

REPORT No. 133/11¹
PETITION 259-11
ADMISSIBILITY
FÉLIX ROCHA DÍAZ
UNITED STATES
October 19, 2011

I. SUMMARY

1. On March 2, 2011, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the IACHR”) received a petition lodged by Sandra L. Babcock of the Center for International Human Rights at Northwestern University School of Law and Kathryn M. Kase (hereinafter “the petitioners”) against the United States of America (hereinafter “the United States” or “the State”). The petition was filed on behalf of Félix Rocha Díaz (hereinafter “the alleged victim” or “Mr. Rocha”), a Mexican national. At the time the petition was filed, Mr. Rocha had been on death row in a Texas prison for 13 years.

2. The petitioners contend that Mr. Félix Rocha was never notified of his consular rights under Article 36 of the Vienna Convention on Consular Relations (hereinafter “the Vienna Convention”); that the attorneys appointed by the State to represent Mr. Rocha were ineffective throughout the proceedings; that the lethal injection employed by the state of Texas uses in capital punishment, creates a risk of causing excruciating suffering owing to its composition and the manner in which it is administered; and that the conditions of confinement on death row in the state of Texas are inhumane and possibly the harshest in the country. At the time of the adoption of this report, the State had not yet submitted its observations on the petitioners’ allegations.

3. Without prejudging the merits of the complaint and after examining the position of the petitioners, and in compliance with the requirements set forth in articles 31 to 34 of its Rules of Procedure, the Inter-American Commission decides to declare the case admissible for purposes of an examination of the alleged violation of the rights recognized in articles I, XVIII, XXV and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter “the American Declaration”). The IACHR also decides to advise the parties of this decision, to publish it and include it in its Annual Report to the OAS General Assembly.

II. PROCEEDINGS BEFORE THE IACHR

4. The Inter-American Commission received the petition on March 2, 2011, and on March 10 forwarded a copy of the relevant parts of the petition to the State, giving it two months in which to submit its response. The IACHR again requested information from the State on August 30, 2011. As of the date of the adoption of this report, the State had still not presented its response.

Precautionary measures

5. In the March 10, 2011, communication, the IACHR also notified the State that precautionary measures had been granted on behalf of the alleged victim, and requested a stay of execution until the Inter-American Commission issues its decision on the merits of the petition.

¹ In keeping with Article 17(2) of the Inter-American Commission’s Rules of Procedure, Commissioner Dinah Shelton, a United States national, did not participate in the discussion, deliberation or decision of the present case. Commissioner José de Jesús Orozco Henríquez, a Mexican national, felt that, based on Article 17(3) of the Rules of Procedure of the IACHR, he should abstain from participating in the study and decision of this matter. Commissioner Orozco Henríquez explained that the alleged victim in this case is one of the persons included in the *Case concerning Avena and Other Mexican Nationals (Mexico v. the United States of America)*, which Mexico filed with the International Court of Justice. The Inter-American Commission accepted his disqualification, with the result that Commissioner Orozco Henríquez did not participate in the deliberation or vote on this case.

III. POSITION OF THE PARTIES

A. Position of the petitioners

6. The petition states that in November 1998 Félix Rocha Díaz, a Mexican citizen, was convicted and sentenced to death in the state of Texas. The Texas Court of Criminal Appeals affirmed his conviction and sentence. Various motions and appeals were subsequently filed with the state and federal courts. The Fifth Circuit Court of Appeals denied the most recent appeal (rehearing *en banc*) on December 17, 2010. According to the petitioners, when the petition was filed with the IACHR, the alleged victim was in the process of preparing a petition for writ of *certiorari* to be filed with the United States Supreme Court.

7. The petitioners allege that Mr. Rocha was the victim of the following violations on the part of the United States: the non-compliance with the obligation to notify the consular authorities of the arrest, detention or commitment to prison of a national of that state, set forth in Article 36 of the Vienna Convention; that the defense counsel appointed to assist the alleged victim was ineffective; that lethal injection, the method that the state of Texas currently employs for capital punishment, carries a risk of excessive suffering; and that the prison conditions in which the alleged victim is being held, combined with the so-called “death row syndrome”, constitute cruel and unusual punishment.

8. The petitioners assert that Mr. Rocha is one of the Mexican citizens included in the judgment delivered by the International Court of Justice on March 31, 2004, in the *Case concerning Avena and Other Mexican Nationals (Mexico v. United States)*.² They further assert that the International Court of Justice held that the United States had violated Article 36 of the Vienna Convention and, as remedies to redress the violations, ordered the State to review and reconsider the respective criminal convictions and sentences. The petitioners point out that the United States Supreme Court held that neither the Avena judgment nor the memorandum in which the President of the United States requested the state courts to give effect to the decision, was binding, because the decision of the International Court of Justice is not self-executing.³ They conclude that despite the Executive Branch’s good intentions, Congress has not passed the legislation necessary to implement the judgment in the Avena case.

9. According to the petitioners, there is no dispute that the authorities failed to notify the alleged victim of his consular rights under Article 36 of the Vienna Convention, which has been in effect in the United States since December 24, 1969. They also contend that had it been notified, the Mexican government could have provided Mr. Rocha with assistance, as it had a special program to provide legal counsel to Mexican citizens who are sentenced to death in the United States.

10. As for the second allegation, the petitioners contend that the legal counsel appointed by the State to assist the alleged victim was ineffective throughout the proceedings and that had it not been for the defense counsel’s errors, Mr. Rocha would probably not have been sentenced to death. They further allege that more than one juror observed that the jury sentenced Mr. Rocha to death because it learned little about his life and family and social history.

11. The petitioners assert that the jury was deprived of a complete picture of Mr. Rocha or the circumstances surrounding his actions. For example, information about the extreme poverty and domestic violence in which the alleged victim lived during his childhood and adolescence in the state of Michoacán in Mexico was omitted. Defense counsel also reportedly failed to inform the jury that the alleged victim had to enroll in special education because of his low educational achievement. The petitioners state that such information, along with character testimony of friends and family might have influenced the jury’s assessment of Mr. Rocha’s culpability. They also mention that the defense’s

² International Court of Justice, *Case concerning Avena and other Mexican nationals (Mexico v. United States of America)*, Judgment of 31 March 2004. Available at: <http://www.icj-cij.org/docket/files/128/8188.pdf>.

³ *Medellín v. Texas*, 552 U.S. 491, 498 (2008).

punishment phase presentation was so lacking that the prosecution actually declared that Mr. Rocha's was "one of those rare cases that comes along where there is no mitigation," no mental retardation and no child abuse.

12. As for the argument regarding lethal injection, the petitioners state that the method of execution employed by Texas would subject Mr. Rocha to excessive and avoidable pain and suffering. According to the petitioners, this is due to the defects in the lethal injection drugs and the manner in which it is applied. They point out that there is substantial evidence that lethal injection as currently practiced in Texas fails to comply with the requirement that a method of execution cause "the least possible physical and mental suffering."⁴ They state further that while the courts in California, Florida and Missouri have temporarily stayed executions while they consider whether lethal injection creates an unacceptable risk of suffering, Texas continues to use lethal injection for executions. Here, the petitioners conclude that the use of lethal injection would inflict cruel and unusual punishment on Mr. Rocha.

13. The petitioners also contend that prison conditions on death row in Texas are inhumane and are the harshest in the country. According to the petition, persons deprived of liberty are held in individual cells, completely segregated from other prisoners and are not allowed any physical contact with either their attorneys or family members, not even in the hours leading up to their execution. The petitioners point out that prisoners with the best disciplinary records are allowed outside for approximately two hours a day, when they are released into what can best be described as "cages." According to the petitioners, death row inmates are not allowed to participate in any recreational or group activity, and necessities like soap, shampoo and deodorant, are not provided and must be purchased at the prison store. They also contend that incarceration on death row for thirteen years is itself cruel and unusual punishment and that the acute psychological damage caused by the "death row phenomenon" is internationally recognized.

14. Finally, they contend that because of his lack of understanding of the United States legal system and the lack of consular assistance, Mr. Rocha made damaging admissions during the interrogation. They observe in this regard that the alleged victim was interrogated while in the hospital recovering from the six bullet wounds he sustained when arrested for a crime unrelated to his death sentence. According to the petitioners, Mr. Rocha waived his *Miranda* rights after undergoing invasive surgery and while under heavy sedation; hence, he was in no position to make a reasoned judgment about waiving his rights.

15. As for the exhaustion of domestic remedies, the petitioners contend that the remedies available at the state and federal level to challenge the denial of Mr. Rocha's consular rights and the ineffectiveness of the court-appointed counsel have been exhausted. They also point out that although a petition for writ of *certiorari* with the United States Supreme Court will be filed, Mr. Rocha cannot wait for all conceivable avenues of review to be exhausted before petitioning the Inter-American Commission, since he could be executed before the IACHR has had an opportunity to consider his petition.

16. As for the two remaining arguments, the petitioners state that those claims have not been presented in the courts of the United States since doing so would be an exercise in futility, which is why the exception to the rule requiring exhaustion of domestic remedies applies. As for the detention conditions, the petitioners state that both the Texas Court of Criminal Appeals and the United States Supreme Court have repeatedly refused to consider arguments relating to the conditions of confinement on death row as cruel and unusual punishment. The petitioners contend that since 1976, no court in the United States has ever recognized that the psychological torture and anguish caused by prolonged incarceration on death row violates the Eighth Amendment. As for lethal injection, the petitioners assert that since 2006 the state of Texas has executed 13 people who have legally challenged the lethal injection protocol and that no court ever held that the protocol is unconstitutional.

⁴ The petitioners are citing General Comment No. 20, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), paragraph. 6.

17. The petitioners conclude that because there is no reasonable prospect for success, they are exempt from the rule requiring exhaustion of domestic remedies with respect to these two arguments. They further assert that Mr. Rocha is barred from presenting these claims before the United States courts because of the draconian limitations on the presentation of “successive” post-conviction petitions. They point out that the interpretation of these provisions by the Texas Court of Criminal Appeals is very strict. For example, it has expressly held that courts are barred from considering the merits of claims raised in “successive” or “subsequent” applications even where those claims were not previously raised due to the incompetence of post-conviction counsel.

18. Based on these considerations, the petitioners are alleging that the State violated the rights recognized in articles I, XVIII, XXV and XXVI of the American Declaration, to the detriment of Félix Rocha Díaz.

B. Position of the State

19. The State has not presented its response to the petitioners’ allegations.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

20. Under Article 23 of the Rules of Procedure of the Inter-American Commission on Human Rights, the petitioners are, in principle, authorized to lodge petitions with the IACHR. The alleged victim named in the petition is an individual person, whose rights under the American Declaration the United States undertook to respect and guarantee. As for the State, the Inter-American Commission observes that under the OAS Charter, Article 20 of the Statute of the IACHR and Article 51 of its Rules of Procedure, the United States is bound by the obligations that the American Declaration imposes. The United States has been a member state of the Organization of American States since June 19, 1951, the date on which it deposited its instrument of ratification of the OAS Charter,⁵ and has been subject to the jurisdiction of the IACHR since 1959, the year in which this body was created. Therefore, the Inter-American Commission is competent *ratione personae* to examine the petition.

21. The IACHR is also competent *ratione loci* to take up the petition, inasmuch as it alleges violations of rights protected by the American Declaration, said to have occurred within the territory of the United States, a State Party to the Declaration. The Inter-American Commission is competent *ratione temporis* since the obligation to respect and guarantee the rights protected under the American Declaration was already in force for the State on the date on which the events alleged in the petition were said to have occurred. Finally, the Inter-American Commission is competent *ratione materiae* because the petition alleges possible violations of human rights protected by the American Declaration.

B. Admissibility requirements

1. Exhaustion of domestic remedies

22. Article 31(1) of the Inter-American Commission’s Rules of Procedure provides that for a petition to be admissible, the remedies of the domestic legal system must have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to give the national authorities the opportunity to take cognizance of the alleged violation of a protected right and, if appropriate, to resolve the matter before it is taken up by an international body.

23. Article 31(2) of the IACHR’s Rules of Procedure states that the provisions of Article 31(1) shall not apply when: the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated; the party alleging violation of his or

⁵ See also, I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989, paragraph 45.

her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

24. In the instant case, after the direct appeal was denied, various motions and appeals were filed at the state and federal levels to challenge the conviction and sentence, all of which were denied. According to the information provided, one of the claims raised was the alleged lack of consular notification and the alleged ineffective representation by the court appointed defense counsel. Therefore, the petitioners have satisfied the rule requiring prior exhaustion of domestic remedies with regard to these two allegations.

25. The IACHR observes that the petition makes reference to the eventual filing of a petition for writ of *certiorari* with the United States Supreme Court. The argument made in this regard is that were Mr. Rocha to wait for the ruling on that petition before filing with the IACHR, he might be executed before the Inter-American Commission had an opportunity to issue its finding on the matter. The Inter-American Commission has held that “the requirement of exhaustion of domestic remedies does not mean that the alleged victims have the obligation to exhaust all the remedies available to them.” Accordingly, “if the alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled.”⁶ It should also be noted that at the time the present decision was adopted, the IACHR had not been informed of the filing of the petition in question.

26. As for the claims made regarding lethal injection and the conditions of confinement on death row, the petitioners contend that the exception to the rule requiring exhaustion of domestic remedies applies in this case, because the United States courts have repeatedly rejected those claims. The Inter-American Commission has observed that the principles of international law mentioned in Article 31(1) of its Rules of Procedure do not refer exclusively to the formal existence of such remedies; instead, the jurisprudence of the inter-American system clearly indicates that only those remedies that are suitable and effective must be exhausted.⁷ In order to be in accordance with generally recognized principles of international law, domestic remedies must be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they were designed.⁸

27. Based on the allegations made by the petitioners and the information they supplied, the Inter-American Commission concludes that domestic remedies with respect to these two claims would have no reasonable prospect of success and therefore would not have been effective under the principles of international law. Therefore, this would qualify for the domestic remedies exception allowed under 31(2)(b) of the IACHR’s Rules of Procedure.

2. Timeliness of the petition

28. Article 32(1) of the Inter-American Commission’s Rules of Procedures requires that petitions be lodged within a period of six months following the date on which the alleged victim was notified of the decision that exhausted the domestic remedies. Article 32(2), however, provides that in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the

⁶ IACHR, Report No. 60/11, Petitions P-11.575 *et al.* Admissibility, Clarence Allen Lackey *et al.*, United States, March 24, 2011, paragraph 139.

⁷ IACHR, Report No. 105/09, Petition P-592-07, Admissibility, HUL’QUMI’NUM TREATY GROUP, Canada, October 30, 2009, paragraph 31.

⁸ IACHR, Report No. 16/04, Petition P-129-02, Admissibility, Tracy Lee Housel, United States, February 27, 2004, paragraph 31.

Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.⁹

29. In the instant case, the most recent appeal filed was denied on December 17, 2010, and the petition was lodged with the Inter-American Commission on March 2, 2011. Therefore, with respect to the alleged lack of consular notification and the alleged ineffective defense counsel, the six-month time period stipulated in Article 32(1) of the Rules of Procedure has been met. As for the other two claims, given the circumstances of the case the Inter-American Commission concludes that those claims were lodged within a reasonable period of time. Therefore, the requirement established in Article 32(2) of the Rules of Procedure has been satisfied.

3. Duplication of proceedings and international *res judicata*

30. Nothing in the case file suggests that the subject matter of the petition is pending in another international proceeding for settlement, or is substantially the same as one previously studied by the Commission or by another international body. Hence, the requirements established in Article 33(1) of the Inter-American Commission's Rules of Procedure have been satisfied.

4. Colorable claim

31. Article 34(a) of the Inter-American Commission's Rules of Procedure provides that the petitions lodged with the Commission must state facts that tend to establish a violation of the rights referred to in Article 27 of the Rules of Procedure. If not the petition will be declared inadmissible on the grounds that it is "manifestly groundless" or "out of order", as provided in Article 34(b) of the Rules of Procedure. The criterion for examining the admissibility of a petition is different from the one used when examining its merits, since in the admissibility phase the Inter-American Commission only does a *prima facie* analysis to determine whether the petitioners have established an apparent or possible violation of a right guaranteed by the American Declaration. It is a summary analysis that does not imply any prejudgment or preliminary opinion on the merits of the petition.

32. Neither the American Declaration nor the IACHR Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the Commission, based on the system's jurisprudence, to determine in its admissibility report which provisions of the relevant Inter-American instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements.

33. The petitioners are alleging that Mr. Rocha was arrested, committed to detention and sentenced to death, without ever being notified of his consular rights under Article 36 of the Vienna Convention. They also allege that the legal counsel appointed to assist the alleged victim was ineffective throughout the process. According to the petitioners, had it not been for the defense counsel's errors and omissions, the alleged victim would not have been sentenced to death. They further contend that lethal injection, a method of execution employed by the state of Texas, fails to comport with the requirement of causing the least possible mental and physical suffering because of its composition and the way in which it is administered. Finally, they allege that the conditions of confinement on death row in the state of Texas are inhuman and that, because he has been on death row for so long, the alleged victim is suffering from the so-called "death row syndrome."

34. Taking into consideration the more rigorous degree of scrutiny that the Inter-American Commission has practiced in death penalty cases,¹⁰ the IACHR observes that if proved, the petitioners'

⁹ IACHR, Report No. 63/10, Petition 1119-03, Admissibility, Garifuna Community of Punta Piedra and Its Members, Honduras, March 24, 2010, paragraph 49.

¹⁰ See, IACHR, Report No. 60/11, Petitions P-11.575 and others, Admissibility, Clarence Allen Lackey, March 24, 2011, paragraph 158; Report No. 77/09, Petition 1349-07, Admissibility, Orlando Cordia Hall, United States, August 5, 2009, paragraph 47; and Report No.61/03, Petition 4446-02, Admissibility, Roberto Moreno Ramos, United States, paragraph 66.

allegations would characterize violations of articles I, XVIII, XXV and XXVI of the American Declaration. The IACHR must again underscore the point that it has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration.¹¹

35. In conclusion, the Commission decides that the petition is not manifestly groundless or obviously out of order and finds that *prima facie*, the petitioners have complied with the requirements established in Article 34 of the Rules of Procedure of the Inter-American Commission.

V. CONCLUSIONS

36. The Inter-American Commission concludes that it is competent to examine this matter and that the petition is admissible under articles 31 to 34 of its Rules of Procedure. Based on the foregoing arguments of fact and of law and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible with respect to articles I, XVIII, XXV and XXVI of the American Declaration;
2. To notify the parties of this decision;
3. To continue with its examination of the merits of the matter;
4. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C. on the 19th day of the month of October of 2011.
(Signed): Rodrigo Escobar Gil, Second Vice President; and Paulo Sérgio Pinheiro, Felipe González, and María Silvia Guillén, Commissioners.

¹¹ IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, paragraph 43.