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IV INTER-AMERICAN SYSTEM

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The Inter-American Commission on Human Rights (hereinafter 'Commission') has recently adopted the practice of publishing their decisions on the merits of a case (the so-called Article 51 Reports) on the web site of the Commission. Until recently, the Commission only published its Article 51 Reports in its Annual Report, which is usually released in March or April of each year. This new practice allows for immediate dissemination of cases and, therefore, a more timely availability of the decisions.

A good example of this are two reports released in the Fall 2002 against the United States. The cases deal with issues that are currently being debated and/or litigated in the United States and abroad. The *Martinez-Villareal vs USA* Case deals with the issue of the death penalty imposed on a Mexican national that was deprived of certain due process rights, including the right to have the Mexican consular authorities informed of his detention under Article 36 of the Vienna Convention on Consular Relations. This same issue was recently the subject matter of an application filed by Mexico against the United States before the International Court of Justice, which amplifies the significance and impact of this otherwise 'softer' decision.

The other case reported, *Domingues vs USA*, examines the issue of imposing the death penalty to minors. The Commission concluded that the US acted in violation of a *jus cogens* norm under Article I of the American Declaration on the Rights and Duties of Man by imposing the death penalty on a minor under the age of 18 at the time of the offense. This finding further develops certain notions initially considered in the *Roach and Pinkerton vs USA* decision,¹ an earlier case of the Commission. The *Domingues* case coincides with an intense legal debate regarding the execution of minors in the US, and of the death penalty in general, and with the trial of Lee Boyd Malvo, the infamous 'sniper' that created terror in the Washington DC area during the Fall 2002, who has been charged with capital murder in the State of Virginia for events occurred when he was under the age of 18.

¹ James Terry Roach and Jay Pinkerton *vs* United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report of the IACHR 1986-87.

1. **RAMÓN MARTÍNEZ VILLAREAL VS. USA, IACHR, REPORT NO. 52/02, CASE 11.753 – DECISION ON 10 OCTOBER 2002**

1.1. **Facts/Background**

Mr. Villareal is a Mexican National who was living in the United States. In 1983, he was convicted by a jury in Arizona of two counts of first-degree murder and one count of first-degree burglary and subsequently sentenced to death. His execution was postponed until 21 May 1997, but has since been indefinitely postponed.

The petitioners in this case allege that the State violated Mr. Martinez-Villareal's rights under Articles I, XVIII and XXVI of the American Declaration of the Rights and Duties of Man ('Declaration') because his attorney ineffectively represented him at trial, because he was incompetent to stand trial, and because the State failed to uphold its obligations under Article 36 of the Vienna Convention on Consular Relations ('Vienna Convention'). Additionally, petitioners allege that the State violated Article II of the Declaration by instituting the death penalty in contravention of Mr. Martinez-Villareal's right to equality before the law.

The State contends that the Vienna Convention does not provide a private right of action for petitioners such as Mr. Martinez-Villareal, and that even if it did, the Mexican government was able to learn about the proceedings via the extensive media coverage thereof. The State goes on to say that Mr. Martinez-Villareal is prohibited from challenging his legal representation because he failed to raise the issue at his post-conviction hearing, and he is likewise unable to raise the issue of his mental competence because his mental problems were never proven at trial. Finally, the State rejects the contention that it has violated Article II of the Declaration since due process requirements apply to all States, including those that maintain the death penalty.

The Commission concluded that the US is responsible for violations of Articles XVIII and XXVI of the Declaration and that if the State continues with the execution of Mr. Martinez-Villareal, it 'will perpetrate a grave and irreparable violation of the fundamental right to life under Article I of the Declaration'.

1.2. **Proceedings**

The Commission opened this case on 20 May 1997, and immediately requested a delay in the execution of the petitioner pending the outcome of the proceedings herein. Petitioners submitted observations on 8 July 1997 to which the State responded on 18 December 1997. Petitioners delivered further observations on 30 March 1998 to which the State responded on 8 September 1998. Petitioners responded to these submissions on 20 January 1999, and the State wrote again on 6 October 1999. Petitioners again

responded on 19 November 1999. The Commission requested information about the case from petitioners on 14 August 2000, to which the petitioners responded on 13 November 2000. The Commission adopted Report No. 108/00 on 4 December 2000, in which it admitted the claims of Mr. Martinez-Villareal.

1.3. Positions of the Parties

The petitioners noted that Mr. Martinez-Villareal brought several proceedings for post-conviction relief in Arizona State and US Federal courts to no avail. They claimed five violations of Mr. Martinez-Villareal's rights under the Declaration: 1) failure of the State to provide notice of consular assistance in accord with Article 36(1)(b) of the Vienna Convention; 2) failure of the State to provide effective legal representation for Mr. Martinez-Villareal; 3) failure of the State to consider Mr. Martinez-Villareal's mental incompetence at trial; 4) delay in Mr. Martinez-Villareal's execution; and 5) unequal application of the death penalty in the US.

First, petitioners alleged that in the Inter-American Court's Advisory Opinion OC-16/99 on 1 October 1999, the Court determined that a detained foreign national has an individual right to consular assistance. This, they claimed, created an obligation for the state of Arizona to consult with the Mexican Consulate at the earliest stages of the proceedings. This failure was particularly harmful since Mr. Martinez-Villareal did not speak or understand English and was represented by admittedly incompetent counsel.

Second, petitioners alleged that Mr. Martinez-Villareal's trial counsel was inexperienced and incompetent. He failed to examine the mental competence of Mr. Martinez-Villareal, and failed to seek a change to a less prejudicial venue. This created what the petitioners term a 'procedural default' at trial.

Third, petitioners alleged that Mr. Martinez-Villareal was denied due process at trial because he was precluded from introducing evidence of his mental incompetence in court. A special proceeding in April and May 1997 of the Arizona Superior Court determined that Mr. Martinez-Villareal suffered from mental illness, mental retardation, and/or organic brain damage, but that he was still competent to be executed. The Superior Court of Arizona refused admittance of a Magnetic Resonance Image showing the deterioration of Mr. Martinez-Villareal's frontal lobe. The Arizona Supreme Court upheld this decision with two concurring judges stating, 'this is a case which raises serious doubts about the propriety of the death sentence'.

Fourth, petitioners alleged that Mr. Martinez-Villareal's right to due process, to a fair trial, and to be free from cruel, infamous or unusual punishment were violated by the extensive delay in the rendering of a final decision. Mr. Martinez-Villareal has been on death row for 14 years and has, as a result, been caused unnecessary suffering and stress.

Finally, petitioners alleged that because there is an inconsistent application of the death penalty throughout the states, it is not equally implemented. This is in contravention of Articles I and II of the Declaration in that it contravenes Mr. Martinez-Villareal's right to life and equality before the law.

The State alleged that although little information is available to show what steps were made to contact representatives in Mexico, the Mexican Government was in a position to know of the proceedings through media sources. Prison records show that Mr. Martinez-Villareal was visited by someone from the Mexican Government on the first day of his trial. The State also alleged that Mr. Martinez-Villareal's claim is manifestly groundless, and that his rights to due process were upheld consistently with the US Constitution. Additionally, regarding Mr. Martinez-Villareal's mental competence, the State contended that because the judge was of a Hispanic background, he 'would be particularly alert to indications of mental disorder in a Hispanic'.

1.4. Analysis

The Commission began by restating its doctrine of applying a heightened level of scrutiny to cases involving capital punishment. They also specified that they are not precluded by the Fourth Instance Formula, which prevents review of judgments issued by domestic courts acting with judicial guarantees.

The Commission started its analysis with an examination of Article 36 of the Vienna Convention on Consular Relations, to which the US is a party without reservation. They determined that they do not have the jurisdiction to find violations of the Convention or any other international instrument by States parties to those agreements. However, they went on to decide that the corpus of international human rights law is shaped by such instruments and thus the provisions therein may be drawn upon in applying the Declaration. Additionally, evidence of compliance with the Vienna Convention at Article 36 is relevant to show adherence to the due process and fair trial requirements of the Declaration.

Failure to provide access to consular assistance places foreign nationals at a 'considerable disadvantage' in criminal proceedings. Also, in cases involving capital punishment, States must adhere to a strict standard of due process and must 'exercise rigorous control for observance of judicial guarantees'. Thus, the right to access consular assistance is among the minimum judicial guarantees for foreign nationals. Failure to adhere to this standard in a capital case may result in an arbitrary deprivation of life.

The Commission referenced the *LaGrand* decision,² where the ICJ found that the US violated the LaGrand brothers' rights by not providing access to the German consulate, which thus constituted a violation of Article 36(2) of the Vienna Convention. The ICJ stated that Article 36 of the Convention creates individual rights, which could be invoked by the home State of the foreign national. As such, the Commission in the case at hand determined that it is appropriate to consider adherence to the Vienna Convention in determining whether the requirements of the Declaration were met.

The State has not argued that it met the requirements of Article 36(1)(b) of the Vienna Convention, but rather argued that the media surrounding this case was sufficient to alert the Mexican Government of the situation. No evidence was submitted by the State to support this allegation. The Commission held that even if the Mexican authorities had been alerted to the case via the media, this would have happened at the outset of the trial, rather than during the crucial preliminary stages, and would have thus violated the requirement that contact with the consulate take place 'without delay'.

The Commission concluded that the State failed to inform Mr. Martinez-Villareal of his rights under Article 36(1)(b) of the Vienna Convention and that, in the context of this case, this may have had a significant effect on the fairness of his criminal proceedings. Since the minimum standards of fairness and due process were not met in this case, the Commission found that the appropriate remedy would be a retrial in accordance with the protections afforded by Articles XVIII and XXVI of the Declaration or, if not possible, release of Mr. Martinez-Villareal. The Commission did 'not consider it necessary to determine the remaining claims raised by the Petitioners in this case'.

1.5. Proceedings Subsequent to Report No. 114/01

On 27 December 2001, the US delivered a response to the Commission in which it requested a reconsideration of its conclusions and recommendations, withdrawal of Report No. 114/01, and dismissal of the petition. The Commission responded by emphasising

'that the purpose of transmitting a preliminary merits report to the state concerned in accordance with Article 43(2) of the Commission's Rules on Procedure is to receive information concerning what measures have been adopted to comply with the Commission's recommendations (...) it is not for a state at this point to reiterate its previous arguments, or to raise new arguments, concerning the admissibility or merits of the complaint

² International Court of Justice, *LaGrand Case (Germany vs United States)*, Judgment of 27 June 2001, General List No. 104.

before the Commission, nor is the Commission obliged to consider any such submissions prior to adopting its final report on the matter’.

Nevertheless, the Commission chose to briefly address the State’s arguments. The State asserted three claims: 1) that the American Declaration is only a recommendation and is not binding on the State; 2) that the petitioner does not state facts that would constitute a violation of the Declaration; and 3) that the meaning and extent of the Vienna Convention is not within the competence of the Commission. The State also asserted that they have made efforts since 1998 to improve compliance with their obligations under the Vienna Convention by Federal, state and Local government officials.

In response to the first argument of the State, the Commission stated that the Declaration is a source of international obligations for the US and other OAS member States by virtue of the Charter of the OAS, which is a binding instrument.

In response to the second and third arguments of the State, the Commission stated that it was clearly determined that they are within their competence to determine the extent to which a State party to the Vienna Convention complied with Article 36 since these requirements constitute part of the *corpus juris gentium* of international law. As such, since non-compliance with Article 36 obligations could have had a ‘direct and deleterious effect’ on the due process of Mr. Martinez-Villareal, claims of violation under Articles XVIII and XXVI of the Declaration are appropriately raised.

In response to the State’s assertion that it has taken measures to come into compliance with Article 36 of the Vienna Convention, the Commission responded that it is ‘encouraged’ by the actions; however, since no effective remedy was provided to the petitioner in this case, the State has failed to come into compliance with the recommendations of the Commission.

The Commission thereby ratified its conclusions and found the US responsible for violating Articles XVIII and XXVI of the Declaration. They recommended that the State provide Mr. Martinez-Villareal with an effective remedy including either a re-trial with proper due process guarantees, or release.

2. MICHAEL DOMINGUES VS USA, IACHR REPORT NO. 62/02 CASE 12.285, DECISION ON 22 OCTOBER 2002

2.1. Facts/Background

In 1993, at the age of 16, Michael Domingues reportedly took part in two homicides in Nevada. In August 1994, he was convicted by a jury of one count of burglary, one count of robbery with a deadly weapon, one count of first degree murder, and one count of first degree murder with a deadly

weapon. Mr. Domingues was convicted by the state of Nevada and sentenced to death for his crimes.

Mr. Domingues filed a motion in the trial court to correct an illegal sentence, claiming that Nevada law is superseded by international law, which prohibits the execution of juveniles. This motion was denied. He then filed two appeals with the Nevada Supreme Court, the second of which upheld his sentence based on a reservation made by the United States to the International Covenant on Civil and Political Rights (ICCPR). Finally, a Writ of Certiorari was filed with the United States Supreme Court, but was denied on 1 November 1999.

Additionally, Mr. Domingues claimed that he was denied an effective remedy via the legislative and executive branches of the US Government because in 1992, the Senate placed a reservation on Article 6(5) of the ICCPR, which prohibits the imposition of the death penalty on people under the age of 18 when they commit the crime.

Mr. Domingues contended that the imposition of the death penalty on a person who was 16 years old at the time the offence is a violation of the American Declaration at Articles I, II, VII and XXVI. The State did not respond to these allegations.

The Commission concluded that the petition was admissible and found that the State violated Article I of the American Convention by failing to protect the life, liberty, and security of the person of Michael Domingues.

Due to the exceptional circumstances of the case as a result of the nature of the potential violation, the Commission decided to consider admissibility and the merits together. They emphasised the obligation of member States to respond to Commission communications and, since the State did not respond to the Commission's request for information, under Article 39 of its Rules of Procedure, the Commission presumed the facts alleged by the petitioner to be true.

2.2. Admissibility

The Commission found Mr. Domingues' petition admissible for satisfying four grounds. First, the Commission found that Mr. Domingues exhausted his domestic remedies in accordance with Article 31(1). Second, they found that the petition did not violate the six-month period stipulated in Article 32. Third, they found no evidence to indicate that there are duplicate proceedings regarding this complaint, in accordance with Article 33(1)(a). And finally, they found that the complaint is not manifestly groundless and contains facts, which, if proven, would establish violations of the American Convention, in accordance with Article 34. Subsequently, the Commission found the complaint of Mr. Domingues admissible.

2.3. Merits

Preliminarily, the Commission stated that it is reviewing this case under 'a heightened level of scrutiny' since it involves capital punishment. 'The right to life is widely-recognized as the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other rights.' Under the Commission's 'fourth instance formula,' they will not review a decision of a domestic court acting within its competence and with due judicial guarantees; however, since the potential violation of a person's rights under inter-American human rights instruments is involved here, the formula does not apply.

The Petitioner argued that the Commission should expand the decision set forth in the *Roach and Pinkerton* decisions, which held that although no norm of customary international law yet exists to prevent the execution of persons under 18 years of age, the norm is emerging.³ Thus, the Commission stated that it would examine relevant international law to determine whether a norm of customary international law has since been established.

The Commission began its analysis by setting forth four requirements utilised to establish a norm of customary international law:

'a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; b) a continuation or repetition of the practice over a considerable period of time; c) a conception that the practice is required by or consistent with prevailing international law; d) general acquiescence in the practice by other states.'

Evidence in establishing these elements is gathered from State practice, including, *inter alia*, legislation, treaties, practice of international and regional organisations, and press releases. 'Once established, a norm of international customary law binds all states with the exception of only those states that have persistently rejected the practice prior to its becoming law.'

Next, the Commission considered the elements necessary for establishing a rule of *jus cogens*. They found that there must be evidence showing the indelibility of the norm by a large majority of States, despite dissent by a small group of States. Once established, '...violations of such preemptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition, or acquiescence'.

The Commission then went on to determine whether a norm of *jus cogens* for the execution of juveniles had yet been established. Examining treaty

³ *James Terry Roach and Jay Pinkerton vs United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report of the IACHR 1986-87, paras. 56, 57, 60.

law, they found that the United Nations established the Convention on the Rights of the Child in 1989, which prohibits the execution of persons under the age of 18 at the time of the offence. As of September 2001, 191 States were party to this convention. The US has signed but not yet ratified the Convention. The International Covenant on Civil and Political Rights (ICCPR) entered into force in 1976, and presently has 147 parties in adherence. The ICCPR also prohibits the execution of persons under 18 years of age at the time of the offence. The US reserved on this article over significant objection from the international community, and despite the declaration by the UN Human Rights Committee that this reservation is contrary to the object and purpose of the treaty.

Further, the Commission discussed the prohibition on the execution of persons under eighteen years of age found in Article 4 of the American Convention. At present, 24 States are parties to the Convention, thus establishing 'broad hemispheric adherence'. The US has signed but not yet ratified this treaty. However, the US has signed without reservation the Fourth Geneva Convention,⁴ which prohibits the application of the death penalty to persons under eighteen years of age in situations of occupation. Presently, 189 States have become party to that Convention.

The Commission subsequently mentioned the resolution passed by the United Nations Sub-Committee on the Promotion and Protection of Human Rights, which condemned the imposition of the death penalty on persons under eighteen years of age at the time of their offence. The United Nations Commission on Human Rights also passed a resolution asking state parties that continue to impose the death penalty to comply with the International Covenant by not doing so on persons under 18 years of age. The Commission stated that '[i]t is therefore apparent that the United Nations bodies responsible for human rights and criminal justice have consistently supported the norm expressed in international human rights agreements prohibiting the execution of offenders under the age of 18'.

In reviewing the domestic practice of States, the Commission determined that 109 countries have now abolished the death penalty altogether, and that of the countries that maintain the punishment, 115 of them exclude the use of the penalty against child offenders. However, 'since 1998, only three States, the US, Congo, and Iran, have executed juvenile offenders sentenced to death.' Presently, within the US, 23 States allow the execution of persons under 18 years of age, as compared with 27 in 1986. The Commission noted that fewer states today maintain the death penalty for juveniles than in previous years, and also that the Federal Government does not allow the execution of those under 18 years of age.

Finally, as a corollary, the Commission noted that 18 is the minimum age under the Optional Protocol on the Rights of the Child for persons to take part in hostilities. The US signed, but has not yet ratified this Protocol.

⁴ See Art. 68, para. 4.

In conclusion, the Commission found that 'by persisting in the practice of executing offenders under age 18, the US stands alone amongst the traditional developed world nations and those of the Inter-American system, and has also become increasingly isolated within the entire global community'. They then determined that 'a norm of customary international law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime'. Additionally, the Commission concluded that this norm has taken on a 'sufficiently indelible nature to now constitute a norm of *jus cogens*'. This norm cannot be derogated from by treaty or objection. Thus, the Commission determined that the United States has violated its obligations under the American Declaration by disrespecting the life, liberty, and security of Michael Domingues.

2.4. Subsequent Proceedings

On 27 June 2002, after adopting its report and submitting it to the US, the US responded by rejecting the Commission's conclusions and recommendations. The Commission emphasised again the obligation of the State concerned to respond to requests from the Commission in a timely manner. This obligation not being met here, 'all that remains is for the state to indicate what measures have been adopted to comply with the Commission's recommendations'. Despite this finding, because of the nature of this case, the Commission went on to address the arguments of the State.

The State first argued that the case was not admissible because it violated Article 33(b) of the Rules of Procedure by being a duplicate proceeding to that heard in the *Roach and Pinkerton* Case. The Commission responded that different victims bringing different claims of violations do not rise to the level of duplicate proceedings and are not barred.

The State next argued that the Commission's reliance on State practice and legal standards was insufficient to establish a customary or *jus cogens* prohibition on the death penalty for juveniles since the negotiating of the documents mentioned was not based on customary practice. The Commission responded by stating that they may rely on treaties inside and outside the Inter-American system to evidence the emergence of such norms. Also, it is 'possible for a new rule of customary international law to form, even over a short period of time, on the basis of what was originally a purely conventional rule, provided that the elements for establishing custom are present'.

The State next argued that the United Nations has recognised through their negotiation of the agreements cited by the Commission in this case that there is no customary international law prohibition on the execution of juvenile offenders. The Commission responded by stating that State practice provides evidence that 'nearly all world states, abolitionist and retentionist alike, have through the acts of ratification or accession accepted this proscription unconditionally'. They suggested that the US has misplaced its

reliance on ‘a historical disconnect between the ratification and implementation of treaty provisions by states’.

The State next contended that the Commission ignored *opinio juris* in its determination of customary international law by failing to establish that States ceased using the death penalty against juveniles out of legal obligation as opposed to fairness or morality. The Commission responded that ‘evidence of *opinio juris* through state practice followed out of a sense of legal obligation is not necessarily a prerequisite to the existence of a norm of *jus cogens*.’ Additionally, an instrument that is widely ratified by the ‘international community and speaks to the legality of certain actions’ may have its provisions deemed evidence of *opinio juris*.

The Commission determined that, since no measures have been taken by the State to comply with its recommendations, it would ratify its conclusions and reiterate its recommendations.

2.5. Conclusions and Recommendations

The Commission concluded that the US acted in violation of a norm of *jus cogens* under Article I of the American Declaration by sentencing Mr. Domingues to death. ‘Consequently, should the State execute Mr. Domingues pursuant to his sentence, it will be responsible for a grave and irreparable violation of Mr. Domingues’ right to life’.

The Commission therefore recommends that the State provide Mr. Domingues with an effective remedy, including commutation of his sentence, and that it review its laws, procedures and practices to ensure that the death penalty is not imposed on anyone under the age of 18 at the time of the offence.