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REPORT No. 24/15
PETITION 1752-09
REPORT ON ADMISSIBILITY

BERNARDO ABAN TERCERO
UNITED STATES

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United States. June 24, 2015.



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ADMISSIBILITY
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I. SUMMARY

1. On September 10, 2009, the Inter-American Commission on Human Rights (hereinafter, “the Inter-American Commission” or “the IACHR”) received a petition lodged by Peter Bellamy (hereinafter, “the petitioner”) on behalf of Bernardo Aban Tercero (hereinafter, “the alleged victim” or “Mr. Tercero”), a Nicaraguan national deprived of his liberty on death row in Texas, United States. According to press reports, Mr. Tercero is scheduled to be executed on August 26, 2015.

2. The petitioner submits that Mr. Tercero was under 18 years of age at the time of the offense; that the State refused to notify the consular authorities in violation of Article 36 of the Vienna Convention on Consular Relations, despite the alleged victim’s request; and that the court-appointed counsel rendered ineffective assistance. Likewise, the petitioner states that Mr. Tercero’s right to due process has been violated; in particular, that the prosecution suppressed the declarations and evidence of witnesses, by threat or intimidation. As of the date of approval of this report, the State has not submitted its observations.

3. Without prejudging the merits of the complaint, after examining the position of the petitioner, and pursuant to the requirements set out in Articles 31 to 34 of its Rules of Procedure, the Inter-American Commission decides to declare the case admissible for the purpose of examining the alleged violation of the rights set forth in Articles I (right to life, liberty and personal security), VII (right to protection for children), 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 (hereinafter, “the American Declaration”). The IACHR also decides to notify the parties of its decision and include it in its Annual Report to the General Assembly of the OAS.

II. PROCEEDINGS BEFORE THE IACHR

4. On September 10, 2009, the Inter-America Commission received a petition filed initially against Nicaragua by Peter Bellamy on behalf of the alleged victim. By letter dated January 24, 2013, the IACHR informed the petitioner that, having completed the study set forth in Article 26 of the Commission, it was not possible to process the petition against Nicaragua given that the information it contained did not satisfy the requirements set forth in those Rules and other applicable instruments. Furthermore, the IACHR informed the petitioner that it had also identified allegations in the petition against the United States and that such claims were under study in accordance with the Rules of Procedure. The Commission also requested that the allegations against the United States be sent in English, the official language of the concerned State.

5. On March 19, 2013, the IACHR received a communication in English summarizing the allegations against the United States and requesting precautionary measures. On March 24, April 7, May 29, and August 20, 2013, the petitioner sent additional information. On November 5, 2013, the Commission forwarded the pertinent parts of the petition to the State, granting it a three month period in which to submit its observations as provided for in Article 30(3) of the Commission’s Rules of Procedure.

6. On June 30, 2014, the petitioner sent additional information, which was transmitted to the State. As of the date of the adoption of this report, the Inter-American Commission has not received any observations from the United States.

¹ Commissioner James L. Cavallaro, a U.S. national, did not participate in discussing or deciding this case, in accordance with Article 17.2.a of the IACHR’s Rules of Procedure.

Precautionary Measures

7. On April 4, 2013, the Inter-American Commission notified the State that it had adopted precautionary measures in favor of Mr. Tercero, and requested a stay of execution until such time as it would be able to issue a determination on the merits of the petition.

III. POSITION OF THE PARTIES

A. Position of the petitioner

8. According to the information available in the file,² on October 20, 2000, Mr. Tercero was sentenced to the death penalty in the 232nd District Court of Harris County, Texas, for a capital murder committed during the course of an aggravated robbery on March 31, 1997. On November 20, 2000, counsel for the alleged victim filed a Motion for New Trial based upon prosecutorial misconduct, which was denied on December 18, 2000. The Texas Court of Criminal Appeals denied the direct appeal on September 18, 2002, and on November 16, 2005, the same court denied a state habeas corpus petition.

9. On October 24, 2006, Mr. Tercero filed a federal habeas corpus petition containing a number of claims, one of which was that the alleged victim was supposedly under 18 years when he committed the offense for which he received the death penalty and was therefore ineligible for execution pursuant to the decision of the U.S. Supreme Court in *Roper v. Simmons* (543 U.S. 551, 125 S.Ct. 1183, 2005).

10. On June 22, 2007, the State filed its answer to the habeas corpus petition, setting forth the results of an investigation by the U.S. Embassy in Nicaragua. The State claimed that there was a “rectification” of the alleged victim’s birth records which purportedly changed his birth date to show that he was younger than he actually was. Based on this answer, counsel for Mr. Tercero was allocated funds to do their own investigation in Nicaragua. In November of 2007, Norma Villanueva, the investigator retained by his counsel, traveled to Nicaragua and reportedly conducted an exhaustive investigation. On January 8, 2008, Mr. Tercero’s counsel presented a detailed affidavit from Ms. Villanueva, in which she confirmed the authenticity of the birth certificate. On March 31, 2008, the Court of Appeals directed the alleged victim’s counsel to return to state court to exhaust the *Simmons* claim.

11. On November 4, 2009, the parties submitted their proposed findings of fact and conclusions of law before the Harris County District Court. On November 13, 2009, the District Court signed the State’s proposed findings and issued an Order denying Mr. Tercero’s application for writ of habeas corpus. On March 3, 2010, the Court of Criminal Appeals adopted the District Court’s findings and conclusions and denied relief.

12. On July 14, 2010, the alleged victim filed a second amended petition for habeas corpus, which was denied by the District Court on February 7, 2013. On March 5, 2013, the alleged victim filed a notice of appeal. There is no information in the Commission’s file regarding the outcome of this proceeding. On June 30, 2014, the U.S. Supreme Court denied a petition for certiorari. According to publicly available information, Mr. Tercero is scheduled to be executed on August 26, 2015.

13. Petitioner argues that the purported human rights violations against the alleged victim render his death penalty conviction and sentence contrary to domestic and international law. He alleges in this regard that Mr. Tercero was under 18 years of age at the time of the offense; that the State refused to notify the consular authorities in violation of Article 36 of the Vienna Convention on Consular Relations; that the court-appointed counsel rendered ineffective assistance; and that Mr. Tercero’s right to due process has been violated.

² Request for the Issuance of a Certificate of Appealability and Supporting Brief, U.S. Court of Appeals for the Fifth Circuit, Case: 13-70010, Document 00512253902, Filed on May, 28, 2013. Communication from the petitioner received on May 29, 2013.

14. According to the petitioner, Mr. Tercero was under 18 years of age at the time of committing the offense for which he was convicted and sentenced to death. The petitioner asserts in this regard that the imposition of the death penalty is a violation of the alleged victim's rights under the Eighth and Fourteenth Amendments of the U.S. Constitution as ruled by the U.S. Supreme Court in *Roper v. Simmons*. The petitioner indicates that the state of Texas, the Federal District Court and prosecuting authorities have sought to undermine the legal evidentiary documents obtained from Nicaraguan authorities, in particular, a birth certificate, attested microfiche records, affidavits of Mr. Tercero's mother and other family members and neighbors, and the affidavit of a certified defense investigator.

15. According to the information provided, Mr. Tercero's real date of birth is August 20, 1979. He allegedly immigrated to the United States in 1994 when he was 15 years old. Given that he was an undocumented child he could not find work, had no money to obtain food, and would sometimes sleep on the street. That same year he purportedly asked his grandmother in Nicaragua to send his older brother's birth certificate. His older brother, who reportedly was also born on August 20, but of 1976, died before Mr. Tercero was born. Following the tradition in Nicaragua, the alleged victim was reportedly given his brother's name. Mr. Tercero allegedly used this document to obtain a Texas Identification Card in order to find a job.

16. It was allegedly on the basis of his brother's identity and age that the presumed victim was convicted and sentenced to the death penalty. At the time of the trial in 2000 Mr. Tercero allegedly did not reveal his true identity given that it was constitutional to sentence to death persons who had committed a crime when they were under the age of 18. It was after the Supreme Court's decision in *Roper v. Simmons* in 2005 that he revealed his true age. In November 2007 the U.S. District Court appointed investigator Norma Villanueva, who traveled to Nicaragua to conduct an investigation on the authenticity of the birth certificate. According to the affidavit submitted to the court, the investigator interviewed numerous Nicaraguan Officials, reviewed the microfiche of the original birth certificate of both the alleged victim and his brother, and conducted interviews with Mr. Tercero's family members and a close friend of his mother who had firsthand knowledge of the birth of the alleged victim. The affidavit confirmed the authenticity of the birth certificate that indicates that Mr. Tercero was born on August 20, 1979.

17. With regard to the alleged violation of Article 36 of the Vienna Convention on Consular Relations, the petitioner argues that the Federal Bureau of Investigation (FBI) and other agents of the state of Texas and the United States failed or refused to notify the Consulate of Nicaragua of the arrest of the alleged victim, though he reportedly requested to be provided with consular assistance.

18. Further, the petitioner alleges that the United States violated Mr. Tercero's right to due process of law. The petition alleges that the death for which the alleged victim was charged, convicted and sentenced was the result of the accidental discharge of a gun in the course of a tussle with the individual who was killed. The petitioner alleges in this regard that Mr. Tercero did not have the intent to kill and that therefore the definition of capital murder was not met in his case.

19. In addition, the petitioner alleges that, after the conviction, three persons, including Mr. Tercero's former girlfriend, admitted having been subjected to manipulation by the Prosecutor during the hearing for a new trial on December 18, 2000. The petitioner alleges in this regard that Mr. Tercero was arrested "in a clandestine operation of the FBI in July 1999." According to the petitioner, the FBI promised to pay the alleged victim's ex-girlfriend US\$ 5 million to make him cross the border between Mexico and the United States. He also states that the actions of the Prosecutor to suppress the declarations and evidence of witnesses, by threat or intimidation, constitute an act of coercion.

20. Regarding the alleged ineffective assistance of counsel, the petitioner states that Mr. Tercero's state appointed attorney informed the Consul of Nicaragua of the prosecution of the alleged victim only seven months after the arrest, in violation of the provision of Article 36 of the Vienna Convention on Consular Relations that establishes that the competent authorities should inform the consular post of the sending State "without delay." In addition, he asserts that the court-appointed lawyer deliberately excluded a Brady claim concerning the alleged suppression by the prosecution of evidence favorable to the defendant in the appeal before the state courts.

B. Position of the State

21. The IACHR has not received any information or observations from the State regarding Mr. Tercero's petition.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY**A. Competence**

22. In accordance with Article 23 of the Rules of Procedure of the IACHR, the petitioner has *locus standi* to submit petitions before the Inter-American Commission. The petition identifies as the alleged victim an individual, with respect to whom the United States has committed itself to respect and ensure the rights set forth in the OAS Charter and the American Declaration. As to the State, the Commission notes that the United States is subject to the obligations set forth through the American Declaration, the OAS Charter, Article 20 of the Statute of the IACHR and Article 51 of its Rules of Procedure. The United States has been a member of the Organization of American States since June 19, 1951, when it deposited the instrument of ratification of the OAS Charter.³ Consequently, the IACHR is competent *ratione personae* to examine the petition.

23. Additionally, the Inter-American Commission is competent *ratione loci* to hear the petition, inasmuch as violations of rights protected in the American Declaration are alleged to have taken place within the territory of the United States. The IACHR is competent *ratione temporis* given that the obligation to respect and ensure the rights protected in the American Declaration was already in effect for the State on the date when the facts alleged in the petition presumably occurred. Lastly, the Inter-American Commission is competent *ratione materiae*, because the petition charges potential violations of human rights protected by the American Declaration.

B. Admissibility Requirements**1. Exhaustion of domestic remedies**

24. In accordance with Article 31(1) of the Rules of Procedure of the Inter-American Commission, for a petition to be admissible, domestic remedies must have been pursued and exhausted pursuant to generally recognized principles of international law. This requirement is aimed at enabling national authorities to take cognizance of the alleged violation of the protected right and, if appropriate, resolve the matter before it is heard by an international body.

25. According to the information available, after the conviction and sentence were upheld on direct appeal, the Texas Court of Criminal Appeals denied relief. On October 24, 2006, Mr. Tercero filed a federal habeas corpus petition, which was denied on March 3, 2010. On June 30, 2014, the United States Supreme Court denied a petition for certiorari. Mr. Tercero is scheduled to be executed on August 26, 2015.

26. Hence, the IACHR concludes that the remedies under domestic law have been pursued and exhausted in accordance with Article 31(1) of its Rules of Procedure.

2. Timeliness of the petition

27. Article 32(1) of the IACHR's Rules of Procedure requires that for a petition or communication to be admitted, it must be lodged within a period of six months from the date on which the party alleging the violation of his rights was notified of the final judgment.

³ See also, IA Court of HR, Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, OC-10.89, par. 45 (July 14, 1989).

28. In the case under analysis, the United States Supreme Court denied certiorari on June 30, 2014. The IACHR received the original petition on September 10, 2009, and the English version of the allegations against the United States on March 19, 2013. The Inter-American Commission therefore concludes that the present petition satisfies the requirement specified in Article 32(1) of its Rules of Procedure.

3. Duplication of proceedings and international *res judicata*

29. Nothing in the present file indicates that the subject of this petition is pending in any other international proceeding for settlement, or that it is substantially the same as another petition previously studied by the Inter-American Commission or by any other international organization. Hence, the requirements set forth in Article 33 of the IACHR's Rules of Procedure have been met.

4. Colorable claim

30. Under Article 34(2) of its Rules of Procedure, the Commission must declare any petition or case inadmissible when it does not state facts that tend to establish a violation of the rights referred to in Article 27 thereof, in which case the petition would be dismissed as "manifestly groundless" or "out of order," as provided in Article 34(b). The criterion for analyzing a petition's admissibility differs from the one used to analyze its merits, since in the admissibility phase the Inter-American Commission does only a *prima facie* analysis to determine whether a petition establishes the apparent or possible violation of a right guaranteed by the American Declaration. It is a preliminary analysis that does not imply any prejudgment on the merits of the case.

31. The Inter-American Commission's Rules of Procedure do not 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 IACHR, based on the inter-American system's jurisprudence, to determine in its admissibility report which provisions of the relevant instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements.

32. The petitioner contends that Mr. Tercero was under 18 years of age at the time of the offense; that the State refused to notify the consular authorities in violation of Article 36 of the Vienna Convention on Consular Relations; and that the court-appointed counsel rendered ineffective assistance. The petitioner further argues that Mr. Tercero's right to due process has been violated, in particular, that the prosecution suppressed the declarations and evidence of witnesses, by threat or intimidation.

33. Given the more rigorous scrutiny that the Inter-American Commission has applied in death penalty cases,⁴ it observes that, if proven, the petitioner's allegations could tend to establish violations of Articles I, VII, XVIII and XXVI of the American Declaration. The IACHR reiterates that it has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty is in strict compliance with the applicable inter-American human rights instruments, including the American Declaration.⁵

34. In conclusion, the IACHR decides that the petition is not manifestly groundless or out of order and declares that the petitioner has, *prima facie*, complied with the requirements established in Article 34 of the Commission's Rules of Procedure.

⁴ According to the IACHR's established jurisprudence, it will review and decide capital punishment cases with a heightened level of scrutiny, to ensure that any deprivation of life that an OAS member state proposes to effect through the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments. See IACHR, Report No. 54/14, Petition 684-14, Admissibility, Russell Bucklew and Charles Warner, United States, July 21, 2014, para. 38.

⁵ IACHR, Report No. 11/15, Case 12,833, Merits, Felix Rocha Diaz, United States, March 23, 2015, para. 53.

V. CONCLUSIONS

35. The Inter-American Commission concludes that it is competent to take cognizance of the present matter and that the petition is admissible under Articles 31 to 34 of its Rules of Procedure. Based on the arguments of fact and of law set forth herein and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present petition admissible with respect to Articles I, VII, XVIII and XXVI of the American Declaration;
2. To notify the parties of this decision;
3. To proceed to the analysis of the merits of the case; and
4. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 24th day of the month of June, 2015. (Signed): Rose-Marie Antoine, President; José de Jesús Orozco Hernández, Second Vice-President; Felipe González, Rosa María Ortiz, Tracy Robinson, Paulo Vannuchi, Commissioners.