

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA

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JUAN RAUL GARZA,

Petitioner,

vs.

HARLEY LAPPIN, WARDEN,  
UNITED STATES PENITENTIARY,  
TERRE HAUTE (USP),

Respondent.

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CAUSE NO: \_\_\_\_\_

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**PETITION FOR WRIT OF HABEAS CORPUS  
PURSUANT TO 28 U.S.C. ' 2241**

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**PETITION FOR WRIT OF HABEAS CORPUS**  
**PURSUANT TO 28 U.S.C. ' 2241**

JUAN RAUL GARZA hereby petitions this Court, pursuant to 28 U.S.C. ' 2241, to invalidate his sentence of death, stay his execution until a final judgment on this petition is entered, and order his release from custody unless he is accorded a new sentencing hearing.

1. Mr. Garza is currently incarcerated by the U.S. Government at the United States Penitentiary in Terre Haute, Indiana. He is scheduled to be killed by the U.S. Government on June 19, 2001 at the same facility. Accordingly, venue is proper in this Court pursuant to 28 U.S.C. ' 2241(d).

2. This petition should be granted because the Inter-American Commission on Human Rights (the ACommission@) has ruled that Mr. Garza=s rights under the Charter of the Organization of American States (the AOAS Charter@) and the American Declaration of the Rights and Duties of Man (the AAmerican Declaration@) were violated by the introduction at his sentencing hearing of evidence concerning four murders that allegedly took place in Mexico, and for which Mr. Garza had never been arrested, charged, prosecuted or convicted. See Report No. 52/01, Case No. 12.243, Organization of American States, Inter-American Commission on Human Rights && 118,120 (April 4, 2001) (the ACommission Report@) (annexed hereto as Exhibit A). The Commission has also ruled that to execute Mr. Garza in light of those violations would be a further violation of the OAS Charter, the American Declaration, and international law.

Id.

3. The Commission is an international tribunal established pursuant to the OAS Charter, a treaty to which the United States is a party. The U.S. Constitution provides that All Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. @ U.S. Const. art. VI, cl. 2. Accordingly, because the OAS Charter is a treaty made under the authority of the United States, see United States v. BCCI Holdings (Luxembourg), S.A., 73 F.3d 403, 405 (D.C. Cir. 1996) (the OAS Charter is binding on the United States as an OAS member @) -- and because the OAS Charter establishes the Commission to adjudicate human rights claims involving member states (see paragraphs 20-27 below) -- this Court must recognize and enforce the Commission's ruling that executing Mr. Garza would violate the OAS Charter, the American Declaration, and international law.

#### **PROCEDURAL HISTORY**

4. On July 29, 1993, Mr. Garza was convicted after a jury trial in the United States District Court for the Southern District of Texas of drug trafficking, money laundering, engaging in a continuing criminal enterprise, and three counts of killing in furtherance of a continuing criminal enterprise. On August 2, 1993, the jury recommended a sentence of death, and the Court accordingly sentenced Mr. Garza to death on August 10. The Court of Appeals affirmed the conviction and sentence, United States v. Flores & Garza, 63 F.3d 1342 (5th Cir. 1995), and denied a motion for rehearing, United States v. Garza, 77 F.3d 481 (5th Cir. 1995). The Supreme Court denied Mr. Garza's petition for writ of certiorari, United States v. Garza, 519 U.S. 825 (1996), and his petition for rehearing, United States v. Garza, 519 U.S. 1022 (1996).

5. On December 1, 1997, Mr. Garza filed a habeas petition pursuant to 28 U.S.C. ' 2255, arguing that his sentence should be vacated because, *inter alia*, the Government had violated his rights under the Due Process Clause of the U.S. Constitution by introducing at his sentencing hearing evidence of the four uncharged, unadjudicated offenses that allegedly occurred in Mexico. On April 9, 1998, the District Court denied the motion to vacate and denied a certificate of appealability. On January 14, 1999, the Court of Appeals denied Mr. Garza=s petition for leave to appeal the District Court=s decision, United States v. Garza, 165 F.3d 312 (5th Cir. 1999), and on April 4, 1999, it denied Mr. Garza=s petition for a rehearing. On November 15, 1999, the Supreme Court denied certiorari. United States v. Garza, 528 U.S. 1006 (1999).

6. On December 20, 1999, after the aforementioned direct appeal and habeas petition were denied, Mr. Garza filed a petition against the United States with the Commission, alleging that his death sentence violates the American Declaration, the OAS Charter, and international law. The Commission issued an unpublished, preliminary decision in Mr. Garza=s case on December 4, 2000, finding that Mr. Garza=s rights under the American Declaration, the OAS Charter and international law had been violated.

7. On information and belief, the U.S. Government responded to the Commission=s preliminary decision. After considering the Government=s response, the Commission issued and published a final decision on April 4, 2001.

8. The present petition raises new issues for the Court=s review that could not have been raised in prior proceedings. As discussed in paragraphs 29, 49 and 50 below, it

would have been futile for Mr. Garza to raise any arguments under the OAS Charter or the American Declaration before the Commission issued its final decision. In addition, the Commission's procedures do not allow a petitioner to commence proceedings before it until all domestic appeals have been exhausted.

### **SUMMARY OF FACTS**

9. This petition pertains to the introduction of certain evidence at Mr. Garza's sentencing hearing -- evidence concerning four murders that allegedly took place in Mexico and for which Mr. Garza has never been arrested, charged, prosecuted or convicted (the uncharged offenses) -- and to the Commission's decision concerning the legality, under the OAS Charter, the American Declaration and international law, of using that evidence in sentencing Mr. Garza to death. The relevant facts concerning Mr. Garza's sentencing hearing and the Commission's findings are set forth below and in the Commission Report. This petition does not challenge the verdict reached in the guilt phase of Mr. Garza's trial, nor does it raise issues covered in the direct appeal or '2255 petition. Accordingly, the facts pertinent solely to those proceedings will not be reiterated here.

#### A. The Sentencing Proceeding

10. At Mr. Garza's sentencing hearing, the Government introduced as aggravating factors evidence of four uncharged offenses allegedly committed in Mexico. The

Mexican authorities had been unable to solve any of the four crimes and had closed their investigation. See, e.g., Trial Tr. vol. 15 at 3304, 3307, 3313.<sup>1</sup>

11. The Government's evidence during the sentencing phase related almost entirely to these uncharged offenses.

12. All the evidence the Government introduced concerning the uncharged offenses was inherently unreliable, and would have been inadmissible under the Federal Rules of Evidence had it been introduced in the guilt phase of Mr. Garza's trial. First, in attempting to show that the uncharged offenses had occurred, the Government introduced evidence from investigative files, statements and other information obtained from Mexican law enforcement officials and other Mexican residents, none of whom appeared as witnesses. Second, the only witnesses to testify about this foreign evidence were U.S. Customs agents with no direct knowledge of the events or even of how the evidence was gathered. Moreover, the Mexican officials who allegedly supplied information to the U.S. Customs agents regarding the uncharged offenses were not under any of the constitutional obligations that apply to U.S. law enforcement officials, including the obligation to disclose potentially exculpatory evidence, such as the identities of other suspects. Third, the Government offered no physical evidence tying Mr. Garza to the crimes; the only evidence linking him to the crimes was the inherently unreliable and uncorroborated testimony of three accomplices who received promises of substantially reduced

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<sup>1</sup> ATrial Tr.@ refer to the transcript of the trial of Mr. Garza; the cited excerpts are attached as Exhibit B.

sentences in exchange for their testimony implicating Mr. Garza. See Trial Tr. vol. 7 at 1618-21; vol. 8 at 1894-98, 2042-46; vol. 10 at 2412-14, 2479-83.

13. Mr. Garza sought unsuccessfully to exclude all evidence of the uncharged offenses both in pre-trial proceedings and at the sentencing hearing. Hearing at 22, 26-27, 44.<sup>2</sup> He had no opportunity to test the accuracy of the evidence obtained from Mexico. There is no mechanism by which a private individual in the United States can compel testimony or document production by Mexican officials or residents. In addition, Mr. Garza's hearsay objections to the U.S. Customs agents' testimony were overruled.

14. After the evidence was introduced at the sentencing hearing, the jury was asked, pursuant to 21 U.S.C. § 848(k), to make findings regarding certain aggravating factors specified in Section 848 (the statutory aggravating factors), other aggravating factors proposed by the Government (the non-statutory aggravating factors), and mitigating factors proposed by the defense. The statutory scheme then required the jury to decide whether the aggravating factors sufficiently outweighed the mitigating factors so as to justify a sentence of death.

15. The Government presented evidence concerning thirteen non-statutory aggravating factors it had identified as justifications for the death penalty. *Ten* of those factors related to the uncharged offenses. Moreover, the vast majority of the evidence the Government

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<sup>2</sup> AHearing@ refer to the transcript of pretrial conference proceedings on June 30 and July 1, 1993; cited excerpts are attached as Exhibit C.

presented on both statutory and non-statutory aggravating factors related solely to those offenses.

16. The jury found eleven of the non-statutory aggravating factors identified by the Government, including *eight* factors pertaining to the uncharged offenses.

17. The jury also found four mitigating factors, including that Mr. Garza was under unusual and substantial duress, that he was youthful, that other defendants equally culpable in the crime would not be punished by death, and that the victims consented to the criminal conduct that resulted in the victim=s death.

18. In balancing the aggravating and mitigating factors, the jury found that the aggravating factors -- including *eight* factors pertaining to the uncharged offenses -- outweighed the mitigating factors and recommended that a sentence of death be imposed. On August 10, 1993, the District Court entered judgment sentencing Mr. Garza to death.

19. As set forth above, between the sentencing in 1993 and November 1999, Mr. Garza pursued a direct appeal and a habeas petition under 20 U.S.C. ' 2255, both of which were denied.

**B. The Commission and the Inter-American System of Human Rights**

20. On December 20, 1999, after exhausting his direct and habeas appeals in the U.S. courts, Mr. Garza filed a petition against the United States with the Commission. The following background information on the origins and authority of the OAS Charter, the Commission and the American Declaration will put the import of his petition before the



Commission, as well as the Commission Report invoked in the instant habeas petition, into context.

21. A central part of the OAS is the Inter-American system of human rights enforcement and promotion. The Commission and the American Declaration are integral parts of that system. The United States has participated in each step of the development of the Inter-American system of human rights and cannot now be heard to complain that this system has no bearing within the borders of the United States.

22. The Inter-American system of human rights was first put in place with the adoption of the OAS Charter and the American Declaration in 1948. As a founding member of the OAS, the United States was an active participant at the 1948 conference at which both the OAS Charter and the American Declaration were adopted.<sup>3</sup>

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<sup>3</sup> The OAS Charter was adopted at the Ninth International Conference of American States (Bogotá, Colombia, April 30, 1948) and entered into force on December 13, 1951, 119 U.N.T.S. 3, 2 U.S.T. 2394, T.I.A.S. No.2361. The American Declaration was adopted pursuant to Resolution XXX, Ninth International Conference of American States (Bogotá 1948), and is reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

23. The United States ratified the OAS Charter in 1951.<sup>4</sup> The OAS Charter shows a clear intention that the state parties to it should respect human rights. In particular, the preamble provides that the States entered into the Charter A[c]onfident that the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man.<sup>5</sup>

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<sup>4</sup> 2. U.S.T. 2349, T.I.A.S. No. 2361, 119 U.N.T.S. 3. The United States ratified the OAS Charter subject to one reservation not relevant here:

That the Senate give its advice and consent to ratification of the Charter with the reservation that none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.

<sup>5</sup> OAS Charter preamble, & 4.

24. The Commission was created in 1959 as an autonomous entity of the OAS to promote and protect human rights.<sup>6</sup> In 1960, the OAS members incorporated the American Declaration into the Statute for the new Commission.<sup>7</sup> In 1965, the Commission's functions and powers were expanded to give particular attention . . . to the observance of the human rights referred to in Articles I through IV, XVIII, XXV and XXVI of the American Declaration,<sup>8</sup> and the Commission was authorized:

to examine communications submitted to it and any other available information, to address to the government of any American State a request for information deemed pertinent by the Commission, and to make recommendations, when it deems this appropriate, with the objective of bringing about more effective observance of fundamental human rights.<sup>8</sup>

25. In 1967, amendments to the OAS Charter made the Commission a principal organ through which the OAS was to accomplish its purposes. Amended Charter, art.

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<sup>6</sup> Fifth Meeting of Consultation of Ministers of Foreign Affairs (Santiago, Chile 1959).

<sup>7</sup> Statute of the Commission, art. 2 (1960). The current Statute of the Commission, which contains the same article 2, can be found at <<http://www1.umn.edu/humanrts/oasinstr/zoas4cms.html>>.

<sup>8</sup> Res. XXII, A Expanded Functions of the Inter-American Commission on Human Rights,<sup>8</sup> Second Special Inter-American Conference (Rio de Janeiro, Brazil, Nov. 17-30, 1965) (emphasis added). For the complete text in the Final Act of the Second Conference, see OAS Official Records, OEA/Ser.C/I.13, 1965, pp. 32-34.

51.<sup>9</sup> The amended OAS Charter specifically provided that A[t]here shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.@ Id., art. 112.<sup>10</sup>

26. The United States signed the amendments to the OAS Charter in 1967 and ratified them without reservation in 1968.<sup>11</sup>

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<sup>9</sup> The OAS Charter was amended pursuant to the Protocol of Buenos Aires, 721 U.N.T.S. 324, 21 U.S.T. 607, T.I.A.S. No. 6847, entered into force Feb. 27, 1970 (the AAmended Charter@).

<sup>10</sup> The Amended Charter further provided that A[u]ntil the inter-American convention on human rights, referred to in Chapter XVIII, enters into force, the present Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights.@ Id., art. 150.

<sup>11</sup> 721 U.N.T.S. 324, 21 U.S.T. 607, T.I.A.S. No. 6847.

27. Thus, with the full consent and ratification of the United States, the Commission acquired an express role under the OAS Charter to promote and protect human rights within the Inter-American system.<sup>12</sup> In addition, the United States consented to giving this role to a Commission empowered to hear individual petitions against OAS member states and to determine whether human rights protected by the American Declaration have been violated. See & 24, above. As a consequence, the United States= treaty obligations include a recognition of the Commission=s authority to promote and protect human rights.

**C. Mr. Garza=s Petition Before the Commission**

28. On December 20, 1999, Mr. Garza filed a petition against the United States with the Commission, alleging that his death sentence violates the American Declaration, the OAS Charter, and international law. Specifically, Mr. Garza argued that the procedures employed at his sentencing hearing violated his rights to a fair trial and to due process under Articles I, XVIII and XXVI of the American Declaration, which provide:<sup>13</sup>

Article I: Every human being has the right to life, liberty and the security of his person.

Article XVIII: Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief

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<sup>12</sup> International legal scholars have argued Athat the effect of this change of status was to incorporate the Commission=s Statute into the Charter, thus enhancing the authority of the Declaration and creating an obligation to respect the rights contained therein.@ 1 Human Rights: The Inter-American System, Booklet 5, at ii (Thomas Buergenthal & Robert E. Norris, 3ds., 1982).

<sup>13</sup> Mr. Garza also argued that the sentencing procedures violated his right to equal protection of the law under Article II of the Declaration; the Commission, however, arrived at its decision without addressing that argument.

procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XXVI: Every accused person is presumed to be innocent until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

29. The Commission found that pursuant to Article 37 of the Regulations of the Commission, Mr. Garza could not bring his petition before the Commission until he had exhausted all remedies under United States domestic law. Commission Report & 67. Mr. Garza did not exhausted his domestic remedies until November 1999, when the Supreme Court denied his final petition for a writ of certiorari. Furthermore, during the proceedings before the Commission, the Government did not Aallege[ ] or otherwise establish[ ] that Mr. Garza has failed to exhaust the domestic remedies available to him in the United States.@ Id. & 61. The Government also did Anot contest[] the timeliness of Mr. Garza=s petition@ to the Commission. Id. & 62.

30. While Mr. Garza=s claim before the Commission was pending, the Government set his execution for August 5, 2000. On August 2, 2000, new guidelines for seeking presidential clemency in federal death penalty cases went into effect. In order to give Mr. Garza the benefit of the new procedures, President Clinton granted a reprieve of Mr. Garza=s execution date until December 12, 2000. (Executive Grant of Clemency, signed by President Clinton, August 2, 2000.)

31. The Government participated in the proceedings before the Commission. On July 20, 2000, after requesting and receiving an extension of time to file its response, the

Government filed a formal response to Mr. Garza's petition with the Commission. Commission Report && 7, 11.

32. On September 22, 2000, Mr. Garza also submitted to the Commission a Request to Raise Additional Matters,<sup>10</sup> based on a September 12, 2000 report issued by the Department of Justice entitled Report on the Federal Death Penalty System: A Statistical Survey (1988-2000) (the DOJ Report<sup>11</sup>). The DOJ Report contained statistics revealing racial and geographic disparities in the application of the death sentence in federal cases in the United States. The Commission declined to consider this evidence because it had not been previously raised before a domestic court.

33. After a further exchange of briefs and supporting evidence, a formal hearing was held on October 12, 2000 at the Commission's headquarters in Washington D.C. For the purpose of receiving the parties' representations on the admissibility and merits of the case.<sup>12</sup> Id. & 14. Representatives of Mr. Garza and the U.S. Government attended the hearing, presented oral argument on the merits of Mr. Garza's case, and delivered written summaries of their oral submissions. Id. & 17.

34. On December 4, 2000, the Commission issued a report finding that, by introducing evidence of the uncharged foreign offenses during the sentencing hearing, the Government had violated Mr. Garza's right to a fair trial and to due process under Articles XVIII and XXVI of the American Declaration. The Commission further found that sentencing Mr. Garza to death in this manner was arbitrary and capricious under Article I of the American Declaration, and that to carry out Mr. Garza's execution would constitute a further deliberate

and egregious violation@ of his right to life under Article I. Finally, the Commission recommended that the United States provide Mr. Garza with an effective remedy for these violations, including commutation of his sentence. Id. && 118, 121(1).

35. Given that Mr. Garza=s execution was then scheduled for December 12, 2000, the Commission gave the Government five days to respond to the Commission Report and recommendations. On December 7, 2000, however, President Clinton granted a reprieve staying Mr. Garza=s execution for six months. Referring to the impact of the DOJ Report mentioned in paragraph 32 above, President Clinton granted the reprieve in order Ato allow the Justice Department time to gather and properly analyze more information about racial and geographic disparities in the federal death penalty system.@ (Statement of President Clinton, December 7, 2000, White House, Office of the Press Secretary.) Thus, Mr. Garza=s execution is currently scheduled for June 19, 2001.

36. The Government responded to the Commission report on March 6, 2001, by reiterating the arguments in its previous submissions and stating that the Commission=s conclusions were in conflict with United States domestic law. Id. & 115.

37. On April 4, 2001, after considering the Government=s response, the Commission ratified and published its December 4, 2000 report. The Commission ruled once again that the United States Ais responsible for violations of Articles I, XVIII, and XXVI of the American Declaration in condemning Juan Raul Garza to the death penalty@ and that Athe United States will perpetrate a grave and irreparable violation of the fundamental right to life under Article I of the American Declaration, should it proceed with Mr. Garza=s execution based



upon the criminal proceedings under consideration. @ Id. & 120. The Commission also found that if the Government proceeded with the execution of Mr. Garza, that would constitute A serious and deliberate violations of its international obligations under the OAS Charter and the American Declaration. @ Id. & 118.

38. The Commission reiterated its recommendation that the United States provide Mr. Garza with an effective remedy for these violations, including commutation of his sentence. Id. & 121(1).

39. In particular, the Commission found, in pertinent part, the following:

§ The American Declaration prohibits the application of the death penalty in an arbitrary manner. Id. && 90-91.

§ Due process protections apply equally in the guilt and the sentencing stages of a criminal prosecution. Id. & 102.

§ The introduction of evidence of the uncharged offenses did not comply with due process requirements, with the result that Mr. Garza A was also convicted and sentenced to death for the four murders alleged to have been committed in Mexico, but without having been properly and fairly charged and tried for these additional crimes. @ Id. & 105.

§ A[T]he prejudice resulting from the determination of Mr. Garza=s guilt for four additional murders during his sentencing hearing was compounded by the fact that lesser standards of evidence were applicable during the sentencing process. @ Id. & 108.

§ A[A] significant and substantive distinction exists between the introduction of evidence of mitigating and aggravating factors concerning the circumstances of an offender or his or her offense, such as those enumerated in 21 U.S.C. 848(n), and an effort to attribute to an offender individual criminal responsibility for violations of additional serious offenses that have not, and indeed could not under the State=s criminal law, be charged and tried pursuant to a fair trial offering the requisite due process guarantees. The State itself asserts that the purpose of a sentencing hearing is to determine the appropriate punishment for a

defendant=s crime, not to prove guilt. Yet proving Mr. Garza=s guilt for the four unadjudicated murders so as to warrant imposition of the death penalty was, by the Government=s own admission, precisely the intended and actual effect of its effort in introducing evidence in this regard during Mr. Garza=s sentencing hearing.@ Id. & 109 (emphasis added).

§ The Government=s Aconduct in introducing evidence of unadjudicated foreign crimes during Mr. Garza=s capital sentencing hearing was antithetical to the most basic and fundamental judicial guarantees applicable in attributing responsibility and punishment to individuals for crimes.@ Id. & 110 (emphasis added).

40. This Court has the power to enforce these rights because they are founded in a treaty made under the authority of the United States and, as such, are the Asupreme Law of the Land@ pursuant to Article VI, clause 2, of the United States Constitution. See, e.g., Amaya v. Stanolind Oil & Gas Co., 158 F.2d 554, 556 (5th Cir. 1946) (A[a] treaty lawfully entered into stands on the same footing of supremacy as does the Constitution and Laws of the United States@).

## **ARGUMENT**

### **I. THIS COURT HAS JURISDICTION OVER THE INSTANT PETITION UNDER 28 U.S.C. ' 2241**

41. Section 2241 of the habeas statute provides that a writ of habeas corpus may be granted by the district courts when a federal prisoner Ais in custody in violation of the Constitution or laws or treaties of the United States.@ 28 U.S.C. ' 2241(a), (c)(3) (emphasis added).

42. The OAS Charter is inarguably a treaty, having been duly ratified by the United States after obtaining the advice and consent of the U.S. Senate. It has been in full force and effect as a treaty of the United States for fifty years since its ratification in 1951.

Commission Report & 60. Accordingly, the OAS Charter is binding on the United States. United States v. BCCI Holdings (Luxembourg), S.A., 73 F.3d 403, 405 (D.C. Cir. 1996).

43. The American Declaration is also a treaty for purposes of Section 2241. Courts have expansively interpreted the term "Treaty" as it is used in federal legislation, holding that a "Treaty" includes not only treaties formally consented to by the Senate and ratified by the President, but also executive agreements and other international compacts. Weinberger v. Rossi, 456 U.S. 25, 36 (1982) (interpreting the word "Treaty," as used in a federal employment discrimination statute, to include executive agreements); United States v. Belmont, 301 U.S. 324, 331 (1937) (recognizing that international compacts and executive agreements are "Treaties" within the meaning of the Circuit Court of Appeals Act); see also United States v. Pink, 315 U.S. 203, 230-31 (1942) (holding that the supremacy clause of Constitution requires state law to yield when inconsistent with a treaty, international compact or executive agreement). The American Declaration is an international instrument agreed to by the United States; therefore, like the executive agreements in Weinberger, Belmont, and Pink, it is a "Treaty" for purposes of Section 2241.

44. Mr. Garza is therefore in custody in violation of the . . . treaties of the United States within the meaning of 28 U.S.C. § 2241(c)(3) and is entitled to resort to the habeas corpus jurisdiction conferred on the federal district courts by that provision.

45. Furthermore, the proscription on successive habeas petitions in 28 U.S.C. § 2255 does not apply here. Rather, a Section 2241 petition in this Court is the appropriate proceeding to challenge the legality of Mr. Garza's sentence and execution because his

constitutional and international law claims fall within the so-called Asavings clause@ of 28 U.S.C. ' 2255, which provides:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. ' 2255 (emphasis added). See, e.g., Reyes-Requena v. United States, 2001 WL 197931, at \*\*10-11 (5th Cir. Feb. 28, 2001) (district court had jurisdiction under Section 2241 to adjudicate habeas petition notwithstanding petitioner=s prior petition under Section 2255).

46. A[T]he Supreme Court has not provided much guidance as to the factors that must be satisfied for a petitioner to file under habeas corpus provisions such as ' 2241.@ Reyes-Requena, 2001 WL 197931, at \*7. Rather, the Supreme Court has merely observed generally that habeas corpus writs are available under Section 2241 when Section 2255 is an inadequate remedy. See Swain v. Pressley, 430 U.S. 372, 381 (1977); United States v. Hayman, 342 U.S. 205, 223 (1952).

47. Based on these observations by the Supreme Court, a number of courts have held that Section 2241 is available as a jurisdictional basis for a successive habeas petition under certain circumstances, even though such a petition would be barred by Section 2255. See, e.g., Reyes-Requena, 2001 WL 197931, at \*7; In re Jones, 226 F.3d 328 (4th Cir. 2000); In re Davenport, 147 F.3d 605 (7th Cir. 1998); Triestman v. United States, 124 F.3d 361 (2d Cir. 1997); In re Hanserd, 123 F.3d 922 (6th Cir. 1997); In re Dorsainvil, 119 F.3d 245 (3d Cir.

1997); Sustache-Rivera v. United States, 221 F.3d 8 (1st Cir. 2000) cert. denied, 121 S. Ct. 1364 (2001); United States v. Lurie, 207 F.3d 1075 (8th Cir. 2000); Wofford v. Scott, 177 F.3d 1236 (11th Cir. 1999).

48. For example, in Reyes-Requena, the petitioner had been convicted of use of a firearm during the commission of a drug trafficking offense. After his conviction -- and after his initial petition for a writ of habeas corpus under Section 2255 had been denied -- the Supreme Court held in Bailey v. United States, 516 U.S. 137 (1995), that a use of a firearm required evidence of an active employment of the firearm by the defendant. Id. at 138. Because petitioner in Reyes-Requena had not made active use of a firearm, he filed a second petition for a writ of habeas corpus. The district court dismissed this second petition on the ground that such a petition was precluded by the bar on successive habeas petitions in Section 2255. The Fifth Circuit, however, reversed and held that the savings clause allowed this second petition to be pursued under Section 2241. Addressing the facts before it, the Fifth Circuit held that the savings clause of ' 2255 applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which establishes that petitioner may have been convicted of a non-existent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first ' 2255 motion. Reyes-Requena, 2001 WL 197931, at \*10.

49. The same result is mandated here. Under the provisions of the OAS Charter, the Commission is charged with interpreting the American Declaration. As of the time of Mr. Garza's trial and initial petition, the Commission had not yet adjudicated the meaning of

the American Declaration with respect to the use of uncharged offenses in considering a sentence of death. Moreover, the Commission decision is not a general statement of human rights principles, but applies specifically to Mr. Garza's case. In addition, the second prong of the Reyes-Requena test also applies here because Mr. Garza clearly was not able to raise this issue during his trial, on direct appeal, or in his first habeas petition. U.S. courts require a petitioner to exhaust his administrative remedies under international law before asserting such a claim in a U.S. court. Indeed, at least one court has held with respect to the American Declaration that no claim may be brought in a U.S. court unless and until the Commission has issued its decision. See Roach v. Aiken, 781 F.2d 379, 380 (4th Cir. 1986) (refusing to stay execution while defendant's petition before Commission was pending); accord McMahan v. Hunter, 179 F.2d 661, 663 (10th Cir. 1950) (dismissing habeas petition because Apetitioner has failed to exhaust his remedy under Article of War 53@).

50. Furthermore, Article 37 of the Commission's Regulations requires a petitioner to exhaust domestic remedies before petitioning the Commission, which Mr. Garza did; he filed his complaint with the Commission promptly upon exhausting his domestic direct appeal and Section 2255 remedies. The Government has agreed to the procedures set forth in the Commission's Regulations and, indeed, has participated in numerous cases before the Commission pursuant to those procedures.<sup>14</sup> The Government cannot agree to an international

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<sup>14</sup> See, e.g., Statement of the United States delegation before the UN Committee on Juridical and Political Affairs:

A[T]he universal protection and promotion of human rights has been and is an

system requiring exhaustion of domestic remedies and then argue that Mr. Garza should have raised his rights under the American Declaration in prior domestic proceedings. Denial of this Section 2241 petition, given the decision in Roach and the requirements of the Commission's Regulations, would render the entire Inter-American human rights scheme meaningless.

## **II. THE COMMISSION REPORT IS AN EXPRESSION OF TREATY-BASED RIGHTS AND INTERNATIONAL LAW THAT MUST BE ENFORCED**

51. The Commission Report created rights in Mr. Garza under international law that are binding on the United States for two reasons: (1) because they are derived directly from the OAS Charter, a treaty within the meaning of the U.S. Constitution; and (2) because they are derived, through the OAS Charter, from the American Declaration, a statement of human rights norms the United States has not only adopted, but helped to draft. Furthermore, the Commission is a tribunal expressly established under the OAS Charter to promote and protect

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integral part of [the United States'] foreign policy, as evidenced by its accession to the Universal Declaration of Human Rights and to the American Declaration. . . The United States has...submitted to the procedures of the Commission, both through the case system and on-site investigations, on the basis of the provisions of the American Declaration.@

Permanent Council of the OEA/Ser. G, OAS CP/CAJP-1600/00 rev. 2, April 24, 2000 (emphasis added).

human rights and, therefore, its ruling on the application of human rights principles in Mr. Garza=s case must be considered authoritative. For these reasons, this Court is obligated to follow the Commission=s recommendation that Mr. Garza=s sentence of death be commuted, by invalidating his sentence and ordering a new sentencing hearing.

A. The Supremacy Clause Requires that Mr. Garza=s Death Sentence Be Invalidated and that He Be Given a New Sentencing Hearing

52. The Commission ruled that for the Government to proceed with Mr. Garza=s execution would be a serious and deliberate violation of the United States= international obligations under the OAS Charter. Commission Report & 118. The Commission=s findings based on the OAS Charter referred specifically to Mr. Garza=s rights and the circumstances of his sentencing. (Id.)

53. The Supremacy Clause of the Constitution binds courts to enforce treaties: A[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.@ U.S. Const. art. VI, cl. 2.

54. As established above, the OAS Charter is a treaty that has been in full force and effect since the United States ratified it in 1951. Thus, the OAS Charter, as a treaty duly signed and ratified by the United States, Ais binding on the United States as an OAS member@ and this Court is bound to enforce it. BCCI, 73 F.3d at 405.

55. Furthermore, Mr. Garza may invoke the human rights protections of the OAS Charter. The OAS Charter expressly authorizes the Commission to promote and protect human rights, and the Commission is authorized to hear individual petitions and to interpret the



scope and meaning of human rights under the OAS Charter and the American Declaration. Thus, the OAS Charter implicitly, if not expressly, provides a private right of action to enforce human rights. United States v. Noriega, 808 F. Supp. 791, 799 (S.D. Fla. 1992) (holding that Aif a treaty expressly or impliedly provides a private right of action, it is self-executing and can be invoked by the individual@).

56. The Court, however, need not decide whether the OAS Charter is self-executing; even if it is not, the United States is still obligated to honor its international commitments under the treaty. See Noriega, 808 F. Supp. at 799 (holding that the United States is obligated to observe the provisions of the Geneva Convention regardless of whether the treaty was self-executing). It would be inconsistent with both the language and spirit of the OAS Charter, as well as with the purpose it proclaims for the Commission, to find that the Commission=s decisions cannot be enforced by an individual in a court of law.

57. Therefore, to prevent a violation of the OAS Charter through disregard of Mr. Garza=s rights based on that treaty, the Supremacy Clause requires this Court to enforce the Commission Report by invalidating Mr. Garza=s sentence of death and requiring that he be given a new sentencing hearing.

**B. The Commission=s Interpretation of the American Declaration Is Also an Expression of Treaty-Based Rights that Must Be Enforced Under the Supremacy Clause**

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58. The Commission found that for the Government to proceed with Mr. Garza=s execution would also be a serious and deliberate violation of the United States= international obligations under the American Declaration. Commission Report & 118. Again, the

Commission's interpretation of the American Declaration referred specifically to Mr. Garza's rights and the circumstances of his sentencing. Id.

59. Although the American Declaration is itself a non-binding declaration of human rights norms, those rights became binding, enforceable rights when applied in a specific case by the Commission, a treaty-based tribunal specifically empowered to interpret and promote the rights contained in the American Declaration. As described in detail in paragraphs 20-27 above, the OAS Charter established the Commission as the organ for authoritatively determining the obligations of member states in the matter of international human rights. In ratifying the Charter, the United States assented to the creation of the Commission. The rights set forth in the American Declaration are, as the name of the instrument suggests, *declared* as human rights norms, and become treaty-based obligations to the extent they are adjudicated by the Commission in a particular case. Hence -- as the Government has repeatedly argued -- Mr. Garza had no judicially enforceable rights under the American Declaration until the Commission issued its final decision; that decision, however, gave him a treaty-based right to have the Government respect and enforce the Commission's determination.<sup>15</sup>

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<sup>15</sup> The Commission also determined that the American Declaration is a source of legal obligation for the United States in Roach & Pinkerton v. United States, Case 9647, Inter-Am. C.H.R. 147, OEA/ser.L/V/11.71, doc. 9 rev. 1 (Sept. 22, 1987), <[http://www.wcl.american.edu/pub/humright/digest/inter-american/english/annual/1986\\_87/res0387.html](http://www.wcl.american.edu/pub/humright/digest/inter-american/english/annual/1986_87/res0387.html)>. In the Roach & Pinkerton case, the petitioners had already been executed when the Commission issued its report. The instant petition is the first time a U.S. court has been asked to apply a Commission Report when a petitioner was still alive. See also Statute of the Commission, art. 20.

60. Therefore, to prevent a violation of Mr. Garza=s rights under the American Declaration, and thereby prevent a violation of the OAS Charter from which it derives its authority, the Supremacy Clause requires this Court to enforce the Commission Report by invalidating Mr. Garza=s sentence of death and requiring a new sentencing hearing.

**C. The Commission=s Report Made Mr. Garza=s Inchoate Rights Under the OAS Charter and American Declaration Into Specific, Enforceable Treaty-Based Rights**

61. Because the Commission is an organization established pursuant to the terms of a treaty, and is authorized by treaty to interpret and promote human rights under the OAS Charter and the American Declaration, its decisions when it carries out its official functions must be considered to be treaty-based. The rights set forth in the OAS Charter and the American Declaration are general human rights norms. The Commission accepted evidence and arguments presented by Mr. Garza and the Government, held a formal hearing, and issued a reasoned Report concerning Mr. Garza. In doing so, the Commission applied the American Declaration to the specific facts of Mr. Garza=s sentencing hearing. The Commission made specific findings as to whether the general -- and universally recognized -- right to a fair trial and right to due process were observed in Mr. Garza=s case. When applied to a specific case by a treaty-based organization, Mr. Garza=s inchoate rights under the OAS Charter and the American Declaration became specific, enforceable treaty-based rights. Accordingly, a report of the Commission -- a treaty-based body -- interpreting the Government=s obligations under the American Declaration as to Mr. Garza, must be regarded as authoritative. Failure to enforce the Commission=s

decision would place the United States in violation of its obligations under the OAS Charter and the American Declaration.

**D. The United States is Bound by the Commission Report Because It Agreed to the Commission=s Authority To Enforce Human Rights by Hearing Individual Complaints Against Member States and by Interpreting the American Declaration**

62. The United States has, through the OAS Charter, accepted treaty obligations establishing the authority of the Commission to promote observance and protection of human rights. Moreover, at the time the Commission acquired an express role under the OAS Charter to promote and protect human rights within the Inter-American system, it had already been empowered to hear individual complaints against OAS member states and to determine whether human rights protected by the American Declaration have been violated, including specifically those Articles of the American Declaration at issue here -- Articles I, XVIII, and XXVI. See ¶ 24, above.

63. Indeed, the U.S. Government has admitted that under the Charter of the OAS, the Commission has of course the competence and responsibility to promote observance of and respect for the standards and principles set forth in the [American] Declaration. The United States has consistently displayed its respect for and support of the Commission in this regard, *inter alia*, by responding to petitions presented against it on the basis of the Charter and the Declaration. @ Andrews v. United States, Case 11.139, Inter-Am. C.H.R. No. 57/96; DEA/Sec.

L/VI 11.98, doc. 7 rev. (1998); see also Roach & Pinkerton<sup>16</sup>; White & Potter v. United States, Case 2141, Inter-Am. C.H.R. 25, DEA/ser. L/V/11.54 doc. rev. (1981).<sup>17</sup>

64. The American Declaration has become the standard[] by which the human rights policies of the American nations are judged.@ 1 Human Rights: The Inter-American System, Booklet 5, at i (Thomas Buergenthal & Robert E. Norris, 3ds., 1982). Moreover, the U.S. Government itself has repeatedly cited to the responsiveness to complaints before and recommendations from the Commission as indicators of OAS members' human rights records.<sup>18</sup>

65. A[T]he American Declaration is for . . . States [who are OAS members] a source of international obligations related to the Charter of the Organization.@<sup>19</sup> Thus, a breach

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<sup>16</sup> Supra, n.15.

<sup>17</sup> The White and Potter decision can also be found at <[http://www.wcl.american.edu/pub/humright/digest/inter-american/english/annual/1980\\_81/res2381.html](http://www.wcl.american.edu/pub/humright/digest/inter-american/english/annual/1980_81/res2381.html)>.

<sup>18</sup> See, e.g., Country Reports on Human Rights Practices - 2000, Mexico, released by the State Department's Bureau of Democracy, Human Rights, and Labor (February 2001), <<http://www.state.gov/g/drl/rls/hrrpt/2000/wha/index.cfm?docid=810>>.

<sup>19</sup> Advisory Opinion OC-10/89 of July 14, 1989, Inter-Am. Ct.H.R. (sec. A) No. 10 (1989)

of the obligations contained in the American Declaration is a violation of the Charter and thereby a violation of the United States= treaty obligations under international law.

**E. U.S. Courts Have Recognized the Decisions of Similar Tribunals and International Bodies as Authoritative**

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&& 35-45, reprinted in 11 Hum. Rts. L.3 (18, 124-26 (1990)).

66. No United States court has yet considered the status of a final report and recommendation from the Commission. However, courts have recognized and relied upon decisions by similar international tribunals. For example, in United States v. Duarte-Acero, 208 F.3d 1282 (11th Cir. 2000), the Court considered whether the government had violated the double jeopardy clause in the International Covenant on Civil and Political Rights (ICCPR)<sup>20</sup> by trying and convicting a person for crimes for which he had already been convicted and served time in Colombia. In deciding that there was no treaty violation, the Court relied upon an opinion of the Human Rights Committee (HRC), the body charged under the ICCPR with monitoring the implementation and interpretation of the treaty. The HRC had found that the ICCPR prohibited only double jeopardy within a single State and not multiple adjudications in different States. Id. at 1287. Recognizing the authoritative nature of the HRC's interpretation, the Court observed that A[m]ost importantly perhaps, the HRC, the body charged under the ICCPR with monitoring its implementation, has spoken on this issue. Id. (alteration in original) (citation omitted). The Court stated that the Appellant fails to explain why we should depart from the HRC's revealing view. Id.; Maria v. McElroy, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999) (relying on the views and decisions of the HRC as authoritative interpretations of the ICCPR).

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<sup>20</sup> The ICCPR is a treaty that was ratified by the United States on June 8, 1992. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

67. Like the HRC, the Commission is a body charged with interpreting human rights obligations under a treaty. This Court should, therefore, treat the Commission Report as an authoritative interpretation of the United States' obligations under the OAS Charter and, through the Charter, of the American Declaration, and should as the court in Duarte-Acero did with the HRC decision, follow the decision of the Commission.

68. Similarly, the court in Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 127-28 (E.D.N.Y. 2000), found that customary international law as reflected in the work of the Nuremberg tribunals as well as in United Nations resolutions provided a sufficient basis to assert jurisdiction under the Alien Tort Claims Act. In addition, the court in McKesson Corp. v. Islamic Republic of Iran, 116 F. Supp. 2d 13 (D.D.C. 2000), relied on customary international law as demonstrated by the decisions of the Iran-U.S. Claims Tribunal, as well as the Restatement (Third) of the Foreign Relations Law, in reaching its decision that Iran was liable for expropriating plaintiff's interest in an Iranian dairy company and for failing to pay dividends.

69. Courts have even relied upon commentaries of international bodies not charged with hearing cases or controversies for authoritative interpretations of treaty obligations. For example, in interpreting the meaning of the Geneva Conventions, the court in Noriega relied heavily upon a published commentary about the Geneva Conventions by the International Committee of the Red Cross as a widely recognized and respected authority. Noriega, 808 F. Supp. at 795 & n.6.<sup>21</sup> Based on the Red Cross Commentary, the Court ruled that the

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<sup>21</sup> Specifically, the court in Noriega relied upon 3 International Committee of the Red Cross, Commentary on the Geneva Conventions of 12 August 1949 (J. Pictet, ed. 1960).



defendant was entitled to certain rights set forth in the Geneva Convention Relative to the Treatment of Prisoners of War. Id. at 800-03.

**F. U.S. Courts Can Remedy a Violation of International Law Even in the Absence of a Constitutional or Statutory Violation**

70. Courts have also found that there can be a violation of customary international law, even where there has been no violation of the Constitution or any statute. See, e.g., Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980), aff=d on other grounds, 654 F.2d 1382 (10th Cir. 1981) (finding that Aarbitrary detention is prohibited by customary international law@ even where there was no violation of the Constitution or statutory law). Thus, it is not dispositive that the courts found no constitutional or statutory violations in Mr. Garza=s direct appeal and Section 2255 petition. The instant petition is the first time that Mr. Garza=s treaty-based rights have been brought - or could have been brought - before a U.S. court, and this Court need not find a constitutional or statutory violation in order to enforce the Commission=s decision as to Mr. Garza.

**PRAYER FOR RELIEF**

For all the foregoing reasons and for the reasons set forth in the accompanying motion for stay of execution and memorandum in support of said motion, petitioner Juan Garza respectfully requests a judgment invalidating his sentence of death, staying his execution until a final judgment on this petition is entered, ordering that he be released from the custody of the Respondent unless he is accorded a new sentencing hearing, and granting such other and further relief as this Court deems just and proper.

Dated: New York, New York April 23, 2001

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