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College of Liberal Arts
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The Death Penalty and Mexico-U.S. Relations: Historical Continuities and Present Dilemmas

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CONFERENCE MEMORIA

The University of Texas at Austin
The Mexican Center of LLILAS,
College of Liberal Arts
and the UT School of Law,
present:

an International Symposium

The Death Penalty and Mexico-U.S. Relations
Historical Continuities, Present Dilemmas

Held at the Benson Latin American Collection
Rare Books Room
and the School of Law, UT-Austin

Sponsored by:
The Mexican Center of LLILAS; Teresa Lozano Long Institute of Latin American Studies; Dean of Graduate Studies; Texas Cowboys Lectureship; Benson Latin American Collection; Dean of the UT School of Law; the Shell Foundation

Wednesday, April 14, 2004
Held at the Benson Latin American Collection
Rare Books Room
and the School of Law, UT-Austin

Table of Contents

Introduction: Conference Purpose

Peter Ward & Patrick Timmons

Death sentences for Mexican nationals for capital crimes committed in the United States constitute an impediment to good international relations between the two countries. Mexican nationals comprise the largest number of foreign nationals now on U.S. death rows, sixteen Mexicans of whom are in Texas – also the state with the highest number of executions since 1976. The dispute highlights the difficulties of erecting an international justice system, and poses an obstacle for conducive ongoing bi-lateral relations. The recently concluded legal proceedings at the International Court of Justice in the *Avena* Case have further underscore that, in regards to capital punishment, the United States and Mexico have two opposing understandings about how to define justice, and the bilateral relationship has suffered as a result. [Mexico's application to the ICJ may be found at: http://www.icjcij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF]

This arena of the legal and diplomatic disputes between Mexico and the United States over capital punishment is poorly understood. Mexico is widely perceived as an abolitionist country, but in fact, no prohibition against the death penalty exists in Mexico's Constitution. Indeed, death sentences continue to be occasionally handed down by military tribunals, although since the 1960s none has been carried out, instead being commuted by the Mexican President to life imprisonment. The retention of the death penalty in the Constitution, but the absence of actual executions, raises important questions about the trajectory of capital punishment in Mexico's lengthy history.

These ongoing debates, Texas' position in the frontline of Mexican nationals on death row, together with Mexico's recent legal battle at the International Court of Justice, has prompted the Mexican Center at the Lozano Long Institute of Latin American Studies and the UT School of Law of the University of Texas at Austin to convene a bi-national symposium, in April 2004, to understand better Mexico's stance on capital punishment from both contemporary and historical perspectives. The symposium brought together academics, lawyers, international relations policy analysts, Texas public officials, the media and the general public in order to analyze the death penalty's place within Mexican history, and to review the contemporary debate.

The Memoria: Developments since the Conference and Useful Information

Patrick Timmons

As of mid August 2004, some four months after the Conference, there have been significant developments in two distinct but interrelated areas. Within the United States, legal appeals by Mexican nationals condemned to die seem to have been bolstered by the International Court of Justice's ruling in favour of Mexico in the *Avena* Case. Osbaldo Torres' scheduled execution in Oklahoma on 18 May never went forward and instead he was granted clemency by the state's governor. Distinct from this issue, in Mexico City "civil society" called for the restoration of the death penalty in the "March Against Violence", one demand in response to rising crime rates, in particular instances of kidnapping. At more or less the same time, President Vicente Fox sent a package of justice reforms to the Congress in which he proposed the full abolition of the death penalty in Mexican law.

Most of Fox's countrymen seem to agree that the death penalty in the United States is applied to Mexican nationals in a capricious manner and agrees with the government's legal and logistical support for condemned Mexican nationals. [See, for example, a recent survey conducted by Parametria into the Death Penalty and Life in Prison: http://parametria.com.mx/comments.php?id=P43_0_1_0_C] But within Mexico a very different debate, impelled by the persistence of violence, has begun to emerge. The dissonance between the two issues is difficult to reconcile, indicating that much more research on these issues needs to be undertaken. As this Conference Memoria tries to make plain, the Government of Mexico's position still remains poorly understood, and the UT conference probably offers the most readily accessible source of information on this dynamic and compelling aspect of U.S.-Mexican relations.

The Memoria contains summaries (sometimes by the presenters themselves, sometimes by audience members) of the presentations delivered at the day-long conference. A video recording of the proceedings may also be found at:

http://www.utexas.edu/cola/llilas/centers/mexican/

(click on Calender of events and go to the Death Penalty section and select the first section).

Opening Remarks and a Few thoughts on Capital Punishment
*Sheldon Ekland-Olson**

Any discussion of human rights generally drawn as well as capital punishment more particularly considered should be embedded in considerations of moral imperatives; how we go about violating these moral dicta, and in the process justifying the violation.

Let me start with two relevant moral imperatives: First, that life is sacred and should be protected; and second, that suffering, when identified, should be addressed and alleviated. These moral dicta are imperative in that they command attention in all known communities across time, place, and life circumstances. Does this mean they are determinative of actions taken? Clearly not. Violations are routine and routinely justified.

Does this mean imperatives do not exist, that all non-determinative moral standards are relativistic? Or, in contrast, that we live with the tension that comes when deeply held beliefs are not in line with commonly occurring actions, policies and laws? If this latter life-infused-with-tension position is correct, then we should find tension reflected in concrete patterns of actions, laws and policies, cyclical and otherwise. There are two major situations when such moral tension is evidenced. In the first, separate imperatives may conflict, producing unavoidable tension. In the second, the tension produced by violation can be neutralized, thus minimizing and even eliminating the moral discomfort.

In the first case of competing imperatives and unavoidable tension we speak of moral dilemmas. It may be impossible to simultaneously alleviate suffering and protect the sanctity of life. Euthanasia, stem cell research, and fetal tissue transplant debates highlight the issues. Similarly, many argue that we cannot alleviate the suffering of surviving victims to a homicide without ending the life of the perpetrator. It is impossible to honor both imperatives. Choices must be made, always resulting in a

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* Dr Ekland Olson is Provost and Executive Vice President of The University of Texas at Austin. Among his many publications he is co-author with James W. Marquart and Jonathan R. Sorensen of *The Rope, the Chair, and the Needle: Capital Punishment in Texas, 1923 – 1990* (Austin: University of Texas Press, 1994). This summary is taken from a full paper in preparation.

tension-producing, non-satisfying resolution. When such competing moral imperatives are present we can expect dilemma-driven cycles of action and legal change as policies are made and remade in pendulum-like fashion.

The second mechanism for dealing with the violation of moral imperatives and justifying the violation in the process is through definitional neutralization. To justify the violation of the life-is-sacred imperative, a *neutralizing logic of exclusion is frequently found.* The imperative remains operable, but not applicable. Starting from these grounding questions and principles, the broader study upon which I am engaged examines relevant empirical findings.

Logic of Exclusion, Slavery, and Capital Punishment: Executions in the United States are heavily concentrated in the former Confederacy. While several explanations can be offered for this dramatic pattern, the legacy of slavery in which a logic of exclusion traditionally set a category of persons outside the protective boundaries of otherwise binding moral imperatives is compelling.

In December 1865, with the ratification of the thirteenth amendment to the U.S. Constitution, slavery was henceforth illegal – "except as a punishment of crime." Slavery, contrary to widely held impressions, was not abolished by the 13th Amendment. It was simply severely restricted. With the ratification of the 13th Amendment, the United States joined more distant Aztec, as well as Chinese and Egyptian civilizations excluding persons and turning them into slaves where the dominant image of the slave was, quoting Orlando Patterson (1982: 41-42), "that of an insider who had fallen, one who ceased to belong and had been expelled from normal participation in the community because of a failure to meet certain minimal legal or socioeconomic norms of behavior."

A few years after ratification of the 13th Amendment, a Virginia court in *Ruffin v. Commonwealth*, buttressed the slave-of-the-state image of the duly convicted felon, holding, "A convicted felon…As a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being a slave of the state. He is *civiliter mortuus;* and his estate, if he has any is administered like that of a dead man."

This slave-of-the-state, civilly dead status for duly convicted felons held center stage in the United States for the next one hundred years. It was not seriously challenged

until the prison reform movement, borrowing the inclusionary principles of the broader civil rights movement of the 1960s, gained momentum. From this slave-of-the-state status much followed. Perhaps most importantly in the present context, the implied logic of exclusion buttressed the moral and legal foundation for capital punishment. As Justice Brennan would note in *Furman v. Georgia*, "The calculated killing of a human being by the state involves by it very nature, a denial of the executed person's humanity."

Closing arguments by prosecutors in courtroom trials investigated while researching *The Rope, The Chair, and the Needle,* provide ample repetitious, almost cadence-like evidence for how this dehumanizing logic plays out in closing prosecutorial arguments. An example, taken from a trial in the 1920s finds the prosecutor admonishing the jury, "If you turn a deaf ear to the thousands of mothers who have daughters of her age [The victim was 15 years old.] haven't you formed a league with death and a covenant with hell?… This defendant is a lustful animal, without anything to transform to ay kind of valuable citizen, because he lacks the very fundamental elements of mankind."

The evidence is clear. Capital punishment is intimately tied to exclusionary dehumanization. This being the case, executions should be most likely to occur in those regions where tendencies to dehumanize are the greatest. In the United States, this would be in those states most closely aligned with the legacy of slavery. It is not just that there is evidence that capital punishment has been practiced in a racist manner, which over time it clearly has. The legacy of slavery is more subtle, thorough going and tenacious.

The Logic of Exclusion, Civil Rights, Innocence, and the Defendant's Mental State:

In addition to variation across regions of the country, exclusionary tendencies vary across time and individual circumstances as well. Three sets of findings are discussed.

1) Support for and practice of capital punishment has waxed and waned in a pendulum-like fashion as the Civil Rights Movement built a more inclusive foundation for society, only to be countered by a law-and-order movement that presented a more exclusionary view of those involved in crime.

2) The question of innocence and culpability are closely tied to the justification of an exclusionary logic. It is in this sense that the three issues of mistaken verdicts, mental

retardation, and offenders not yet considered adults can be examined within the same conceptual framework.

3) Also related to a consideration of the logic of exclusion at the individual level is the possibility of reversal. Do we ever reach a point where we want to reverse the logic of exclusion? Two examples here would be secular rehabilitation on the one hand, and sacred redemption, on the other.

Moral Dilemmas: If it can be shown that executions and the consequent violation of the sanctity of life imperative lowered the level of suffering among surviving family and friends of the victim, the moral case for capital punishment would be greatly strengthened. It would become a matter of balancing a moral dilemma rather than neutralizing the normally binding imperative linked to the sanctity of life.

There are two aspects to this issue. One has to do with the general deterrent effect of capital punishment. If capital punishment reduces the number of homicides, human suffering goes down and the practice may be justified. This issue is basically settled: there is no general deterrent effect from capital punishment. Any effects detected have been marginal and counterbalancing at best. Second, and less well understood, is whether executions heal the harm done to surviving victims. If it can be shown that the execution of guilty offenders healed the searing emotional wounds of the surviving friends and family, the moral case for capital punishment would be strengthened. At this point, and unlike the mountain of deterrence research, the impact of an execution on the alleviation of suffering of surviving friends and family is not well understood. Also, we must ask, what about the suffering we inflict on family and friends of the individual being executed? Surely, in many cases this creation of suffering, instead of its alleviation, must be entered into the moral calculus.

Panel One: **The History of Capital Punishment in Mexico**

Opening Remarks

Patrick Timmons

Though Mexico has had a turbulent history, the study of the death penalty has received little attention. In fact, executions are an often invoked part of Mexico's dramatic backdrop, so the particular nuances associated with capital punishment in Mexico have gone overlooked. In fact, the study of death in Mexico is often reduced to its exotic elements – such as the *calaveras* and *pan de muerto* prepared in observation of Day of the Dead – to assist the explanation of how Mexicans have dealt with the tragedies of their historical development. The perception of Mexico as a land of exotic death is reinforced by emphasizing the significance of Aztec ritual sacrifice and the myths of the God of War, Huitzilopochtli. Death is the life force of mythologization, as the lithographs from El Libro Rojo bring to life – which many of you passed today on the way down to the Benson Rare Books Room.

But is exoticism a form useful to explaining the diversity of human experiences influenced by death? If we concentrate on a form of imposed death, capital punishment for instance, could not a number of insights about Mexican history (rather than stereotypes) reveal themselves? What about the ways in which the death penalty brings to light culturally-specific values such as retribution, rehabilitation, and reconciliation; the roles played by laws and punishments in mediating the relationship between victim and victimizer; disputes over rights and obligations of citizenship; and the construction of state power. In other words, the historical study of the death penalty in Mexican history permits us to move away from the widespread exotic motif of death, and instead examine holistically how capital punishment helps to expand explanations of the country's development.

Mexico is particularly suited for historical analysis of the death penalty because – as in other places, and for a variety of reasons – capital punishment has been and continues to be heavily politicized. Historical analysis thus enables us to cut through this politicization. To that end, we should confront the idea that Mexico only recently ceased the practice of judicial executions after several centuries of imposing death as punishment, even though the desire for full abolition goes back until at least the early

nineteenth century. And, we have to be careful about describing present-day Mexico as full abolitionist because the death penalty persists in Mexican Constitutional law, although it is absent from most penal codes within the country, save the Military Code of Justice. The distance between the Constitution and lesser laws is something of a constant in Mexican history, and similarly mirrors the distance between stated goals and everyday reality. But the distance between law and practice affects most socities, thus the Mexican case helps to spell out some of the specific effects of this distance.

Interpretation of historical evidence helps reveal some of the contradictions associated with the death penalty in Mexico. The rich source materials used in Linda Arnold's and Everard Meade's analyses – some of which you will find in the Benson Latin American Collection Library exhibit – raise a variety of intriguing questions about how capital punishment shaped and was shaped by legal, political, social, economic, and cultural factors. The sheer complexity of some of the issues raised by studying capital punishment in Mexico demands a somewhat value-free understanding that does not seek to create more myths from the death penalty.

Linda Arnold achieves this in a paper about laws concerning the rights of the accused and condemned in Mexico. The legal scholar John Merryman once wrote that a traveler will go to a country knowing something about its history and culture, but rarely finds out anything about its laws. Ignorance of Mexico's legal traditions has compounded the notion that Mexico is a land of disorder, without legal traditions. Linda Arnold's paper must be seen as part of a body of her scholarship, sustained over the past thirty years, which has attempted to explain how Mexico's legal institutions worked. In this paper she explains a long-standing commitment to particular rights for the defendant. The cases Linda Arnold has examined reveal the ways in which the Mexican legal system arrives at its verdicts. There is no one way to explain the Mexican government's current commitment to condemned inmates on U.S. death rows. But the use of the Vienna Convention on Consular Relations and Optional Protocols fits into many centuries of legal innovations demonstrating concern for the rights of the accused and condemned.

But commitments to a defendant's rights – and in particular the notion that the death penalty fundamentally contradicted those rights – changed over time and in response to different stimuli. Mexican society has often been scandalized by awful

crimes, and sometimes such crimes have been used by political opponents to demonstrate the government's inability to protect society. At such times, there are often calls to reinstate the death penalty. (For example, in the Estado de México about three years ago, the Partido Revolucionario Institucional presided over a non-binding referendum about reinstating capital punishment. The PRI in the Edo de Mexico argued that increasing the severity of criminal penalties, notably by reinstating capital punishment, would help deter the high rates of crime, especially kidnap.)

Everard Meade's paper explores how a notorious crime in the early 1940s precipitated calls for the reinstatement of capital punishment. In turn this forced the government and legal scholars to defend the abolition of the death penalty. His analysis of the debate over capital punishment demonstrates that the death penalty brought different historical actors (public opinion versus elite decision making) into conflict with one another. Meade's analysis reveals that the abolition of the death penalty permitted Mexican elites to defend a stated commitment to individual rights, while simultaneously enabling those elites to examine the principles underlying their attempts to contain a disorderly society. Meade reveals a previously ignored finding: disputes over the death penalty contributed to the formation of the Revolutionary Mexican State.

These two papers demonstrate that Mexicans have long discussed with each other what it means to impose death as punishment. The present dispute between Mexico and the United States resonates strongly with Mexico's legal tradition of trying to weigh up the extent of individual rights against the appropriate use of state power. It also might fit into a pattern of using the death penalty as shorthand to prove the government's commitment to a particular vision of society.

By outlining and explaining the historical trajectory of the death penalty within Mexico, we have not elaborated specifically upon the historical roots of consular protection afforded Mexican nationals in the United States. Research by Robert Marlin from the University of Houston demonstrates that the Mexican government's services for its nationals condemned by the Texas criminal justice system reach back at least into the pre-war years of the twentieth century. And, in response to diplomatic petitions for clemency, some Texas governors, in particular James Allred during the 1930s, commuted death sentences of Mexican nationals. Thus, historical analysis of the death penalty as it

has affected Mexico's domestic and foreign policies, illuminates some of the important ideas that should govern thinking about capital punishment in Mexico. One of those important ideas must be that Mexicans have a great deal of experience explaining and questioning the value of capital punishment.

Why Pablo Parra Wasn't Executed: Courts and the Death Penalty in Mexico, 1797-1929

Linda Arnold

Protecting the rights of the accused and condemned in Mexico

The Iberian roots for the protection of the rights of the accused and condemned can be found in the 1188 *Carta Magna Leonesa*, the *Siete Partidas*, royal decrees, and *cédulas*. By the late colonial era in Mexico innovative decrees, *cédulas*, and laws strengthened those rights. Notably, the 1797 royal pragmatic and its 1798 *cédula* mandated that only a panel of judges had the authority to impose corporal punishment in general and the death penalty in particular on a person convicted of a crime. Subsequent decrees outlawed torture as a means to obtain evidence and abolished hanging as a form of capital punishment. Mexican law makers after independence continued to author innovative legislation, regulations, and legal codes. Among the most significant of those shortly after independence were the 1837 provisional judicial administration law, which established mandatory procedural and sentencing reviews in all capital cases; the 1841 decree that required defense attorneys, prosecutors, and judges to cite the legal bases for their legal conclusions; and the conditional abolition of the death penalty in the 1857 constitution. Law makers, attorneys, and judges at state and federal levels continued to contribute to the innovative tradition, authoring and implementing creative jurisprudence, ranging from the *amparo* legislation of the second half of the 19th century to the 1929 penal code which abolished capital punishment in the federal district and territories.

This study of the judicial protection of the rights of the accused in Mexico is based on an analysis of the jurisprudence presented in briefs and judgments written by Mexican attorneys, appellate prosecutors, and judges in a series of criminal cases between 1821 and 1860. For illustrative purposes this presentation is limited to the discussion of one case in which the appellate courts reversed a death penalty sentence to uphold the legal rights of a man convicted of a particularly heinous crime.

The Pablo Parra Story

A review of an 1851-1852 case reveals the scope and depth the courts' efforts to guarantee the rights of the accused and convicted:

- Legal identification of the body of the crime: abduction, rape, and murder of a 5 year old girl.
- Preliminary investigation: medical autopsy.
- Preliminary investigation: witness testimony.
- Statements and personal papers of the accused
- First instance findings: guilty and sentenced to death

Appellate Justice

Mandatory procedural and sentencing review was unnecessary in this particular case because the perpetrator appealed his sentence without contesting any of the major findings or evidence against him. At the appellate level the prosecution urged the court to support the first instance sentence, an option rejected by the defense attorney and by the court. Critical issues involved the legal nature of the evidence:

- *Prueba plena* (conclusive proof): eyewitnesses, legal documents, observations.
- *Prueba semi-plena o incompleta*: a single witness, extrajudicial confession or hearsay, personal papers, unsubstantiated logical presumptions, reputations of witnesses and accused.

While other cases might have involved mitigating circumstances to justify changing a first instance sentence, in the Parra case as well as other particularly heinous crime cases, the appellate prosecutor made a public vengeance argument in his efforts to convince the court to uphold the death penalty. Nevertheless, the court opted for strict adherence to rules of evidence. Ley 26, tit. 1, Partida 7 stated that the death penalty could only be imposed when convictions were based on *prueba plena*. At the second and third instances, appellate judges reversed the death sentence in the Parra case because the nature of the evidence against the defendant was insufficient to impose the death penalty.

The definitions of evidence, legal proof, served as the key at both the second and third instance to the appellate judges changing the sentence from the death penalty to the alternative maximum imprisonment (10 years) in the Parra case

Importantly, the *Siete Partidas* served as the foundation for the prosecution and defense attorney's arguments as well as the courts' findings for the definition of the body of a crime; the assessment of evidence, witness testimony, depositions of the accused; the importance of observation, autopsy, and medical examiners' reports; and sentencing. Both defense and prosecuting attorneys along with judges cited 17th, 18th, and 19th century legal treatises and recent continental criminal codes. They clearly understood and were familiar with their juridical tradition as well as the most recent legal developments in the western world.

Conclusion

As argued by defense attorneys and determined by the courts, the legitimacy of the courts and the legality of the criminal justice system depended on the protection of the rights of the accused and convicted lest the law become a simple tool for revenge. Innovative jurisprudence along with a rich and vibrant juridical heritage that protected the rights of the accused characterized the Mexican criminal justice system prior to independence. The continuation of an innovative tradition in Mexican criminal justice after independence lent legitimacy to the criminal court system. The abolition of the death penalty in the 1929 criminal code was a significant step, but by no means the only step, in an innovative juridical tradition that had identified and pursued the protection of the rights of the accused and the convicted for over 800 years.

Anatomies of Justice and Chaos:
The Mexican Public and the Death Penalty, 1929 – 1950

Summarized as:

From Sex Strangler to Model Citizen:
Gregorio Cárdenas Hernández and the Death Penalty Debate in Mexico, 1942-45*
Everard Meade

Mexico does not practice capital punishment. While the Constitution (Art.22) permits the death penalty for a limited set of offenses, it was removed from the Penal Code for the Federal District and All Federal Territories in 1929 and all of Mexico's thirty-one states subsequently followed suit. The following excerpts introduce the tale of serial killer Gregorio Cárdenas Hernández, the congressional debate over capital punishment that his case provoked in 1942, and the ambivalent death penalty policies of then President Manuel Ávila Camacho (1940-46). They illustrate four points central to understanding the proscription of the death penalty in Mexico:

1. Sensational newspaper coverage of heinous crimes has driven attempts to reinstate the death penalty in Mexico since it was first stricken from the penal code in 1929;
2. The death penalty has stimulated remarkably open public debate in Mexico, challenging images of absolute authoritarianism under the one-party regime;
3. The resolution of these debates has entailed a rejection of the kind of public that has demanded the death penalty as much as the penalty itself; and
4. A long tradition of executive clemency in capital cases has always mitigated the experience of capital punishment in Mexico, even during states of emergency.

* Modified excerpts from: Everard Meade, "Anatomies of Justice and Chaos: Capital Punishment and the Public in Mexico, 1929-1950." (PhD Dissertation: The University of Chicago, 2004).

On September 8, 1942, a talented twenty-seven-year-old chemistry student named Gregorio Cárdenas Hernández became an instant celebrity in Mexico City. For several weeks he fed a ravenous national obsession for crime stories, and new developments in his case would periodically pique the public appetite for decades to come. He would go down in popular memory as the star of a morbid soap opera that generated a mass of cultural products, ranging from scientific studies and legislative hearings, to satirical ballads, a radio drama, and even a pornographic film. The serial in which the soft-spoken chemist performed his spectacular routine was *la nota roja* (the red news), the crime pages of the Mexico City newspapers. The episode in which he starred sparked a heated debate over the death penalty in the national congress and marked a major transformation in Mexican citizenship.

On that Tuesday morning, the crime pages reported in gruesome detail how Gregorio Cárdenas had strangled four young women and buried them in the garden behind his suburban bungalow. But the murders themselves did not make the case a permanent sensation. The erotic dimensions of the crime and the sophistication of the criminal propelled the case into the arena of rumor, fantasy, and urban myth. The modernity and malleability of his perversions made Gregorio Cárdenas an ideal symbol around which both the crime pages and progressive penal reformers could construct competing visions of justice. And the criminal's articulate mythomania fueled their respective fires. Ultimately, Gregorio Cárdenas, a notorious and reviled criminal who would have been executed almost anywhere else in the world in 1942, suffered neither the death penalty, nor *la ley fuga*.*

A testament to the ascendancy of penal professionals and the therapeutic model of justice that they championed, he lived a long and productive life behind bars and served as the subject of scores of psychiatric studies. Upon his release from prison in 1976, he received no less than a standing ovation in the Chamber of Deputies, the example par excellence of the rehabilitated man. At the outset, however, the most sensational murder

* The *ley fuga*, literally 'the law of flight,' is a Mexican euphemism for the murder of convicted or accused criminals, by police or jailers, on the false pretense that they tried to escape.

story in Mexican history exploded onto the crime pages, and an energetic campaign to reinstate the death penalty rode its popular concussion through the autumn of 1942.

On November 13, 1942, while Gregorio Cárdenas hovered in legal limbo, a heated debate over the proposed reinstatement of capital punishment absorbed the Chamber of Deputies. Although several of the deputies who supported the death penalty fiercely denied that the Cárdenas Hernández case had affected the timing or intensity of the debate, the connection was plain to see. On October 9, 1940, Eduardo Hernández Cházaro, a distinguished army colonel and career politician from the state of Veracurz, had submitted a formal proposal to reinstate capital punishment in the Penal Code for the Federal District and all Federal Territories. The President of the Chamber politely referred the initiative to the Justice Committee for review; and there it languished. In the fall of 1942, however, with the sex strangler epic and a chorus of calls for the reinstatement of capital punishment consuming the crime pages, the Justice Committee concluded its review and publicly endorsed the initiative. A protracted and passionate debate ensued in which the public outrage over the crimes of Gregorio Cárdenas often stole the spotlight. After days of sometimes raucous discussion before a nearly full chamber, including two late-night sessions, on November 24, the Hernández Cházaro initiative lost 25 to 76. The death penalty would remain off the books, for the time being.

More than the final tally might suggest, the 1942 death penalty initiative generated a remarkable public dialogue. In the first place, the negative vote did not reflect the true divisions within the congress. The legislature had fragmented into three groups: a minority that supported the rather expansive re-instatement of the death penalty proposed by Hernández Cházaro, a coalition that supported a much more limited version of capital punishment (only for the most repugnant criminals – like Gregorio Cárdenas), and a third group that opposed the death penalty altogether. The coalition in the middle got little traction, and thus the substantive debate and final roll call lumped them with the doctrinaire opponents of the death penalty, creating a sizeable majority against the Hernández Cházaro initiative. Regardless, the 1942 debate produced the most dissenting votes in the 38th legislature (1940-43) and would prove one of the only major national issues to generate a significant proportion of open dissent in the congress, and within the

ruling party, over the next fifty years. Loyal congressmen split with the President and their closest colleagues over the issue. Newspapers violated their predictable party lines, publishing editorials on both sides. Lawyers, criminologists, and other experts likewise proffered sincere opinions both in favor and against the death penalty and leveled biting criticism at their respective adversaries. And none of those who supported reinstating capital punishment seem to have suffered the usual litany of negative consequences for disagreeing with the President or dissenting from the majority line implied in countless commentaries on corruption and censorship in the Mexican press. That is not to say that the death penalty debate challenges outright the standard corruption narrative, or vindicates a rosy glossing of political struggle and repression during 'the golden age' of the one-party regime. It does suggest, however, that proponents of the death penalty articulated profound social concerns that the establishment could not simply brush aside.

In the 1942 debate, proponents of the death penalty cited the public outcry against the sex strangler and related popular calls for vengeance from crime pages as evidence that "the people" demanded its reinstatement. They argued that crime inhered in the criminal body and that criminals had to be physically expunged, like gangrenous limbs, from the national body. While this line of argument did not ultimately prevail in congress, it forced opponents of capital punishment to make a case not only for the ineffectiveness and cruelty of the death penalty, but for the illegitimacy of popular opinion, affective and localized notions of justice, and purely biological or hereditarian constructions of Mexican people as legitimate loci of rights.

The opposition rose to the challenge. Drawing on Mexican Liberalism and modern psychiatry, opponents of capital punishment acknowledged the influence of the body and its passions, but held that all individuals retained the capacity to subdue and transcend them. The product of socioeconomic conditions, ignorance, and mental illness, crime was potentially extricable from the criminal body pending the surveillance and redemptive work of the state, and its psychiatric and criminological experts, in particular. Combining Enlightened notions of natural law with a hyper-modern vision of the state, they constructed the independence of personhood from the physical body as inalienable "right to life" that the state would guarantee through therapeutic interventions. In so doing, they outlined a mode of national representation that would characterize Mexican

citizenship for decades to come. A buffer of "civilization" would insulate a limited group of public representatives, from the particular expressions of citizens, and citizens from the particular expressions of their bodies. This buffer helps to explain why the Mexican state pursued a remarkable policy of protecting the lives and welfare of everyday people (even reviled criminals) without submitting to the rigors of an electoral democracy, in the heyday of the one-party regime.

President Manuel Ávila Camacho made this compromise work in practical terms. He opposed reinstatement of the death penalty in the penal code in 1942 and he maintained this position consistently, repeatedly rejecting congressional reactions to sensational crime stories. In various diplomatic forays abroad, moreover, he discouraged the use of the firing squad to solve political disputes, establishing a Rooseveltian rhetoric of humanitarian statesmanship.

And yet, in the same period (1942 to 1945), the President used his assumption of emergency powers during Mexico's involvement in World War II to mandate the death penalty for a wide variety of offenses committed anywhere in the national territory. In response to a wave of hold-ups on major highways, on October 7, 1943 Avila Camacho issued a presidential decree imposing the death penalty on all those found guilty of the federal crimes of *salteamiento de caminos* (highway robbery), or *asalto en el despoblado* (assault in a depopulated area). While the decree delineated highway robbery in relatively narrow terms, *asalto en el despoblado* encompassed a wide and subjective range of offenses. As defined by the 1943 decree and its statutory referents, virtually any assault where the assailant took the victim by surprise qualified *as an asalto en el despoblado.* State and local officials remitted anyone arrested for either crime to a federal District Judge for a summary trial. In the case of a guilty verdict, convicts faced the firing squad at the nearest military barracks. In principle, the administration had designed the decree to protect provincial order, vital infrastructure, and wartime supply-lines from the famed 'Fifth Column' of the Axis forces. In practice, nearly every robbery, assault, or murder that took place in the Mexican countryside qualified as *asalto en el despoblado*. Common criminals of every stripe found themselves condemned to death by federal judges, in many cases for crimes that neither resulted in the death of their victims, nor carried the death penalty in the regular criminal statutes where they

were committed. Furthermore, as the Decree took effect under the suspension of individual guarantees, it denied those sentenced to death access to the regular avenues of judicial review. A presidential pardon, filed within five days of the sentence, remained the only recourse for the condemned.

All told, federal District Judges in nearly every Mexican state sentenced at least 83 offenders to death. And yet, the State executed perhaps four of these men. The President commuted the sentences of the vast majority of those convicted under the 1943 Decree, striking a perfect balance between short-term fears of violence and long-term aspirations for progress, and between popular calls for vengeance and elite invocations of progressive principle.

Panel Two: The Mexican Constitution and the Death Penalty

Panel Summary

Creighton Chandler

At the second session of the conference, attendees considered the death penalty in the context of Mexico's constitutional history. The first speaker, Patrick Timmons illuminated the legislative debates surrounding the inclusion of the death penalty in the Constitution of 1857. His presentation focused particularly on the affects of Enlightenment philosophy and the contemporary milieu of political violence upon delegates to the Constitutional Convention of 1856-1857. The second presenter, Dr. Enrique Díaz Aranda delivered arguments delineating the unconstitutionality of the application of the death penalty in Mexico, an especially exigent issue, he averred, given the recent public pressure in Mexico in favor of increased application of execution as a punitive measure. The following paragraphs sketch the major points of the two presentations, which may be viewed in full on the video recording as the proceedings (http://www.utexas.edu/cola/llilas/centers/mexican/).

A Unique Proposition: The Mexican Constitution of 1857 and the Death Penalty

Mexico has a unique history in regards to the imposition of the death penalty for the delegates to the Constitutional Convention of 1856-1857 decided neither to abolish nor to endorse completely the death penalty within the nation's borders. Instead, they opted for a seemingly ambiguous solution. The death penalty, the representatives resolved, would no longer apply to political crimes but only to ordinary crimes. Furthermore, the Constitution of 1857 called for the abolition of the punishment contingent upon the future construction of a modern penitentiary system. Timmons' paper outlined the derivation of this historically unique provision and notes the resolution's importance because the constitutional debates which formulated the law not only influenced past attitudes towards capital punishment in Mexico but also, Timmons contended, "explain, in some small part, the retention of the death penalty in Mexico's fundamental law even to the present."

The constitutional abolition of the death penalty for political crimes has its roots in the often literal battle waged between ideologically different governments which ruled

Mexico during the first thirty years of the post-Independence period. During this era governments, most notably those led by the Liberals and the Conservatives, commonly "used death to eradicate their political opponents." Adding to the politically repressive atmosphere, General Antonio López de Santa, who referred to himself as *su alteza serenísima*, or His Supreme Highness, ruled as dictator for many of the thirty years. In 1853, he passed the Ley Lares, a law which outlawed printed debate of the government's policies. Dissenting journalists now did so under the threat of imprisonment. Consequently, many Liberal leaders went into exile where Santa Ana's orders, that "they should be shot as soon after they have been apprehended," followed them.

Despite the severely repressive environment, liberal supporters rose up in the Rebellion of Ayutla in 1854. Conservatives then countered with the Law of Conspirators, which branded the rebels outlaws deserving of the penalty stipulated by the law, death by execution. After the Liberals consolidated their recently-acquired power, they began new constitutional debates in 1856. With the specter of past violence looming large in their minds, liberals looked to Mexico's future as much as to their own personal well-being. The most radical liberal at the constitutional convention, Ignacio Ramírez, argued against the death penalty because, he believed, nothing "worthwhile could come from society acting as the vengeful party, piling 'corpse upon corpse.'" Yet, the desire to "protect their [own] lives from future conservative revenge" should the liberal government fail appeared just as exigent to the delegates as the social ills posed by the further violence executions would create in Mexico. As Timmons detailed, "two factors seemed to be working together: the principle of future self interest grounded in the experience of recent history." For these reasons, delegates abolished the death penalty for political crimes.

The abolition of the death penalty for ordinary crimes constituted another set of debates for the constitution's framers, who demonstrated their affinity for Enlightenment philosophers such as Cesare Beccaria. Beccaria saw the death penalty as futile and favored "permanent penal servitude [where] a single crime gives many very lasting lessons." But philosophy itself did not necessarily translate into law, Timmons contended. "Local experiences" additionally shaped the constitution's ambivalence towards the death penalty. Because of previous political repression, many of the

delegates had experienced first hand the deplorable state of Mexico's prison system as well as its inability to halt recidivism through rehabilitation. Liberal journalist Ignacio Cumplido wrote in 1841 of the deplorable conditions of the prisons which had "'affected me personally.'" Having spent thirty days in the Acordada prison for breaking censorship laws, Cumplido concluded that the mixing of prisoners who committed minor crimes with those who committed more grave ones formed " 'an evil mass composed of contrary elements, that time makes homogenous and compact, succumbing virtue to vice, by means of repeated examples of immorality and corruption.'" Cumplido remembered the dying words of one young man who stated that, "They are going to kill me. I was mostly innocent when they put me in prison for the first time." Yet, because of the prison system's conditions, "I haven't been taught a trade I could use to sustain myself…crime and vice has constantly been in front of my eyes….I am the work of the same people who condemn me…." Lack of prison reform, delegates realized, led to executions.

Meaningful prison reform, the legislators came to believe, would terminate the need for the death penalty. Even delegates such as Filomeno Mata, who advocated full abolition, conceded that while the prison system remained unreformed, the death penalty should remain part of Mexican law for certain serious ordinary crimes as patricide and premeditated murder. Once the government had created a reform-minded prison system, individual criminals would make better personal choices, eliminating the need for capital punishment. Thus, as Timmons concluded, while Liberals shared "an innate belief in progress - that the state would improve over time," their horror at the death penalty for political crimes did not translate into abolition for ordinary crimes. Instead, "the contingent death penalty clause represented a means to reconcile future desires with present realities."

¿Es Constitutional la Pena de Muerte en México?

Enrique Díaz Aranda stated that the recent increase in premeditated murder and other violent crimes in Mexico has led to public clamor in favor of the death penalty as a means to lower the crime rate. Those in favor of the penalty, he argued, draw on Paragraph 4 from Article 22 of Mexico's constitution which appears to sanction the use of capital punishment for non-political crimes committed by civilians (non-military) such

as premeditated murder, parricide, and piracy. Even more threatening for opponents of capital punishment, Díaz Aranda noted, is that two candidates recently elected to the Mexican Congress gained office largely by basing their candidacy on necessity of capital punishment. Incredibly, one survey taken by the candidates reported that 85.4% of those polled via telephone and the internet supported the use of the death penalty for incidents of kidnapping. The candidates' victories have opened up "a new interrogation" into the constitutionality of execution as a means of dealing with violent, non-political crimes. Díaz Aranda argued that, in spite of high levels of public approval, "the death penalty may not be reestablished in Mexico" because it contradicts Mexico's constitution according to historical, systematic, teleological, and political-criminal arguments, which are summarized below.

Historical Arguments: Díaz Aranda cited legislator Bolaños who, in the constitutional debates of 1917, spoke against the death penalty because, among other reasons, "it is a violation of one's natural rights" as it does not offer the ability of the convicted to "obtain moral correction" while causing the convict's family more grief than the condemned. But most importantly from a historical viewpoint, Bolaños asserted that "the penitentiary system has already been established." As a result, "the completion of this solemn promise" of the Constitution of 1857 to abolish the death penalty upon the penitentiary system's completion "must not be delayed." Consequently, history demands the abolition of the death penalty in contemporary Mexico.

Systematic Arguments: Díaz Aranda conceded that, "we may not establish a conflict of constitutional and international rules that permit us to give the judicial support necessary to eradicate the death penalty from the constitution" as many anti-death penalty forces have recently argued. True, article 133 of the Constitution does lend equal accord to international treaties signed and ratified by the President of the Republic as it does to the Mexican Constitution. But although accords such as Article 43 of the American Convention on Human Rights state "that the death penalty shall not be reestablished in states which have abolished it," they do not apply to Mexico because technically the constitution never abolished the penalty. Additionally, Mexico has never signed other international accords against capital punishment. Because an international conflict of interests does not exist, Díaz Aranda concluded that anti-death penalty advocates must

look within the guidelines of the current constitution for arguments. These, Díaz Aranda stated, exist in the constitution's definitions of crimes such as parricide, or killing of kinship. Because "the radius of prohibition of the rule has changed to include new subjects [like wives and concubines]," Díaz Aranda contended, "the nature of parricide properly stated has been lost." Therefore, certain crimes only fall under parricide analogically. This sets a dangerous precedent, Díaz Aranda warned, because legal prohibitions "could be extended teleologically" when a judge "wants to interpret a constitutional precept analogically in order to apply the death penalty."

Teleological Arguments: During the 1917 Constitutional Convention, delegate Rios manifested to his colleagues that "if you do not want murder, set the example yourselves, Mr. Assassins." In this vein, Díaz Aranda declared that governments which wish to eradicate murder must not commit the crime themselves. In fact, through executions murderers may even "acquire a definite and perverse moral victory by converting the state into an assassin" and an entity which has actually sanctioned the very violence it wished to eradicate. Most importantly, Díaz Aranda stated, advocates of the death penalty assume that after the sentencing and setting a date for the execution, the accused "will suffer psychological torment knowing nothing will save him." Yet, this intended punishment "constitutes a crime of calculated homicide characterized by the premeditation" which articles 315 and 316 of the Federal Penal Code prohibits. Thus, capital punishment converts the state into a calculated killer.

Criminology Argument: In this section Díaz Aranda developed several reasons for abolition of the death penalty. Most notably, linking the unequal racial proportions of death row inmates in comparison to the racial national demographics, as exists in the U.S.. Díaz Aranda illustrated the possibility of the same situation occurring in Mexico, for as Mexican legislator del Castillo stated, the death penalty is usually reserved "for the weak and never for the magnate." In addition, no judicial system can accurately make decisions all the time. Between 1973 and 1999, 84 U.S. death row inmates have had their convictions overturned because new evidence emerged. Furthermore, costs of execution and appeals often by far exceed that of lifetime imprisonment. As a case in point, an execution in Texas costs around US $2.3 million on the average, while the state pays between U.S. $500,000 and U.S. $750,000 to house an inmate for life. Finally, although

Mexico has made more stringent the punishment for kidnapping from 20 years in 1931, 30 years in 1951, and 40 years in 1955, the rate of this crime has still increased. Instead of adopting the death penalty in reaction to the recent increase of violent crimes, Díaz Aranda suggested that Mexico funnel resources into education campaigns, improvements of the economy, and a justice and police system better designed to handle cases of delinquency. With such improvements rather than the implication of the death penalty, he concluded, Mexico's government will practice true justice.

Keynote Address

Capital Punishment in the Jurisprudence of the Inter-American Court
Sergio García Ramírez

La pena de muerte en la jurisprudencia de la Corte Interamericana de Derechos Humanos
Sergio García Ramírez

1. La Corte Interamericana de Derechos Humanos (CorteIDH) es un tribunal internacional creado por la Convención Americana sobre Derechos Humanos (CADH), con competencia consultiva y contenciosa. La competencia consultiva se ejerce en relación con todos los Estados partes en la Carta de la Organización de los Estados Americanos, y con órganos de la OEA. La competencia contenciosa, destinada a la solución de controversias mediante sentencia vinculante, abarca a los veintiún Estados americanos que son partes en la CADH y que además han reconocido expresamente dicha competencia para la decisión de controversias derivadas de la interpretación y aplicación de la CADH y otros tratados americanos que atribuyen esta facultad a la CorteIDH.

2. En el ejercicio de su competencia consultiva y contenciosa, la CorteIDH se ha pronunciado sobre asuntos relacionados con la pena de muerte en diferentes ocasiones. Al respecto, son particularmente relevantes las siguientes resoluciones: *Opinión Consultiva OC-3/83,* del 8 de septiembre de 1983, acerca de "Restricciones a la pena de muerte (arts. 4.2 y 4.2 de a CADH)"; *Opinión Consultiva OC-16/99*, del 1 de octubre de 1999, sobre "El derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal" (en la que por primera vez se examinó la inobservancia del artículo 36.1 de la Convención de Viena sobre Relaciones Consulares en relación con procesos que culminan en la aplicación de la pena de muerte), y sentencias del 21 de junio de 2002 en los *Casos Hilaire, Constantine y Benjamín y otros vs. Trinidad y Tobago*.

3. En esos pronunciamientos --que son examinados en este trabajo--, la Corte ha estudiado la aplicación a países americanos (en general o en particular) de las disposiciones sobre esta materia contenidas en diversos instrumentos internacionales, o de las concordancias de éstos con instrumentos relevantes que poseen otro ámbito de aplicación: Declaración Americana de los Derechos y Deberes del Hombre (1948), Convención Americana sobre Derechos Humanos (1969), Protocolo a la CADH relativo a la abolición de la pena de muerte (1990), Pacto Internacional de Derechos Civiles y Políticos (1966), Segundo Protocolo al Pacto Internacional destinado a abolir la pena de muerte (1989), Salvaguardias para garantizar la protección de los derechos de los condenados a muerte (1984), Convención (Europea) de Salvaguardia de los Derechos del Hombre y de las Libertades Fundamentales (1950), Protocolo 6 a la Convención Europea (1983), Protocolo 13 a la Convención Europea (2002) y Convención de Viena sobre Relaciones Consulares (1963).

4. Cuando es pertinente, se estudian los criterios adoptados por otros tribunales internacionales en casos relevantes, a propósito de temas que también han sido considerados por la CorteIDH. Este examen se hace en relación con los pronunciamientos de dicha Corte. Son ejemplos de ello los casos *Soering v. The United Kingdom* (1989) y *Ôcalan v. Turkey* (2003), resueltos por la Corte Europea de Derechos Humanos, así como los **c**asos *LaGrand Case (Germany v. United States of America)* (2001) y *Avena and other Mexican nationals (Mexico v. United States of America)* (2004).

5. La primera parte de la exposición se refiere a las disposiciones de la CADH acerca del derecho a la vida y la aplicación de la pena de muerte (artículo 4), que se analizan detalladamente, a partir de las expresiones retencionistas y abolicionistas en la Conferencia Especializada sobre Derechos Humanos (San José, Costa Rica, 1969) que aprobó la CADH. Esto abarca tanto la consideración del derecho a la vida, en sí mismo, como el examen casuístico de los párrafos del artículo 4 de la CADH que regulan la pena de muerte con tendencia restrictiva, que culmina --por ahora-- en la previsión abolicionista depositada en el Protocolo de 1990, que todavía contempla, sin embargo,

algún espacio de vigencia de la pena capital: delitos sumamente graves de carácter militar en tiempos de guerra.

6. Así, son objeto de comentarios específicos los siguientes puntos: a) naturaleza grave de los delitos por los que puede imponerse la pena de muerte; b) características del debido proceso legal en los casos que implican la posibilidad de aplicar la pena capital; c) prohibición de aplicar dicha pena a delitos que no se hallen actualmente sancionados con ella; d) prohibición de restablecer la pena de muerte en los Estados que la han abolido; e) prohibición de aplicación de la pena de muerte por delitos políticos y delitos comunes conexos con aquéllos; f) restricciones a la imposición de la pena de muerte en función de características especiales de los inculpados, y g) procedencia del indulto, la conmutación y la amnistía.

7. En la segunda parte de la exposición se examina la mencionada *Opinión Consultiva OC-16/99*, cuyo problema básico es la situación de hecho y de derecho de los detenidos extranjeros sujetos a un procedimiento penal (investigación, proceso, sentencia) por delitos que implican la posibilidad de aplicación de la pena de muerte. Esta *Opinión Consultiva* fue solicitada por México el 9 de diciembre de 1997 (antes del reconocimiento de la competencia contenciosa de la CorteIDH por ese país) y emitida por el Tribunal el 1 de octubre de 1999.

8. Los puntos específicos abarcados por las respuestas de la Corte a la solicitud de *Opinión Consultiva* y analizados en el presente trabajo (tanto en sus propios términos como en relación con otras resoluciones de la jurisdicción internacional), son: a) naturaleza de los derechos que reconoce al detenido extranjero la Convención de Viena sobre Relaciones Consulares; b) vinculación entre esos derechos (y las obligaciones correlativas) y la preceptiva contemporánea en materia de derechos humanos; c) obligación de observar esos derechos (y cumplir las obligaciones correlativas) en relación con las protestas, por incumplimiento, expresadas por el Estado que envía; d) alcance de la expresión “sin dilación” contenida en la Convención de Viena, con respecto a la información sobre el derecho a la asistencia consular; e) el derecho a la información

sobre el derecho a la asistencia consular y el debido proceso legal; f) consecuencias jurídicas procesales de la violación del derecho a la información sobre el derecho a la asistencia consular; y g) implicaciones que pudiera tener, a este respecto, la estructura federal del Estado que ejerce su jurisdicción sobre el detenido, procesado y/o sentenciado.

Keynote Address Summary

*Tanner Neidhardt**

The issue of capital punishment is problematic for the judges of the Inter-American Court of Human Rights (IAC) because while they are bound to the dictates of the American Convention on Human Rights, which preserve capital punishment, they must do so in light of the fact that m

the legal issues of capital punishm nt on the margins. In his presentation before the

Court have interpreted international law in order to scrutinize capital punishment in a

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and Canada is not intended to subsume those states' policies but rather to further fortify the credibility of the inter-American system.

After defining the IAC, Judge García Ramírez divided his presentation into two principal themes. The first theme concerned the interpretation and application of Article 4 of the American Convention on Human Rights. The second theme narrowed the analysis of the Court's work to Advisory Opinion No. 16. That decision bears many similarities to *LeGrand v. United States* and *Avena v. United States,* cases that the International Court of Justice (ICJ) recently decided.

The Court's review of capital punishment is driven by Article 4 of the American Convention, which declares: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." To Judge García Ramírez, the discussion of capital punishment in the inter-American system should begin with this article.

The IAC has interpreted the meaning of the right to life broadly. "It is not only the right to be alive, to exist biologically; instead, the Court has taken it farther. The right to life also means the condition of a worthy life, a life with all the characteristics that we desire for ourselves and our fellow human beings," García Ramírez explained. However, even under this interpretation, the Court is limited by the meaning of the right to life provided in the American Convention. Within those boundaries, the right to life means that a state "recognizes the right to life, proclaims that right, adopts positive measures so that the right is exercised, removes obstacles against the observance of that right, and provides effective, functional guarantees." To avoid hollow guarantees, Judge García Ramírez continued, the Court must interpret these rights in a light favorable to the individual. This *pro omine* understanding was articulated in the *Soering* case [*Soering v. The United Kingdom* (1989)] decided by the European Court of Human Rights, which the IAC and Inter-American Commission frequently cite.

Judge García Ramírez then moved to an explanation of why the American Convention preserves capital punishment. He said the reasons can be traced to the ratification process of the Conference of San José, the meetings that established the treaty. The American Convention was a pact among states with varied interests. The format forced states to compromise, and capital punishment was an issue to which

abolitionists were forced to yield. However, as soon as the conference ended, a process began to overturn capital punishment in "total and absolute terms." Judge Garcia Ramirez suggested that the abolitionist countries decided to avoid the subject in 1969, thinking that a later date would produce more favorable results. Over the years, the abolitionists – 14 of the 19 states that participated at the Conference of San Jose – took progressive steps to overturn capital punishment. In 1980 at a UN Congress in Caracas, the states again aggressively debated the subject. Again, the abolitionists were unable to obtain an agreement to terminate capital punishment. The participants concluded that the subject had not been sufficiently analyzed. In spite of the impasse in Caracas, Judge Garcia Ramirez believes that these abolitionist efforts and the creation of the Protocol to Abolish the Death Penalty (1993) signify a progressive "tendency" towards abolition.

Another area relevant to capital punishment in the dictates of the American Convention emerges from Paragraph 2 of Article 4, which declares: "In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime…" Judge Garcia Ramirez broke this portion of his presentation into two questions. First, what does the Convention mean by the "most serious crimes?" And second, what is at issue by the explicit reference to due process in cases of capital punishment?

There are two interpretations to the discussion of who should determine which crimes are the most serious. Some states say that legislatures should decide. Conversely, the Court says that the determination should be based on the evolution of penal theory and independent of legislatures.

1) Trinidad and Tobago's capital punishment law provides an example of the former. A 1924 law prescribed capital punishment for any intentional homicide. The law lent no room for mitigating factors, such as the relationship between the actor and the victim, the context of the homicide, or other circumstances.

The Court held a point of view entirely distinct. It concluded that intentional homicide should fall under distinct categories. These categories should be graded to factors such as the special relationship of the actor and the victim, the motivation of the conduct, the circumstances of the event, and the type of force used. Each graded crime

should have a corresponding degree of punishment. "In other words, not all crimes of homicide should be sanctioned with capital punishment," Judge García Ramírez concluded. Thus, the Court decided that Trinidad and Tobago's capital punishment law should be nullified. (Trinidad and Tobago declined to comply with the IAC's decision and withdrew from its jurisdiction.)

The explicit reference in Article 4(2) to due process in cases of capital punishment is critically important, according to the Judge. The American Convention and the International Convention on Civil and Political Rights (ICCPR) give special emphasis to unique standards of due process in cases of capital punishment. Thus, the IAC "is very scrupulous in distinguishing what is the due process required." Furthermore, the IAC reviews other conventions – even those not specified as human rights pacts – to determine which rights are inherent to the due process requirements of a capital punishment case and whether violations of those rights are considered violations of due process. To elaborate on this issue, Judge García Ramirez turned to the second of the general themes that outlined his presentation –Advisory Opinion No. 16 (OC-16).

2) OC-16 (1999) is a decision frequently cited in international doctrine and European tribunals. In that opinion, the IAC explored the right of detained foreign nationals to receive information regarding consular assistance. (The decision predates the ICJ's decision in *LeGrand* and *Avena*, though the ICJ does not cite OC-16.) The issue before the Court was whether special due process rights should be applied to "vulnerable groups." Vulnerable groups include minors and foreigners whose unfamiliarity with the culture, language, customs, and laws of the detaining state place them at a disadvantage to nationals. The imbalance created by that distinction moved the Court to affirm that foreign detainees required special due process rights in order to reach an equal standing with nationals. The Court viewed this interpretation not as a concession of more rights to one group but rather as compensation to a group that faced unequal conditions or discrimination. (This analysis is also found in Advisory Opinion No. 18 regarding undocumented migrant workers and in *The Mayagna (Sumo) Awas Tingni Community Case*.)

The Vienna Convention on Consular Relations significantly guided the Court's conclusions in OC-16. While human rights conventions do not recognize the right to consular information as part of due process law, Article 36 of the Vienna Convention on Consular Relations contained that right. Consequently, the IAC opinion in OC-16 attempted to justify that Article 36, which established a duty of notification between states, also recognized subjective rights of the individual. Thus, Judge García Ramírez says, the right to consular information should be part of the right to due process in all cases, including those of capital punishment, and the court may scrutinize death penalty cases accordingly.

In sum, the OC-16 majority concluded that violating a foreign national's due process right to notification of consular assistance constituted a violation of the Vienna Convention, for which the state was obligated to make reparations. One justice disagreed, finding that the remedy for the prisoner must be considered in light of the gravity of the due process violation. Nevertheless, OC-16 sent a strong message regarding the importance that the IAC gives to notifying foreign nationals of their right to consular assistance.

Judge García Ramírez closed his presentation candidly: "The right to life is an unalterable right. As a person, I am absolutely abolitionist. As a judge, I have to apply the American Convention and the Protocol, which, to now, has not produced any cases."

∗ I wish to give special thanks to Cecilia Azerrad for her patient assistance with this project.

Bilateral Dilemmas: Mexican-U.S. Relations

Panel Summary
Patrick Timmons

Panelists:
Peter M. Ward (Director of the Mexican Center): *Moderator*
Jordan Steiker (UT School of Law): *Introduction*
Erasmo Lara (Director of International Law, Secretaría de Relaciones Exteriores): *Opening Remarks*
Eduardo Ibarrola (Consul General de México, Houston): *The Mexican Consular Protection in Death Penalty Situations*
Sarah Cleveland (UT School of Law): *The United States and the Vienna Convention*
Sandra Babcock (Mexican Capital Legal Assistance Project): *Avena and Other Mexican Nationals vs. United States*

By the time we arrived at this afternoon session, conference participants had provided reasons which helped to explain the historical and constitutional background related to perceptions about the death penalty in Mexico. Judge García Ramírez's keynote address explained the underpinnings and the development of human rights law related to capital litigation in the Inter-American system. But the Government of Mexico's current support for its nationals condemned on U.S. death rows – while it may be informed by that country's history of constitutional abolitionism, and inter-American relations and institutions – makes its claims both through U.S. and international law rather than Mexican law. In so doing, the Government of Mexico's legal proceedings in more than fifty capital cases has illuminated the way in which U.S. law responds to the institutions of international law.

Jordan Steiker began his introduction to this session by explaining that criminal justice systems are evaluated on the way in which they strike a balance between societal and individual interests. Society's interests include passing legislation to deter crimes and punishing wrongdoing in a quick and timely manner. These interests have to be balanced against those of the individual which include placing limits on state power. In the United States weighty procedural guidelines govern the use of state power but such limits co-exist with an unusual punitive approach. This division permitted Steiker to advance the notion that criminal justice is comprised of procedural and substantive issues. Steiker

used these distinctions to illuminate Mexico's current legal proceedings in favor of its condemned nationals in the United States.

Mexico's complaint against the United States at the International Court of Justice (ICJ) is procedural rather than substantive. In other words, Mexico claimed (and the ICJ averred) violations in criminal law procedure: that law enforcement officials within the United States failed to notify arrested Mexican nationals of their right to contact their consulate, a right granted by the Vienna Convention on Consular Relations and Optional Protocols, to which the United States and Mexico are both parties. The Government of Mexico had been forced to go to the ICJ to assess the nature of Mexico's claim because U.S. courts failed to remedy the procedural violation. For Steiker, this "consular notification issue allows the treaty [the Vienna Convention] to become the wedge into American criminal procedure. But it seems like a peculiar means of expressing what, at bottom, is a much more fundamental disagreement about criminal substance [that Mexico, as a *de facto* abolitionist country, opposes the death penalty]." This begged the question of whether or not America's neighbors have the right to use diplomatic fronts on the U.S. to alter its substantive law, e.g. the retention of the death penalty. For an abolitionist country, such as Mexico, the substantive issue of using international law to secure abolition has not really been broached, mainly because sovereign nations cannot force their counterparts to adopt substantive changes in criminal law. The federalist system of government further complicates the issue. Thus, although the United States may be a party to the Vienna Convention with the Supremacy Clause making such a treaty binding upon the states, there are fifty one possible avenues to settle the issue and, in this case, it seems unlikely that abolition of the death penalty will be the end result.

Erasmo Lara, the Director of International Law for Mexico's foreign ministry, confirmed that Mexico does not want to question another sovereign country's application of sentences. Instead, the *Avena* litigation at the ICJ confirmed that the Government of Mexico and its citizens have rights according to treaties, in this case the Vienna Convention. Thus, Mexico was not seeking to interfere in the political relationship between the two countries. The *Avena* case was not "a wild adventure" but an attempt to consolidate due process rights for its nationals in the United States.

Eduardo Ibarrola, the Consul-General in Houston confirmed and expanded upon Lara's point. Responding to the criticism that the *Avena* case has promoted disrespect for U.S. law, Ibarrola argued, "We are not promoting impunity. That's not our business. Our business is the due process of law. What we want is that a person who is arrested has all the rights and all the procedure according to the legislation of the United States." The role of the Consular Officer is to provide assistance for any Mexican national arrested by an official of U.S. law enforcement. If a Mexican national is arrested, the Consulate in Houston finds attorneys who speak Spanish. If there is a possibility that the crime might become a capital case, the Consul also informs Sandra Babcock, who directs the Mexican Capital Legal Assistance Project.

The ICJ litigation relates to U.S. violations of rights conferred by the Vienna Convention. (The ICJ is a dependency of the United Nations, and as such was established to oversee claims of treaty violations between signatories to international treaties.) Sarah Cleveland provided background detail about the ways in which the United States has made similar claims to those of Mexico on behalf of its nationals. Surprisingly, the United States did not immediately ratify the Vienna Convention until the late 1960s "because we did not think it was protective enough of the rights of foreign nationals to consular access." Equally significant is the point that the U.S. Government has often demanded that other countries respect the rights of U.S. nationals when abroad on the basis of the Vienna Convention. A compelling example of this type of action arose in 1979 when the U.S. sued Iran at the ICJ during the hostage crisis. In the 1990s, however, the U.S. government and some of its states have ignored ICJ rulings relating to the legitimacy of death sentences. In the *LaGrand* case, brought by Germany on behalf of a national to be executed in Arizona that state chose to ignore Provisional Measures emitted by the ICJ which ordered the execution not to proceed until it could assess the facts of the alleged treaty violation.

Unlike the *Avena* litigation, previous suits based upon the Vienna Convention at the ICJ attempted to prevent the execution of capital sentences after a state judge had set an execution date. **Sandra Babcock's** presentation on the development and status of *Avena* explained that in light of *LaGrand*, the Mexican government decided to present its suit to the ICJ well in advance of a possible execution date. When the U.S. government

demonstrated its opposition to the ICJ litigation, it did so with the argument that the case was premature because no execution dates had been set at the time of filing suit in late 2002 / early 2003. Babcock found this claim ironic given that the U.S. government had said that in previous cases the suit had been brought too late to prevent an execution from going forward. Whatever the basis of American opposition, however, the ICJ issued Provisional Measures in *Avena* ordering the United States to not impose executions while the litigation was ongoing. Even though the Texas Governor has stated publicly his opposition to the ICJ ruling, it is significant to note that all states with Mexican nationals on death row (and Texas has the most, numbering sixteen) have effectively complied with the Provisional Measures because no executions have proceeded.

Babcock explained that there are five issues at the heart of the *Avena* litigation and the ICJ's subsequent ruling.

1. Was there a violation of the Vienna Convention?
2. If a violation did occur, what is the appropriate remedy in regards review and reconsideration of sentence?
3. Are the cases procedurally defaulted at appeal if defendants did not raise Vienna Convention claims at trial?
4. Is the right to consular notification a due process right?
5. What does it mean that notification of consular access must be provided "without delay"?

The ICJ's ruling found in favor of Mexico in most of these areas. The ICJ found in 52 cases that Vienna Convention violations did occur. The Court narrowed the appropriate response available for the United States. Unlike in previous cases, such as *LaGrand*, the United States could no longer interpret the appropriate response to such violations so broadly to include an apology to the state whose rights had been violated. The ICJ confirmed that U.S. courts must hear the claims that the Vienna Convention had been violated. In other words, the claim was not to be considered procedurally defaulted on appeal.

Nonetheless, the Court did not significantly strengthen the right to consular notification as a due process right. And the Court did not order that notification must be made immediately upon arrest. Instead, notification of the right to consular access need

occur only when the arresting party believes a person is a foreign national prior to execution.

Babcock concluded her presentation by suggesting that the ICJ ruling, while it favored Mexico, was not radical in its intent. To wit, the ICJ ruling was in fact rather reasonable and conservative because it did not invalidate any death sentences with its ruling. Instead, it found that there must be a meaningful review and reconsideration of these fifty-two death sentences in light of the confirmed Vienna Convention violations.

Conference Overview

Peter Hodgkinson

This overview is informed by extracts from Chapter One [Capital Punishment: improve it or remove it?] in *"Capital Punishment: strategies for abolition*," edited by Peter Hodgkinson & William Schabas, Cambridge University Press, February 2004 and chapters by Peter Hodgkinson [Alternatives to the death penalty – The United Kingdom experience Capital punishment and The families of the homicide victim and the condemned] from the book "*Death Penalty – Beyond Abolition"* to be published by the Council of Europe, May 2004 [ISBN: 92 871 5333 7]

The Usual Suspects

The 'usual suspects' such as deterrence, race, mental illness, mental retardation, prosecutorial bias, juveniles, wrongful convictions, inadequate legal defense, public opinion, etc. have dominated and shaped the literature and subsequently the agenda of the debate about capital punishment in the USA and therefore inevitably the wider world. This list of flaws in the administration of capital punishment in the USA provides those opposed in principle to abolition opportunities to concede the need to improve the system, however it also provides those sailing under the flag of convenience of abolition to disguise their true position, thus capital punishment: improve it or remove it?

The international work of the Centre for Capital Punishment Studies refers to the annual and compelling evidence from the USA of the profound flaws in the administration of capital punishment to dispel many myths about the USA and then invite our target countries to accept the inevitability that if the most richly resourced country in the world perpetuates such flaws then the manner in which their death penalty is administered must too be suspect. Furthermore this is expressly not an invitation to squander scarce resources in what will be a failed attempt to 'improve' their system but an encouragement to abandon the entire panoply of capital punishment and concentrate their resources on the establishment of an effective, proportionate and humane penal policy.

The moratorium movement – progress or procrastination?

The focus of abolitionist activity in recent years has been the push for a moratorium on executions. Some abolitionists believe that a period without capital punishment will show its folly, or that it is unnecessary, or that it bears unnecessary political and financial costs. In this way, it is believed a moratorium will lead to genuine abolition. Retentionists, on the other hand, hope to use the moratorium period to 'fix' capital punishment's flaws. The US moratorium movement has brought together some rather unlikely bedfellows in the persons of Sister Helen Prejean and the Christian Coalition. That the two sides have found some common ground presents those who seek the replacement of the death penalty with both opportunity and danger. Is there really evidence for the premise that abolition will follow such a period of review?

Many countries, of course, go through periods of *de facto* abolition before they proceed to eliminate it from their statute books though to describe the status of such countries as de facto abolitionist is misleading and it would be more correct to describe their status as having suspended executions as in general the rest of the panoply of death penalty legislation continues.

This type of suspension should only be considered as a last resort as politicians are already past masters at the art of delay and prevarication and one should not be in the business of providing formal opportunities to justify further delay. What is important is that the moratorium, not become a goal in itself, and that it be continually presented– by abolitionists, at any rate – as a step towards total, permanent and eternal replacement of capital punishment. Even more desirable, where possible, would be to obtain the suspension of the entirety of the death penalty process while the raft of changes to legislation and infrastructure is put in place to prepare society for a life without capital punishment. This in essence is the approach the Council of Europe institutes in those states seeking membership.

Public Opinion –v- Public Education

Without exception, governments and others in positions of influence refer to strong public support for the death penalty as one of the justifications for retaining it. I have never found it particularly helpful, when consulting with governments in death penalty States to dwell too long on this issue preferring to stress the importance of raising public

knowledge and understanding about a penalty on which it has come to rely and, moreover, one it has every reason to believe is effective in reducing serious crime – an exercise in reassurance.

Another way to approach this issue of 'beliefs' and the death penalty is to ascertain what measures 'the public' considers effective in the battle against serious crime. An example of such an approach is a recent analysis undertaken by Market and Opinion Research International [MORI] of four social surveys conducted in 1994, 1996, 2000 and 2001. Subjects were asked: 'Which two or three of the following [measures] do you think would do most to reduce crime in Britain?' In the first three surveys, the police were ranked as the most important (51%, 58%, 54%). In 2001, 'better parenting' was considered the most important measure with 55% support. Capital punishment for murder was rated third with 38% support in 1994 and third with 35% support in 1996. By 2000, capital punishment was tied for fourth place with tougher institutions for young offenders, at 25%, and in 2001 it had fallen to seventh place with 20%.

The approach of 'consulting' with the public in addition to having access to public opinion polls is not a new one but perhaps one that has fallen into disuse during the modern debate about capital punishment. It is an approach utilised by a number of commissions in the 1950s and '60s when Ceylon [now Srilanka] and the United Kingdom conducted rigorous examinations into the death penalty of both these nations. The Commission referred to the debate on abolition in the House of Commons in July 1948 when the Attorney-General of Great Britain cautioned reliance on public opinion urging that any reliance must be founded on the confidence that the public opinion under consideration is 'well informed and instructed'. Their view was that whilst politicians might be faced with the dilemma of political practicality and / or social wisdom of a course of action it was the duty of members of a Commission of Enquiry to concentrate on the social wisdom. This is an approach that can be adopted not just with the general public but also with those pivotal agencies that comprise the 'machinery of death'.

Alternatives to capital punishment

The debate about alternatives – more correctly its absence – is all too characteristic of mainstream abolitionists, which in my view represents a fundamental omission equalled only by their failure to explicitly address the issue of crime victims. Pre-eminent among

abolitionist organisations is Amnesty International (AI), which takes no active position on either victims or alternatives, and as recently as 2002 AI sections rejected the recommendations of its own review of work against the death penalty. To quote: 'The classic AI position has been that the organisation does not advocate any specific alternative penalty but that any such alternative must not constitute cruel, inhuman or degrading punishment. Amnesty's unwillingness to recommend [or oppose] specific substitute punishments may undermine the credibility of its overall argument for abolition.'

The failure to address this issue extends to all countries actively engaged in discussions to remove the death penalty. Though the temptation to substitute draconian prison terms or whole of life imprisonment in the belief that this is necessary to "buy" the support of a public generally opposed to abolishing the death penalty may be understandable but politically it has to be avoided. This is the moment when rational penal policy should prevail over expediency and compromise. The UK experience illustrates how easily, though perhaps inadvertently, how the best of intentions at the time of abolition can saddle nations with long-term problems. In 2004, the UK and N. Ireland had in prison more life sentenced prisoners than the total of number of lifers in the other 44 member states of the Council of Europe.

The negative effects of such a policy have recently been compounded by the Home Secretary's decision to introduce whole of life imprisonment into our culture – a wholly indefensible move and one that will, with the support of the judiciary, inevitably be challenged in the domestic and the European Court. It may also give rise to tensions within the EU and CoE extradition debates with certain member states echoing the position of Mexico and Uruguay in their decisions not to extradite suspects without extracting assurances neither to sentence to death or to whole of life.

The families of the homicide victim and the condemned

Crime victims are too often ignored and when remembered too often exploited in the interest of political expediency. They are a constituency almost universally overlooked by the traditional abolitionist movement which I believe has proved a significant obstacle to the process of replacing the death penalty. Politicians the world over justify the retention

of the death penalty, in part, because of their concerns about crime victims though frequently, in my experience, little or no provision for them has been made by the state.

Victims' issues are crucial to any debate about capital punishment though paradoxically the attention given to this topic and therefore to homicide victims and their families frequently exacerbates the anger, hurt and confusion felt by many who have been victimized. Where victim initiatives exist they seem increasingly to manifest themselves by lobbying for procedural rights and harsher penalties at the expense of their more traditional needs-based origins. The most vociferous of these are to be found in the United States where such groups have made considerable inroads into shaping the agenda in legal and penal policy. My experience thus far has not identified similarly fundamentalist groups elsewhere even in countries such as Taiwan and the Philippines, where the United States continues to have a significant influence in shaping political and popular culture. Groups such as Justice for All and Parents of Murdered Children characterize the pro-punishment victim movement in the US and both enjoy considerable political support. Of the two, Houston-based Justice for All, a comparative newcomer, adopts a particularly virulent line on punishment especially the death penalty. Its views represent a failure of the political system to responsibly address the legitimate feelings of pain and anger many crime victims and their families' experience. There is of course a contrary view that it suits populist politicians to have such aggressive emotions aired as it provides ammunition for their platform on the extremes of law and order policy.

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SYMPOSIUM PROGRAM

THE DEATH PENALTY AND MEXICO-U.S. RELATIONS
HISTORICAL CONTINUITIES, PRESENT DILEMMAS

8:30:8:50 Continental Breakfast. Under the Oaks, LLILAS.

9:00-10:45 Rare Books Room, Benson Latin American Collection.
Welcome and Opening Remarks
Peter M. Ward, Director of the Mexican Center
Sheldon Ekland-Olson, Provost, UT Austin

The History of Capital Punishment in Mexico
Moderator: Patrick Timmons, Department of History, UT Austin

"Why Pablo Parra Wasn't Executed: Courts and the Death Penalty in Mexico, 1797-1929."
Linda Arnold, Department of History, Virginia Tech

**"Anatomies of Justice and Chaos: The Mexican Public and the Death Penalty, 1929 1950."
Everard Meade, Department of History, University of Chicago

View Exhibit

10.45 Walk to Jeffers Court Room, UT Law

11:00-12:00 The Mexican Constitution, the Death Penalty and Human Rights.
Moderator Manuel González Oropeza, IIJ-UNAM

"A Unique Proposition: Contingent Abolitionism and the 1857 Constitution"
Patrick Timmons, Department of History, UT Austin

"¿Es constitucional la pena de muerte en México?"
Enrique Díaz-Aranda, IIIJ-UNAM

12:00-1:00 Keynote
"La pena de muerte en la jurisprudencia de la Corte Interamericana de Derechos Humanos".
Sergio García Ramírez, IIJ-UNAM / Judge, Interamerican Court of Human Rights

1:00-2:00 Luncheon

2:15- 4:15 Bilateral Dilemmas: Mexican-U.S. Relations
Introduction: Jordan Steiker, UT Law
Moderator: Peter M. Ward, Director of the Mexican Center, UT Austin

** "What's at stake for Mexico?"
Arturo Dager, Legal Counsellor, SRE

"**The Death Penalty as an Obstacle to International Relations"
Eduardo Ibarrola, Consul General de México, Houston

**"Avena and Other Mexican Nationals vs. United States"
Sandra Babcock, Mexican Capital Legal Assistance Project

**"The United States and the Vienna Convention"
Sarah Cleveland, UT Law

Discussion: Texas Public Officials and Lawyers

415:4:30 Coffee break

4:30-5:15 Conference Overview and the Future

"In place of capital punishment - addressing the issues of victims, alternatives and public reassurance"
Peter Hodgkinson, Centre for Capital Punishment Studies, University of Westminster