

WorldCourts™

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 61/03; Petition 4446/02
Session: Hundred and Eighteenth Regular Session (7 – 24 October 2003)
Title/Style of Cause: Roberto Moreno Ramos v. United States
Doc. Type: Decision
Decided by: President: Jose Zalaquett;
First Vice-President: Clare K. Roberts;
Second Vice-President: Susana Villaran;
Commissioner: Julio Prado Vallejo.
Commission Member Prof. Robert Goldman, a national of the United States, did not take part in the discussion and voting on this case, in accordance with Article 17(2) of the Commission's Rules of Procedure.
Dated: 10 October 2003
Citation: Moreno Ramos v. United States, Petition 4446/02, Inter-Am. C.H.R., Report No. 61/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)
Represented by: APPLICANT: the law firm of Sergi & Associates
Terms of Use: Your use of this document constitutes your consent to the Terms and Conditions found at www.worldcourts.com/index/eng/terms.htm

I. SUMMARY

1. On November 4, 2002, the Inter-American Commission on Human Rights (hereinafter the “Commission”) received a petition dated October 31, 2002 from the Texas law firm of Sergi & Associates (hereinafter the “Petitioners”) against the Government of the United States of America (hereinafter the “State” or “United States”). The petition was presented on behalf of Mr. Roberto Moreno Ramos (hereinafter “Mr. Moreno Ramos” or “Moreno Ramos”), a citizen of Mexico who is incarcerated on death row in the State of Texas. The petition indicated that Mr. Moreno Ramos was convicted on March 18, 1993 of the capital murder of his wife and two children and sentenced to death on March 23, 1993. The petition also indicated that the Texas trial court had scheduled a hearing for November 12, 2002 to determine whether to schedule Mr. Moreno Ramos’ execution and that the District Attorney was seeking a February 12, 2003 execution date. As of the date of this report, the Commission has not been apprised of an established date for Mr. Moreno Ramos’ execution.

2. The petition alleges that the State is responsible for violations of Mr. Moreno Ramos’ rights under Articles I, II, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter the “American Declaration” or the “Declaration”), based upon deficiencies in the fairness of the criminal proceedings against him, including an alleged failure on the part of the State to notify Mr. Moreno Ramos of his rights to consular notification and access at the time of his arrest in violation of Article 36 of the Vienna Convention on Consular Relations. The Petitioners also claim that Mr. Moreno Ramos has exhausted domestic remedies,

or has been denied access to the remedies under domestic law or has been prevented from exhausting them, in respect of the allegations raised before the Commission, and therefore that his petition is admissible.

3. The State claims in response to the petition that Mr. Moreno Ramos has failed to exhaust his domestic remedies as required under the Commission's Rules of Procedure, and that the issues raised by the Petitioners are either beyond the Commission's competence, are barred from consideration based on duplication of proceedings, or are without merit.

4. As set forth in the present report, having examined the information available and the contentions on the question of admissibility, and without prejudging the merits of the matter, the Commission decided to admit the claims in the present petition relating to Articles I, II, XVIII, XXV, and XXVI of the American Declaration and to continue with the analysis of the merits of the case.

II. PROCEEDINGS BEFORE THE COMMISSION

5. Following the receipt of the Petitioners' petition, which was designated as Petition P4446/02, the Commission transmitted the pertinent parts of the complaint to the United States by means of a note dated November 8, 2002 with a request for observations within two months as established by the Commission's Rules of Procedure. By note of the same date, the Commission informed the Petitioners that the pertinent parts of their petition had been transmitted to the State.

6. Also on November 8, 2002, the Commission granted precautionary measures in favor of Mr. Moreno Ramos, whose execution date was, at that time, to be scheduled at a hearing before the trial court on November 12, 2002. The Commission requested that the United States take the necessary measures to preserve Mr. Moreno Ramos' life pending the Commission's investigation of the allegations in his petition.

7. In a note dated November 13, 2002, the Permanent Mission of the United States to the Organization of American States informed the Commission that it was coordinating with the State of Texas and the Office of the Legal Advisor in the United States Department of State to provide a response to the Commission's request for precautionary measures in relation to Mr. Moreno Ramos. In a subsequent note to the Commission dated January 6, 2003, the State requested an extension of time of 30 days within which to respond to the Commission's request. By communication to the State dated January 21, 2003, the Commission granted the State's request for an extension of time.

8. By means of a note dated February 13, 2003 and received by the Commission on February 14, 2003, the State transmitted its response to the Petitioners' petition. In a note dated February 20, 2003, the Commission transmitted the pertinent parts of the State's response to the Petitioners.

9. On March 31, 2003, the Commission received from the Petitioners their observations dated March 28, 2003 regarding the State's response of February 13, 2003. By note dated April

8, 2003, the Commission transmitted the pertinent parts of the Petitioners' March 28, 2003 observations to the State with a request for a response within 30 days. The Commission did not receive any further observations from the State within the prescribed time period.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

10. According to the petition, Roberto Moreno Ramos is a citizen of Mexico who is incarcerated on death row in the State of Texas. The petition indicates that Mr. Moreno Ramos was convicted on March 18, 2003 of the capital murders of his wife and two children and sentenced to death on March 23, 2003.

11. The Petitioners argue that the Commission has jurisdiction to entertain their petition, on the basis that the American Declaration of the Rights and Duties of Man is binding on the United States as a member of the Organization of American States and the Commission is competent to promote the observance of and respect for the rights in the Declaration in respect of all OAS member states.[FN1]

[FN1] Petitioners' petition dated November 2, 2002, p. 8, citing Case 9647 (United States), Res. 3/87 of 27 March 1987, in 1986-87 Annual Report of the IACHR, OEA/Ser.L/L/V/II.71, doc. 9, rev. 1 (22 September 1987) at 147 et seq.

12. With regard to the admissibility of the petition, the Petitioners argue that Mr. Moreno Ramos has exhausted available domestic remedies within the United States, or has been denied access to the remedies under domestic law or has been prevented from exhausting them, in respect of the allegations raised before the Commission. In support of this allegation, the Petitioners provided information concerning the various legal proceedings pursued by Mr. Moreno Ramos before the U.S. domestic courts.

13. In particular, the Petitioners' information indicates that on direct appeal, the Texas Court of Criminal Appeals affirmed Mr. Moreno Ramos' conviction on June 26, 1996 and the United States Supreme Court denied certiorari from that decision on April 28, 1997. Mr. Moreno Ramos next filed a post-conviction application, which was denied by the Texas Court of Criminal Appeals on July 15, 1998.

14. The petition also indicates that Mr. Moreno Ramos pursued post-conviction proceedings before the U.S. federal courts. In particular, he filed a petition for a writ of habeas corpus in the Federal District Court for the Southern District of Texas on April 2, 1999, which denied his petition on March 2, 2000. Mr. Moreno Ramos then appealed this decision to the Fifth Circuit Court of Appeals on May 31, 2000, which denied relief on February 14, 2001, and the U.S. Supreme Court denied Mr. Moreno Ramos' petition for a writ of certiorari in respect of this decision on October 7, 2002.

15. The Petitioners acknowledge that, with one exception, the legal claims raised in their petition have not been presented to the courts of the United States, in the proceedings described above or otherwise. They suggest, however, that Mr. Moreno Ramos should be excused from exhausting on these issues, on the ground that the United States failed to afford due process of law for the violations alleged. More particularly, the Petitioners claim that Mr. Moreno Ramos was in no way to blame for his failure to exhaust these arguments, but rather fell victim to his lawyers' incompetence. The Petitioners contend that Mr. Moreno Ramos' trial counsel was unprepared and ineffective and therefore failed to present any mitigating evidence at the penalty phase of the trial, made no attempt to convince the jury to sentence Mr. Moreno Ramos to life imprisonment, and failed to preserve the international arguments now raised before the Commission by raising them at that stage. Mr. Moreno Ramos' attorney on appeal similarly failed to raise these claims. The Petitioners state in this regard that Texas has long provided incompetent lawyers for defendants facing capital murder charges and, unlike other states, has no central agency responsible for providing specialized representation in death penalty cases.[FN2]

[FN2] Petitioners' petition dated November 2, 2002, p. 5, citing Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty* at 77-118 (2000).

16. Further in this regard, the Petitioners argue that any attempt to exhaust his domestic remedies by raising new legal arguments, such as the violation of Article 36 of the Vienna Convention on Consular Relations, ineffective assistance of counsel at the penalty phase, the admission of an uncharged offense, or the discriminatory remarks of the prosecution in this case, would be fruitless, as state and federal legislation stringently limits the ability of individuals to bring "successive" or "subsequent" post-conviction application.[FN3] With respect to the claim under Article 36 of the Vienna Convention on Consular Relations in particular, Mr. Moreno Ramos' attorney failed to object to this violation at the time of trial and the Petitioners claim that as a result the legal argument was waived and it could not be challenged in any subsequent proceedings.[FN4]

[FN3] Petitioners' petition dated November 2, 2002, p. 6, citing Tex. Code Crim. P. 11.071, Sec. 5 (a) (applicant filing subsequent application must demonstrate that factual or legal basis for the claim was previously unavailable, and setting forth stringent burden of proof); 28 U.S.C. § 2244(b)(2) (claim presented in second habeas corpus application that was not presented in a prior application shall be dismissed unless the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable). The Petitioners also note that in August 2002, the Texas Court of Criminal Appeals and the United States Supreme Court refused to review the case of Javier Suarez Medina, who had filed a petition with the Commission raising two of the same claims raised by Mr. Moreno Ramos and who was executed on August 14, 2002 before the Commission had an opportunity to address his claims.

[FN4] Petitioners' petition dated November 2, 2002, p. 5, citing *Breard v. Greene*, 523 U.S. 371 (1998).

17. Based upon these submissions, the Petitioners argue that requiring Mr. Moreno Ramos to file a second post-conviction application at this juncture would serve only to delay the Commission's review of his arguments, would fail to protect Mr. Moreno Ramos from illegal execution, and indeed would enhance the likelihood that Mr. Moreno Ramos will be executed before the Commission is able to process his petition.

18. Finally, the Petitioners contend that the facts raised in the Petition are largely undisputed and therefore that Mr. Moreno Ramos has established prima facie violations of Articles I, II, XV, XVIII and XXVI of the American Declaration. In particular, the Petitioners claim that the United States failed to notify Mr. Moreno Ramos of his rights to consular notification and access at the time of his arrest in violation of Article 36 of the Vienna Convention on Consular Relations, that prosecutors introduced evidence of a crime for which Mr. Moreno Ramos was neither tried nor convicted at the penalty phase of his trial, that Mr. Moreno Ramos was denied a fair trial because his attorneys failed to investigate or present any mitigating evidence at the penalty phase of his trial, that prosecutors made inflammatory arguments at the sentencing phase of the trial designed to draw jurors' attention to Mr. Moreno Ramos' status as an undocumented Mexican immigrant, and that the trial court failed to instruct jurors that Mr. Moreno Ramos would not be eligible for parole for 35 years if given a life sentence.

19. In their March 28, 2003 observations on the State's response to their petition, the Petitioners claim that the exhaustion of domestic remedies requirement should be excused in this case, because the legislation of the United States fails to afford due process for the protection of the rights allegedly violated, and because the party alleging the violation has been hindered in his access to the domestic remedies. In particular, the Petitioners argue that United States legislation imposes severe limitations on the ability of death row inmates to obtain judicial review, and that it is no longer true that multiple courts will carefully and meticulously scrutinize the procedural fairness of the original trial and the quality of the evidence supporting a death sentence.[FN5] They also indicate that no domestic recourse is available to Mr. Moreno Ramos apart from executive clemency, but that in Texas, clemency review provides no meaningful review whatsoever.[FN6]

[FN5] Petitioners' March 28, 2003 Observations Regarding the State's response dated February 13, 2003, p. 2, citing Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty* 119 (2000), www.texasdefender.org/study.

[FN6] Petitioners' March 28, 2003 Observations Regarding the State's response dated February 13, 2003, p. 2, citing Amnesty International, *Clemency Procedures in Texas: Killing without Mercy*, AI Index AMR 51/85/99; Death Penalty Information center, [http:// deathpenaltyinfo.org](http://deathpenaltyinfo.org) (indicating that as of March 21, 2003, Texas had executed 300 prisoners since reinstating the death penalty in 1977, but that only one Texas death sentence has been commuted on humanitarian grounds).

20. The Petitioners also argue that the United States has further hindered Mr. Moreno Ramos in obtaining access to domestic remedies by providing him with incompetent and poorly trained,

court-appointed lawyers who failed to raise meritorious claims at trial, on appeal and in state and federal post-conviction proceedings. They assert that Mr. Moreno Ramos, as an indigent, foreign defendant, had no means to retain legal counsel and was entirely dependent on his court-appointed lawyers to fulfill their constitutional function and provide a vigorous defense. The Petitioners also claim that Texas has no state-wide agency responsible for providing specialized representation in capital cases, that a great majority of lawyers who handle death penalty cases in Texas are sole practitioners lacking the experience and resources necessary to properly defend their clients, and that as a result capital defendants frequently receive deficient legal representation. In Mr. Moreno Ramos' case, the Petitioners assert that none of his lawyers, during trial, appeal, or in post-conviction proceedings, conducted a mitigation investigation or raised any claims that were not already on the record. The Petitioners also argue that Mr. Moreno Ramos cannot be faulted for the failings of his appointed counsel, which they claim constitute discrete violations of Articles I, XVIII and XXVI of the American Declaration.

21. Further, the Petitioners argue that requiring Mr. Moreno Ramos to exhaust domestic remedies would be futile, because procedural obstacles of the State's own devising preclude the domestic courts from hearing the claims that Mr. Moreno Ramos wishes to raise. Rather, it would require a court to re-open a procedure that was previously completed, which, according to the Petitioners, is so unlikely under United States law that it cannot be deemed an adequate and effective remedy requiring exhaustion.[FN7]

[FN7] Petitioners' March 28, 2003 Observations Regarding the State's response dated February 13, 2003, p. 5, citing Eur. Comm. H.R., X and Church of Scientology v. Sweden, 7805/77, May 5, 1979, 16 D.R. 68; G v. United Kingdom, 11932/86, May 9, 1988, 56 D.R. 199; Karaduman v. Turkey, 16278/90, (Dec.) May 3, 1993, 74 D.R. 93.

22. The Petitioners also argue that a claim of denial of due process guarantees falls within the Commission's competence, including due process deficiencies stemming from violations of the right to consular information and notification.[FN8] They point out in this regard that the United States does not dispute that it failed to provide consular notification to Mr. Moreno Ramos without delay, but attempts to minimize the effects of the failure of consular notification on Mr. Moreno Ramos' case through unsupported conjecture as to what Mexican consular officials would or would not have done had the violations not occurred. The Petitioners assert that to the extent that such speculation is relevant, it falls within the merits determination rather than admissibility. They also note that by the time Mexican consular officials learned of Mr. Moreno Ramos' detention, jury selection was already underway, at which point there was no time left for trial preparation, development of defense themes, and investigation of previously-unexplored mitigating evidence.

[FN8] Petitioners' March 28, 2003 Observations Regarding the State's response dated February 13, 2003, p. 6, citing Report N° 52/02, Case N° 11.753, Martinez Villareal v. United States, Annual Report of the IACHR 2002, paras. 62, 77.

23. Further, the Petitioners assert, contrary to the State's submissions, that the clemency process in the state of Texas cannot be considered sufficient to provide "review and reconsideration" of Vienna Convention violations as required by the International Court of Justice in its LaGrand decision, but rather that such review and reconsideration must be judicial in nature. The Petitioners argue that clemency procedures are entirely discretionary, non-reviewable and subjective and therefore fail to constitute reasonable, consistent and effective remedies necessary to remedy breaches of the state's international obligations.

24. Moreover, the Petitioners dispute the State's contention that Mr. Moreno Ramos' petition is inadmissible as a duplication of procedures due to the recent proceedings instituted by Mexico before the International Court of Justice in the Case of Avena and other Mexican Nationals (Mexico v. United States). They assert in this regard that the ICJ proceeding fails to satisfy the elements of Article 33(1) of the Commission's Rules of Procedure governing duplication, or fall within one of the exceptions under Article 33(2), on three interrelated grounds. They first assert that the application before the ICJ cannot be described as an "individual petition", as only states, and not individuals, have standing before the ICJ and Mexico has no mandate from Mr. Moreno Ramos. For the same reasons, the Petitioners assert that Mr. Moreno Ramos cannot be said to have a case "pending settlement" before the ICJ. They note in this regard that Mr. Moreno Ramos' case is one of 51 individual cases cited by Mexico to "illustrate the systemic nature of the United States' violation of Article 36 in capital cases" and in which Mexico is seeking restitutio in integrum in its own right, and argue that there is no assurance that any eventual ICJ judgment on the merits will lead to an effective settlement that would specifically address the claims raised by Mr. Moreno Ramos.

25. Further, the Petitioners argue that subject matter of Mexico's ICJ application cannot be said to duplicate the range of claims raised by Mr. Moreno Ramos before the Commission, as the ICJ proceeding is a dispute between states over the interpretation and application of the Vienna Convention on Consular Relations, while Mr. Moreno Ramos has alleged that he is the victim of violations of the American Declaration, the latter of which the ICJ has no mandate to address. The Petitioners also contend that the subject matter of Mr. Moreno Ramos' complaint before the Commission is not limited to claims stemming from the violation of his consular rights, but include other claims relating to Mr. Moreno Ramos' due process rights, including the introduction of prior unadjudicated offenses during the sentencing phase of his trial, and therefore his Commission claim cannot be said to essentially duplicate the ICJ proceedings.

26. The Petitioners also submit that Mr. Moreno Ramos' complaint before the Commission cannot be considered to duplicate the ICJ application based upon the Commission's case law interpreting Article 33 of its Rules, as the two proceedings cannot be said to address the same legal claims and guarantees, do not involve the same facts and only tangentially address the same person.[FN9]

[FN9] Petitioners' March 28, 2003 Observations Regarding the State's response dated February 13, 2003, pp. 11-12 citing Report N° 96/98, Case N° 11.827, Peter Blaine v. Jamaica, Annual Report of the IACHR 1998, para. 42; Report

Nº 25/99, Case Nº 12.018, Steve Shaw v. Jamaica, Annual Report of the IACHR 1998, para. 24.

27. Alternatively, the Petitioners argue that if the Commission is not yet persuaded that the petition satisfies the exceptions to the duplication provision of its rules, it should defer its treatment of admissibility until the debate and decision on the merits of the case as provided for in Article 37(3) of the Commission's Rules.

28. Finally, the Petitioners emphasize that, in accordance with jurisprudence of the Commission and the Inter-American Court, Mr. Moreno Ramos' petition must receive heightened scrutiny because of the enhanced due process protections required in capital cases. The Petitioners assert that the due process issues raised in Mr. Moreno Ramos petition are precisely those that have required both heightened scrutiny and a meaningful remedy in past cases, and that the legitimacy of the judgment against Mr. Moreno Ramos' rests upon the legitimacy of his process. In this respect, the Petitioners argue that where due process requirements have not been complied with, a death sentence and its execution are both rendered arbitrary, and accordingly, were the State to attempt to execute Mr. Moreno Ramos based upon the criminal proceedings for which he is presently convicted and sentenced, this would constitute an arbitrary deprivation of his life contrary to Article I of the American Declaration.

B. Position of the State

29. In its February 13, 2003 response to the Petitioners' petition, the State argues that the Commission should declare the Petitioners' claims inadmissible on five grounds, namely that Mr. Moreno Ramos has failed to exhaust his domestic remedies, the Commission is not competent to entertain Mr. Moreno Ramos' claim under Article 36 of the Vienna Convention on Consular Relations, Mr. Moreno Ramos' claim on consular notification is pending before the International Court of Justice and is therefore inadmissible for duplicity, Mr. Moreno Ramos' due process claims are without merit, and the petition fails to state facts that constitute a violation of principles under the American Declaration.

30. The State first provides an accounting of the factual and procedural history to the case, according to which a Texas jury found Roberto Moreno Ramos guilty in 1993 of the 1992 murders of his wife, Leticia, and his two youngest children, Abigail and Jonathan. According to the State:

[. . .] Mr. Moreno Ramos slew his wife and children with a sledge hammer and then buried their bodies under the bathroom floor. An investigation in the United States and Mexico revealed that Mr. Moreno Ramos had planned to marry a woman with whom he had been having an extramarital relationship. On February 7, 1992, a neighbor heard a woman's scream and Mr. Moreno Ramos' wife and children were never seen again. Three days later, Mr. Moreno Ramos married his lover. With his consent and pursuant to two search warrants, authorities searched his home and found blood throughout the house. They also found a blood-stained sledge hammer at his new wife's home in Mexico. Moreno Ramos was elusive about his family's exact whereabouts. Later he admitted to authorities to killing only his wife, even though his wife and

children died from similar injuries to the head inflicted with a similar weapon and had been buried together.

Law enforcement officials questioned Moreno Ramos on March 30, 1992 regarding the reported disappearance of his wife and children. Moreno Ramos voluntarily accompanied law enforcement officials to the police station where officers read him his Miranda rights before questioning him, telling him that he had a right to legal counsel and to remain silent. After questioning, officers learned of an outstanding arrest warrant for Moreno Ramos for traffic violations and arrested him. From there, he was indicted for murder, tried, and sentenced. [FN10]

[FN10] State's response dated February 13, 2003, p. 2.

31. The State also indicated that Mr. Moreno Ramos was sentenced to death in accordance with the provisions of the Texas Penal Code and that his appeal from his conviction was dismissed by the Texas Court of Criminal Appeal on June 26, 1996, with the U.S. Supreme Court refusing certiorari on April 28, 1997.[FN11] Mr. Moreno Ramos also pursued a writ of habeas corpus before the state courts, which was dismissed by the Texas Court of Criminal Appeals on July 15, 1998, and before the federal courts, which was dismissed by the Federal District Court for the Southern District of Texas on March 2, 2000, followed by the US Court of Appeals for the Fifth Circuit on February 14, 2001, and the U.S. Supreme Court denied certiorari on October 7, 2002.[FN12]

[FN11] State's response dated February 13, 2003, p. 2, citing *State of Texas v. Ramos*, Hidalgo County District Court, June 26, 1996; *Ramos v. State*, 934 S.W. 2d 358 (Tex. Cr. App. 1996); *Moreno Ramos v. Texas*, 117 S.Ct. 1556 (1997).

[FN12] State's response dated February 13, 2003, p. 2, citing *Ex parte Ramos*, 977 S.W. 2d 616 (Tex. Cr. App. 1998); *Ramos v. Cockrell*, 123 S.Ct. 248 (2002).

32. Concerning the admissibility of Mr. Moreno Ramos' claims, the State argues that Mr. Moreno Ramos has failed to exhaust his remedies within the United States judicial system. In particular, the State notes the Petitioners' acknowledgement that only one of the five claims raised before the Commission was raised in United States courts. The State argues that Mr. Moreno Ramos has had since 1993 to raise these claims, and that his claim concerning the failure to advise him of the right to consular assistance could have been raised by him at trial, as it must have been known to his defense lawyer as well as to Mexican consular officials who became aware of his case before his trial. Further, the State argues that Mr. Moreno Ramos' remaining claims, relating to the introduction of evidence of unadjudicated offenses, ineffective assistance of counsel, and inflammatory arguments at the sentencing phase of the trial, could have and should have been raised by him in his initial appeals from conviction and sentence. The State also contends that Mr. Moreno Ramos admitted that he failed to raise his ineffective assistance of counsel claim in court and therefore waived it.

33. In addition, the State disputes the Petitioners' contention that exhausting his domestic remedies by raising new legal arguments at this stage would be fruitless, on the basis that the role of United States courts is not to second-guess lawyers' trial strategies and will not raise issues if parties do not raise them. The State argues that if a petitioner does not raise an issue before a court, it deprives the court of the opportunity to consider it, and that the United States, as a matter of sovereignty, has the right to hear all claims before they are taken to an international forum. In this respect, the State contends that international tribunals were not intended to replace national adjudication, and that the failure of Mr. Moreno Ramos to raise his claims within the national system when he had opportunity to do so was a fatal flaw to the admissibility of his petition.

34. The State also argues that Mr. Moreno Ramos has no additional remedy under the Convention for not receiving consular notification because the Commission is without competence to review claims brought under the Vienna Convention on Consular Relations. The State asserts in this regard that it disagrees with Advisory Opinion OC-16/99 of the Inter-American Court of Human Rights that a failure of consular notification is a violation of human rights or of due process of law. Alternatively, the State contends that the Petitioners' reasoning as to the alleged violation of Article 36(1)(b) of the VCCR is flawed because consular officials were in fact aware of Mr. Moreno Ramos' situation by the time of his trial and were able to attend the trial and provide assistance at that time. Correspondingly, the State claims that Mr. Moreno Ramos can identify no point in time in either the trial or appellate proceedings when he was denied access to a remedy within the meaning of Article 37(2)(b) of the Commission's Rules. The State also argues that the Petitioners have failed to demonstrate that Mexican consular officials did anything other than let the trial proceed while they sat and listened, or that they would have provided any greater degree of assistance had they learned of his situation sooner.

35. Further, the State contends that the text and negotiation history of the VCCR fail to support any argument by the Petitioners, based on the decision of the International Court of Justice in the LaGrand case, that the Convention requires the United States and other states parties to the Convention to amend their internal law to provide for an automatic remedy of changing a sentence when there is a failure to advise of the right of consular notification. In any event, the State argues that the Petitioners' claim is consistent with the International Court of Justice's conclusion that, in cases of violations of Article 36 in which foreign nationals are convicted and sentenced to severe penalties, the United States is expected to provide "review and reconsideration of the conviction and sentence" and that such review and reconsideration should be "by means of the [United States'] own choosing." The State asserts in this regard that it has been providing review and reconsideration in accordance with the LaGrand decision and will continue to do so. Concerning Mr. Moreno Ramos' case in particular, the State alleges that the United States Department of State has already informed the Office of the Governor of Texas of the consular relations issue and asked him to investigate the case,[FN13] that the Hidalgo County (Texas) District Court judge agreed to hear the Mexican General Consul's concerns regarding Mr. Moreno Ramos, and that if he so wishes, he can seek review and reconsideration of his sentence through the established parole process of the State of Texas.

[FN13] State's response dated February 13, 2003, p. 5, citing Letter from Clyde Howard, Coordinator for Consular Notification, Bureau of Consular Affairs, U.S. Department of State, to David Zimmerman, Assistant General Counsel, Office of the Governor of Texas, dated November 18, 2002; Letter from J. Kevin Paterson, Assistant General Counsel, Office of the Governor of Texas, to Clyde Howard, Coordinator for Consular Notification, Bureau of Consular Affairs, U.S. Department of State, dated December 19, 2002.

36. The United States also opposes the admissibility of the Petitioners' petition on the ground of duplication. In particular, the State indicates that on February 5, 2003, the International Court of Justice issued a provisional measures order with respect to Mr. Moreno Ramos and two other Mexican nationals who are subject to the death penalty and who allegedly were not advised in a timely manner of their right to request consular notification.[FN14] The State also indicated that the Court has not yet entertained Mr. Moreno Ramos' case, presented by Mexico, on the merits. In these circumstances, the State argues that consideration of Mr. Moreno Ramos' petition by the Commission would result in a duplication of effort and expense by international tribunals, and therefore that the petition should be deemed inadmissible as duplicative.

[FN14] State's response dated February 13, 2003, p. 5, citing Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America).

37. Finally, the State argues that the merits of the petition are manifestly groundless and should also be rejected as inadmissible on this basis. In particular, the State rejects the Petitioners' contention that Mr. Moreno Ramos was denied due process at various stages in the proceedings. According to the State, the record clearly reflects that Mr. Moreno Ramos was afforded due process consistent with the U.S. Constitution and all applicable international norms, through review by the Hidalgo County District Court, the Federal District Court for the Southern District of Texas, the Texas Court of Criminal Appeals on two occasions, the Fifth Circuit Court of Appeals, and the United States Supreme Court on two occasions.[FN15] The State also reiterated its contention in this regard that there is no sound basis for asserting that a failure to advise a foreign national of his right to have his consular officials notified of his arrest or detention is a violation of the due process rights of the accused, and that the Inter-American Court's Advisory Opinion OC-16/99 is fundamentally wrong to the extent that it suggests otherwise. Further, the State argues that Mr. Moreno Ramos' sentence does not violate the right to life under Article I of the American Declaration, because capital punishment for the most serious crimes is consistent with international law, including applicable human rights treaties, when carried out in accordance with due process. As Mr. Moreno Ramos' crime was sufficiently heinous to merit a death sentence, and as he received all appropriate due process, he has not been the victim of a violation of Article I of the Declaration.

[FN15] State's response dated February 13, 2003, p. 6, citing Ramos v. State, 934 S.W. 2d 358 (Tex. Cr. App. 1996); Moreno Ramos v. Texas, 117 S.Ct. 1556 (1997); Ex Parte Ramos, 977 S.W. 2d 616 (Tex. Cr. App. 1998); Ramos v. Cockrell, 123 S. Ct. 248 (2002).

IV. ANALYSIS

A. Competence of the Commission *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

38. Upon considering the record before it, the Commission considers that it has competence *ratione personae* to entertain the claims in the present petition. Under Article 23 of the Rules of Procedure of the Commission, the Petitioners are authorized to file complaints alleging violations of rights protected under the American Declaration of the Rights and Duties of Man. The alleged victim, Mr. Roberto Moreno Ramos, is a person whose rights are protected under the American Declaration, the provisions of which the State is bound to respect in conformity with the OAS Charter, Article 20 of the Commission's Statute and Article 49 of the Commission's Rules of Procedure. The United States has been subject to the jurisdiction of the Commission since June 19, 1951, the date on which it deposited its instrument of ratification of the OAS Charter.

39. The Commission also considers that it is competent *ratione temporis* to examine the complaints because the petition alleges facts that occurred on and after March 30, 1992, the date on which Mr. Moreno Ramos was arrested by the police after being questioned regarding the disappearance of his wife and children. The facts alleged therefore occurred subsequent to the date on which the United States' obligations under the American Declaration took effect.

40. In addition, the Commission finds that it is competent *ratione loci*, given that the petition indicates that Mr. Moreno Ramos was under the jurisdiction of the United States at the time the alleged events occurred, which reportedly took place within the territory of that State.

41. Finally, with regard to the competence *ratione materiae* of the Commission in the present proceeding, the State has contended that the Commission lacks jurisdiction to entertain the Petitioners' claims concerning Mr. Moreno Ramos' failure to receive consular notification because the Commission was fundamentally established to hear petitions and communication regarding the American Convention and the American Declaration, not the Vienna Convention on Consular Relations. In this respect, the State indicates that it does not agree with the finding by the Inter-American Court in its Advisory Opinion OC-16/99 that failure of consular notification is a violation of human rights or of due process.

42. In considering the State's objection on this point, the Commission observes that in its October 2002 decision in the case of *Martinez Villareal v. United States*, the Commission determined that it was appropriate to consider compliance by a state party to the Vienna Convention on Consular Relations with the requirements of Article 36 of that treaty in interpreting and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to prison or to custody pending trial, or is detained in any other manner by that state. In particular, the Commission found that it could consider the extent to which a state party has given effect to the requirements of Article 36 of the Vienna Convention on Consular Relations for the purpose of evaluating that state's compliance with a foreign

national's due process rights under Articles XVIII and XXVI of the American Declaration.[FN16] In reaching this conclusion, the Commission found support in the Inter-American Court's Advisory Opinion 16/99 on the Rights to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, as well as from the judgment of the International Court of Justice in the LaGrand Case.[FN17] Based upon the information and arguments before it in the present complaint, the Commission sees no reason to depart from its conclusions in this regard. The State did not challenge the Commission's subject matter jurisdiction to entertain the other claims raised by the Petitioners' complaint.

[FN16] Report N° 52/02, Case 11.753, Ramon Martinez Villareal v, United States, Annual Report of the IACHR 2002, para. 77.

[FN17] Id., paras. 65-75, citing I/A Court H.R., Advisory Opinion OC-16/99 of October 1, 1999, The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, (Ser. A) N° 16 (1999); International Court of Justice, LaGrand Case (Germany v. United States), Judgment of June 27, 2001, General List N° 104.

43. Accordingly, the Commission considers that it is competent *ratione materiae* to examine the Petitioners' claims of violations of Articles II, XVII, XVIII and XXVI of the American Declaration, including any implications that the State's alleged non-compliance with Article 36 of the Vienna Convention on Consular Relations may have had upon Mr. Moreno Ramos' rights to due process and to a fair trial.

B. Duplication

44. Article 33 of the Commission's Rules of Procedure provides as follows:

1. The Commission shall not consider a petition if its subject matter:

- a. is pending settlement pursuant to another procedure before an international governmental organization of which the State concerned is a member; or,
- b. essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member.

2. However, the Commission shall not refrain from considering petitions referred to in paragraph 1 when:

- a. the procedure followed before the other organization is limited to a general examination of the human rights situation in the State in question and there has been no decision on the specific facts that are the subject of the petition before the Commission, or it will not lead to an effective settlement; or,
- b. the petitioner before the Commission or a family member is the alleged victim of the violation denounced and the petitioner before the other organization is a third party or a nongovernmental entity having no mandate from the former.

45. The State has objected to the admissibility of Mr. Moreno Ramos' petition on the ground that its subject matter is pending settlement pursuant to another procedure before an international governmental organization of which the state concerned is a member, or essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization of which the state concerned is a member, contrary to Article 33(1) of the Commission's Rules of Procedure. In particular, the State argues that Mr. Moreno Ramos' situation is one of numerous cases incorporated by Mexico in a proceeding recently brought by that state before the International Court of Justice against the United States pursuant to the Vienna Convention on Consular Relations Optional Protocol Concerning the Compulsory Settlement of Disputes, namely the case of *Avena and other Mexican Nationals (Mexico v. United States)*. The State suggests that the same issues have been raised before the ICJ as are contained in the Petitioners' petition, and therefore consideration of the petition by the Commission "would result in a duplication of effort and expense by international tribunals."

46. The Petitioners have disputed the State's contention, essentially on the basis that the proceeding before the ICJ does not constitute a proceeding to which Article 33(1) of the Commission's Rules applies, and alternatively that the exceptions to the duplication requirement under Article 33(2) of the Commission's Rules would permit the Commission to examine the petition notwithstanding the ICJ proceeding.

47. In light of the provisions of Article 33 of its Rules of Procedure, the Commission must first determine whether Mr. Moreno Ramos' petition may fall within the terms of Article 33(1), because the subject matter of his complaint is pending settlement before another international governmental organization of which the United States is a member, or because it essentially duplicates a petition pending before such an organization. In this regard, the Commission first concludes that the International Court of Justice, as an organ of the United Nations whose competence the United States has accepted through the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes,[FN18] constitutes an international governmental organization within the meaning of Article 33(1) in the circumstances of the present case.

[FN18] In this connection, the United States ratified the Charter of the United Nations on August 8, 1945 and the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes on November 24, 1969. See United Nations Treaty Data Base, <http://untreaty.un.org/>, visited September 24, 2003.

48. In order to determine whether the subject matter of Mr. Moreno Ramos' complaint before the Commission duplicates the proceeding before the ICJ, the Commission must first set forth its understanding of the nature and subject matter of the proceeding before the ICJ. According to the Application filed by Mexico against the United States in the *Avena* Case, the proceeding relates to 54 Mexican nationals who were arrested, detained, tried, convicted and sentenced to death in various states in the United States following proceedings in which Mexican authorities contend competent authorities failed to comply with their obligations under Article 36(1)(b) of the

Vienna Convention on Consular Relations.[FN19] It is apparent from Mexico's Application that an individual having the name Roberto Moreno Ramos has been included as one of the 54 Mexican nationals referred to in its proceeding.[FN20] There appears to be no disagreement between the parties that the individual named in the ICJ proceeding is also the alleged victim in the present proceeding before the Commission. Indeed, the ICJ Application explicitly refers to the fact that Mr. Moreno Ramos filed a petition with the Commission in November 2002.

[FN19] *Avena and other Mexican Nationals (Mexico v. United States of America)*, General List N° 128 (9 January 2003), para. 1 (<http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>).

[FN20] *Id.*, paras. 201-205 (stating as follows:

201. On 30 March 1992, law enforcement authorities in the State of Texas arrested Mr. Moreno Ramos, aged 37, on suspicion of murder. On 18 March 1993, Mr. Moreno Ramos was convicted of murder and on 23 March 1993, the trial court sentenced him to death.

202. Although prosecutors made reference to Mr. Moreno Ramos's Mexican nationality during his capital murder trial, the competent authorities at no time informed him of his rights to consular assistance. Not having been apprised on these rights, Mr. Moreno Ramos could not and did not exercise them before his trial.

203. Mexican consular officials learned of Mr. Moreno Ramos's detention through the media in February 1993, approximately 11 months after his arrest, by which time the trial was already underway. Having been unaware until that time of Mr. Moreno Ramos's detention, consular officials were unable to assist him during his pre-trial detention, a critical phase of any capital murder trial. Upon learning of his situation, Mexican consular authorities began rendering assistance, both legal and otherwise, to Mr. Moreno Ramos.

204. Mr. Moreno Ramos was denied relief by the Texas Court of Criminal Appeals, a federal district court, a United States court of appeals, and the United States Supreme Court. The violation of his Vienna Convention rights was never raised during his direct or collateral appeals. On 4 November 2002, Mr. Moreno Ramos filed a petition alleging violations of his human rights, and a request for precautionary measures, before the Inter-American Commission on Human Rights. In his petition, Mr. Moreno Ramos alleges that the State of Texas violated his right to consular notification, among other violations of his human rights. The Commission issued Precautionary Measures on 8 November 2002.

205. As Mr. Moreno Ramos has exhausted his primary appeals in the United States, the State of Texas may schedule his execution at any time.)

49. In its Application, the Government of the United Mexican States has requested the ICJ to adjudge and declare:

- (1) that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row described in this Application, violated its international legal obligation to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively on the Vienna Convention;
- (2) that Mexico is therefore entitled to restitution in integrum;

- (3) that the United States is under an international legal obligation not to apply the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise of the rights afforded by Article 36 of the Vienna Convention;
- (4) that the United States is under an international legal obligation to carry out in conformity with the forgoing international legal obligations any future detention of or criminal proceeding against the 54 Mexican nationals on death row or any other Mexican national in its territory, whether by a constituent, legislative, judicial, or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;
- (5) that the right to consular notification under the Vienna Convention is a human right;

and that, pursuant to the foregoing international legal obligations,

- (1) the United States must restore the status quo ante, that is, re-establish the situation that existed before the detention or, proceeding against, and convictions and sentences of, Mexico's nationals in violation on the United States international legal obligations;
- (2) the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended;
- (3) the United States must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the Vienna Convention, including by barring the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her right under the Convention; and
- (4) the United States, in light of the pattern and practice of violations set forth in this Application, must provide Mexico a full guarantee of the non-repetition of the illegal acts.[FN21]

[FN21] Id., para. 281.

50. It is also pertinent to observe that according to the international instruments governing the proceeding before the ICJ, in particular the Statute of the ICJ and the Optional Protocol to the Vienna Convention on Consular Relations, states are the only permissible parties to the proceedings.[FN22] Further, the Petitioners have stated that Mexico has no mandate from Mr. Moreno Ramos and has brought its claim before the ICJ in its own right, which the United States has not disputed. In addition, it is evident that in addition to allegations that the United States violated Mr. Moreno Ramos' right to consular information and notification and according his right to due process under Article XXVI of the Declaration, the Petitioners have claimed before the Commission due process violations based upon the quality of his legal representation and the nature of evidence introduced during the penalty phase of his capital proceedings.

[FN22] Statute of the International Court of Justice, Art. 34(1) (providing that “[o]nly states may be parties in cases before the Court.”); Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, Art. I (providing that “[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by an party to the dispute being a Party to the present Protocol.”).

51. In considering the State’s objection, the Commission notes that it is for the State, as the party raising the objection, to substantiate the juridical requirements of duplication before the Commission. In this respect, the Commission takes into consideration its previous jurisprudence according to which a prohibited instance of duplication under the Commission’s procedures involves, in principle, the same person, the same legal claims and guarantees, and the same facts adduced in support thereof.[FN23] Correspondingly, claims brought in respect of different victims, or brought regarding the same individual but concerning facts and guarantees not previously presented and which are not reformulations, will not in principle be barred by the prohibition of duplication of claims.[FN24]

[FN23] See e.g. Case 11.827, Report N° 96/98, Peter Blaine (Jamaica), Annual Report of the IACHR 1998, para. 43.

[FN24] Id., para. 45.

52. In the present case, the Commission considers on the information available that it cannot be said that the same parties are involved in the proceedings before the Commission and the ICJ, or that the proceedings raise the same legal claims and guarantees. In particular, it is evident that Mr. Moreno Ramos cannot be considered a party to the ICJ claim, as participants in contentious proceedings before the Court are limited to states. While the circumstances surrounding his criminal proceedings may comprise part of the matters considered by the ICJ in determining Mexico’s application, Mr. Moreno Ramos has no independent standing to make submissions in the proceeding or to request relief, and there is no requirement or certainty that Mexico will represent his interests before the ICJ. The State has not presented any evidence suggesting otherwise.

53. Nor can it be said that the same legal claims have been raised before both tribunals. The central issue before the ICJ is whether the United States violated its international obligations to Mexico under Articles 5 and 36 of the Vienna Convention on Consular Relations based upon its procedures in arresting, detaining, convicting, and sentencing 54 Mexican nationals on death row, including Mr. Moreno Ramos. The issue before the Commission, on the other hand, is whether the United States violated Mr. Moreno Ramos’ rights to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration, based upon five main grounds: the failure to provide Mr. Moreno Ramos with his right to consular information and notification under Article 36 of the Vienna Convention on Consular Relations; the provision of incompetent defense counsel in a capital case; the prosecution’s introduction of an unadjudicated offense to secure a death sentence; inflammatory arguments made by the prosecutors at the sentencing

phase of Mr. Moreno Ramos' trial; and errors in the trial judge's instructions to the jury. In the Commission's view, the Petitioners' petition before the Commission raises substantive issues that are distinct from those presented by Mexico to the International Court of Justice.

54. While the claims in both proceedings are similar to the extent that they require consideration of compliance by the United States with its obligations under Article 36 of the Vienna Convention, this matter is raised in two different contexts: the ICJ is asked to adjudicate upon the United States' international responsibility to the state of Mexico for violations of the VCCR, while this Commission is asked to evaluate the implications of any failure to provide Mr. Moreno Ramos with consular information and notification for his individual right to due process and to a fair trial under the American Declaration of the Rights and Duties of Man. This contextual discrepancy highlights the broader distinction between the mandate and purpose of the ICJ and the Commission. The function of the ICJ, as defined through Article I of the Optional Protocol to the Vienna Convention on Consular Relations, is to settle, as between states, disputes arising out of the interpretation and application of the Vienna Convention on Consular Relations. This Commission, on the other hand, is the principal human rights organ of the Organization of American States charged with promoting the observance and protection of human rights in the Americas, which includes determining the international responsibility of states for alleged violations of the fundamental rights of persons.

55. Based upon the foregoing, the Commission considers that the Petitioners' petition does not duplicate the Avena proceeding before the International Court of Justice within the meaning of Article 33(1) of the Commission's Rules, and therefore finds no bar to the admissibility of the Petitioners' claims on the ground of duplication.

C. Exhaustion of Domestic Remedies

56. Article 31(1) of the Commission's Rules of Procedure specifies that, in order to decide on the admissibility of a matter, the Commission must verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with generally recognized principles of international law. Article 31(2) of the Commission's Rules of Procedure specifies that this requirement does not apply if the domestic legislation of the state concerned does not afford due process of law for protection of the right allegedly violated, if the party alleging the violation has been denied access to domestic remedies or prevented from exhausting them, or if there has been an unwarranted delay in reaching a final judgment under the domestic remedies.

57. In addition, the Inter-American Court of Human Rights has observed that domestic remedies, in order to accord with generally recognized principles of international law, must be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they were designed.[FN25]

[FN25] I/A Court H.R., Velásquez Rodríguez Case, Merits, Judgment of July 29, 1988, Ser. C N° 4, (1988), paras. 64-66.

58. Further, when a petitioner alleges that he or she is unable to prove exhaustion, Article 31(3) of the Commission's Rules of Procedure provides that the burden then shifts to the State to demonstrate that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.

59. In the present case, the Petitioners have acknowledged that, with one exception, namely Mr. Moreno Ramos' argument that the state trial court erred by failing to instruct jurors regarding his parole eligibility, the legal claims raised in their petition have not been presented to the courts of the United States. They suggest, however, that Mr. Moreno Ramos should be excused from exhausting on these issues, on the ground that the United States failed to afford due process of law for the violations alleged. More particularly, the Petitioners claim that Mr. Moreno Ramos' failure to exhaust these arguments resulted from the incompetence of his attorneys at trial and on appeal, who failed to raise these issues or otherwise preserve them for further consideration before the domestic courts. In addition, the Petitioners argue that any attempt to exhaust his domestic remedies by raising new legal arguments, such as the violation of Article 36 of the Vienna Convention on Consular Relations, ineffective assistance of counsel as the penalty phase, the admission of an uncharged offense, or the discriminatory remarks of the prosecution in this case, would be fruitless, as state and federal legislation stringently limits the ability of individuals to bring "successive" or "subsequent" post-conviction applications when they failed to raise those issues at the initial stages of the criminal process.[FN26] With respect to the claim under Article 36 of the Vienna Convention on Consular Relations in particular, Mr. Moreno Ramos failed to object to this violation at the time of trial and as a result the Petitioners' claim that the legal argument was waived and it could not be challenged in any subsequent proceedings.[FN27]

[FN26] Petitioners' petition dated November 2, 2002, p. 6, citing Tex. Code Crim. P. 11.071, Sec. 5 (a); 28 U.S.C. § 2244(b)(2).

[FN27] Petitioners' petition dated November 2, 2002, p. 5, citing *Breard v. Greene*, 523 U.S. 371 (1998).

60. In response, the State has argued that the claims raised before the Commission must have been known to his defense lawyer and Mexican consular officials at his trial and therefore could have been raised by him at that time, as well as in his initial appeals from conviction and sentence. Concerning Mr. Moreno Ramos' argument that he did not raise these claims due to the incompetence of his counsel the State suggests that he also failed to raise his ineffective assistance of counsel claim in court and therefore waived it. Specifically with respect to Mr. Moreno Ramos' claim relating to Article 36 of the Vienna Convention on Consular Relations, as discussed above, the State asserts that the Commission is without competence to review claims brought under that treaty and disagrees with the finding by the Inter-American Court of Human Rights that a failure of consular notification is a violation of human rights or of due process of law.

61. After considering the parties' arguments, the Commission first rejects the State's contention that the Commission is without jurisdiction to entertain the Petitioners' claims relating to the Vienna Convention on Consular Relations, for the reasons set out in Part IV.(A) above.

62. Concerning the Petitioners' contention that Mr. Moreno Ramos should be excused from exhausting domestic remedies due to the incompetence of his legal representatives during the proceedings against him, the Commission notes that one of the claims raised by the Petitioners on the merits of their petition is that the State is responsible for violating Mr. Moreno Ramos' rights to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration because the state of Texas provided Mr. Moreno Ramos with incompetent attorneys. They claim that at every stage of Mr. Moreno Ramos' criminal proceedings, his attorneys' performance fell outside of the range of professionally competent representation. Moreover, the State has failed to present any evidence or information indicating that the Petitioners' claims in this regard may be manifestly ill-founded.

63. Given the interplay between the effective availability to Mr. Moreno Ramos of domestic procedures and one of the substantive human rights violations alleged in the merits of the case, namely the competence of Mr. Moreno Ramos' trial representation, the Commission considers that the question of the prior exhaustion of these remedies must be taken up with the merits of the case.[FN28] Accordingly, the Commission will join this aspect of the exhaustion of domestic remedies question to the merits of the case.

[FN28] See similarly I/A Court H.R., Velasquez Rodriguez Case, Preliminary Objections, Judgment of June 26, 1989, Ser. C N° 1 (1994), para. 94.

D. Timeliness of the Petition

64. The record in this case indicates that the Petitioners' petition was lodged with the Commission on November 4, 2002, and therefore within six months from the October 7, 2002 dismissal by the U.S. Supreme Court of his petition for the writ of certiorari. The State has not contested the admissibility of the petition on the ground of timeliness. Accordingly, the Commission finds that the petition is not barred from consideration under Article 32 of the Commission's Rules of Procedure.

E. Colorable Claim

65. Article 27 of the Commission's Rules of Procedure mandates that petitions state facts "regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments." In addition, Article 34(a) of the Commission's Rules of Procedure requires the Commission to declare a petition inadmissible when it does not state facts that tend to establish a violation of the rights referred to in Article 27 of the Rules.

66. The Petitioners allege that the State has violated Articles I, II, XXV, XVIII, and XXVI of the Declaration. The Commission has outlined in Part III of this Report the substantive allegations of the Petitioners, as well as information submitted by the Petitioners in support of those allegations. After carefully reviewing the information and arguments provided by the Petitioners in light of the heightened scrutiny test applied by the Commission in capital punishment cases,[FN29] and without prejudging the merits of the matter, the Commission considers that the petition states facts that tend to establish violations of Articles I, II, XXV, XVIII, and XXVI of the Declaration and is not manifestly groundless or out of order. Accordingly, the Commission concludes that the Petitioners' petition should not be declared inadmissible under Article 34 of the Commission's Rules of Procedure.

[FN29] According to the Commission's established jurisprudence, it will review and decide capital punishment cases with a heightened level of scrutiny, to ensure that any deprivation of life that an OAS member state proposes to effect through the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments. See Report N° 57/96 (Andrews v. United States), Annual Report of the IACHR 1997, paras. 170-171; Report N° 38/00 (Baptiste v. Grenada), Annual Report of the IACHR 1999, paras. 64-66; Report N° 41/00 (McKenzie et al. v. Jamaica), Annual Report of the IACHR 1999, paras. 169-171.

F. Precautionary Measures

67. According to the information presently available, Mr. Moreno Ramos' execution has not yet been scheduled but could be set by the state at any time. In this connection, the Commission recalls its jurisprudence concerning the legal effect of its precautionary measures in the context of capital punishment cases. As the Commission has previously observed, its ability to effectively investigate and determine capital cases has frequently been undermined when states have scheduled and proceeded with the execution of condemned persons, despite the fact that those individuals have proceedings pending before the Commission.

68. In order to prevent this unacceptable situation, it has been the Commission's practice to request precautionary measures from states in capital cases to preserve a condemned prisoner's life and physical integrity until the Commission has had an opportunity to investigate his or her claims. The Commission has expressed the view in this regard that OAS member states, by creating the Commission and mandating it through the OAS Charter and the Commission's Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission's mandate.

69. As the Commission has emphasized on numerous occasions, it is beyond question that the failure of an OAS member state to preserve a condemned prisoner's life pending review by the Commission of his or her complaint undermines the efficacy of the Commission's process, deprives condemned persons of their right to petition in the inter-American human rights system, and results in serious and irreparable harm to those individuals. For these reasons, the Commission has determined that a member state disregards its fundamental human rights

obligations under the OAS Charter and related instruments when it fails to implement precautionary measures issued by the Commission in these circumstances.[FN30]

[FN30] See Case 12.243, Report N° 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2000, para. 117; IACHR, Fifth Report on the Situation of Human Rights in Guatemala, Doc. OEA/Ser.L/V/II.111 doc.21 rev. (6 April 2001), paras. 71, 72. See similarly I/A Court H.R., Provisional measures adopted in the James et al. Case, Order of August 29, 1998, Series E; International Court of Justice, Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America), Request for the Indication of Provisional Measures, Order of 3 March 1999, I.C.J. General List, N° 104, paras. 22-28; United Nations Human Rights Committee, Dante Piandiong and others v. The Philippines, Communication N° 869/1999, U.N. Doc. CCPR/C/70/D/869.1999 (19 October 1999), paras. 5.1-5.4; Eur. Court H.R., *Affaire Mamatkulov et Abdurasulovic c. Turkey*, Reqs. Nos. 46827/99, 46951/99 (6 February 2003), paras. 104-107.

70. In light of these fundamental principles, and given that the Commission has determined the claims raised by Mr. Moreno Ramos to be admissible in accordance with its Rules of Procedure, the Commission hereby reiterates its request of March 7, 2002 pursuant to Rule 25 of its Rules of Procedure that the United States take the necessary measures to preserve Mr. Moreno Ramos' life and physical integrity pending the Commission's determination of the merits of his petition.

V. CONCLUSIONS

71. The Commission concludes that it has the competence to examine the Petitioners' allegations, and that the petition is admissible in accordance with the Commission's Rules of Procedure.

72. On the basis of the findings of fact and law set forth above, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES TO:

1. Declare the present case admissible, in respect of Articles I, II, XVIII, XXV and XXVI of the American Declaration.
2. Transmit this report to the parties.
3. Continue with the analysis of the merits of the case.
4. Reiterate its request pursuant to Rule 25 of the Commission's Rules of Procedure that the United States take the necessary measures to preserve Mr. Moreno Ramos' life and physical integrity pending the Commission's determination of the merits of his petition
5. Publish this report and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., U.S.A., on the 10th day of the month of October, 2003. (Signed): José Zalaquett, President; Clare Roberts, First Vice-President; Susana Villarán, Second Vice-President; Julio Prado Vallejo, Commissioner.