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Inter-American System

Diego Rodriguez-Pinzon

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II INTER-AMERICAN SYSTEM

DIEGO RODRÍGUEZ-PINZÓN

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Recently elected members joined the Inter-American Commission on Human Rights this year. They are: Evelio Fernández Arévalos from Paraguay, Freddy Gutiérrez from Venezuela, Florentín Meléndez from El Salvador, and Paulo Sergio Pinheiro from Brazil. The outgoing Commissioners are: Marta Altolaguirre from Guatemala, Robert Goldman from the United States, Juan Méndez from Argentina and Julio Prado Vallejo, from Ecuador. The new Commissioners join Clare K. Roberts from Antigua and Barbuda, Susana Villarán from Perú, and José Zalaquett from Chile, in the seven member body.

During 2003 the Inter-American Commission continued to actively discharge its mandate regarding individual complaints. It continued its practice of publishing some of its decisions on its website as soon as they are adopted. This occurred particularly in decisions related to admissibility or inadmissibility of petitions, friendly settlements or compliance with decisions, and cases rendered under the American Declaration. Below we report three cases, one declaring the inadmissibility of a petition against the United States, the second one that is called a 'compliance agreement' in a case against Chile (the first of its kind published by the Commission), and the third one regarding a decision in the merits in a case brought against the United States.

Kenneth Walker vs United States, IACHR, Report No. 62/03, decision of 10 October 2003

Kenneth Walker ('Petitioner') alleged that the United States ('State') violated his rights under Articles I, II, V, VIII, XIV, XVII, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man ('American Declaration'). Walker bases these claims on the United States' practice of irregular extraterritorial rendition. He claims that the US customs officials lured him to the United States as part of a covert operation and subsequently improperly arrested, detained and charged him of arms export offenses.

Procedural History

Originally the Petitioner and two other petitioners brought this case to the Commission in August 1998. The two other petitioners were severed from

the case on 5 March 1999 for their failure to satisfy the Commission requirement to exhaust domestic remedies. The Commission held a hearing on 5 March 1999 to hear the parties' representations regarding admissibility and the merits of Walker's claims. After the hearing, both the State and Petitioner submitted their responses to the complaints and observations, respectively. By January 2000, the Commission was notified by the Petitioner that it did not intend to reply to the State's response.

Facts

Walker, a Canadian citizen, had worked as a businessman and commodities trader. He agreed to assist Barry Brokaw, who was under surveillance by US Customs agents, in obtaining 1,000 pistols for delivery to Ecuador. Walker claims that he did not have previous experience trading in arms prior to this arrangement with Brokaw. Walker claims that the US Customs Service agents arranged for Walker to meet Brokaw in the Bahamas in November 1989. Walker's flight to the Bahamas made a stop in New York. While stopped in New York, Walker was arrested by US Customs agents pursuant to an arrest warrant citing 'conspiracy to defraud the United States and to violate the Arms Export Control Act'.

In addition to being interrogated for eight hours without counsel, Walker claims that the customs officials promised to send him back to Canada in exchange for his signing an agreement admitting his involvement in the arms trade. Based on this signed agreement, the US District Court for the Eastern District of New York indicted Walker on the charges and denied Walker bail in December 1989.

Walker claims that in 30 March 1990, he agreed to a plea bargain in exchange for the government attorney's promise to endorse a sentence of time served. Upon execution of the plea bargain, Walker returned to Canada on 6 April 1990.

On 17 January 1991, Walker moved to withdraw his plea. While the district court agreed to hear the pleading, it adjourned the motion until Walker appeared before the Court and issued a bench warrant for Walker's arrest. The State requested extradition of Walker to the United States, which the Canadian Government refused.

Walker filed a civil action in the Ontario Court of Justice for damages from abduction, which Walker claimed constituted *de facto* kidnapping because the US customs agents lured him by deceit to New York. Despite the Ontario Court of Appeal's overturning of the Ontario Court of Justice's decisions, the Court of Appeals did recognise that Walker was encouraged to enter the United States by false representations, which caused Walker mental duress, harm and false imprisonment.

Walker's petition to withdraw his guilty plea or attempt to gain redress in the United States have been unsuccessful because he refuses to return to the United States for fear that he will be incarcerated.

Walker claims that the US Customs agents deceived him into thinking the guns were to be delivered to Ecuador, and not to Chile as the Government claims, and thereby lured him into a transaction that violated US law. Walker also claims that he is excused from exhausting domestic remedies because of his status as a fugitive. Furthermore, he claims the court is responsible for undue delay in issuing a final judgment in the proceeding.

The State holds that Walker's claims are inadmissible before the Commission because he failed to exhaust domestic remedies and that the Doctrine of Fugitive Disentitlement is not a jurisdictional bar to the pursuit of proceedings by fugitives. Secondly, the State claims that Walker failed to assert facts that would constitute a violation of rights set forth in the American Declaration. The State claimed that Walker was the cause of the delay to his suit as a result of his failure to return for his hearing. Additionally, the State argues that he voluntarily took the airline ticket, which indicated a stop in the United States, and therefore was not forcibly taken into the United States.

Admissibility

The Commission established that it is competent to examine Walker's petition. It then proceeded to examine whether Walker's petition was eligible for the Commission's review under Article 31 of the Commissions' Rules of Procedure, which specifies that the Petitioner must exhaust all domestic remedies and, if not, that there exists an exception to the general exhaustion of remedies requirement. Walker and the State acknowledge that Walker did not exhaust the domestic remedies available before the US courts. The Commission stated that the main issue it must settle is whether Walker should be expected to return to the United States to attempt to pursue domestic remedies despite the criminal proceedings against him in New York.

In addressing this issue, the Commission noted that: (1) Walker's action of leaving the United States caused his inability to pursue domestic remedies; and (2) Walker has not contended that a motion to withdraw his guilty plea would be ineffective, just that it is not available due to the Doctrine of Fugitive Disentitlement. The Commission found that Walker would be able to pursue constitutional and other remedies in the US courts. The Commission also noted that Walker failed to raise any of these issues before the US courts during any of the stages of his criminal proceedings. Rather, Walker made the decision to admit guilt and participate in an agreement that facilitated his release and return to Canada. In light of these facts, the Commission held that an exception to the exhaustion of domestic remedies requirement is not properly applicable, and that his case is inadmissible.

The Commission differentiated Walker's situation, where there is no evidence that he may be in jeopardy of violations of fundamental rights if returned to the United States, and the situation where a petitioner faces the

threat that future decisions of the domestic courts will violate fundamental rights during the petitioner's exhaustion of domestic remedies. The Commission also differentiated Walker's case from those involving a petitioner who has fled the State is a victim of torture or inhumane treatment or is subjected to criminal proceeding that are manifestly incompatible with due process standards.

The Commission expressed that its decision should not be read to condone the US officials' actions in Walker's arrest and detention.

Carmelo Soria Espinoza vs Chile, Compliance Agreement, Report No. 19/03, Case 11.725, 6 March 2003

The Commission received this case in February 1997 in which Chile was accused of violating the Petitioners right to justice by failing to investigate the death of Carmelo Soria Espinoza. In 1999 the Commission adopted a report in which it found Chile had violated Articles 1, 2, 8, and 25 of the American Convention on Human Rights.

Carmelo Soria Espinoza, a dual Spanish and Chilean citizen, worked as chief of the editorial and publications section of the Latin American Demographic Center in Chile. This Center is part of the United Nations system and as such Carmelo Soria Espinoza had the status of international official. In July 1976 Carmelo Soria Espinoza was kidnapped by security agents of the *Dirección de Inteligencia* and subsequently murdered, with his body and car found in a stream. The Chilean courts established the Chilean agents responsible for the crime, yet due to the Chilean law number 2.191, the criminal prosecution was dismissed.

In January 2003 the Commission received a commitment signed by Chile to comply with the recommendations made in the 1999 Commission report and a statement by the petitioner accepting Chile's commitment.

The commitment summarises the Commission's findings as stated in the 1999 Commission report. This summary includes finding that Chile violated Carmelo Soria Espinoza's right to personal liberty, right to life, and right to personal integrity and that the dismissal of the criminal prosecution of those responsible for the violations affected Carmelo Soria Espinoza's right to justice, violating his rights under Article 8, 25 and 1 and 2 of the American Convention. The report also made recommendations to Chile to take certain measures regarding the violations of Carmelo Soria Espinoza.

The Chilean proposal for compliance with the Commission's recommendations were made with the objective of putting an end to the international action; to lay the basis for terminating the judicial proceedings against Chile for the death of Carmelo Soria Espinoza before the Chilean court; and to obviate further judicial actions against Chile for liability.

The elements of the compliance proposal include:

- The family of Carmelo Soria Espinoza to end the action before the Commission and declare that all recommendations contained within the Commission report are complied with;

- The family to accept the symbolic reparation made by the Government of Chile in which it publicly declares responsibility for the death of Carmelo Soria Espinoza and offers to erect a monument of remembrance in a location chosen by his family;
- The family will desist from the suit currently before the Chilean domestic court and promise not to pursue future litigation for State liability;
- The State's payment of USD 1,500,000 as compensation to the family;
- The State's declaration of Carmelo Soria Espinoza's status as an international official of the United Nations; and
- Chile will present an application to the Courts of Justice to reopen the criminal proceedings that were initiated to prosecute those who killed Carmelo Soria Espinoza.

The daughter of Carmelo Soria Espinoza signed a declaration that she was aware of the proposal and expressed conformity and acceptance.

The Commission recognised the willingness of Chile to resolve the case by complying with the recommendations of the Commission's report. It also concluded that it would continue to monitor the State's compliance.

Statehood Solidarity Committee vs United States, Report No. 98/03, Case 11.204, decision of 29 December 2003

Members of the Statehood Solidarity Committee ('Petitioners') filed a petition in April 1993 alleging that the United States violated Article II (right to equity before the law) and Article XX (right to vote and participate in government) of the American Declaration of the Rights and Duties of Man ('American Declaration'). The Petitioners allege these violations stem from the inability of the citizens of the District of Columbia to vote for and elect members to Congress.

Procedural History

The Commission granted the Petitioners a hearing on their complaint for 4 October 1993. During this hearing, the Petitioners presented oral submissions regarding admissibility, as well as on the merits of the case. They also submitted documents regarding exhaustion of domestic remedies. Subsequent to the hearing, the Commission opened the case in regard to the Petitioners' complaint. In February 1995, the Commission held a second hearing at which the Petitioners presented more evidence in support of admissibility and merits, as well as presenting several witnesses. The Commission requested information regarding the exhaustion of domestic remedies, to which the Petitioners responded in April 1995. In June 1996, the Commission requested further information from the Petitioners regarding Congressional authority over the District of Columbia. Throughout this time, the Petitioners offered multiple submissions,

including related US court decisions, regarding developments pertaining to admissibility and exhaustion of domestic remedies.

The Commission decided to consider the admissibility of the Petitioners' claims together with the merits.

Admissibility

The Commission found that the Petitioners had satisfied the exhaustion of remedies requirement based on the cases *Adams vs Clinton* and *Alexander et al. vs Daley* and the fact that the absence of Congressional representation for D.C. residents has been unsuccessfully challenged under equal protection rights and the right to republican form of government in US federal district court and the US Supreme Court. Additionally, the Commission held that the Petitioners lodged their petition within six-months they were notified of the US Supreme Court decision and of the consolidation of *Adams vs Clinton* and *Alexander et al. vs Daley*. Therefore it found that the petition was not barred under the Rules of Procedure. The Commission also held that the Petitioners' claims were admissible under Article 34 of the American Convention, especially given the importance representative democracy has played in the development of the Organization of the American States.

Merits

Addressing the merits of the petition, the Commission began by summarizing the structure and status of the District of Columbia. The Commission identified the issue in the present case turns upon the role of the residents of the District of Columbia in the legislative branch of the federal Government. The Commission noted that there was no dispute that the residents of the district, otherwise eligible if living elsewhere, cannot vote in federal elections or elect full members to Congress. This preclusion stems from Article 1 of the US Constitution, which outlines Senate and House of Representative elections. The judiciary has determined that only states may elect members to the legislature and it will not consider whether the District of Columbia is a 'state' within the meaning of the provision. The Commission also noted that the purpose of the district's status was to ensure that Congress would not have to depend on other states for its protection. Through various initiatives, the residents of the district have been granted some representation at the local level. These initiatives resulted in the participation of residents in Presidential elections, election of one non-voting delegate to the House of Representatives, election of city council and mayor, two non-voting senators, and non-voting delegates to Congress' Committee of the Whole. While the non-voting delegates are able to vote in the House of the Representatives, it may not cast a deciding vote.

Addressing the Petitioners' claims of violations of Article II and XX (the equal rights of all people) and (the right to participate in government and elections), the Commission reiterated the significance of representative democracies and the representation's connection with the protection of

human rights. The Commission also noted that when interpreting Article 23 of the American Convention it needs to also consider the degree of autonomy afforded to states in organising their political institutions. It noted that not all differences in treatment are forbidden under human rights law, including the rights to participation in government. The Commission's role in evaluating the right to participate in government is to ensure that any differences in treatment are in pursuit of legitimate ends and that the classifications used are reasonably and fairly related to the ends sought by the legal order.

The Commission looked to the interpretation by the European Court of Human Rights when establishing its approach to interpreting Article XX of the American Declaration and Article 23 of the American Convention. The Commission concluded that it must take account of the State's autonomy and only interfere where the State has curtailed the effectiveness and essence of the petitioner's right to participate in government. The Commission also referenced the UN human rights system, which uses an 'objective and reasonable criteria' standard when evaluating the right to political participation.

The Commission concluded that the Petitioners' rights to participate in the federal legislature has been limited in law and in fact. It held that the delegates afforded the residents are 'meaningless' since they are not able to affect the ultimate results of the matters before the Committee of the Whole. Additionally, the Petitioners' right to elect representatives to other levels of the government and participate in public debates is not equivalent to the participation contemplated by Article XX of the Declaration. The prohibition of the Petitioners to vote for a representative in legislature, unlike similarly-situated citizens elsewhere in the United States, is a violation of equal rights under the law, contrary to Article I of the Declaration.

The Commission did not make a determination regarding the allegations regarding the existence of racially discriminatory intent against the majority African-American population of the district on the part of Congress.

The Commission next turned to analyse whether the limitation on the rights under Articles XX and II of the Declaration were justified when examined in the political context of the United States.

The State argued that the limitation of the right to elect members of Congress is justified. It argued that the issue raised by the Petitioner relates to the federal structure of the United States and that the founders' decision not to make the district a state was not a conscious, discriminatory decision to disenfranchise the Petitioners. The Commission, however, rejected the State's argument and found that the restrictions on the Petitioners' rights to participate in government have deprived them of 'the very essence and effectiveness of that right', without offering adequate justification.

The Commission found that the Congress exercises expansive control over the Petitioners yet remain unaccountable; thereby depriving them of the essence of representative government. The Commission also found that

the State, while offering historical justifications for the deprivation, failed to offer present-day justifications for the denial of representation of the Petitioners. The Commission noted that the US courts have found that the US Constitution cannot violate the right to the one vote principle, but that the American Declaration does not place a comparable limitation on the Commission. As such, the American Declaration establishes standards that apply to states, including the constitutional provisions. In determining the violation, the Commission considered that other federal enclaves in the Western Hemisphere do not deny their residents the right to vote for representatives in national legislatures.

The Commission concluded that the State had failed to justify the denial to the Petitioners their right to effective representation in government and their denial of effective participation in government by way of elected representative. The Commission added that Articles II and XX do not require that the Petitioners be afforded the same means or degree of participation as residents in states of the United States. Rather, the articles require that the State offer the Petitioners the opportunity to exercise a meaningful influence on matters considered by the legislature. While this opportunity may be achieved through elected representatives, it remains a matter of discretion for the State to determine the appropriate mechanism.