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## News from the Regional Human Rights Systems

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# NEWS FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

by David Baluarte\*

## Inter-American Commission on Human Rights

### *The Implications of Sentencing Aliens without Consular Notification*

#### *Case 11.753: Ramón Martínez Villareal*

On October 10, 2002, the Inter-American Commission on Human Rights (Commission) issued Report No. 52/02 on the merits of Case 11.753 regarding Ramón Martínez Villareal. This report is the culmination of an investigation initiated on May 16, 1997 against the United States concerning the murder conviction of Ramón Martínez Villareal, a Mexican national. Mr. Martínez Villareal was convicted of two counts of first degree murder on May 20, 1983, and has since been incarcerated and placed on death row in Arizona. The petitioner, the Center for Justice and International Law, alleged five violations of Mr. Martínez Villareal's rights: the failure of the United States to provide notice of consular assistance under Article 36(1)(b) of the Vienna Convention on Consular Relations (Vienna Convention) to which the United States is bound; the failure of the United States to provide and guarantee effective assistance of counsel to Mr. Martínez Villareal; the failure of the United States to take into account Mr. Martínez Villareal's mental competence at the trial and sentencing phases of his criminal proceeding and its obligation not to execute Mr. Martínez Villareal due to his mental incompetence; the delay in Mr. Martínez Villareal's execution; and the unequal application of the death penalty throughout the United States. The petitioner claimed that these violations of Mr. Martínez Villareal's rights by the United States contravene Articles I (right to life, liberty, and personal security), II (right to equality before law), XVIII (right to a fair trial), and XXVI (right to due process of law) of the American Declaration of the Rights and Duties of Man (American Declaration).

### *Analysis*

The Commission limited its analysis of the merits to the petitioner's first claim, based on its finding that the United States' failure to comply with Article 36(1)(b) of the Vienna Convention was a sufficient basis to find violations of the rights to a fair trial and to due process of law under the American Declaration. The Commission further noted it would apply a heightened level of scrutiny, consistent with the restrictive approach previously taken by the Commission and other international human rights authorities in considering issues regarding the imposition of the death penalty.

In response to the government's argument that the Vienna Convention does not vest any private rights in a criminal defendant, the Commission stated that, based on the current jurisprudence of the Inter-American Court of Human Rights, it does not have competence to adjudicate the United States' responsibility for violations of the Vienna Convention *per se*. The Commission nonetheless maintained that Mr. Martínez Villareal's right to information and consular assistance under Article 36 of the Vienna Convention constitutes a fundamental component of the due process protections to which he is entitled pursuant to Articles XVIII and XXVI of the American Declaration. Accordingly, the state's failure to respect and ensure this obligation constituted serious violations of Mr. Martínez Villareal's rights to a fair trial and due process. In arriving at this conclusion, the Commission considered current developments in international law in the decision of the International Court of Justice in the LaGrand case and the decision of the Inter-American Court of Human Rights in Advisory Opinion 16, which asserted that Article 36

of the Vienna Convention creates individual rights that give rise to the international responsibility of a state.

At no point did the United States ever allege that Article 36(1)(b) had been satisfied. Rather, it claimed that the Mexican Consulate should have been on notice because of the media attention attracted by Mr. Martínez Villareal's arrest. The Commission not only found this defense to be insufficient, but stated that the possible knowledge of the Mexican consular staff did not address Mr. Martínez Villareal's right to be informed of his right to consular assistance.

In evaluating the importance of the state's compliance with Article 36 of the Vienna Convention, the Commission noted that granting consular assistance to a criminal defendant helps ensure the protection of the defendant's due process rights through the provision of services, including translation, the collection of mitigating evidence from the defendant's country, and the preparation of an adequate defense. In this case, the Commission considered that the record showed that Mr. Martínez Villareal was arrested and tried without having a clear understanding of the proceedings. Mr. Martínez Villareal did not speak English, his attorney did not speak Spanish, and the earlier stages of the proceedings were not translated into Spanish. The record also reflected that Mr. Martínez Villareal did not understand the purpose or composition of the jury. There was further evidence that Mr. Martínez Villareal suffered from mental deficiency at the time of the trial against him, and that this mental deficiency was not adequately explored by his attorney. Based on these findings, the Commission held that the United States' failure to comply with the Vienna Convention placed it in violation of Articles XVIII and XXVI of the American Declaration. The Commission further concluded that if the United States executes Mr. Martínez Villareal, it will be violation of Article I of the American Declaration.

### *Recommendations*

In light of the Commission's finding regarding the violation of Mr. Martínez Villareal's rights to due process and a fair trial, it urged the United States to retry the case in accordance with the protections prescribed by Articles XVIII and XXVI of the American Declaration. If a retrial in compliance with these protections is not possible, the Commission recommended Mr. Martínez Villareal's release. The Commission further advised the United States to review its laws and procedures relating to foreign nationals who are arrested and incarcerated to assure that consular notification is integrated into the earliest stages of criminal proceedings. The Commission announced that it would continue to evaluate the measures adopted by the United States with respect to the above recommendations until it reaches full compliance.

### *Establishing an International Ban on the Execution of Juveniles*

#### *Case 12.285: Michael Domingues*

On October 22, 2002, the Commission issued Report No. 62/02 on the admissibility and the merits of case 12.285 regarding Michael Domingues. Mr. Domingues was convicted of two counts of first-degree murder and sentenced to death for crimes he committed when he was 16 years old. On May 1, 2000, the Commission received a petition from the Magnus Hirschfeld Center for Human Rights and Mark Blaskey of the Clark County Public Defender on behalf of

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## ALUMNI PROFILE

by Inbal Sansani\*



**N**omi Dave, a 1999 J.D. graduate of the Washington College of Law (WCL), is currently working as an associate protection officer with the United Nations High Commissioner for Refugees (UNHCR) in Guinea, West Africa. Ms. Dave is a member of the Junior Professional Officers (JPO) program, which provides opportunities for nationals of different countries to work with UN agencies for a two-year period. She applied to the JPO program through the U.S. government, which sponsors JPOs for UNHCR and the World Food Program. Although Ms. Dave is a staff member of the UNHCR, her position is funded through the U.S. Department of State. Upon acceptance to the program, she was posted to the UNHCR Branch Office in Conakry, Guinea. At this duty station, she works primarily with refugees from Cote d'Ivoire, Liberia, and Sierra Leone, which are currently the main sources of the refugee population in Guinea.

Ms. Dave's work focuses on the protection of refugees, including analysis of issues pertaining to international refugee law and the legal and physical protection of refugees. In addition, UNHCR addresses other human rights issues affecting refugees, including arbitrary arrest and detention, freedom of expression, freedom of movement, and rights specific

to the needs of women and children in the refugee community. According to Ms. Dave, the most challenging aspect of her work involves addressing the basic needs of individuals and groups on a daily basis. Each morning she greets a queue of refugees outside the UNHCR office. She explains that this group may include people who have not eaten for days, people who have nowhere to sleep, or those whose spouses or siblings have been arrested. One of her first lessons was that working at UNHCR involves a variety of responsibilities including counseling, social services, and informal dispute resolution in addition to engaging in legal analysis.

Immediately after law school Ms. Dave worked as a researcher and writer for the UN Secretariat in New York, focusing on economic and social affairs. Ms. Dave's advice to law students is to study topics that they find stimulating and to keep focused on their chosen fields of interest. Her favorite law school experience was participating in the International Human Rights Law Clinic, which she found to be both instructive and enjoyable.

Ms. Dave is currently beginning to explore new areas of interest in the law, including issues of cultural rights, economic and social development, and the protection of children and the elderly in conflict situations. She plans to pursue writing opportunities in the future. 🌐

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Mr. Domingues. The petition alleged that by sentencing Mr. Domingues to death for crimes he committed while he was a juvenile, the United States breached Articles I (right to life), II (right to equality before the law), VII (right to protection for mothers and children), and XXVI (right to due process of law) of the American Declaration. The petitioner alleged that the United States violated Article I of the American Declaration by breaching the *jus cogens* norm prohibiting the execution of juveniles. The petitioner further argued that the use of the death penalty in a limited number of U.S. states resulted in arbitrary deprivation of life and inequality before the law in the United States.

### Analysis

After ruling that the case was admissible based on evidence that Mr. Domingues had been denied a substantive appeal of his "illegal sentence" and had therefore exhausted all domestic remedies, the Commission considered the merits of the claim, focusing first on the allegation that the United States violated a *jus cogens* norm. The Commission indicated that it would apply a heightened level of scrutiny reserved for capital cases. The Commission began its analysis with its 1987 decision, *Roach and Pinkerton v. United States*, in which it determined whether a *jus cogens* norm that prohibits the execution of juveniles existed. The Commission held in *Roach and Pinkerton* that, although there was a recognized *jus cogens* norm among member states of the Organization of American States (OAS) that prohibits the execution of chil-

dren, there was no consensus as to the age of majority. Based on the precedent set by that decision, the Commission defined the question before it as being whether, since 1987, the international community had established 18 as the age of majority.

In determining whether a *jus cogens* norm had developed for the age of majority since its 1987 decision in *Roach and Pinkerton*, the Commission considered the development of international treaty law, United Nations resolutions and standards, domestic practices within individual states, and practices within the United States. The Commission noted numerous developments that it considered indicative of an international consensus on 18 as the age of majority. In reaching its conclusion, the Commission relied on the fact that 191 states are currently parties to the UN Convention on the Rights of the Child, which provides that no person under the age of 18 shall receive the death penalty; that 64 countries have acceded to or ratified the International Covenant on Civil and Political Rights, which provides that death sentences shall not be imposed on individuals below the age of 18; that 5 member states of the OAS have ratified or acceded to the American Convention on Human Rights, which prohibits the execution of persons below the age of 18; that 49 countries have abolished the death penalty since 1986 (making the total of nations that do prohibit the death penalty 111), and that 20 additional countries that have not carried out an execution in 10 or more years; and that 16 states in the United States have expressly chosen the age of 18 as the minimum age for

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courts above, that Yaser Hamdi, a U.S. citizen captured during battle in Afghanistan, was properly designated an unlawful combatant under the president's war powers. The court, however, also held that the Third Geneva Convention was a non-self-executing treaty, meaning that Hamdi could not invoke its provisions without further congressional action to implement the treaty domestically. To the contrary, the district court decisions in both *Lindh* and *Padilla* found the treaty to be self-executing. The court's decision effectively leaves Hamdi, now in custody in a naval detention center in Norfolk, Virginia, without access to counsel or further access to the courts.

Two other related decisions recently before domestic courts merit mention. In late January 2003, the trial judge in the federal trial of Zacarias Moussaoui ruled in a closed hearing that Moussaoui should be provided with access to Ramzi Binalshibh, the self-described coordinator of the September 11, 2001 terrorist attacks in the United States and also in U.S. custody, in order to be able to effectively prepare Moussaoui's defense to capital charges of his own involvement in those attacks. Close followers of the trial suggest that the government's resolve not to permit the two alleged terrorists to meet may compel them to seek the first known trial before a military commission, a decision which would unquestionably raise further criticism of such tribunals. Finally, in Boston, the judge who recently sentenced Richard Reid, the admitted al-Qaeda "shoe-bomber," was praised for his strong condemnation of Reid during the sentencing hearing. The judge, responding to assertions by the defense that Reid was a combatant in a war, responded by repeatedly asserting, "You are not an enemy combatant—you are a terrorist." By that reference, the judge seemed to suggest that the criminal law, not the law of war, was the way to deal with terrorism, thus ironically undermining the administration's assertions that their actions are justified as legitimate actions in the war on terrorism.

The term "legal black hole" in reference to the status of the Guantánamo detainees seems to originate with a decision by the British courts in *R (on the Application of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs*. In this case, a British national named Feroz Ali Abbasi, a Guantánamo detainee since January 2002, complained to British judges that he had been without access to a court or any other tribunal, or even to a lawyer, since his arrival in Guantánamo. His representatives sought to compel the British Foreign Office to take some action on his behalf to challenge his arbitrary detention in Cuba. The British court declined, noting that there were several legal actions pending in the United States dealing with the matter, and that Mr. Abbasi is "within the sole control of the United States executive." The court did note, however, that although Mr. Abbasi's detention as an "illegal combatant" may ultimately be justified,

the judges found it "objectionable . . . that Mr. Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal." It was in that context that the British tribunal expressed its profoundest desire that the U.S. courts assume jurisdiction so as not to leave Mr. Abbasi in arbitrary detention in that "legal black hole" alluded to by Amnesty International and others. The British court also noted that the issue of the validity of the detention in Guantánamo Bay was pending before the Inter-American Commission on Human Rights, but that "it is as yet unclear what the result of the Commission's intervention will be."

Finally, the Canadian courts also may take on the issue of the Guantánamo detentions. Press reports in February of 2003 indicate that a former member of Parliament asked the Quebec Superior Court to rule whether Canadian soldiers in Afghanistan had surrendered alleged enemy soldiers to the U.S. military for transport to Guantánamo in violation of Canada's obligations under the Geneva Conventions. The filing of the suit followed criticism of the government in the Canadian House of Commons for its failure to determine if those captured were prisoners of war prior to their surrender.

The core of the Commission's precautionary measures ruling lies in its conclusion that the executive branch of the U.S. government is not entitled to unilateral and unreviewable designation of the Guantánamo detainees as unlawful combatants under international humanitarian law. What is common to all three of the domestic court decisions in the cases involving Lindh, Padilla, and Hamdi is the courts' assumption that there was no doubt as to the status of the individuals involved in those cases; all were legitimately and properly designated as "illegal," or more properly "unprivileged" combatants, by the executive branch. The petitioners' position in the Guantánamo case relies on Article 5 of the Third Geneva Convention, which requires that the detainees are entitled to a presumption of protection of the Third Convention "until such time as their status has been determined by a competent tribunal." Their argument also relies on customary law and the assertions of many leading international law experts who maintain that the detainees are entitled to a presumption of treatment as privileged combatants until a competent tribunal has determined their status. The detainees must be designated as civilians, combatants, or criminals rather than lumped into a single composite group of unlawful combatants by presidential fiat. The Commission's view is not a radical position but one consistent with established interpretations of international human rights and humanitarian law. ☹

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eligibility for the death sentence. In considering this and other evidence, the Commission established that a *ius cogens* norm had developed that prohibits the execution of people under 18. The Commission found that the United States violated this norm in the *Domingues* case and breached Article I of the American Declaration.

#### Recommendations

Based on these findings the Commission recommended that the United States offer Mr. Domingues a commutation of sentence. The Commission further recommended that

the United States review its laws and procedures to ensure that the death penalty is not imposed on anyone who was under the age of 18 at the time of his or her crime. The Commission announced that it would continue to evaluate the measures adopted by the United States with respect to the above recommendations until the United States reaches full compliance. ☹

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