

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

PHILIP R. WORKMAN,)
Movant,)
)
V.) No. _____
) DEATH PENALTY CASE
) **Execution scheduled for 1 a.m. on**
) **March 30, 2001**
STATE OF TENNESSEE,) **EXPEDITED ACTION REQUESTED**
Respondent,)

MEMORANDUM IN SUPPORT OF MOTION FOR STAY

I. INTRODUCTION.

Philip Workman is scheduled for execution at 1 a.m. on March 30, 2001. On January 22, 2001, the Inter-American Commission on Human Rights [hereinafter IACHR] opened a case on Mr. Workman’s behalf to examine whether his conviction and sentence constitute a violation of human rights. (Attached Letter from IACHR dated January 22, 2001) That same day, the IACHR sent a letter to the United States Department of State requesting that they take asking that “all necessary measures [be taken] to preserve Mr. Workman’s life and physical integrity” so that the IACHR could review his case. (Attached letter from IACHR dated January 22, 2001) The IACHR has since reiterated “its request . . . that precautionary measures be adopted to avoid irreparable harm to Mr. Workman’s life until the Commission decides upon the claim filed on his behalf.” (Attached letter from IACHR dated March 28, 2001)

Mr. Workman is now asking for this Court to grant a stay to allow the IACHR sufficient time to review Mr. Workman’s case on the grounds that executing Mr. Workman without

allowing him to exhaust all of his remedies in the Inter-American system would violate his federal and state constitutional rights to due process and procedural fairness as guaranteed under the Fourteenth Amendment to the United States Constitution and Article I, § 8 of the Tennessee Constitution; the open courts provision found in Article I, § 17 of the Tennessee Constitution; the Supremacy Clause of the United States Constitution, Article VI, clause 2; the Full Faith and Credit Clause, Article IV, clause 1; the Charter of the Organization of American States; the American Convention on Human Rights; and customary international law.

II. SUMMARY OF FACTS.

Mr. Workman petitioned the IACHR in April 2000 asking the IACHR to review his case for human rights violations and requesting that the IACHR request precautionary measures from the United States government so that his case could be properly reviewed in the Inter-American system. (See attached petition to IACHR and accompanying letter). Following the United States Court of Appeals for the Sixth Circuit grant of an en banc hearing, the case was held in abeyance at the IACHR. On January 17, 2001, Jae W. Jo, a student attorney at the International Human Rights Clinic at the Washington College of Law and Mr. Workman's counsel before the IACHR, contacted the IACHR to inform them that all of Mr. Workman's domestic remedies had been exhausted and the case was ripe for review by the IACHR. On January 22, 2001, the IACHR officially opened Mr. Workman's case for review and issued a request for precautionary measures to the United States' government. Id. The IACHR specifically requested that **“the United States of America take all necessary measures to preserve Mr. Workman's life and**

physical integrity so as not to hinder the processing of his case before the Inter-American system.” Id.

The IACHR was established in 1960 as an autonomous entity of the Organization of American States (OAS). Thomas Buergental, *International Human Rights in a Nutshell* 181 (2d ed. 1995). The OAS is a regional, inter-governmental organization with 35 member states, including the United State of America. Id. at 174. The IACHR’s principal function is “to promote the observance and protection of human rights” within the Inter-American system. Id. at 182 (quoting Article 9 of the Statute creating the IACHR). As an OAS Charter organ, the IACHR has “constitutional legitimacy,” id. at 179, and is entitled to receive and act upon individual petitions charging OAS member states with human rights violations. Id. at 182. The United State of America has signed and ratified the OAS Charter, April 30, 1948, 2 U.S.T. 2394, as well as the Protocol of Buenos Aires that established the IACHR as an OAS Charter organ. Feb. 27, 1970, 21 U.S.T. 607.

III. LAW AND ARGUMENT.

Executing Mr. Workman without allowing him to exhaust all of his remedies in the Inter-American system would violate his federal and state constitutional rights to due process and procedural fairness as guaranteed under the Fourteenth Amendment to the United States Constitution and Article I, § 8 of the Tennessee Constitution; the open courts provision found in Article I, § 17 of the Tennessee Constitution; the Supremacy Clause of the United States Constitution, Article VI, clause 2; the Full Faith and Credit Clause, Article IV, clause 1; the

Charter of the Organization of American States; the American Convention on Human Rights; and customary international law.

A. Mr. Workman’s Right to Resolution of his Petition Before the Inter-American Commission Is Guaranteed by Due Process and Procedural Fairness.

A recent decision of the British Privy Council provides support for the notion that Mr. Workman’s execution must be stayed pending the resolution of his petition before the IACHR. In Lewis v. Attorney General of Jamaica, Privy Council Appeal Nos. 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 2000 (British Commonwealth Privy Council Sept. 12, 2000) (available at <http://www.privacy-council.org.uk/judicial-committee/2000/judgments>), an appeal of four condemned men on Jamaica’s death row, the Privy Council held that carrying out the death sentences of individuals with cases pending before the IACHR would be contrary to Jamaica’s obligations in the Inter-American system of human rights. The Privy Council held that persons with cases pending before the IACHR are entitled to have those petitions considered by the IACHR—even though Jamaica had not incorporated the provisions of the American Convention on Human Rights into domestic law. Id.

In essence, the Privy Council concluded that the men had a due process right to complete the “international appellate process,” under domestic principles of due process and procedural fairness. See id. “By ratifying a treaty which provides for individual access to an international body, the government made that process . . . part of the domestic criminal justice system and thereby . . . extended the scope of the due process clause in the Constitution.” Id. (citing Thomas v. Baptiste, 3 W.L.R. 249(1999)).

In officially recognizing that right, the Privy Council said:

“[D]ue process of law” . . . is a compendious expression in which the word “law” does not refer to any particular law and is not a synonym for a common law or statute. Rather invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law. . . . The due process clause must there fore be broadly interpreted. It does not guarantee particular forms of legal procedure. . . .The content of the clause is not immutably fixed. . . .**But the right to be allowed to complete a current appellate or other legal process without having it rendered nugatory by executive action before it can be completed is par of the fundamental concept of due process.**

Id. (emphasis added). The Privy-Council held unequivocally that the execution of the persons with petitions pending before the IACHR would be unlawful.

The United States Government has acceded to the establishment of the Inter-American Commission as a body that investigates complaints of human rights violations and accepts petitions from individuals.¹ Under the Supremacy Clause, Article VI, clause 2 of the United States Constitution, all treaties made by the United States are the law of the land and apply with equal force to all states, including Tennessee.

The IACHR has jurisdiction to issue advisory opinions “regarding the interpretation of the [American] Convention [on Human Rights][hereinafter American Convention] or other treaties concerning the protection of human rights in the American States.” American Convention, Nov. 22, 1969, O.A.S.T.S. No. 36, O.A.S. Off. Riec. OEA/Ser. L./V./II.23/Doc. 21

¹ The United State of America has signed and ratified the OAS Charter, April 30, 1948, 2 U.S.T. 2394, as well as the Protocol of Buenos Aires that established the IACHR as an OAS Charter organ. Feb. 27, 1970, 21 U.S.T. 607.

Rev. 6.² “Advisory Opinions [of the IACHR] are not academic exercises; they are judicial pronouncements. The mere fact therefore that the [IACHR] has made a pronouncement in an advisory opinion rather than in a contentious case does not diminish the legitimacy or authoritative character of the legal principle enunciated by it.” Thomas Buergental, *International Human Rights in a Nutshell* 220 (2d ed. 1995).

Precautionary measures are the legal manifestation of the assurances to the rights accorded in the OAS Charter and the American Declaration on the Rights and Duties of Man, to which the United States is a party. In this regard, the United States government has recognized the very competence of the OAS as member State, giving national recognition of the OAS’s competence to carry out its roles as enumerated in its Charter and Declaration. By committing the United States to its membership, the executive and legislative branches have effectively endorsed the OAS’s mission to perform its designated function, one of them being the power of the IACHR to request precautionary measures made at the behest of individuals such as Mr. Workman. This joint endorsement by the other branches of government should give courts further cause to recognize requests for precautionary measures made by the IACHR. It recognizes the competence of the OAS and its IACHR organ to make such requests on the behalf of petitioners such as Mr. Workman. Mr. Workman seeks the fullest measure of due process afforded not only under the Constitutions of the United States and Tennessee, but under international law, and moreover, under the United States’ obligations as a member of the OAS and its instruments.

²The American Convention was signed by the President of the United States on June 1, 1977.

These factors alone should give courts sufficient reason to recognize precautionary measures as the judicial act of a sovereign body and international tribunal, and grant them full faith and credit. These measures in no way seek to subvert the sovereignty of the United States, Tennessee and their courts. It is important to note that the granting of precautionary measures will not be the equivalent of a foreign judicial opinion inserting itself into domestic law to have superseding effect. This danger is absent as precautionary measures are non-binding requests in the form of a judicial opinion. It requests a stay of an execution; it does not ask for the reversal of the murder conviction. At most, it asks for the delay of the inevitable. The guiding goal of any court should not be the expedient employment of punishment merely for expediency's sake, but the zealous protection of the rights guaranteed under law.

B. Mr. Workman's Right to Pursue Any and All Remedies Available to Him in the Inter-American System of Human Rights Is Guaranteed by the Open Courts Provision of the Tennessee Constitution.

The Open Courts provision of the Tennessee Constitution, Article I, § 17 states: "That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay." This Constitutional provision directs the Courts of Tennessee to rule broadly in favor of protecting the citizens' right to have his/her day in court. See *Presson v. Lockhart*, 8 Tenn.(Higgins) 283 (Tenn. Civ. App. 1918). Therefore, Mr. Workman is entitled under the Tennessee Constitution to have his day before the IACHR and pursue the remedies afforded in the Inter-American system.

C. The Inter-american Commission's Request for Precautionary Measures to Stay Mr. Workman's Execution Constitutes an Act of State to Be Given Recognition in U.s. Courts

The federal laws and judicial precedents of the United States give compelling weight to the notion that a decision from an international organization such as the Organization of American States to grant precautionary measures should be recognized as an act of a sovereign State in the courts of the United States. As such, the precautionary measures requested by the OAS's IACHR to stay the execution of Mr. Workman in essence carries the sovereign character of an act by a sovereign State, which should be recognized and respected by the courts of the United States. In this case, no compelling reason exists to believe the contrary, since the precautionary measures requested by the IACHR to the U.S. government to stay Mr. Workman's execution does not have the legal effect of overturning his murder conviction and the state's prescribed death sentence. It merely asks for a stay of the execution until it can fully hear the petitioner's case and in no way prejudices the laws and sovereignty of the United States and Tennessee.

The federal laws and courts of the United States recognize the sovereign character of international organizations in several ways. The International Organization Immunities Act, 22 U.S.C. §288 (hereinafter "IOIA") establishes into federal law the sovereign character of international organizations such as the Organization of American States and the United Nations, which through the Act enjoy many of the rights and immunities that sovereign States have long possessed under the federal law of sovereign immunity. Presidential executive order number 10533 specifically recognized the OAS as one the organizations to enjoy the rights and immunities that the Act confers.

Construed more narrowly, this notion of sovereign immunity for international organizations is recognized by the federal courts whether it is examined under the rubric of absolute or restrictive

immunity as codified in the Foreign Sovereign Immunities Act of 1976 (hereinafter "FSIA"). 28 U.S.C. §1330. The FSIA codified into federal law the theory of sovereign immunity, but cabined it to a "restrictive" theory. Under this theory, a State will have broad immunities when acting in its *public capacity*, but will be liable as any private individual if it acts in a commercial capacity causing direct effect in the United States. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

With respect to the OAS, the court in Broadbent v. Organization of American States did not question whether the OAS enjoyed restrictive or absolute immunity from a suit filed by former employees for wrongful termination, but concluded simply that sufficient immunity existed to shield them from lawsuit based on acts committed in the United States. 628 F.2d 27 (D.C. Cir. 1980). However, the court in Mukaddam v. Permanent Mission of Saudi Arabia applied the restrictive theory under the FSIA and denied the defendant's motion to dismiss a wrongful discharge suit brought by an employee, concluding that the defendant's employment of the plaintiff constituted a commercial activity beyond the immunities granted under the FSIA. 111 F. Supp. 2d 457 (S.D.N.Y. 2000).

The important principle to be gleaned from Broadbent and Mukaddam is that both these cases give recognition to the notion that international organizations enjoy sovereign immunities in tandem with that of sovereign States under federal law. In this regard, when the OAS through its IACHR organ makes a request for precautionary measures on behalf of a petitioner, it is acting within the full competence of its public scope as clearly articulated in its Charter and therefore enjoys the immunities of an independent sovereign.

In Banco National de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964), the Court held that the expropriation by Cuba of sugar owned by U.S. nationals was a valid act of state and therefore unreviewable before the Supreme Court. Sabbatino used act of state not as a rule public international law, but treated it as a rule of constitutional law derived from the principle of separation of powers, stating that "the doctrine . . . expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations. . . ." Id. at 423.

This constitutional foundation still remains in the application of the act of state doctrine for the judiciary not to interfere with acts within the scope of executive power. This constitutional foundation also underlies the Full Faith and Credit Clause, which requires states to give equal weight and measure to the judicial proceedings of other states. U.S. Const. art. IV, §1. While Full Faith and Credit is generally measured to domestic decisions, it applies as well to the decisions of foreign courts and tribunals as an act of state. The Restatements on the Foreign Relations Law of the United States articulates this in § 481(1):

[A]final judgment of a court of a foreign state granting or denying recovery of a sum of money, *establishing or confirming the status of a person*, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States. [emphasis added].

The rationale underlying the Full Faith and Credit Clause of the United States Constitution has led courts in the United States, in general, to enforce judgments rendered in foreign states. Ritchie v. McMullen, 159 U.S. 235 (1895). The only matter that would indeed block the recognition of a foreign judgment in the U.S. courts is a lack of regard for due process or lack of jurisdiction by the foreign tribunal. of the Restatements on Foreign Relations Law § 482.

In this regard, the precautionary measures requested by the IACHR should be granted full faith and credit in the U.S. courts as they clearly uphold. Indeed, the purpose of the precautionary measures is to ensure these very due process rights of the petitioner, and to guarantee those rights can be exercised to the fullest extent possible.

11

CONCLUSION

For the above stated reasons, Philip Workman asks this Court to grant a stay of execution until he has had a chance to exhaust his remedies in the Inter-American system.

Respectfully submitted,

Marjorie A. Bristol, BPR # 19988
Counsel for Mr. Workman
Office of the Post-Conviction Defender
530 Church St., Suite 600
Nashville, TN 37243
615-741-9331
615-741-9430 fax

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was served via hand delivery on this _____ day of _____ 2001 to Attorney General Paul G. Summers, 425 Fifth Ave. N, 2nd FL, Nashville, TN 37243.

Marjorie A. Bristol