

THE INTERNATIONAL JUSTICE PROJECT

No Reprints without Express Permission of the Director of The International Justice Project

**REPORT NO 62/02
CASE NO 12.285
MICHAEL DOMINGUES
UNITED STATES****DECISION OVERVIEW****HOLDING**

The Inter-American Commission on Human Rights held that sentencing a juvenile offender to the death penalty violated an international norm of *jus cogens*. Consequently should the state execute a juvenile pursuant to such a sentence it would be responsible for a grave and irreparable violation of the right to life under Article I of the American Declaration of the Rights and Duties of Man.

DECISION SUMMARY

On October 22 2002, the Inter-American Commission on Human Rights (IACHR) concluded that the prohibition against the execution of juveniles (under the age of 18 at the time of the offense) was now of a sufficiently indelible nature to constitute a norm of *jus cogens*. As the IACHR explained norms of *jus cogens* "derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence."¹

Further the IACHR found that "by persisting in the practice of executing offenders under the age 18, the US stands alone amongst the traditional developed world nations and those of the inter-American system, and has been increasingly isolated within the entire global community."² The Commission continued to find such executions to be 'inconsistent with prevailing standards of decency.'³

Correspondingly it was held that the United States of America acted contrary to an international norm of *jus cogens* by sentencing Michael Domingues to death for a crime committed whilst a juvenile (an offender under the age of 18 at the time of the crime). The Commission further held that should the United States execute Mr. Domingues pursuant to this sentence, it would constitute a 'grave and irreparable violation' of Mr. Domingues' right to life under Article I of the American Declaration.⁴

DECISION CONTEXT

In August 1994 Michael Domingues, a U.S. citizen, was tried and convicted in the state of Nevada of one count of first degree murder, one count of first degree murder with the use of a deadly weapon, one count of burglary and one count of robbery with the use of a deadly weapon.

¹ *Domingues*, paragraph

² *Domingues*, paragraph 84

³ *Ibid*

⁴ *Domingues*, paragraph 5

THE INTERNATIONAL JUSTICE PROJECT

No Reprints without Express Permission of the Director of The International Justice Project

Subsequently, on each count of murder, Domingues was sentenced to death. Domingues was 16 years of age at the time of the offense and 17 when sentenced. Domingues appealed his death sentence to the Nevada state trial court which denied the motion.

On appeal to the Nevada Supreme Court, Domingues filed a motion for correction of an ‘illegal’ sentence, arguing that the execution of a juvenile constituted a violation of the International Covenant of Civil and Political Rights and customary international law. The Nevada Supreme Court chose to review the sole issue as to whether Nevada state law was superseded by the ICCPR. The Court concluded that the United States’ express reservation to the ICCPR by the U.S. permitted the execution of juvenile offenders. The Nevada Supreme Court failed, however, to address the validity of the reservation or whether the execution of those under the age of 18 violated customary international law. On March 3, 1999, Domingues filed a petition for writ of certiorari to the U.S. Supreme Court. The writ alleged violations of the ICCPR, customary international law and *jus cogens*. The U.S. Supreme Court denied cert on November 1, 1999, without giving reasons.

Following this a petition to the IACHR was made on Domingues’s behalf on May 1 2000. A subsequent petition on Domingues’ behalf was then filed on December 8 2000 and the two petitions were consolidated. The petition alleged, that by sentencing Domingues to death for a crime committed while he was a juvenile the United States was in breach of 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). Further, Domingues submitted that the United States acted in violation of Article I because of an international norm of *jus cogens*, prohibiting the execution of juvenile offenders.

DECISION RATIONALE

In 1987 the IACHR decided in the case of *Roach and Pinkerton v United States*⁵ that a norm of *jus cogens* existed prohibiting the execution of children, however, it found that an uncertainty existed regarding the age of majority and therefore concluded that a norm of *jus cogens* did not exist prohibiting the execution of a person under 18 years of age. From examining developments in the *corpus juris* of international human rights law and state practice since 1987, the IACHR concluded that a consensus of 18 as the age of majority and hence, a norm of *jus cogens* prohibiting the application of the death penalty to those under 18, had emerged.

OBJECTIVE SOURCES OF CONSIDERATION

In interpreting and applying the American Declaration, the IACHR re-iterated the necessity to consider the provisions in the ‘context of broader international and inter-American human rights systems.’⁶ Further, it emphasized the respect to be given to developments in the *corpus juris gentium* of international human rights law, including the provisions of other international instruments, customary international law and norms of *jus cogens*.⁷

Correspondingly, the Commission noted that Article I of the declaration, (the right to life) must be evaluated in the context of such developments since 1987. The Commission looked at treaties,

⁵ *James Terry Roach and Jay Pinkerton v United States* Case 9647, Res. 3/87, 22 September 1987, Annual Report of the IACHR 1986-87

⁶ *Domingues*, paragraph 44

⁷ *Ibid.*

THE INTERNATIONAL JUSTICE PROJECT

No Reprints without Express Permission of the Director of The International Justice Project

United Nations Resolutions and Standards, the domestic practice of States, practice of the United States and other related developments regarding the age of majority to determine the nature or existence of a prohibition against executing those under the age of 18.

Treaty Developments

In examining treaty provisions and developments, the IACHR concluded that there has been, since 1987, and consistent with events prior to that date, a ‘concordant and widespread development and ratification of treaties, by which nearly all of the world states have recognized, without reservation, a norm prohibiting the execution of individuals who were under 18 years of age at the time of their offense.’⁸ The most significant development was held to be that of the adoption in 1989, by the U.N. General Assembly of the United Nations Convention on the Rights of the Child. Article 37(a) of the Convention explicitly prohibits the application of the death penalty to those under the age of 18.

It noted that the extent of ratification (191 state parties) of ‘this instrument alone constitute[d] compelling evidence of a broad consensus on the part of the international community repudiating the execution of offenders under 18 years of age.’⁹ Further support for this was found by the IACHR in the lack of explicit reservations taken to Article 37(a).

Also of importance to the IACHR’s finding of consensus, were developments relating to the International Covenant on Civil and Political Rights (ICCPR). The IACHR noted that since 1986, a further 64 states had acceded to or ratified the ICCPR, including the United States. Article 6(5) of the ICCPR specifically prohibits the application of the death penalty to those under 18 years of age. Noting that only two states have currently asserted reservations to Article 6(5); the U.S. and Thailand, the IACHR felt it ‘noteworthy’¹⁰ that the US reservation provoked widespread condemnation within the international community and prompted eleven European States Parties to file objections declaring the reservation to be invalid on grounds of inconsistency with the aims and purposes of the ICCPR. Further the IACHR noted the U.N Human Right’s Committee’s declaration of the reservation by the US to be contrary to the object and purpose of the ICCPR and it’s recommendation to the US to withdraw it.

In relation to establishing a regional consensus, the IACHR drew heavily upon the provisions of the American Convention on Human Rights and the prohibition of the applicability of the death penalty to those aged under 18 within Article 4. The IACHR concluded that the existence of 24 state parties to the American Convention, including those member states that retained the death penalty, indicated a broad hemispheric adherence to the provisions of the Convention. Correspondingly such adherence constituted ‘compelling evidence of a regional norm repudiating the application of the death penalty to persons under 18 years of age.’¹¹

Further developments in both the inter-American and European systems since 1987 were also found to be of relevance to determining developments in the corpus of international human rights law. These included the approval by the OAS General Assembly of the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, in 1990 and subsequent ratification by 8 states and Protocol No. 6 to the European Convention on Human Rights concerning the

⁸ *Domingues*, paragraph 68

⁹ *Domingues*, paragraph 57

¹⁰ *Domingues*, paragraph 62

¹¹ *Domingues*, paragraph 64

THE INTERNATIONAL JUSTICE PROJECT

No Reprints without Express Permission of the Director of The International Justice Project

Abolition of the Death Penalty which came into force in 1985. Protocol No 6 abolished the death penalty entirely except in times of war. Since 1985 it had been ratified by 39 States, with three state signatories and Turkey standing alone as the only member state of the Council of Europe state which had not signed the protocol. Further, the increased ratification of the Fourth Geneva Convention of 1949, which, prohibits the imposition of the death upon those under 18 years of age in times of armed conflict or occupation¹² contributed heavily to the IACHR's conclusion that there could be no 'appropriate justification for applying a more restrictive standard for the application of death penalty to juveniles in times of occupation than in times of peace.'¹³

United Nations Resolutions and Standards

The IACHR found the developments within the law of treaties to be supported by developments within the United Nations.¹⁴ The IACHR cites various resolutions and practices, including the Resolution on The Death penalty, Pertaining in Relation to Juveniles; The Resolution on The Question of the Death penalty and standards adopted by the United Nations Economic and Social Council, General Assembly; the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, all of which prohibit the execution of juvenile offenders.

Domestic Practice of States

The IACHR found the 'articulation of an international norm proscribing the execution of juvenile offenders through international practice' to be 'accompanied by the expression of a similar standard in domestic practice of states.'¹⁵ The IACHR examined both State domestic practice in relation to the death penalty in general and the death penalty as it pertains to those under the age of 18. The IACHR cited statistics compiled by Amnesty International indicating that the rate of countries abolishing the death penalty had increased from 1.5 countries (1965-1988) to 4 (1989-1995) per year. Further they noted a huge increase in abolishment of the death penalty (49 countries) between 1986 and 2001, with a further 20 who had not actually carried out an execution.

In relation to the juvenile death penalty, the IACHR again cited Amnesty in stating that 115 States prohibit the application of the death penalty to juveniles and that since 1998 only three states persist in executing those under the age of 18 at the time of the offense, the U.S., Iran and Congo. Drawing upon regional practices, the IACHR felt it pertinent to note that only the U.S within the inter-American system continues in this practice, further reinforcing 'the existence of a particularly pervasive regional norm repudiating the application of the death penalty to persons under 18 years of age.'¹⁶

Notably, the IACHR found such developments to evidence 'a nearly unanimous and unqualified international trend towards prohibiting the execution of offenders under he age of 18'¹⁷ and further that such a 'trend crosses political and ideological lines and has nearly isolated the U.S. as

¹² Article 68, paragraph 4, Fourth Geneva Convention

¹³ *Domingues*, paragraph 67

¹⁴ *Domingues*, paragraph 69

¹⁵ *Domingues*, paragraph 72

¹⁶ *Domingues*, paragraph 75

¹⁷ *Domingues*, paragraph 76

THE INTERNATIONAL JUSTICE PROJECT

No Reprints without Express Permission of the Director of The International Justice Project

the only country that continues to maintain the legality of the execution of 16 and 17 year old offenders.¹⁸

Practice of the United States

The IACHR recognized not only the number of states which have adopted legislation prohibiting the application of the death penalty to juveniles (16 post 1986, 10 pre 1986), but also the initiative of the Supreme Court in *Thompson v Oklahoma* in concluding that it would ‘offend civilized standards of decency to execute a person who was less than 16 years of age at the time of his or her offense’ and subsequent legislative moves towards a higher standard such as the states of Florida and Montana.¹⁹ The IACHR further considered it significant that the U.S. federal government considers the minimum age for the purposes of federal capital crimes to be 18. Articulating the significance of this, the IACHR noted the responsibility of the US government to uphold the State’s obligations under the American Declaration and other international instruments and hence considered it indicative, by the U.S itself, of the appropriate standard for the application of the death penalty. These developments, both in regard to judicial determinations and legislative initiatives within the US were found to demonstrate a trend towards lack of acceptance of the application of the death penalty to those under the age of 18.

Related Developments Regarding the Age of Majority

In regard to related developments concerning the age of majority in international law, the IACHR specifically focused upon the minimum age for participation in hostilities and conflict as mandated in the Optional Protocol to the Convention on the Rights of the Child.²⁰ Expanding upon its earlier comments in relation to such issues (mentioned above in reference to treaties) the IACHR emphasized the United State’s support, by both the President and the U.S. Congress for the minimum age of 18 for participation in armed conflict. Such a standard reflected in the opinion of the IACHR, those required for societal participation, including the right to vote. Correspondingly the IACHR found such developments to be entirely consistent with the finding that a norm prohibiting the juvenile death penalty has emerged. The IACHR emphatically argued that it would be difficult to rationalize or justify why a lesser standard should apply in the implementation of capital punishment. In support of this the IACHR drew upon broadly recognized obligations to provide enhanced protection to children, including endeavours to rehabilitate and care for juvenile offenders.

Conclusion

The IACHR concluded, from the evidence canvassed above, that since the decision in *Roach and Pinkerton*, the *jus cogens* norm prohibiting the execution of children had further developed in regard to the age of majority (18). The IACHR further acknowledged that ‘the acceptance of this norm crosses political and ideological boundaries and efforts to detract from this standard have been vigorously condemned by members of the international community as impermissible under contemporary human rights standards.’²¹

PROCEDURE

¹⁸ *Ibid.*

¹⁹ *Domingues*, paragraph 77

²⁰ *Domingues*, paragraphs 80, 81, 82

²¹ *Domingues*, paragraph 85

THE INTERNATIONAL JUSTICE PROJECT

No Reprints without Express Permission of the Director of The International Justice Project

It should be noted that the United States failed to respond to the IACHR's communications in regard to the Domingues case, until after the report had been adopted and transmitted to the parties. Consequently, the IACHR also took this opportunity to forcefully address and re-iterate the obligations of member states. Noting the United States failure to respond to communications from the IACHR for 16 months after the initial communication and after the IACHR had adopted its preliminary merits report, the Commission emphasized the obligation of the member state to participate in good faith and a timely manner. The IACHR found the United States delay in responding to be 'plainly inadequate, particularly in a proceeding...concerning the situation of a person under sentence of death.'²²

This point was reinforced by the IACHR's restatement of the procedural and substantive implications of such a delay, including the lack of obligation on the part of the Commission to consider any submissions made at such a stage.

Acknowledging the significance of the issues raised within the case, the IACHR chose to summarize and provide observations upon the United States' submissions, 'without detracting from the fundamental procedural considerations'²³ noted above.

UNITED STATES' SUBMISSIONS AND IACHR RESPONSE

The U.S. submitted several submissions in response to the preliminary merits reports. The U.S. asserted that it was 'inconsistent' and 'implausible' for the IACHR to find the prohibition against the execution of those under 18 to be a norm of *jus cogens*, particularly considering that just 15 years previously (in *Roach & Pinkerton*) the IACHR did not find evidence of customary international law in this respect.²⁴ The IACHR, in response, pointed to the decision in *Roach and Pinkerton*, which concluded that a norm of *jus cogens* prohibiting the execution of children had emerged. Further, the IACHR acknowledges that this was explicitly recognized by the U.S. Therefore the question before the IACHR was whether the norm had since evolved to 'delimit the age of 18 as the defining age of a child.'²⁵

The U.S. also contended that neither the state practice nor legal standards identified by the IACHR were sufficient to support a finding of a *jus cogens* norm; in particular they argued that the IACHR's reliance upon the treaties cited above was 'misplaced.'²⁶ In support of this the U.S. refers to the negotiating history of the treaties and the 'common knowledge' that many countries may ratify such treaties however fail to implement the corresponding obligations. The IACHR responds by highlighting that despite views that may have been asserted at the time of negotiation in respect to both the ICCPR and CRC, nearly all states have accepted the provisions unconditionally through ratification and accession. The IACHR further rejected the proposition that a 'historical disconnect' existed between ratification and implementation of provisions by reference to a point the U.S. itself acknowledges: that all but 14 of the 191 state parties to the CRC have enacted state laws that comply with these obligations. Further the IACHR stresses that only four states have continued to execute those under the age of 18.

²² *Domingues*, paragraph 91

²³ *Domingues*, paragraph 93

²⁴ *Domingues*, paragraph 102

²⁵ *Domingues*, paragraph 104

²⁶ *Domingues*, paragraph 105

THE INTERNATIONAL JUSTICE PROJECT

No Reprints without Express Permission of the Director of The International Justice Project

A further ground of objection by the U.S. related to the IACHR's purported ignorance of *opinio juris* as a necessary component to international customary law.²⁷ The U.S. submitted that the IACHR had failed to 'establish that states have discontinued the process of executing juveniles out of sense of legal obligation' and not for example a sense of morality.²⁸ The IACHR chose to address the objection in depth. Within such an objection they argued was a failure to consider several factors relating to the nature and development of *jus cogens* and how such norms may be evidenced. Expanding upon this the IACHR states that evidence of *opinio juris* may 'not always be necessary to determine the existence of a *jus cogens* norm.'²⁹ Further the IACHR acknowledges that evidence can be garnered through state practice and treaty provisions. Citing genocide as an example, the IACHR, further notes that evidence of *opinio juris* through a sense of legal obligation is not always a 'prerequisite to the existence of a norm of *jus cogens*.'³⁰ Pointing to the consideration given to the ICCPR and CRC, the IACHR stressed that evidence beyond this may not be essential. Further the IACHR criticizes the U.S position for failing to consider the role treaties and international instruments play in evidencing *opinio juris*.

The final objection by the US was in relation to the IACHR's recognition of other related developments.³¹ Arguing that the reliance upon the Optional Protocol to the CRC concerning children in Armed Conflict was misconstrued, the US argues that the provisions contained cannot support the prohibition on the execution of juveniles found by the commission. Further they contend that in any event there is no probative value as it does not address the issue of the juvenile death penalty. In this regard the IACHR re-iterated its view that such developments are motivated by a 'common precept'³², namely that 18 is the internationally accepted age at which an individual may be assumed to 'make and bear responsibility for their judgments.'³³

CONCURRING OPINION OF COMMISSIONER HELIO BICUDO.

Commissioner Helio Bicudo, concurred with the findings of the commission, however he also addressed the lawfulness of the death penalty in general, within the Inter-American System. He identified a conflict between various provisions and instruments within the inter-American system. In his opinion, a conflict and inherent contradiction arose from the provisions of Article 1 of the American Declaration (right to life, liberty and security), Article 2 of the American Declaration (equality before the law), Article 4 of the American Convention (the right to life), Article 5 of the American Convention affirming the right to personal integrity and freedom from torture, cruel or inhumane or degrading punishment and treatment and the explicit provision for the death penalty under Article 4, section 2 of the American Convention.

Adopting a systematic approach, Bicudo, analyzed the various provisions in relation to the application of the death penalty. In addressing the issue of torture, Bicudo comments upon the 'immeasurable suffering' such a punishment can bring in regard to the wait for execution and the corresponding oscillation between hope and despair.³⁴ Noting the provisions within the Inter-

²⁷ *Domingues*, paragraph 99

²⁸ *Ibid.*

²⁹ *Domingues*, paragraph 107

³⁰ *Ibid.*

³¹ *Domingues*, paragraph 101

³² *Domingues*, paragraph 110

³³ *Ibid.*

³⁴ Concurring opinion of Helio Bicudo, paragraph 11

THE INTERNATIONAL JUSTICE PROJECT

No Reprints without Express Permission of the Director of The International Justice Project

American Convention to Prevent and Punish Torture, the ICCPR, Article 3 of the European Convention on Human Rights (ECHR) and Article 5 (2) of the American Convention, Bicudo looked to other international bodies' interpretation for guidance in reconciling such provisions with the death penalty. Bicudo specifically drew upon the decision of the European Court of Human Rights in *Soering* (determining the death penalty to be a violation on Article 3 of the ECHR); the restrictive nature of treaty provisions allowing for the application of the death penalty and commentary by the Inter-American Court on Human Rights. These developments Bicudo acknowledged as expressing the move towards complete abolition of the death penalty.

Bicudo further concluded that the application of the death penalty violates the rule of law and fundamental concepts of proportionality. The rule of law, Bicudo argues, implies there to be a knowledge of what a penalty imposed means and thus, forbids the imposition of a 'penalty whose consequences cannot be unveiled'.³⁵ Due to the illusory nature of death, he argues, the death penalty, following this reasoning is prohibited: the offender facing punishment must be able to understand the nature of the punishment and hence how it will affect him. Death is uncertain: an afterlife in purgatory, heaven or simply the physical and metaphysical end.

Continuing from this hypothesis, Bicudo discusses the proportionality of a sentence of death. Stating that 'all punishment...constitutes species of sanctions' imposed in accordance to a rational scale of proportionality, he argues that the concept of proportionality is 'submerged' by death and the scale of proportionality shattered by the qualitative transition in punishment.³⁶ He draws from the arguments of Reale in arguing that the concepts of life and death cannot be rationally included in a scale of proportionate punishment because they are simply not rational entities. Bicudo thus concludes that "the concept of punishment and the concept of death are logically and ontologically impossible to reconcile".

Turning to issues of equality, Bicudo, noted the prohibition against the execution of women and children contained in the CRC, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the Convention of Belem do Para) and corresponding provisions in regard to the right to equality before the law.³⁷ Bicudo argues that Article 3 of the Convention of Belem do Para prohibits the application of the death penalty to women. This he states cannot be positive discrimination but instead discriminates against men and children on the grounds of the female condition. Further the prohibitions upon the execution of children contained in the above provisions in Bicudo's opinion discriminated against others as this right aimed to preserve rights that are not solely created for children but are applicable to mankind. A tension, he argues, is therefore apparent between provisions of equality before the law and those restricting the application of the death penalty.

Adopting a teleological approach to interpretation, Bicudo reconciled the conflicting provisions by concluding that the provision allowing for the imposition of the death penalty (Art. 4 (2) of the American Convention) had been superseded and made redundant by subsequent and contradictory provisions contained within the Inter-American Systems instruments and the evolution of international law, jus cogens and customary law. The American Convention is, as is any international human rights instrument, in Bicudo's opinion a living instrument and thus must be examined in light of such developments. In support of this interpretative approach, Bicudo points to the European Court on Human Rights decision in *Tyrer v United Kingdom*; the court

³⁵ Concurring Opinion of Helio Bicudo, paragraph 33

³⁶ Concurring Opinion of Helio Bicudo, paragraph 36, 37, 38

³⁷ Concurring Opinion of Helio Bicudo, paragraph 15, 16

THE INTERNATIONAL JUSTICE PROJECT

No Reprints without Express Permission of the Director of The International Justice Project

specifically affirmed that the European Convention on Human Rights was a ‘living instrument which ... must be interpreted in the light of present day conditions.’³⁸ Bicudo further cites comments to the same effect by Judge Cancado Trindade of the Inter American Court on Human Rights.

In accordance with this approach Bicudo acknowledges the significance of the widespread accession and ratification of the CRC as being irrefutable proof that the prohibition against the death penalty was a consolidated principle of international law. Citing the jurist Faundez Ledesma argued that the “rights consecrated in the Convention are minimum rights; it cannot restrict their exercise in a larger measure than the one permitted by other international instruments.”³⁹ The accession to the CRC is considered to be of ‘utmost importance, and its co-existence with the obligations derived from the Convention must be taken into consideration insofar as it might be more favorable to the individual.” Bicudo, taking into account this and the arguments expounded upon above concluded that provisions such as Article 4(2) have been superseded to the effect that international law concurs an absolute prohibition on the death penalty.

³⁸ Concurring Opinion of Helio Bicudo, paragraph 62, quoting *Tyrer vs. UK*

³⁹ Concurring Opinion of Helio Bicudo, paragraph 41, quoting Hector Faundez Ledesma