

# The ICJ Ruling Against the United States: Is it Really About the Death Penalty?

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The practice of capital punishment within the United States now provokes concern and condemnation in many parts of the world. The United States and Japan are the only developed countries to retain this barbaric sanction. Capital punishment has fallen into disuse as a part of criminal law in virtually all of Europe, most of Latin America and much of Africa. It is excluded by the ad hoc international tribunals for the former Yugoslavia and Rwanda, as well as by the newly-created International Criminal Court. According to statistics published by the Secretary-General of the United Nations, approximately two-thirds of the world's countries have abolished the death penalty.<sup>1</sup> Nearly seventy<sup>2</sup> have confirmed this important development by subscribing to international legal instruments that outlaw capital punishment and prevent its reintroduction.<sup>3</sup>

Although it cannot yet be said that capital punishment is prohibited by a customary law rule of universal application, the death penalty as it is carried out in the United States has been condemned by a variety of international and national treaty bodies, courts and political institutions.

As early as 1987, the Inter-American Commission on Human Rights declared that the execution of juvenile offenders in South Carolina and

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1. See generally *Report of the Secretary-General, Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, U.N. ESCOR, U.N. Doc E/2000/3 (2000).

2. *Id.* at 39 (Table 6).

3. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* Apr. 28, 1983, E.T.S. 114; Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty, G.A. Res. 44/128, Dec. 15, 1989, 29 I.L.M. 1464; Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. No. 73, 29 I.L.M. 1447; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, *opened for signature* May 3, 2002, E.T.S. 187. A fifth treaty, the American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, is also an abolitionist instrument because it prevents countries that have already abolished the death penalty from reintroducing it. Thus, a State which has abolished the death penalty and has ratified the American Convention is abolitionist from the standpoint of international law.

Louisiana ran counter to the American Declaration of the Rights and Duties of Man.<sup>4</sup>

In 1989, the European Court of Human Rights ruled that extradition from the United Kingdom to Virginia would violate the European Convention on Human Rights because the prolonged period of post-conviction detention prior to execution, the "death row phenomenon," constituted inhuman and degrading treatment or punishment.<sup>5</sup>

In 1994, the United Nations Human Rights Committee declared that execution by means of the gas chamber in California was contrary to the International Covenant on Civil and Political Rights.<sup>6</sup>

Many national courts, often relying on international law to reach their conclusions, now prohibit their governments from extraditing fugitives to the United States if they are to face the death penalty.<sup>7</sup>

In an August 2000 resolution, the United Nations Sub-Commission on the Protection and Promotion of Human Rights called upon all states to abolish the death penalty for those under eighteen at the time of the offense, a statement of clear relevance to the United States.<sup>8</sup> United Nations human rights monitoring bodies, such as the Special Rapporteur on Extrajudicial, Summary and Arbitrary Institutions<sup>9</sup> and the High Commissioner for Human Rights,<sup>10</sup> have also taken up the issue.

Probably the most aggressive and systematic international critics of United States practice in recent years have been the institutions of the fifteen-member European Union. One of its component organs, the European Parliament, regularly adopts resolutions that address capital punishment issues within the United States. European Union embassies in Washington frequently send demarches to the United States government condemning the practice of the death penalty.<sup>11</sup> The European Union has even intervened as an *amicus curiae* in a case pending before the Supreme Court of the United States.<sup>12</sup>

4. Resolution No. 3/87, *Roach & Pinkerton v. United States*, 8 HUM. RTS. L.J. 345 (1987), No. 9647 (Sept. 1987). Since *Roach & Pinkerton*, the Commission has made several important findings against the United States in death-penalty cases. *E.g.*, Report No. 57/96, *Andrews v. United States*, No. 11.139 (Dec. 1996); Report No. 52/01, *Garza v. United States*, No. 12.243 (Apr. 2001).

5. *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (ser. A) ¶ 111 (June 1989).

6. *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. A/49/40 (Sept. 1991), 15 HUM. RTS. L.J. 149 (1994).

7. *United States v. Burns*, [2001] 1 S.C.R. 283 (Can.); *Mohamed v. Republic of South Africa*, 2001 (3) SA 893 (CC) (S. Afr.); *Mme. Joy Davis-Aylor, Les Engagements d'un Etat Etranger en Matiere D'Extradition*, 9 REV. FR. DROIT ADM. 1166 (Oct. 1993) (C. Vigoreux, conclusions).

8. *The Death Penalty, Particularly in Relation to Juvenile Offenders*, U.N. Subcommission on the Promotion and Protection of Human Rights, Res. 2000/17, U.N. Doc. E/CN.4/SUB.2/RES/2000/17 (2000).

9. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr. Bacre Waly Ndiaye*, Submitted Pursuant to Commission Resolution 1997/61, Addendum, Mission to the United States of America, U.N. Commission on Human Rights, 54th Sess., U.N. Doc. E/CN.4/1998/68/Add.3 (1998).

10. Statement by Mary Robinson, United Nations High Commissioner for Human Rights, U.N. Press Release, U.N. Doc. HR/98/6 (Feb. 4, 1998).

11. See Press Release, Embassy of Sweden, Washington, E.U. Policy on the Death Penalty (May 10, 2001), available at <http://www.eurunion.org/legislat/DeathPenalty/Demarche10may.htm>. A similar demarche was issued in February 2000 by the European Union. See EUROPEAN UNION ANNUAL REPORT ON HUMAN RIGHTS 30 (2000), available at [http://europu.eu.int/comm/external\\_relations/human-](http://europu.eu.int/comm/external_relations/human-)

Opponents of the death penalty who have only begun to learn of this vast and constantly growing body of material condemning the United States frequently ask if its violations of international law cannot be taken to the “world court.” For non-specialists, it seems almost axiomatic that this should be the body to condemn breaches of the law of nations.

Students of public international law know better. First, they understand that most international human rights law instruments, with their specialized mechanisms to adjudicate issues between an individual and his or her own government, simply do not fall within the jurisdictional scope of the International Court of Justice. Even with important exceptions—one thinks of the three genocide cases now pending before the Court as examples of the body being used to litigate issues at the core of international human rights law<sup>13</sup>—there are often insurmountable obstacles because so few States actually accept the optional clause in the Court’s Statute.

The United States of America, of course, has been hostile to the International Court of Justice since the mid-1980s when it was condemned for supporting the Contras in Nicaragua. When the United States ratified the Genocide Convention in 1987, it formulated a reservation to Article IX in order to exclude the jurisdiction of the Court for disputes about the interpretation and application of that instrument.

There was a notable exception to Washington’s antipathy for the International Court of Justice. The United States is a party to the Optional Protocol to the Vienna Convention on Consular Relations, which gives the Court jurisdiction in litigation between States on issues of consular protection.<sup>14</sup> Back in 1980, the United States had successfully sued Iran before the Court with respect to the Tehran Embassy occupation. Perhaps for this reason, the United States stayed within the scheme even when it more generally turned its back on the world’s premier international judicial body.

The possibility that the Optional Protocol to the Vienna Convention might become a vehicle to challenge the death penalty within the United States before the Court began to interest abolitionists. It became apparent that

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rights/doc/report\_00\_en.pdf (describing dialogue sessions with the United States as providing an “opportunity to raise the question of the death penalty”).

12. Brief for European Union as Amicus Curiae in Support of Petitioner, *McCarver v. North Carolina*, 532 U.S. 941 (2001) (No. 00-8727).

13. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugoslavia (Serbia and Montenegro)*), 1993 I.C.J. 3, 16 (April 8) (Request for the Indication of Provisional Measures); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugoslavia (Serbia and Montenegro)*), 1993 I.C.J. 325 (Sept. 13); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugoslavia (Serbia and Montenegro)*), 1996 I.C.J. 595 (July 11) (Preliminary Objections); Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, 1997 I.C.J. 243 (Order of 7 December); Legality of Use of Force (*Yugoslavia v. Belg.*), 1999 I.C.J. (April 28) (Request for the indication of provisional measures); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Yugoslavia*), 1999 I.C.J. (July 2) (Application by the Republic of Croatia Instituting Proceedings against the Federal Republic of Yugoslavia).

14. Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 23 U.S.T. 3374, 500 U.N.T.S. 241.

hundreds of foreign nationals who had never been informed of their right to seek consular assistance were awaiting execution. In 1998, Paraguay filed an application against the United States concerning the impending execution of Angel Breard by the state of Virginia.<sup>15</sup> Before it could be heard on the merits, the United States had executed Breard, and Paraguay subsequently dropped the case. It was hard to demonstrate that Breard had been convicted because of the lack of consular assistance, and this made the fact situation less compelling than it might have been.

Then Germany picked up the baton in 1999 in the case of the LaGrand brothers. Although Berlin had made its opposition to the death penalty quite clear in diplomatic correspondence with United States authorities prior to filing the application,<sup>16</sup> the German government was determined to keep the death penalty on the margins of the litigation. In the provisional measures order, the Court noted carefully that the case did not concern “the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes.”<sup>17</sup> Only the Japanese judge, Oda, often the source of lonely and eccentric individual opinions, seemed to want to make an issue of capital punishment, although not in the direction that Germany or any abolitionist would have wanted. In paragraph 2 of his individual opinion on the issue of provisional measures, he said: “...if Mr. Walter LaGrand's rights as they relate to humanitarian issues are to be respected then, in parallel, the matter of the rights of victims of violent crime (a point which has often been overlooked) should be taken into consideration.”<sup>18</sup>

Death penalty issues are no more present in the Court's final judgment of June 27, 2001. The popular conception of the case may well be that capital punishment within the United States suffered yet another stinging rebuke in a prestigious international body. In reality, though, the case was about a different issue entirely. Or was it?

On a narrow interpretation, the judgment addresses the ability of the International Court of Justice to issue binding provisional measures orders. The United States had not even tried to argue against the claim that the Vienna Convention had been breached.<sup>19</sup> It is perhaps astonishing that the issue of the Court's power to issue binding provisional measures orders had remained undecided throughout the twentieth century. The matter was a source of some dispute because of the apparently hesitant language of its Statute on this subject, which talks of a power to “indicate” rather than to “order” such measures.

The Court held that provisional measures must indeed be mandatory because a contrary view would frustrate the object and purpose of the

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15. Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J. 248 (order of Apr. 9).

16. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. ¶ 26 (June 27), available at <http://www.icj-cij.org>.

17. LaGrand Case (F.R.G. v. U.S.), 1999 I.C.J. ¶ 25 (March 3) (Request for the Indication of Provisional Measures), available at <http://www.icj-cij.org>.

18. *Id.*, Declaration of Judge Oda, ¶ 2.

19. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. ¶ 123 (June 27).

institution as a forum for the settlement of international disputes.<sup>20</sup> This was really nothing more than an issue of treaty interpretation, without much significance in other international legal systems where legal provisions are worded differently.

But fortunately the Court went further, citing with approval a statement from its predecessor, the Permanent Court of International Justice, which had referred to “the principle universally accepted by international tribunals and likewise laid down in many conventions . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.”<sup>21</sup>

These facts make perfect sense. It would seem axiomatic that a body with the authority to settle judicial disputes should be entitled to indicate to the parties that they must preserve the status quo ex ante, pending a final decision. And yet the wording of international legal instruments in this area has always suffered from equivocation. For example, in *LaGrand*, the Court refers to the travaux préparatoires of the relevant provision of its Statute where it seems clear enough that there was a reluctance to use unambiguous terms. But for the Court, the travaux are not really determinative of the issue.

We confront the same problem in application of the major international human rights treaties. The American Convention on Human Rights is the only instrument to state clearly that its principal adjudicative body, the Inter-American Court of Human Rights, has the power to “order” provisional measures.<sup>22</sup> The European Convention on Human Rights is silent on the issue, although the European Commission on Human Rights once tried to fill the gap with a provision in its internal regulations. In 1991, however, the European Court of Human Rights ruled in a close vote that the silence of the Convention meant such orders were not binding.<sup>23</sup> When the Convention underwent a major revision in the late 1990s, the omission was never corrected.<sup>24</sup>

Like the European Convention, the Optional Protocol to the International Covenant on Civil and Political Rights, which creates an individual petition mechanism before the United Nations Human Rights Committee, says nothing about provisional measures. The Committee has itself provided for such a mechanism in article 86 of its Rules.<sup>25</sup> Interim

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20. *Id.* ¶ 102.

21. *Id.* ¶ 103 (citing *Electricity Co. of Sofia and Bulgaria*, 1939 P.C.I.J. (ser. A/B) No. 79, at 199 (Dec. 5)).

22. American Convention on Human Rights, *supra* note 3, art. 63(2).

23. *Cruz Varas v. Sweden*, No. 201, 14 Eur. H.R. Rep. 1 (ser. A) (Mar. 1991).

24. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, May 11, 1994, E.T.S. 155, 15 HUM. RTS. L.J. 86 (1994).

25. Adoption of the Rules of Procedure of the Committee in Accordance with Article 39 of the Covenant, U.N. Human Rights Committee, 17th Mtg., U.N. Doc. CCPR/C/SR.17, ¶¶ 25-26 (1977); Adoption of Further Rules of Procedure of the Committee in Accordance with Article 39 of the Covenant, U.N. Human Rights Committee, U.N. Doc. CCPR/C/3/Rev.1 (1979); Provisional Rules of Procedure for the Consideration of Communications Received Under the Optional Protocol, U.N.

measures are of potentially great significance in cases before the Committee concerning the death penalty, and it has often had occasion to make such "requests".

Jamaica, against whom the vast majority of petitions under the Optional Protocol in death penalty cases have been directed, appears generally to have respected interim measures requests from the Human Rights Committee as a matter of policy. The same cannot be said of Canada, which literally defied two such requests in 1991 when it extradited death row fugitives Joseph Kindler and Charles Ng to the United States.<sup>26</sup> In a subsequent case, the Canadian government observed a provisional measures request from the Committee until it had ruled on the merits of the case.<sup>27</sup>

The Committee was of course unhappy with Canada's non-compliance, but it tackled the matter with some circumspection. In its Views, the Committee meekly "expresse[d] its regret that the State party did not accede to the Special Rapporteur's request" not to extradite Kindler.<sup>28</sup> As for Ng, in which the Committee concluded there was a breach of article 7 of the Covenant, the Views do not even criticize Canada for its contemptuous attitude, stating only that Canada should "make such representations as might still be possible to avoid the imposition of the death penalty."<sup>29</sup> Only Francisco José Aguilar Urbina, in an individual dissenting opinion, took Canada to task, saying that the country "failed to display the good faith which ought to prevail among the parties to the Protocol and the Covenant."<sup>30</sup> In its concluding observations on Canada's fourth periodic report, the Committee "expresse[d] its concern" that Canada considered that it was not required to comply with requests for interim measures, and urged Canada to revise its policy.<sup>31</sup>

The Committee's caution may have only encouraged other governments to show the same disregard as did Canada for interim measures requests, and several other countries followed Ottawa's miserable example, executing offenders before their petitions could be judged.<sup>32</sup> The Committee has now become much more aggressive on the subject, especially in death penalty cases. In November 2000, the Committee said that States parties to the Optional Protocol had made an implicit undertaking to cooperate with the

Human Rights Committee, Selected Decisions under the Optional Protocol (2nd to 16th Sess.), Annex II, at 155, U.N. Doc. CCPR/C/OP/1.

26. *Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. A/48/40 (July 1993), 14 HUMAN RIGHTS L.J. 307 (1993); *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. A/49/40 (Sept. 1991), 15 HUMAN RIGHTS L.J. 149 (1994).

27. *Cox v. Canada*, Communication No. 539/1993, U.N. Doc. CCPR/C/52/D/539/1993, 15 HUMAN RIGHTS L.J. 410 (Nov. 1993).

28. *Kindler*, *supra* note 26, ¶ 17.

29. *Ng*, *supra* note 26, ¶ 18.

30. *Id.* ¶ 612.

31. Final Observations of the Human Rights Committee: Canada, U.N. Human Rights Committee, 65th Sess., U.N. Doc. CCPR/C/79/Add.105, ¶ 14 (1999).

32. Case 580/1994, *Ashby v. Trinidad and Tobago*, U.N. Doc. CCPR/C/54/D/580/1994 (July 1994); Cases 839, 840 & 841/1998, *Kandu-Bo v. Sierra Leone*, U.N. Doc. CCPR/C/64/D/839, 840 & 841/1998 (Nov. 1998); Case 869/1999, *Piandong v. Philippines*, U.N. Doc. CCPR/C/70/O/869/1999, ¶¶ 1.2-1.5 (Oct. 2000).

Committee in good faith. "It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views," the Committee said.<sup>33</sup> The Committee added that a State that proceeded with an execution after being notified of a communication, even in the absence of an interim measures request and before the Committee had concluded its consideration and examination of the case, "commits grave breaches of its obligations under the Optional Protocol."<sup>34</sup>

In July 2001, in its Views on a series of applications from Sierra Leone, where petitioners were executed by firing squad despite an interim measures request from the Committee, it wrote: "[T]he State party would be committing a serious breach of its obligations under the Optional Protocol if it engages in any acts which have the effect of preventing or frustrating consideration by the Committee of a communication alleging any violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile."<sup>35</sup>

*LaGrand* is of immense assistance here in its suggestion that interim measures to prevent irreparable harm, preserving the status quo in cases which cannot otherwise be corrected by a final decision, are an inherent function of adjudicative bodies. In this respect, the Court might have confined its ruling to questions of interpretation of its own Statute. This outcome would have reduced the significance of its ruling considerably with respect to other bodies. As such, the judges of the International Court of Justice, in a case where the death penalty was only a subtext, have handed a powerful precedent to international human rights bodies that confront death penalty issues directly on a very regular basis.

To this extent, then, the *LaGrand* decision is very much about capital punishment. A dimension of the precedent that remains to be explored concerns the transposition of the *LaGrand* principle before national courts when international treaty bodies are involved. When an institution like the Human Rights Committee makes an interim measures order, can litigants use national courts in order to enforce the order? Can it be argued that because such an order is binding, in accordance with the principles underlying paragraphs 102 and 103 of the *LaGrand* decision, national courts should issue injunctive relief to prevent defiant governments from disobeying interim measures requests from treaty bodies?

Obviously, there are difficult technical issues here, many of which relate to procedural law in individual jurisdictions. But the principle ought to be clear enough. Governments will of course attempt to argue that they are free to disobey interim measures orders because of the classic and well-known disconnects between international and national law. Even where treaties are themselves self-executing, it will be suggested that the actual orders of an

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33. Piandong, *supra* note 32, ¶ 5.1.

34. *Id.* ¶ 5.2. See also Cases 839/1998, 840/1998 & 841/1998, *Mansaraj v. Sierra Leone*, UN Doc. CCPR/C/72/D/840/1998, ¶ 6.2 (July 2001).

35. *Mansaraj*, *supra* note 34, ¶ 5.2.

international treaty body like the Human Rights Committee or the Inter-American Commission on Human Rights cannot be enforced by national justice systems in the absence of clear legislation.

However, these arguments are just a bit too cute. Courts everywhere issue injunctive relief on an interim or provisional basis in order to preserve rights pending settlement of disputes on the merits. Case law in some common law jurisdictions now acknowledges that litigants are entitled to a “reasonable expectation” that any decisions taken by governments that affect them must not be arbitrary. Official decision-makers, including governors and ministers with the authority to prevent or delay implementation of capital punishment, should be required at the very least to await determination by an international treaty body in a pending death penalty case. Even if the administrative decision-maker is not bound by the ultimate finding on the merits, the condemned man or woman should, at a minimum, be entitled to have the ruling of an international body taken into account in a final determination concerning pardon, commutation, or extradition. This was essentially the position taken by the Judicial Committee of the Privy Council in a series of Jamaican appeals in September 2000.<sup>36</sup>

The *LaGrand* ruling must become an important new piece in arguments that rely on the significance of interim measures rulings from international human rights treaty bodies. Coming from the United Nations’ premier judicial body, the judgment may command greater respect and credibility than does case law from human rights treaty bodies. It is, consequently, a precedent of potentially considerable significance in death penalty jurisprudence.

The judges—and the German government—may have sought to avoid the issue of capital punishment. And yet like Basil Fawlty who, in a notorious comic sketch, is warned by his shrewish wife not to “talk about the war,” the issue of the death penalty in *LaGrand* is simply unavoidable. Even if the Court did so inadvertently, the decision has effectively advanced the protection of individuals facing capital punishment.

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36. *Lewis v. A.G. Jamaica*, [2001] 2 AC 50 (P.C. 2000) (appeals taken from Jamaica) (App. Nos. 60, 65 and 69 of 1999 & 10 of 2000).