to the Convention for the Protection of Human Rights and Fundamental Freedoms, outlawing the death penalty as a human rights violation.[8] "The death penalty shall be abolished," states the protocol. "No-one shall be condemned to such penalty or executed."[9]

Efforts have been made to eliminate capital punishment at the international level as well. A treaty requiring states to abolish the death penalty has been adopted as a way of pressuring states that continue to use it.[10] Ratified by fifty states, it proclaims, "[n]o one within the jurisdiction of a state party to the present protocol shall be executed."[11]

Foreign states have expressed their displeasure over capital punishment in the United States by direct action when it is within their power. If a person sought by the United States on a capital charge is found outside the United States, the foreign state may decline to extradite unless the United States promises to forego execution. Additionally, many foreign states have insisted on insertion of a clause in bilateral extradition treaties with the United States that allows the requested state to decline to surrender a person being charged capitally.[12] Typically, when foreign states have invoked these clauses the United States has agreed not to seek capital punishment for suspects.

In a Texas case involving Joy Aylor, for example, capital punishment had to be taken off the table in order to gain extradition. In 1989, Aylor was arrested in Dallas on suspicion of hiring a man to kill her husband's lover.[13] While on release pending trial she fled abroad and

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[5] *Lawmakers Call for Ban on Capital Punishment*, TORONTO STAR, June 23, 2001, at A24.

[6] *Former Death Row Inmate Charges Bush Ignores the Innocent*, DEUTSCHE PRESSE-AGENTUR, June 21, 2001.

[7] Anne Montfort, *Bush Under Fire at First World Conference Against Death Penalty*, AGENCE FRANCE PRESSE, June 21, 2001.

[8] Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 13, May 3, 2002, Eur. T.S. No. 187.

[9] *Id.* art. 1.

[10] International Covenant on Civil and Political Rights, Second Optional Protocol, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, at 206, U.N. Doc. A/44/49 (1989).

[11] *Id.* art. 1.

[12] *See, e.g.*, Treaty on Extradition, Dec. 3, 1971, U.S.-Ca., 27 U.S.T. 983.

[13] *Texas Woman Returned from France to Face Texas Charges*, UPI, Nov. 5, 1993.

was arrested in France.[14] When Texas, through the United States government, requested extradition, France indicated it would refuse until given assurance that Aylor would not be sentenced to death.[15] Only after Texas authorities agreed to forego a capital charge did France consent to extradition.[16]

II. INTERNATIONAL ADJUDICATORY INSTITUTIONS

Capital punishment in the United States has also come under scrutiny by international bodies empowered to entertain human rights complaints. The European Court of Human Rights ("ECHR"), a regional international court, ordered the United Kingdom not to extradite a man to the United States to face capital punishment charges.[17] The United Kingdom, despite a treaty provision allowing it to refuse, indicated it would extradite the man to face a murder charge in Virginia.[18] When the man petitioned under the European human rights treaty, the ECHR said that the extradition would violate the United Kingdom's obligation to ensure humane treatment of prisoners.[19] The ECHR did not say imposition of capital punishment itself would violate the United Kingdom's obligations, but it cited conditions on Virginia's death row, which, along with the man's unstable mental condition, would constitute inhumane treatment.[20]

The Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights ("ICCPR"), has also recommended limited extradition to the United States because of the conditions under which capital punishment is imposed.[21] One such case involved Canada's extradition of a man to the United States on a California capital charge.[22] Canada surrendered the man despite the ruling and without insisting on non-application of capital punishment.[23] The man complained to the monitoring committee that the gas chamber, as then used in California, inflicted unnecessary suffering, and therefore Canada's surrender of him violated a provision in the ICCPR that forbids inhumane and degrading treatment or punishment.[24] The monitoring

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

[18] *Id.* at para. 15.

[19] *Id.* at para. 111.

[20] *Id.* at para. 107-108.

[21] *See* International Covenant on Civil and Political Rights, *adopted on* Dec. 16, 1966, 999 U.N.T.S. 171.

[22] Ng v. Canada, U.N. GAOR, Hum. Rts. Comm., 49th Sess., U.N. Doc. CCPR/C/49/D/469/1991, (1993), *reprinted in* 15 HUM. RTS. L.J. 149 (1994).

[23] *Ng*, 15 HUM. RTS. L.J. at 149.

[24] *Id.*

committee agreed, ruling that Canada violated the ICCPR.[25] The United States courts ultimately accepted the same argument that the California gas chamber involved unnecessary suffering and therefore violated United States constitutional protections.[26]

In a more recent case involving extradition from Canada to the United States on a capital charge, the committee went further, ruling that any state that has abolished capital punishment violates the ICCPR if it extradites on a capital charge.[27]

III. FOREIGN GOVERNMENTS AS LITIGANTS

As part of their efforts to discourage the use of capital punishment in the United States, foreign governments often file briefs as *amicus curiae* in United States courts. This represents a substantial development in international practice. In the past, states unhappy with a policy of another state limited themselves to protest at the diplomatic level. The European Union filed a brief in the United States Supreme Court on the issue of the execution of the mentally retarded, arguing that such executions violate internationally accepted norms.[28] The Supreme Court agreed that the mentally retarded should not be executed.[29] In support of its finding, the court cited the European Union's brief, stating that "within the world community the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[30]

Opposition to capital punishment is strong in many countries, and when a foreigner faces execution in the United States, public protest often arises in the state of nationality against the execution. Thus, foreign governments tend to take a more direct role when their own nationals are convicted of a capital offense in the United States.

Treaty requirements have opened a legal avenue for foreign governments relating to consular access for foreigners upon arrest. Under the Vienna Convention on Consular Relations, a widely ratified multilateral treaty, a foreign national arrested on a criminal charge must be informed of the right to contact her or his home-state consulate.[31] Consuls help foreign nationals understand the criminal process, intervene to ensure that the person is treated fairly, and may be able to

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[25] *Id.* at 157.

[26] Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996).

[27] Judge v. Canada, U.N. Hum. Rts. Comm., (2003) U.N. Doc. CCPR/C/78/D/829/1998.

[28] Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

[29] *Id.* at 321.

[30] *Id.* at 316 n.21.

[31] Vienna Convention on Consular Relations and Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261.

secure evidence or trace witnesses in the home state.[32]

Police and prosecutors in the United States typically fail to inform foreigners upon arrest of the right of consular access, even in serious cases like murder. Lawyers for such persons file challenges in court to seek a remedy for the failure. Lawyers have challenged the validity of the conviction or sentence on the theory that a consul might have provided assistance in averting the conviction or the death sentence in a capital case.[33]

Of particular concern is the possibility that foreigners may not understand, without explanation from a consul, that the right to remain silent means a right to refuse to answer questions. Police often begin to ask questions immediately after giving the Miranda warnings. Lawyers for detained foreign nationals who were not provided with consular access have challenged the admissibility of confessions on this ground.[34]

The foreign government may also file a brief as *amicus curiae* and in that fashion attempt to protect its national. In an Illinois case, a foreign government went one step further and inserted itself as a party to the litigation.[35] The case involved a Polish national convicted of capital murder and sentenced to die.[36] The Polish consul in Chicago intervened in the case at the post-conviction stage, having been granted status as a third party to the litigation.[37] The consul based its challenge to the death sentence on the failure of the Chicago police to inform the individual at the time of arrest that he had a right to approach the Polish consul for assistance.[38]

The case went to the Supreme Court of Illinois, which, on a vote of four to three, upheld the death sentence on the ground that the defendant had not raised the consular access issue at trial.[39] Thus, the four judges in the majority did not reach the issue on the merits. Three dissenting judges would have voided the death sentence for the police failure, and two of the three would have voided the underlying conviction as well.[40] Relief from the death sentence, though not from the conviction, came in federal court, when the United States District Court for the Northern District of Illinois granted a writ of *habeas corpus*.[41] The district court stated that the trial attorneys had provided

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[32] John Quigley, *LaGrand: A Challenge to the U.S. Judiciary*, 27 YALE J. INT'L L. 435 (2002).

[33] UnitedStates *ex rel.* Madej v. Schomig, 223 F. Supp. 2d 968 (N.D. Ill. 2002).

[34] *See, e.g.*, United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000).

[35] Illinois v. Madej, 739 N.E.2d 423 (Ill. 2000).

[36] *Id.* at 425.

[37] *Id.* at 426.

[38] *Id.* at 425-26.

[39] *Id.*

[40] *Madej*, 739 N.E.2d at 431 (McMorrow, J., dissenting opinion)(voiding sentence only); *Id.* at 432 (Heiple, J. & Harrison, C.J., dissenting opinion)(voiding conviction and sentence).

[41] United States *ex rel* Madej v. Schomig, 223 F. Supp .2d at 968 (granting petition in

little evidence in mitigation at the penalty phase of the trial, and that a consul might have had access to evidence that would have averted a death sentence.[42]

The Illinois case reflects another trend in foreign government intervention in capital cases, namely, concerted action among foreign governments. This phenomenon is apparent from the filings by the European Union. In the Illinois case, not only did the government of Poland participate as a party to the Illinois litigation, but it enlisted two other governments to file in support. The governments of Germany and Mexico both filed briefs as *amicus curiae* in support of Poland's consul.[43]

Briefs filed by foreign governments may impact the quality of justice in unforeseen ways. In an Ohio murder case, the accused was a young migrant worker from Mexico.[44] In the middle of the night, someone burglarized the apartment where he and several other young Mexicans lived.[45] One of the young Mexicans apparently chased the intruder out of the house and shot and killed him.[46] Later one of them was arrested and interrogated through an interpreter at a local police station. At trial he was convicted and sentenced to life in prison.[47] On appeal of the conviction, the Mexican government filed a brief as *amicus curiae* in the Ohio Court of Appeals.[48] In preparing that brief, the Mexican government discovered a fact that had not been apparent to lawyers on either side.[49] The interpreter who helped the police interrogate the young man spoke Spanish poorly and rendered the *Miranda* warnings in a way that was unintelligible to a native speaker of Spanish.[50] The Ohio Court of Appeals reversed the murder conviction for a failure to give the *Miranda* warnings.[51]

IV. THE CASE OF CESAR FIERRO

Lawyers representing Texas death row inmates have figured prominently in taking capital cases into international fora, and in raising treaty-based arguments in the courts of the United States. In the early 1990s, lawyers representing several foreign nationals on Texas' death

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[42] *Id.* at 980.

[43] *Madej*, 739 N.E.2d at 426.

[44] Ohio v. Ramirez, 732 N.E.2d 1065 (Ohio Ct. App. 1999).

[45] *Id.* at 1065-66.

[46] *Id.* at 1066.

[47] *Id.*

[48] *Id.* at 1065.

[49] The author was co-counsel to the Government of Mexico in this case.

[50] *Ramirez*, 732 N.E.2d at 1067-70.

[51] *Id.* at 1070-71.

row asserted in court that their convictions and sentences should be reversed based on failure to notify of the right to consular access.

Although defendants Stanley Faulder (Canadian), Carlos Santana (Dominican), and Cesar Fierro (Mexican) all raised the consular access issue, the courts gave a detailed response only in Faulder's case.[52] These cases brought the issue of consular access for death row inmates into national legal literature through articles written by lawyers who had raised the issue in Texas.[53] The consular access issue in these three Texas cases was also taken to the Inter-American Commission on Human Rights ("the Inter-American Commission").[54] The Inter-American Commission monitors human rights compliance for the Organization of American States ("OAS"), which is a hemispheric international organization.

In 2003 when Mexico sued the United States in the International Court of Justice ("ICJ") for consular access violations in the cases of Mexican nationals sentenced to death in the United States, it listed fifty-four Mexican nationals on state death rows whose consular access rights had been violated.[55] Of the fifty-four, sixteen were on death row in Texas.[56]

The cases of two Texas death row inmates, Cesar Fierro and Robert Moreno, figure prominently in Mexico's application to the ICJ.[57] These men were two out of the group of fifty-four that, according to Mexico's submission to the ICJ, faced the possibility of execution within a short time.[58] The ICJ issued a provisional injunctive order against the United States forbidding the execution of these men while Mexico's case is pending before the ICJ.[59]

Fierro's case, in particular, illustrates the remedies potentially available at the international level. However, Texas judges and Attorney General have insisted on leaving Fierro's death sentence in force, despite serious questions about the evidence used to convict him. In 1979, El Paso police got information from a young man about a murder that had

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[52] Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996).

[53] Gregory D. Gisvold, Note, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771 (1994); S. Adele Shank & John Quigley, *Foreigners on Texas' Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719 (1995).

[54] *Created by* American Convention on Human Rights, art. 33, *entered into force* July 18, 1978, Organization of American States, Official Records OEA/SER.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2, Jan. 7, 1970, *reprinted in* 9 I.L.M. 673.

[55] Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. (Application), para. 68.

[56] *Id.* at para. 158.

[57] *Id.* at para. 58.

[58] *Id.*

[59] Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. (Order of Feb. 5).

gone unsolved for five months.[60] A taxi driver had been shot dead in his taxi on February 27, 1979.[61] The taxi was later found abandoned across the international border in Juarez, Mexico.[62] At the request of El Paso police, the Ciudad Juarez police began an investigation.[63]

This investigation led to the El Paso police finding Fierro and detaining him for interrogation.[64] Simultaneously, the Ciudad Juarez police arrested Fierro's mother and step-father, though they were not charged with any crimes.[65] The El Paso officer interrogating Fierro informed him of the arrest of his mother and step-father and offered to let him speak by telephone with the officer of the Ciudad Juarez police who was holding them.[66]

Shortly after this telephone conversation Fierro confessed to murdering the taxi driver.[67] The motion to suppress the confession, made by Fierro's lawyer before trial, was denied. At the suppression hearing Fierro's mother and step-father testified that they had been arrested by the Ciudad Juarez police.[68] The El Paso interrogating officer, who had placed Fierro in contact with the police holding his parents, denied knowing that this had occurred and apparently did not inform the prosecutor of these arrests.[69]

At trial, the prosecution presented Fierro's confession, as well as the testimony of the young man who said he saw Fierro commit the murder.[70] With no other evidence presented to connect Fierro to the murder he was convicted and sentenced to death.[71]

In 1994, on the basis of a new defense petition, the District Court of El Paso County found that at the time of the interrogation the interrogating officer "did have information that the Defendant's mother and step-father had been taken into custody by the Juarez police with the intent of holding them in order to coerce a confession from the Defendant."[72] The district court further found that the interrogating officer had "presented false testimony regarding the nature and extent of the cooperation between the El Paso police and the Juarez police in this

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[60] Fierro v. Texas, 706 S.W.2d 310, 312 (Tex. Crim. App. 1986).
[61] *Id.*
[62] *Id.*
[63] *Id.* at 315.
[64] *Id.* at 312.
[65] *Ex parte* Fierro, 934 S.W.2d 370, 371 (Tex. Crim. App. 1996); *Id.* at 389 (Maloney, J., dissenting).
[66] *Id.* at 389 (Maloney, J., dissenting).
[67] *Id.*
[68] *Id.*.
[69] *Id.* at 371.
[70] Fierro v. Texas, 706 S.W.2d at 312.
[71] *Id.* at 311.
[72] *Ex Parte* Fierro, 934 S.W.2d at 371.

particular case, as it existed in 1979."[73] The district court concluded that there was "a strong likelihood that the Defendant's confession was coerced by the actions of the Juarez police," with the knowledge and acquiescence of the interrogating officer in El Paso.[74] The district court vacated Fierro's conviction and ordered a new trial.[75]

The Texas Court of Criminal Appeals accepted the district court's factual findings, stating: "as a result of the trial court's findings and the evidence in the record, we conclude that applicant's due process rights were violated" by the "perjured testimony" of the interrogating officer.[76] The Court of Criminal Appeals, however, disagreed with the district court's conclusion that Fierro's conviction be set aside.[77] The court stated that the introduction of the confession into evidence at trial was error, but harmless error, since an eye-witness testified to having seen Fierro commit the murder.[78] By a vote of five to four the Court of Criminal Appeals found this additional evidence sufficient to sustain the verdict of guilt.[79]

The four dissenting judges found that without Fierro's confession, his conviction could not have been sustained.[80] One of the dissenters, Judge Maloney, recited the contents of an affidavit given by the prosecuting attorney at Fierro's trial that stated the El Paso police had concealed from him their collusion with the Ciudad Juarez police. The affidavit read:

> Had I known at the time of Fierro's suppression hearing what I have since learned about the family's arrest, I would have joined in a motion to suppress the confession. Had the confession been suppressed, I would have moved to dismiss the case unless I could have corroborated Olague's testimony. My experience as a prosecutor indicates that the judge would have granted the motion as a matter of course.[81]

Thus, the prosecuting attorney's opinion was that, absent the confession, there had not been enough evidence to sustain Fierro's conviction. The sole eye-witness' account was uncorroborated and he had made statements during the trial that cast doubt on his credibility.[82]

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[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 371-72.

[77] *Ex Parte* Fierro, 934 S.W.2d at 377.

[78] *Id.* at 376.

[79] *Id.* at 377.

[80] *Id.* at 383 (Clinton, J., dissenting); *Id.* at 385 (Baird, J., dissenting); *Id.* at 388 (Overstreet, J., dissenting); *Id.* at 392 (Maloney, J., dissenting).

[81] *Id.* at 390-91 (Maloney, J., dissenting).

[82] *Ex Parte* Fierro, 934 S.W.2d at 391 (Maloney, J., dissenting).

Judge Maloney also recounted the circumstances of Fierro's confession as they had been determined by the district court.[83] Fierro testified at the pre-trial suppression hearing that the interrogating officer had told him that his mother was in custody in Juarez and would not be released until he confessed.[84] Fierro further testified that the officer had shown him two letters that he and his brother had written to his mother in an effort to convince him that his mother was in custody.[85]

Judge Maloney also noted the testimony that Fierro's mother and stepfather gave at the suppression hearing:

> They were arrested and taken into custody, although they were not charged with an offense. They testified that while in custody at the Juarez jail, applicant's mother was physically abused and threats were repeatedly made to attach an electrical generator, known as a "chacharra," to applicant's stepfather's genitals. They were released at 7:00 p.m. that evening, after applicant [Fierro] had signed a confession.[86]

V. DUBIOUS CONVICTIONS

The use of capital punishment in cases like Fierro's, involving serious doubt about guilt, has been a factor in raising the international reaction against capital punishment as applied in the United States. For example, a United Nations ("UN") investigator who analyzed capital punishment in the United States identified arbitrary application as a serious problem.[87]

In 2001, concern about arbitrary application prompted a judicial decision in Canada that limited extradition to the United States. The Supreme Court of Canada cited what it found to be the arbitrary application of the death penalty in the United States as a basis for refusing to extradite persons sought on capital charges in the United States.[88] Unlike many other governments, Canada had previously been willing to extradite persons sought on a capital charge who were found in its territory, despite a United States-Canada extradition treaty that gave Canada the option to refuse.[89] When such persons had sought

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[83] *Id.* at 389 (Maloney, J., dissenting).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] Elizabeth Olson, *U.N. Report Criticizes U.S. for 'Racist' Use of Death Penalty*, N.Y. TIMES, Apr. 7, 1998, at A17.

[88] United States v. Burns, 195 D.L.R. (4th) 5, 45-49 (2001).

[89] Kindler v. Canada (Minister of Justice), 84 D.L.R. (4th) 438 (1991).

judicial relief, the courts of Canada had originally taken the position that it was within the discretion of the Canadian government to decide to extradite.[90]

In the 2001 case, however, the Supreme Court of Canada reversed itself in a case involving two men wanted on a capital murder charge in Washington state.[91] The fugitives were arrested in Canada, and the United States requested extradition.[92] The Canadian government decided to extradite, even though it could have refused under the terms of Canada's extradition treaty with the United States.[93] The two men then challenged the extradition order through lower Canadian courts, and finally reached the Supreme Court of Canada.[94]

While the Canadian Supreme Court noted its prior rulings that upheld extradition, it stated that the practice of the United States in implementing capital punishment had shown itself to be arbitrary in the sense that the innocent ran a significant chance of being executed.[95] The Canadian Supreme Court cited a Chicago Tribune study asserting that a number of persons sentenced to death in Illinois were in fact innocent.[96] The Court also cited a United States Justice Department study showing racial disparity in the death penalty as applied under federal law.[97] Finally, the Court cited the call by the American Bar Association for a moratorium on executions, a call premised on the inadequate representation of capital defendants, and on racial bias and poverty as factors that play a role in determining who is sentenced to death.[98]

Under the Canadian Constitution a person may not be deprived of life "except in accordance with the principles of fundamental justice."[99] The Canadian Supreme Court found that in light of the arbitrary nature of its application of the death penalty, as applied in the United States, did not accord with those principles.[100] The Court held, therefore, that the Canadian government was "constitutionally bound to ask for and obtain an assurance that the death penalty will not be imposed as a condition of extradition."[101]

The Canadian decision represents a serious embarrassment to the United States. The Supreme Court of Canada, hardly a state hostile to the United States, has essentially found that the rule of law does not

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[90] *Id.*
[91] *Burns*, 195 D.L.R. (4th) at 13.
[92] *Id.*
[93] *Id.* at 11.
[94] *Id.* at 10.
[95] *Id.* at 48.
[96] *Burns*, 195 D.L.R. (4th) at 46.
[97] *Id.* at 47.
[98] *Id.* at 45.
[99] Canadian Charter of Rights and Freedoms, art. 7.
[100] *Burns*, 195 D.L.R. (4th) at 54.
[101] *Id.* at 58.

prevail in the United States' implementation of capital punishment. This is especially surprising because courts are typically reluctant to make negative findings about the law enforcement practices of other countries.

VI. IMPLEMENTATION OF INTERNATIONAL DECISIONS

To date, United States courts have shown no inclination to defer to opinions rendered by international institutions. Nor have governors been influenced by such opinions. However, international decisions are potentially relevant either on the basis of the enforceability of the decisions themselves, or because they reflect an authoritative interpretation of international obligations.

One international decision that might fall into the latter category is an Advisory Opinion issued in 1999 by the Inter-American Court of Human Rights (IACHR). Mexico asked the IACHR, which, like the Inter-American Commission functions under the OAS, to give its opinion on whether a death sentence administered after noncompliance with the obligation to inform about consular access would represent a violation of due process of law. The IACHR, in a lengthy and detailed opinion, found that due process was violated in such a situation.[102]

Although the Advisory Opinion has no binding force, its reasoning has recommended itself to some judges. In the Illinois Supreme Court case of Madej discussed above, one of the dissenting judges who would have voided the death sentence referred to the Advisory Opinion to support his position.[103]

As for decisions of the Inter-American Commission, only one court has given detailed consideration to their status in United States law. The case involved Juan Garza, a man prosecuted federally for murder and sentenced to death.[104] The Inter-American Commission found that Garza's rights were infringed when evidence was introduced at his sentencing hearing of other murders he was alleged to have committed in Mexico, but for which no proceedings had been instituted against him.[105] The United States Fifth Circuit had previously rejected a claim by Garza over the same issue.[106] On the basis of the Inter-American Commission's decision, Garza filed a new petition for a writ of habeas corpus arguing that the decision was binding due to a treaty the United States is a party to, namely, the Charter of the Organization of

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[102] The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Case 16/99, Inter-Am. C.H.R. 99 (ser. A), No. 16 (1999).

[103] Illinois v. Madej, 739 N.E.2d at 431 (Ill. 2000) (McMorrow, J., dissenting).

[104] United States v. Garza, 63 F.3d 1342 (5th Cir. 1995).

[105] Juan Raul Garza and United States of America, Case 12.243, Inter-Am. C.H.R.1255, OEA/ser. L/V/II.111, doc. 21 rev. (Apr. 6, 2001), Report No.52/01 (2001).

[106] United States v. Garza, 165 F.3d 312 (5th Cir. 1999).

American States ("the Charter").[107] Under the Supremacy Clause of the United States Constitution, treaties are the law of the land.[108]

The United States Court of Appeals for the Seventh Circuit rejected Garza's petition on the grounds that the Charter did not intend such decisions to be binding on OAS member states.[109] The United States Supreme Court denied certiorari without opinion.[110] The Seventh Circuit cited a statute adopted by the OAS to create the Inter-American Commission that stated:

> The language of the Commission's statute shows that the Commission does not have the power to bind member states. The Commission's power is only to make "recommendations," which, according to the plain language of the term, are not binding. . . we think it quite unlikely that "recommendations to the government of any member state" could create judicially-cognizable rights in individuals. By their very nature, non-binding recommendations to a government on how to conduct its affairs would appear to be addressed to the executive and legislative branches of the government, not to the courts."[111]

Thus, the Seventh Circuit decision not to enforce the commission's ruling was premised on its finding that the commission's enabling instrument did not make such rulings binding on states. The issue has also arisen in capital cases determined by the International Court of Justice ("ICJ"). The ICJ was formed under the United Nations Charter, to which the United States is a party. The Charter states, "Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."[112]

Paraguay, Germany, and Mexico have each filed a case with the ICJ against the United States challenging the execution of a national.[113] In each case, the ICJ issued a provisional injunctive order against the United States, requesting a stay in the execution pending a final decision by the Court.[114] The case filed by Germany was decided against the

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[107] Garza v. Lappin, 253 F.3d 918, 920 (7th Cir. 2001).

[108] U.S. Const., art 6, cl. 2.

[109] Garza v. Lappin, 253 F.3d at 925.

[110] Garza v. Lappin, 533 U.S. 924 (2001).

[111] Garza v. Lappin, 253 F.3d at 925-26.

[112] U.N. CHARTER, art. 94, para.1.

[113] Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426 (Order of April 9); LaGrand Case (F.R.G. v. U.S.), 1999 I.C.J. 9 (Order of March 3); Avena Case (Mex. v. U.S.), 2003 I.C.J. (Order of Feb. 5).

[114] Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426 (Order of April 9); LaGrand Case (F.R.G. v. U.S.), 1999 I.C.J. 9 (Order of March 3); Avena Case (Mex. v. U.S.), 2003 I.C.J. (Order of Feb. 5).

United States in the final decision.[115]

To date, the United States courts have not decided what effect, if any, these decisions have in United States law. By the reasoning of the Seventh Circuit in the Garza case, a decision of the ICJ is arguably binding on United States courts since the enabling instrument for the ICJ specifies that its decisions are binding, whereas the enabling instrument for the Inter-American Commission on Human Rights does not. The language of the United Nations Charter requires states to comply with such decisions. In the Seventh Circuit's analysis, decisions of the ICJ would appear to be addressed to all branches of government, including the judicial branch.[116]

In the Paraguayan case before the ICJ, the United States Supreme Court asked the Solicitor General to write a brief as the Paraguayan who faced imminent execution in Virginia moved for a stay.[117] The Legal Adviser to the State Department had asked the Governor of Virginia to give consideration to the ICJ provisional order in his clemency determination.[118] The Secretary of State also requested the Governor to place a stay on Breard's execution based on the provisional order.[119] The Governor of Virginia announced that he would await a United States Supreme Court decision on the matter, implying that he would not take it upon himself to honor the injunctive order.[120]

In the Solicitor General's brief to the United States Supreme Court he argued that the ICJ interim order was not binding on the United States.[121] The Solicitor General reasoned that the relevant treaty texts did not specify that such orders were binding, and that the ICJ itself did not view such orders as binding.[122]

However, in the final judgment of the suit filed against the United States by Germany the ICJ decided that injunctive orders it issued were binding on the states against which they were issued.[123] Though Germany had gained such an order from the Court, the execution in the State of Arizona was carried out.[124] Germany then asked the ICJ to rule that the United States was in violation of its Article

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[115] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27).

[116] Garza v. Lappin, 253 F.3d at 924-25.

[117] Breard v. Greene, 523 U.S. 1068 (1998).

[118] Brief of Amicus Curiae United States at 12, Breard v. Greene, 523 U.S. 371 (1998) (No. 97-8214).

[119] *Id.*; Brooke A. Masters, *Albright Urges Va. to Delay Execution*, WASH. POST, Apr. 14, 1998, at B1.

[120] *Id.*

[121] Brief of Amicus Curiae United States at 49-50, Breard v. Greene, 523 U.S. 371 (1998) (No. 97-8214).

[122] *Id.* at 50-51.

[123] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104, para. 109.

[124] *Id.* at para. 34.

94 obligation for ignoring the order.[125] The Court ruled in Germany's favor on this issue, deciding that its own injunctive orders were binding, and that the United States had violated its obligation as a United Nations member state by failing to comply with the order.[126] Thus, one of the bases used by the Solicitor General to deny the impact of such an order is now invalid.

The Solicitor General, moreover, was addressing injunctive orders only, not final orders. There would seem to be every basis for considering that orders by the ICJ, both injunctive and final, are binding on United States courts. There is no question that they are binding on the United States. The only issue is whether they are binding on the judicial branch of government. The Constitution would seem to resolve the point when it states that treaties are the law of the land, and judges are bound by them.

VII. FUTURE TREND OF INTERNATIONAL ATTENTION

Foreign states that are economically dependent on the United States incur potential risks by criticizing the United States over capital punishment. Accordingly, Western European states with relatively strong economies have been at the forefront of the criticism. For example, it is they alone who have filed formal objections to the extensive reservations that the United States entered when it ratified the International Covenant on Civil and Political Rights. One reservation exempts the United States from the obligation to refrain from imposing capital punishment on persons less than eighteen years of age at the time of their offense.[127] Several Western European states filed objections to this United States reservation.[128] No other states did so, despite the fact that the execution of such juveniles is widely condemned around the world.

On the other hand, some weaker states have taken strong positions against the United States' death penalty policy. For instance, Mexico, heavily dependent on the United States, has filed suit in the ICJ over the execution of Mexican nationals and, as indicated above, President Fox has publicly taken the issue up with President Bush. As well, the Dominican Republic, in the case of Carlos Santana made strong appeals to the United States in an unsuccessful effort to avert Santana's execution.[129] When a foreign state's own nationals are in jeopardy, they

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[125] *Id.* at paras. 92-93.

[126] *Id.* at para. 115.

[127] International Covenant on Civil and Political Rights, United States of America Reservations nos. 2, 5 (Sept. 8, 1992), 999 U.N.T.S. 171.

[128] *See, e.g., Id.* at 193 (Belgium), 193 (Denmark), 195 (Netherlands).

[129] Carlos Santana and United States of America, Case 11.130, Inter-Am. C.H.R. at 11

often take steps to protect the international rights of their citizens, even if by doing so they risk repercussions from the United States on other issues.

VIII. IMPACT OF FOREIGN GOVERNMENT ACTION

International attention operates in a sporadic and uneven fashion. In one case in Missouri, Pope John Paul II approached the governor and asked that he exercise clemency in a death sentence case.[130] The governor found nothing to distinguish the case from others, in which he had refused clemency, yet he commuted the death sentence.[131] This action evoked criticism that he was not acting on the basis of principle.[132]

Texas has been a lightning rod for the mobilization of international concern about capital punishment in the United States, both because of the frequency of executions and because of the relatively high number of foreigners sentenced to death. The eventual impact of international expressions of concern is difficult to predict.

The international attention may potentially evoke a defensive reaction that could strengthen capital punishment in the United States. However, the likelihood is that the impact will be in the opposite direction. International attention on any such issue is uncomfortable for a government and makes it more difficult for it to gain what it seeks from other governments. It is an irritant that the United States would prefer not to have to consider as it deals with other governments on a range of issues.

Such practical considerations may impact state governors as well. Governors may be sensitive to the negative image of their states. Governors are typically anxious to promote trade relations with various regions of the world. Many states maintain trade missions and send trade delegations to foster commercial relations. If a state is perceived negatively, trade relations may suffer.

A worldwide effort is underway to abolish the death penalty. Fewer and fewer states use it. Increasingly, states view capital punishment as a violation of an internationally protected right to life. As this movement continues, the United States will find it difficult to ignore the international spotlight in which it finds itself.

(Complainants' Reply to Response of the United States of America) (on file with author).

[130] Jo Mannies, *Carnahan Gives Details in Commutation of Death Sentence; Governor Acted at Request of Pope*, ST. LOUIS POST-DISPATCH, Mar. 31, 2000, at A1.

[131] *Id.* ("There were no circumstances on the basis of justice to help him," explained the Governor).

[132] *Id.*