

PARTIALLY DISSENTING OPINION OF JUDGE OLIVER JACKMAN

1. It is with considerable regret that I must register my inability to accompany the majority of the Court in all the conclusions to which it has come in this Advisory Opinion. Specifically, I must respectfully dissent from the conclusion which concerns the legal effects of failure by a receiving State to respect the right to consular information guaranteed by Article 36 of the Vienna Convention on Consular Relations ("the Convention").

The conclusion in question may be conveniently divided into two parts:

- a) that failure to respect the right to consular information **affects** the guarantees of due process; and
- b) that imposition of the death penalty in such circumstances constitutes a violation of the right not to be arbitrarily deprived of life, as that right is defined in various international treaties on human rights.

2. In regard to (a), there can be no doubt that situations can arise in which failure to advise a detained person of his rights under Article 36.1.(b) of the Convention may have an adverse – and even a determining – effect on the judicial process to which such a person may be subjected, with results that might amount to a violation of that person's right to a fair trial. Where I find myself obliged to differ from the majority is in the finding that such a violation is the inevitable, invariable consequence of the failure in question.

3. In regard to (b), it is clear that States which maintain the death penalty on their law books have a particularly heavy duty to ensure the most scrupulous observance of due process requirements in cases in which this penalty may be imposed. Nevertheless, I find it difficult to accept that, in international law, in every possible case where an accused

person has not had the benefit of consular assistance, the judicial procedure leading to a capital conviction must, *per se*, be considered to be **arbitrary**, for the purposes and in the terms of, for example, Article 6 of the International Covenant on Civil and Political Rights ("the Covenant").

4. The approach taken by the Court in this Advisory Opinion appears to be based on what might be called an immaculate conception of due process, a conception which is not justified by the history of the precept in either municipal or international law. On the contrary, the evidence – from Magna Carta in 1215 to the 1993 Statute of the International Tribunal for the Former Yugoslavia (as amended in May 1998) – suggests that there has been a steady, pragmatic evolution, aimed at increasing the practical effectiveness of the protective structure by attempting to meet the real needs of the individual when confronted with the monolithic power of the State.

5. Thus it is noteworthy that Article 11.1 of the Universal Declaration of Human Rights ("the Declaration") stipulates that a person charged with a penal offence has the right to be presumed innocent "until proven guilty according to law in a public trial at which he has had all the guarantees **necessary for his defence**". (*Emphasis added*). Subsequent developments in international law and, in particular, in the international law of human rights, have progressively added flesh to this skeletal delineation of the basic elements of due process. Analysis of provisions such as those to be found in Articles 9 to 15 inclusive of the Covenant, or in Articles 7, 8, and 25 of the American Convention, makes it clear that the ruling principle in the devising of these guarantees has been the principle of **necessity** laid down in the Declaration.

6. In the case of *Thomas and Hilaire vs the Attorney General of Trinidad and Tobago* (*Privy Council Appeal No. 60 of 1998*) the Privy Council commented that

"Their Lordships are unwilling to adopt the approach of the Inter-American Commission on Human Rights, which they understand holds that any breach of a condemned man's constitutional rights makes it unlawful to carry out a sentence of death ... [T]his fails to

give sufficient recognition to the public interest in having a **lawful** sentence of the court carried out. [Their Lordships] would also be slow to accept the proposition that a breach of a man's constitutional rights must attract some remedy, and that if the only remedy which is available is commutation of the sentence then it must be adopted even if it is **inappropriate and disproportionate**" (*emphasis added*).

7. Reference is made in the present Advisory Opinion to the case of Daniel Monguya Mbenge, which the United Nations Committee on Human Rights examined in 1983. There, in finding that the author of the communication had been sentenced to death in breach of Article 6.2 of the Covenant, the Committee held that it was "the failure of the State party to respect the **relevant requirements** of article 14(3)" that led to "the conclusion that the death sentences pronounced against the author of the communication were imposed contrary to the provisions of the Covenant and therefore in violation of article 6(2)." (*Emphasis added*)

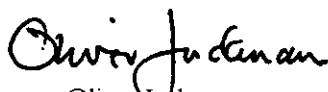
8. In similar vein, this Court has noted, in its Advisory Opinion OC-9/87 on Judicial Guarantees in States of Emergency, that

"28. Article 8 [of the American Convention] recognizes the concept of 'due process of law', which includes the prerequisites **necessary** to ensure the **adequate protection** of those persons whose rights or obligations are pending judicial determination". (*Emphasis added*)

9. In my view, the concepts of relevance, proportionality, adequacy, and, above all, necessity, are indispensable tools in assessing the role which a given right plays in the totality of the structure of due process. On this analysis it is difficult to see how a provision such as that of Article 36.1.(b) of the Convention – which is essentially a right on the part of an alien accused in a criminal matter to be informed of a right to take advantage of the possible availability of consular assistance - can be elevated to the status of a fundamental guarantee, universally exigible as a *conditio sine qua non* for meeting the internationally accepted standards of due process. This is not to gainsay its undoubted utility and importance

in the relatively specialised context of the protection of the rights of aliens, nor to relieve States parties to the Convention from their duty to comply with their treaty obligation.

10. For these reasons, although I am in full support of the analysis and conclusions of the Court in relation to paragraphs 1-6 inclusive and paragraph 8 of this Advisory Opinion, I must respectfully and regretfully dissent from the conclusion at paragraph 7 as well as from the considerations put forward in support of it.



Oliver Jackman
Judge



Manuel E. Ventura-Robles
Secretary