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First Vice-President: Clare K. Roberts;
Second Vice-President: Susana Villaran;
Commissioner: Julio Prado Vallejo.
Commission Member Prof. Robert K. 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: 29 December 2003
Citation: Fierro v. United States, Case 11.331, Inter-Am. C.H.R., Report No. 99/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)
Represented by: APPLICANTS: S. Adele Shank and John B. Quigley
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I. SUMMARY

1. This Report concerns a petition dated July 21, 1994 and lodged with the Inter-American Commission on Human Rights (hereinafter "the Commission") on July 22, 1994 by S. Adele Shank, Attorney at Law, and John B. Quigley, Professor of Law at Ohio State University (hereinafter "the Petitioners") against the United States of America (hereinafter the "United States" or "the State"). The petition was filed on behalf of Cesar Roberto Fierro, a Mexican national incarcerated on death row in the state of Texas who was at that time scheduled to be executed on August 10, 1994 but whose execution has since been postponed owing to additional domestic proceedings pursued on his behalf. The petition alleges violations of Articles II, XVIII and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter "the Declaration") based upon the alleged failure of the United States to inform Mr. Fierro of his right to consular notification under Article 36 of the Vienna Convention on Consular Relations. The State has opposed the petition on the basis that the alleged victim failed to exhaust domestic remedies and that he has failed to establish that he was not afforded his right to due process during the course of his criminal proceedings.

2. Owing to the exceptional circumstances of the case, including information indicating that no stay of Mr. Fierro's execution is in place and his execution could be scheduled at any time, the Commission decided to consider the admissibility of Mr. Fierro's complaints together with the merits in accordance with Article 37(3) of the Commission's Rules of Procedure in the present abbreviated report. Upon considering the petition, the Commission declared as admissible the claims presented on behalf of Mr. Fierro in respect of Articles II, XVIII and

XXVI of the American Declaration. The Commission also concluded that the State is responsible for violations of Articles XVIII and XXVI of the American Declaration in the trial, conviction and sentencing to death of Cesar Fierro, and recommended that the State provide Mr. Fierro with an effective remedy, which includes a re-trial or his release.

II. PROCESSING BEFORE THE COMMISSION

3. By note dated July 25, 1994, the Commission transmitted the pertinent parts of the Petitioners' petition to the State with a request for information within 90 days as provided for in Article 34(5) of the Commission's former Regulations. In the same communication, the Commission requested that the United States stay Mr. Fierro's execution, at that time scheduled to take place on August 10, 1994, in order that the Commission could examine the allegations in his complaint.

4. In a letter dated August 5, 1994, the Petitioners informed the Commission that the Texas Court of Criminal Appeals had granted Mr. Fierro an indefinite stay of execution pending an inquiry into the conduct of the El Paso and Mexican police in the circumstances of Mr. Fierro's arrest and interrogation. This information was also confirmed in a letter dated August 2, 1994 and received by the Commission from the Governor of Texas.

5. By note dated October 21, 1994, the State responded to the Commission's July 25, 1994 request for information in which it alleged, inter alia, that Mr. Fierro's complaint should be dismissed for failure to exhaust domestic remedies, owing to the proceedings then pending before the courts in Texas. The Commission transmitted the State's observations to the Petitioners by communication dated November 15, 1994 with a response requested within 30 days.

6. The Petitioners replied to the State's October 21, 1994 response by letter dated December 28, 1994, which the Commission transmitted to the State with a request for a response within 60 days. The Commission reiterated its request for a response from the State in two subsequent notes dated May 9, 1995 and February 26, 1996.

7. In a communication dated September 19, 1996, the State provided the Commission with a response to the Petitioners' October 21, 1994 observations, which included a letter from Mr. William C. Zapalac, Assistant Attorney General of the State of Texas, addressing the procedural status of Mr. Fierro's case before the courts in Texas. The Commission transmitted the State's response to the Petitioners by note dated April 2, 1997.

8. In a letter dated July 1, 2002 and received by the Commission on July 8, 2002, the Petitioners delivered a document entitled "Request for a Decision on the Merits" which, inter alia, provided current information concerning the status of Mr. Fierro's document proceedings and indicating that his execution could be scheduled by the end of 2002. The Commission transmitted the Petitioners' communication to the State by note dated July 15, 2002 with a request for a response within 30 days.

9. The State delivered its response to the Petitioners' July 1, 2002 communication in a note dated August 16, 2002, which the Commission transmitted to the Petitioners with a request for a response within 20 days. By communication dated September 10, 2002 the Petitioners responded to the Commission's request for information. The Commission transmitted the Petitioners' response to the State by note dated September 17, 2002 with observations requested within 30 days, to which the State responded in a communication dated November 15, 2002. The Commission transmitted the State's response to the Petitioners by letter November 20, 2002 and, by notes dated November 27, 2002, informed the Petitioners and the State that the Commission had decided to open a case but defer its treatment of admissibility until the debate and decision on the merits of the matter pursuant to Article 37(3) of its Rules of Procedure and requested any additional information on the merits of the case from the Petitioners within a period of two months.

10. By communication dated December 19, 2002, the Petitioners delivered additional information to the Commission, which the Commission transmitted to the State in a note dated January 6, 2003. In a letter dated February 1, 2003, the State requested an extension of time until March 8, 2003 within which to deliver its response. By note dated February 24, 2003 the Commission granted the State an extension of time to March 5, 2003 within which to deliver its response. The Commission did not receive any further observations from the State on or before the March 5, 2003 deadline.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

11. According to the information provided by the Petitioners, Cesar Fierro, a national of Mexico, was in the custody of police authorities in El Paso, Texas in relation to probation violations when he was interrogated concerning the February 27, 1979 murder of a taxi driver, Nicolas Castanon, in that city. He was tried for Mr. Castanon's murder, convicted on February 14, 1980 and subsequently sentenced to death.

12. With regard to the admissibility of the petition, the Petitioners argue that Mr. Fierro has exhausted available domestic remedies, as he has pursued direct appeals from his appeal and conviction as well as applications for post conviction relief that have been available to him. Specifically with regard to the issue raised before the Commission, namely the alleged failure of the United States to inform Mr. Fierro upon his arrest and detention of his right to consular notification under Article 36 of the Vienna Convention on Consular Relations, the Petitioners allege that Mr. Fierro raised this issue, together with five others, in his July 27, 1994 application for a writ of habeas corpus before the 171st District Court of El Paso, Texas. The Petitioners also state that the District Court ruled against Mr. Fierro on all six allegations on August 4, 1994, [FN1] and that the Texas Court of Criminal Appeals, the highest appellate court in Texas, decided on appeal on August 5, 1994 to entertain only two of the six issues, which did not include the allegation pertaining to the Vienna Convention on Consular Relations. [FN2] Consistent with this, on October 12, 1994 the Texas Court of Criminal Appeals ordered the District Court to hold an evidentiary hearing on these two issues, noting in a footnote that the case had been filed and set on these two allegations only, [FN3] and the District Court convened

the evidentiary hearing from January 10 to January 13, 1995. Finally, the record indicates that while Mr. Fierro lodged two applications in the U.S. Court of Appeals for the Fifth Circuit, those applications were rejected on procedural grounds without permitting Mr. Fierro to raise any substantive issues concerning his case. [FN4]

[FN1] Petitioners' observations of December 19, 2002, Annex B (Findings of Fact and Conclusions of Law, Orders on Motion and Order to the Trial Court Clerk, Ex Parte Cesar Roberto Fierro, 171st District Court of El Paso County, Texas, August 4, 1994).

[FN2] Petitioners' observations of December 19, 2002, Annex C (Ex Parte Cesar Roberto Fierro, Order dated

August 5, 1994, Texas Court of Criminal Appeals).

[FN3] Petitioners' observations of December 19, 2002, Annex D (Ex Parte Cesar Roberto Fierro, Opinion dated October 12, 1994, Texas Court of Criminal Appeals).

[FN4] Fierro v. Johnson, 197 F.3d 147, U.S. Court of Appeals, 5th Circuit, November 23, 1999, certiorari denied 530 U.S. 1206 (U.S.S.C., May 30, 2000); Fierro v. Cockrell, 294 F.3d 674, U.S. Court of Appeals, 5th Circuit, June 13, 2002).

13. In light of these circumstances, the Petitioners allege that due to the decision of the Texas Court of Criminal Appeals to limit the proceedings before it and the District Court to issues not including that pertaining to the Vienna Convention on Consular Relations, Mr. Fierro was precluded from presenting evidence of a consular access violation before the State courts. The Petitioners also allege that they twice sought review by the U.S. Court of Appeals for the Fifth Circuit and on both occasions were precluded by that court from raising any issues on Mr. Fierro's behalf. Accordingly, the Petitioners contend that Mr. Fierro should be considered to have exhausted the domestic remedies that were available to him in respect of the issue raised before the Commission.

14. The Petitioners also assert that no complaint has previously been filed with the Commission concerning Mr. Fierro, nor has a similar complaint been filed with any other international organization.

15. With regard to the merits of their petition, the Petitioners contend that police authorities were aware of Mr. Fierro's nationality at the time of his detention and interrogation in August 1979 but failed to inform him of his right to consular notification pursuant to Article 36 of the Vienna Convention on Consular Relations.

16. Further, the Petitioners allege that during the course of his interrogation by officers who included one Detective Al Medrano, Mr. Fierro confessed to the murder. Mr. Fierro was subsequently tried for Mr. Castanon's murder and was convicted of the murder on February 14, 1980 and sentenced to death. According to the Petitioners, Mr. Fierro's conviction was based in part upon his signed confession, as well as upon the evidence of a sixteen-year-old boy, Geraldo Olague, who claimed to be in the taxi cab and to have seen Mr. Fierro shoot the driver. [FN5]

[FN5] The Petitioners suggest that Mr. Olague's testimony was suspect, however, in part because he was mentally impaired and claimed to have sold a radio to one of the members of the jury when he had in fact sold the radio to someone else.

17. The Petitioners allege that Mr. Fierro's confession was coerced, because during his interrogation in El Paso, police officials in Juarez, Mexico, where his family resided, had detained Mr. Fierro's mother and step-father and, in a telephone call to Mr. Fierro arranged by the police in El Paso and Juarez, threatened to physically abuse Mr. Fierro's family members if he did not confess to the crime. According to the Petitioners, the Juarez police had a notorious reputation for brutality and torture in the interrogation of suspects and Mr. Fierro was well-aware of this reputation, in part because he had been arrested previously by the Juarez police and was physically abused during his interrogation. Consequently, the Petitioners claim that Mr. Fierro was in a state of panic about his mother and step-father at the time of his interrogation and confession. The Petitioners also allege that Detective Medrano gave perjured evidence at trial concerning this aspect of Mr. Fierro's interrogation and that the evidence of this coercion did not come to light until after his conviction. [FN6]

[FN6] The Petitioners rely in this regard on an affidavit sworn by Mr. Fierro's prosecuting attorney, Gary B. Weiser, on July 13, 1994, in which Mr. Weiser claims that El Paso police concealed key police documents from him at trial including information about the incarceration of Mr. Fierro's mother and step-father at the time of Mr. Fierro's interrogation, and that if he had known these facts at the time he would have joined in a motion to suppress the confession and, if it was suppressed, would have dismissed the charges against Mr. Fierro unless he had additional evidence to corroborate Mr. Olague's testimony.

18. Mr. Fierro subsequently challenged his conviction before the domestic courts based upon the confession. According to the court decisions provided by the Petitioners, the District Court of Texas, following its evidentiary hearing from January 10 to January 13, 1995, concluded that there was a "strong likelihood that the Defendant's confession was coerced by the actions of the Juarez police and by the knowledge and acquiescence [sic] of those actions by Det. Medrano," and also concluded that Mr. Fierro should be retried by another jury who would then render a verdict based upon all of the evidence. After considering the District Court's conclusions, a majority of the Texas Court of Criminal Appeals accepted that Mr. Fierro's due process rights were violated by Medrano's perjured testimony, but that "because we conclude that the error was harmless, we deny relief." The majority of the Court concluded in particular that there was sufficient evidence apart from the confession to sustain Mr. Fierro's conviction, namely the testimony of Mr. Olague, and therefore declined to order a retrial.

19. Based upon these circumstances, the Petitioners contend that the failure of officials to inform Mr. Fierro of his right to consular assistance was a factor that led Mr. Fierro to confess and consequently that the failure of officials to notify Mr. Fierro of his right to consular assistance affected the fairness of the criminal proceedings against him.

20. The Petitioners therefore contend that the State is responsible for violating Mr. Fierro's right to a fair hearing under Article XVIII of the American Declaration, his right to equality before the law under Article II of the American Declaration, and his right to due process of law under Article XXVI of the American Declaration, as well as violations of Mr. Fierro's rights under Article 36 of the Vienna Convention on Consular Relations and correspondent rights under customary international law and U.S. domestic law.

B. Position of the State

21. With regard to the admissibility of the Petitioners' petition, the State has contended that the Commission should dismiss Mr. Fierro's petition for failure to exhaust domestic remedies. Specifically with regard to the Petitioners' consular relations allegations, the State has contended through the observations of the Office of the Attorney General of the State of Texas, provided with its August 16 and November 15, 2002 observations, that Mr. Fierro abandoned his consular notification claim before the state and federal courts, because he did not seek to introduce evidence on the issue when he was afforded an opportunity to do so during the 1995 evidentiary hearing before the District Court of Texas, and because he did not include the claim in his brief before the Texas Court of Criminal Appeals following that hearing. The State also argues that Mr. Fierro did not raise the consular notification claim in any pleading filed in the U.S. federal courts.

22. With respect to the merits of the petition, the State has not provided any observations concerning whether Mr. Fierro was entitled to or in fact received notification of his right to consular assistance under Article 36 of the Vienna Convention on Consular Relations. Rather, the State has suggested, again through the observations of the pursuant Office of the Attorney General of the State of Texas, that Mr. Fierro's challenge to his conviction based upon the use of his confession has no merit. In particular, the State contends that no state or federal court has ever determined that Mr. Fierro's confession was coerced, but to the contrary that the Texas Court of Criminal Appeals explicitly rejected this notion. According to the State, the courts in Texas acknowledged that an El Paso police officer falsely testified during Mr. Fierro's trial concerning that officer's knowledge of investigative efforts by law enforcement officials in Ciudad Juarez, but argue that evidence establishing this falsity was fully available to Mr. Fierro's attorneys in 1979. The State suggests further that these circumstances left open the possibility that Mr. Fierro could challenge the constitutionality of his trial representation in this regard.

IV. ADMISSIBILITY

23. The Commission has considered the admissibility of the present complaint pursuant to Articles 30 and 34 of its Rules of Procedure and makes the following determinations.

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

24. The Commission is competent to examine the petition in question. 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. The alleged victim,

Cesar Fierro, 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.

25. Inasmuch as the Petitioners have filed complaints alleging violation of Articles II, XVIII and XXVI of the American Declaration, the Commission is competent *ratione materiae* to examine the complaint.

26. The Commission is competent *ratione temporis* to examine the complaints because the petition alleges facts that occurred on and after August 1, 1979, the date on which Mr. Fierro is alleged to have been detained and interrogated. The facts alleged, therefore, occurred subsequent to the date on which the United States' obligations under the American Declaration took effect.

27. Finally, the Commission is competent *ratione loci*, given that the petition indicates that the alleged victim 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.

B. Duplication

28. The Petitioners have indicated that the subject matter of Mr. Fierro's complaint has not been previously submitted to the Commission or before any other intergovernmental organization of which the United States is a member. The State has not contested the issue of duplication of procedures. The Commission therefore finds no bar to the admissibility of the Petitioners' claims under Article 33 of the Commission's Rules of Procedure.

C. Exhaustion of Domestic Remedies

29. 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. In accordance with Article 31(2) of the Commission's Rules, however, the requirement under Article 31(1) does not apply when, *inter alia*, the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.

30. The claim raised by the Petitioners before this Commission is the contention that the United States failed to inform Mr. Fierro upon his arrest of his right to consular notification as provided for under Article 36 of the Vienna Convention on Consular Relations, as well as correspondent customary international law and U.S. domestic law, and is thereby responsible for violations of Mr. Fierro's rights under Articles II, XVIII and XXVI of the American Declaration. As described above, the Petitioners argue that Mr. Fierro was precluded by the August 4 and October 12, 1994 decisions of the Texas Court of Criminal Appeals from pursuing this claim before the Texas State courts by limiting his proceedings to issues that did not include the consular notification allegation and that the U.S. Federal Courts precluded Mr. Fierro from

raising any claims based upon limitations in the Anti-Terrorism and Effective Death Penalty Act of 1996. The judicial decisions on the record before the Commission support the Petitioners' contentions in this regard. On this basis, the Petitioners argue that Mr. Fierro should be considered to have exhausted the domestic remedies available to him concerning his consular notification issue, or alternatively that he has been precluded from pursuing that claim before the domestic courts.

31. For its part, the State has contended that Mr. Fierro abandoned his consular notification claim before the domestic courts, because he did not seek to introduce evidence on the issue during the evidentiary hearing before the District Court, nor did he include the claim in his brief to the Texas Court of Criminal Appeals following the appeal.

32. Upon considering the positions of the parties, it is evident to the Commission from the documentation available that Mr. Fierro attempted to raise the consular relations issue in the fora that were available to him but was foreclosed by the courts from litigating the substance of the matter. [FN7] It is not clear how Mr. Fierro should reasonably have been expected to pursue this argument in the face of the courts' rulings that they would not consider his consular relations allegations, and the State, which bears the burden of demonstrating that any remedies allegedly available to Mr. Fierro are effective, [FN8] has not provided any clarification or explanation in this regard. It has only asserted that Mr. Fierro abandoned his consular relations claim before the state and federal courts, a claim that is not supported by the record.

[FN7] See Findings of Fact and Conclusions of Law, Orders on Motion and Order to the Trial Court Clerk, Ex Parte Cesar Roberto Fierro, 171st District Court of El Paso County, Texas, August 4, 1994; Ex Parte Cesar Roberto Fierro, Order dated August 5, 1994, Texas Court of Criminal Appeals; Ex Parte Cesar Roberto Fierro, Opinion dated October 12, 1994, Texas Court of Criminal Appeals; Fierro v. Johnson, 197 F.3d 147, U.S. Court of Appeals, 5th Circuit, November 23, 1999, certiorari denied 530 U.S. 1206 (U.S.S.C., May 30, 2000); Fierro v. Cockrell, 294 F.3d 674, U.S. Court of Appeals, 5th Circuit, June 13, 2002.

[FN8] I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, Ser. C N° 4 (1988), paras. 63-66.

33. Accordingly, based upon the information before it, the Commission considers that Mr. Fierro has pursued and exhausted the domestic remedies that were available to him in relation to his consular notification claim, and therefore that his complaint satisfies the admissibility requirements of Article 31 of the Commission's Rules of Procedure.

D. Timeliness of the Petition

34. Pursuant to Article 32(1) of the Commission's Rules of Procedure, the Commission shall consider petitions that are lodged within a period of six months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies. In the present case, the Petitioners' petition was not lodged beyond six months from the date on which Mr. Fierro was notified of any of the final rulings on the issues raised before the Commission in

his case, in those instances in which domestic remedies were available. The State has not specifically contested the timeliness of the Petitioners' petition. Consequently, the Commission concludes that the Petitioners' petition is not barred from consideration under Article 32 of the Commission's Rules of Procedure.

E. Colorable Claim

35. The Commission has outlined in Part III of this Report the substantive allegations of the Petitioners, as well as the State's responses to those allegations. After carefully reviewing the information and arguments provided by the parties in light of the heightened scrutiny test applied by the Commission in capital punishment cases, [FN9] and without prejudging the merits of the matter, the Commission considers that the petition states facts that tend to establish a violation of rights under the American 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.

[FN9] 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 occurs through the application of 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. Conclusions on Admissibility

36. In accordance with the foregoing analysis of the requirements of Articles 30 to 34 of the Commission's Rules of Procedure, and without prejudging the merits of the matter, the Commission decides to declare as admissible the claims presented on behalf of Mr. Fierro in respect of Articles II, XVIII and XXVI of the American Declaration and continue with the analysis of the merits of the case.

V. MERITS

37. In its recent decision in the case of *Ramón Martínez Villareal v. United States*, [FN10] the Commission determined that it is 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 may 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. [FN11] The

Commission adopts for the purposes of this report its findings in the Villareal Case and will analyze Mr. Fierro's circumstances in light of those findings.

[FN10] Ramón Martínez Villareal v. United States, Case 11.753, Report N° 52/02, Annual Report of the IACHR 2002.

[FN11] *Id.*, para. 77.

38. In the present case, the Petitioners have alleged, and the State has not contested, that Mr. Fierro was at all relevant times a Mexican national and that he was in the custody of the El Paso, Texas Police on August 1, 1979 when he was interrogated in connection with the murder of Nicolas Castanon. Mr. Fierro has also stated that he was never informed of his right to consular notification under Article 36 of the Vienna Convention on Consular Relations during the period of his detention or interrogation. Mr. Fierro was subsequently prosecuted, convicted and sentenced to death for Mr. Castanon's murder based to a significant extent upon a confession elicited from him by the police during his interrogation.

39. It is also not apparent, from the State's observations or otherwise, that Mr. Fierro's proceedings were fair notwithstanding the State's failure to comply with the consular notification requirements. To the contrary, it is evident to the Commission, based upon the information available, that the State's failure in this regard had a potentially serious impact upon the fairness of Mr. Fierro's trial. In particular, Mr. Fierro's confession was taken at a time when consular notification and assistance may have been highly significant in the circumstances. The consulate could, for example, have verified the status of Mr. Fierro's mother and step-father, who were being held in Mexico by the Mexican police, and thereby mitigated any detrimental impact that their detention may have had on Mr. Fierro's interrogation and the veracity of the resulting confession. The conclusion that Mr. Fierro's lack of consular assistance may have adversely affected the fairness of his criminal proceedings is reinforced by the finding of the Texas District Court following its January 1995 evidentiary hearing that there was a "strong likelihood" that Mr. Fierro's confession was coerced and its corresponding recommendation that he be re-tried by another jury, as well as the statements of the prosecuting attorney suggesting that he would not have relied on the confession had he been fully aware of the manner in which it was elicited.

40. Based upon the foregoing, the Commission concludes that Mr. Fierro's right to information under Article 36(1)(b) of the Vienna Convention on Consular Relations constituted a fundamental component of the due process standards to which he was entitled under Articles XVIII and XXVI of the American Declaration, and that the State's failure to respect and ensure this obligation constituted serious violations of Mr. Fierro's rights to due process and to a fair trial under these provisions of the Declaration. [FN12]

[FN12] Ramón Martínez Villareal v. United States, *supra*, para. 84.

41. Accordingly, should the State execute Mr. Fierro based upon the criminal proceedings for which he is presently convicted and sentenced, the Commission finds that this will constitute an arbitrary deprivation of Mr. Fierro's life contrary to Article I of the Declaration.

42. In a case such as the present, where a defendant's conviction has occurred as a result of proceedings that fail to satisfy the minimal requirements of fairness and due process, the Commission considers that the appropriate remedy includes a re-trial in accordance with the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration or, where a re-trial in compliance with these protections is not possible, Mr. Fierro's release. [FN13]

[FN13] See similarly Ramón Martínez Villareal v. United States, *supra*, para. 86; Joseph Thomas v. Jamaica, Case 12.183, Report N° 127/01, Annual Report of the IACHR 2001, para. 146.

VI. PROCEEDINGS SUBSEQUENT TO REPORT N° 21/03

43. On March 6, 2003, the Commission adopted Report N° 21/03 pursuant to Article 43 of its Rules of Procedure, setting forth its analysis of the record, findings and recommendations in this matter. In particular, the Commission admitted the Petitioners' claims under Article II, XVIII and XXVI of the American Declaration and concluded that the State was responsible for violating Mr. Fierro's rights under Articles XVIII and XXVI of the Declaration in respect of his trial, conviction and sentencing to death. The Commission also provided two recommendations, that the State provide Mr. Fierro with an effective remedy including a re-trial or his release, and that the State review its laws, procedure and practices to ensure that foreign nationals who are detained in any manner by the United States are informed without delay of their right to consular assistance.

44. Report N° 21/03 was transmitted to the State by note dated March 24, 2003, with a request that the State provide information as to the measures it had taken to comply with the recommendations set forth in the report within a period of two months, in accordance with Article 43(2) of the Commission's Rules.

45. By communication dated June 6, 2003 and received by the Commission on June 6, 2003, the State delivered a response to the Petitioners' petition and to the Commission's Report N° 21/03, in which it objected to the admissibility and merits of the petition as well as the conclusions in the Commission's report.

46. Prior to discussing these objections in further detail, the Commission emphasizes that the purpose of transmitting a preliminary merits report to the state concerned in accordance with Article 43(2) of the Commission's Rules of Procedure is to receive information concerning what measures have been adopted to comply with the Commission's recommendations. [FN14] At this stage of the process, the parties have had opportunities to argue their positions, the admissibility and merits phases of the process are completed, and the Commission has rendered its decision.

Therefore, while a state may provide its views on the factual and legal conclusions reached by the Commission in its preliminary report, it is not for a state at this point to reiterate its previous arguments, or to raise new arguments, concerning the admissibility or merits of the complaint before the Commission, nor is the Commission obliged to consider any such submissions prior to adopting its final report on the matter.

[FN14] Article 43(2) of the Commission’s Rules of Procedure provides: “If [the Commission] establishes one or more violations, it shall prepare a preliminary report with the proposals and recommendations it deems pertinent and shall transmit it to the State in question. In so doing, it shall set a deadline by which the State in question must report on the measures adopted to comply with the recommendations. The State shall not be authorized to publish the report until the Commission adopts a decision in this respect.” [emphasis added]

47. In light of the significance of the legal issues raised in this matter, however, and without detracting from the procedural considerations noted above, the Commission has decided to summarize and provide observations on certain aspects of the State’s response. In its observations, the State raises several objections to the admissibility and merits of the Petitioners’ petition and the Commission’s conclusions, and provides corresponding observations on the Commission’s recommendations. Concerning the admissibility of the petition, the State maintains its previous position that Mr. Fierro failed to preserve his consular notification claim in United States courts and failed to file timely appeals in courts in the United States and therefore failed to exhaust his domestic remedies. The State also argues that the petition violates Article 33(1) of the Commission’s Rules governing duplication because Mr. Fierro’s case on consular notification is pending before the International Court of Justice (“ICJ”). Further, the State contends that the Commission does not have competence to review Mr. Fierro’s consular notification claim because it arises under the Vienna Convention on Consular Relations and does not otherwise raise a human rights issue.

48. Concerning the merits of the petition, the State argues that the petition fails to accurately state facts that constitute a violation of the principles under the American Declaration, that Mr. Fierro’s complaints attempting to raise a doubt on his guilt have no merit because he already acknowledged his guilt in relation to the murders at issue in filings with the U.S. courts in 1990 and 1992, and that his due process claims have been heard and fairly adjudicated and that he continues to have due process rights, even if he chooses not to pursue them for fear of an unfavorable result. Finally, the State indicates that based upon its observations, it has declined to implement the Commission’s first recommendation. With respect to the Commission’s second recommendation, the State indicates that it has undertaken ongoing and intensive efforts to ensure that relevant domestic practice is consistent with the Vienna Convention and that public law enforcement officials fully implement Article 36 of the Vienna Convention on Consular Relations. It disagrees, however, with any assumption by the Commission that consular notification is a prerequisite for the observance of due process rights under the American Declaration.

49. With respect to the State's objections to the admissibility of the petition, the Commission considers that the only argument meriting comment at this stage of the process is the claim concerning duplication. According to the State, the Commission should not have considered the Petitioners' petition because on January 9, 2003, the Government of Mexico filed an application with the International Court of Justice instituting proceedings against the United States concerning the Vienna Convention on Consular Relations and requested the indication of provisional measures of protection for all of the individuals named in the application, including Mr. Fierro. [FN15] The State also indicates that on February 5, 2003, the ICJ issued a provisional measures order with respect to Mr. Fierro and two other Mexican nationals who are subject to the death penalty and who allegedly were not advised on a timely basis of their right to request consular notification, and that the ICJ has not yet entertained Mr. Fierro's case on the merits. The State therefore argues that the Commission's consideration of the petition would result in a duplication of effort and expense by international tribunals and should be deemed inadmissible as duplicative.

[FN15] State's observations of June 5, 2003, p. 9, citing Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America).

50. Article 33 of the Commission's Rules of Procedure, which governs duplication of procedures, provide 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.

51. In light of the terms of this provision, the Commission must first determine whether Mr. Fierro's 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, [FN16] constitutes an international governmental organization within the meaning of Article 33(1) in the circumstances of the present case.

[FN16] 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.

52. In order to determine whether the subject matter of Mr. Fierro's 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 State 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. [FN17] It is apparent from Mexico's Application that an individual having the name César Roberto Fierro Reyna has been included as one of the 54 Mexican nationals referred to in its proceeding. [FN18] The State contends that the individual named in the ICJ proceeding is the same person as the alleged victim in the present proceeding before the Commission and the circumstances of Mr. Fierro's case, as described in Mexico's Application, confirms this contention.

[FN17] 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>).

[FN18] *Id.*, paras. 164-168 (stating as follows:

164. On 1 August 1979, law enforcement authorities in the State of Texas arrested César Roberto Fierro Reyna, aged 22, on suspicion of murder. On 14 February 1980, Mr. Fierro was convicted of murder, and on 15 February 1980, the trial court sentenced him to death. Mr. Fierro's direct appeal of the conviction and sentence was denied, as was his state petition for post-conviction relief.

165. Although aware of his Mexican nationality, the competent authorities at no time informed Mr. Fierro of his rights to consular assistance. Not having been apprised of these rights, Mr. Fierro could not and did not exercise them during his interrogation by police officers. In the absence of consular assistance and upon being told that the El Paso police had arrested his innocent parents, Mr. Fierro gave a confession to authorities, which was the principal evidence against him at trial.

166. Mexico eventually learned of Mr. Fierro's detention from Mr. Fierro's mother. Upon learning of his situation, Mexico, through its consulate, began rendering assistance, both legal and otherwise, to Mr. Fierro.

167. In 1994, Mr. Fierro filed a petition for state post-conviction relief, asking the Texas courts to reconsider his conviction and death sentence in light of the authorities' violation of his Article 36 rights. The court never considered the issue. Mr. Fierro filed a petition to the federal court of first instance for a writ of habeas corpus, but the federal court denied relief. The immediate federal appellate court affirmed. Mr. Fierro has filed a petition for review with the United States Supreme Court.

168. As Mr. Fierro has exhausted his primary appeals, the State of Texas may schedule his execution in the near future.)

53. 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.
- [FN19]

[FN19] Id., para. 281.

54. 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 proceeding. [FN20] Mexico's claim before the ICJ seeks determinations of the United States' international legal responsibility for violations of rights attributable to Mexico under the Vienna Convention on Consular Relations.

[FN20] 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").

55. 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. [FN21] 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. [FN22]

[FN21] See e.g. Case 11.827, Report N° 96/98, Peter Blaine (Jamaica), Annual Report of the IACHR 1998, para. 43.

[FN22] Id., para. 45.

56. 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. Fierro cannot be considered a party to the ICJ proceedings, 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, it is not apparent that Mr. Fierro has independent standing to make submissions in the proceeding or to request relief, or that there is any requirement or certainty

that Mexico will represent his interests before the ICJ. The State has not presented any evidence suggesting otherwise.

57. 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. Fierro. The issue before the Commission, on the other hand, is whether the United States violated Mr. Fierro's rights to equal protection, to due process of law, and to a fair trial under Articles II, XVIII and XXVI of the American Declaration, based upon its alleged failure to notify Mr. Fierro of his right to consular assistance as provided for under Article 36 of the Vienna Convention on Consular Relations and the effects of this failure on Mr. Fierro's criminal proceedings. 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.

58. 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. Fierro 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.

59. 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.

60. With respect to the merits of Mr. Fierro's complaint, the State indicates that it did not control events concerning Mr. Fierro when he was under the authority of the Government of Mexico, and that in its submissions it has focused exclusively on actions by United States personnel in Mr. Fierro's case. In this framework, the State contends that Mr. Fierro received due process to the fullest extent based upon the numerous instances of review of his case before the state and federal courts in the United States. The State also asserts that Mr. Fierro's confession was not coerced, that Mr. Fierro was not hit or beaten by the El Paso police, and that Mr. Fierro admitted his guilt for the murder at issue on two occasions. Concerning the latter allegation, the State claims that Mr. Fierro, in his June 11, 1990 habeas corpus petition with the

U.S. District Court for the Western District of Texas, stated that “[n]one of this evidence excuses Mr. Fierro’s conduct; he murdered somebody”. The State similarly claims that in Mr. Fierro’s 1992 Motion to Alter and Amend the Judgment in the same proceeding, it was stated that “Fierro argues not that he is innocent of the crime but that he is innocent of the penalty.”

61. Upon reviewing the State’s arguments in this regard, the Commission finds no grounds upon which to interfere with the determinations in its preliminary merits report. The Commission considers that the factual and legal submissions raised by the State could have been raised during the processing of the petition before the Commission and before a decision was taken. In any event, for the reasons set out below concerning the Commission’s recommendations, the Commission does not consider that the State’s submissions affect the Commission’s finding that, owing to the effects of the State’s failure to inform Mr. Fierro of his right to consular assistance, he was not afforded his due process rights prior to or during his trial, or that he fully enjoyed his right to a fair trial notwithstanding this failure.

62. In particular, the State has indicated that it disagrees with the Commission’s conclusions and declined to implement the Commission’s first recommendation, namely that a new trial be convened for Mr. Fierro. With respect to the Commission’s second recommendation, the State has disputed any suggestion that compliance with Article 36 of the Vienna Convention on Consular Relations is a prerequisite for the observance of due process and fair trial protections set forth in Articles XXVI and XVIII of the American Declaration or that consular notification or assistance is relevant to the fair trial and due process protections that are specifically enumerated under those provisions. The State has argued further that to find that the failure to notify a detained foreign national of his or her right to consular notification is per se a denial of a person’s due process of fair trial rights would have profoundly illogical results by, for example, implying that a foreign national is denied due process or a fair trial regardless of his or her need for consular notification.

63. At the same time, the State accepts that effective compliance with the consular notification requirements of Article 36 of the Vienna Convention requires constant effort and attention, and has provided the Commission with examples of efforts that the United States has made in this regard. The State indicates, for example, that it has developed a publication, reference card and training video for federal, state, and local law enforcement officials containing instructions on the consular notification and access, which have been distributed to arresting officers, prosecutors, and judicial authorities in every state and other U.S. jurisdiction as well as to the public through libraries and the internet. According to the State, consular notification and access obligations have also been reviewed at numerous training seminars and meetings throughout the United States as well as at regional and national events involving, among others, police chiefs and sheriffs, federal and state prosecutors, and Attorneys General.

64. In addition, the State emphasizes that the U.S. justice system gives full effect to the important fair trial and procedural guarantees invoked by the Commission, which it argues are not dependent upon consular notification, access or assistance. Citing pertinent U.S. statutory provisions and jurisprudence, the State indicates that these protections include the guarantee for criminal defendants to be tried by a fair and impartial tribunal and that persons shall not be subject to discrimination by federal or state authorities based on their race, gender, ethnicity or

national origin. They are also said to include the entitlement of criminal defendants to the privilege against self-incrimination and not to be subjected to ex post facto laws, to be informed in detail of all charges made against them and to effective legal representation supplied at public expense if they cannot afford an attorney, to be assisted by an interpreter if a defendant does not understand English language proceedings, and to be assisted by investigators and experts where a particularized need for such assistance can be demonstrated. In addition, the State argues that the death penalty may be carried out only under laws in effect at the time the crime was committed, subject to the extensive due process and equal protection requirements of the U.S. Constitution, and after exhaustive appeal, and provides examples of special protections provided for under U.S. law for those accused of capital offenses, such as mandatory automatic review of the conviction and sentence in nearly every state whose laws provide for capital punishment and the inability of states to prohibit acts of executive clemency, including amnesty, pardon and commutation of sentence.

65. The State therefore reiterates that the fair trial rights and procedural protections recognized in the American Declaration and other international human rights instruments are specific and well-understood and that none can reasonably be read to encompass or depend upon a consular notification obligation. Consequently, the State indicates that it “respectfully disagrees with the implication to the contrary contained in Recommendation N° 2 of the Commission’s Report N° 21/03”, and therefore asks the Commission to reconsider its decision and recommendations and find Mr. Fierro’s petition to be inadmissible and without merit.

66. Upon considering the State’s observations concerning the Commission’s conclusions and recommendations, the Commission wishes to state that it is encouraged by the measures taken by the United States to enhance compliance with its obligations under the Vienna Convention on Consular Relations regarding consular notification and access. To this extent, the State appears to have taken some measures to implement the Commission’s second recommendation, as reproduced below. At the same time, the Commission cannot accept the State’s contention that compliance with a foreign national’s right to consular notification and assistance is irrelevant to the due process and fair trial protections under international human rights instruments, including the American Declaration. As the Commission has previously held, fundamental due process protections, such as the right to prior notification in detail of the charges against a defendant and the right to effective counsel, are of such a nature that, in the absence of access to consular assistance, a foreign national could be placed at a considerable disadvantage in the context of a criminal proceeding taken against him or her by a state. Each case must be evaluated on its individual circumstances. Once a failure to inform a foreign national of his right to consular notification and assistance has been proven, however, a formidable presumption of unfairness will arise unless it is established that the proceedings were fair notwithstanding the failure of notification. While the State contends in the present case that the protections provided for in its legal system are among the strongest and most expansive in the world, this does not foreclose situations in which access to consular assistance may have an impact on the fairness of a foreign national’s criminal proceedings in the United States. This could arise, for example, in relation to a defendant’s ability to gather mitigating evidence or other relevant information from his or her home country.

67. Indeed, the Commission considered the availability of information in Mexico to be pertinent in the circumstances of Mr. Fierro's case, where the consulate may have verified the status of Mr. Fierro's mother and step-father while they were in the custody of the Mexican police and thereby mitigate any detrimental impact that their detention may have had on Mr. Fierro's interrogation and the veracity of his resulting confession. The State itself has recognized in its observations that it does not control what happens to individuals when they are outside the jurisdiction of the United States and in the custody of local authorities in their home country. Consular officials, on the other hand, may exercise authority in a defendant's home country and therefore be in a position to gather information located outside of the State's jurisdiction that is pertinent to the individual's defense.

68. To the extent that the State refuses to acknowledge the potential relevance of consular notification and assistance with the rights to due process and to a fair trial under the American Declaration, therefore, the Commission cannot find that the State has complied fully with the Commission's second recommendation in the present matter. The State has clearly indicated that it does not intend to implement the Commission's first recommendation and thereby provide an effective remedy to the individual victim in this case. Based upon the above considerations, therefore, the Commission has decided to ratify its conclusions and reiterate its recommendations, as set forth below.

VII. CONCLUSIONS

69. The Commission, based on the foregoing considerations of fact and law, and in light of the response of the State to Report N° 21/03, hereby ratifies the following conclusions.

70. The Commission hereby concludes that the Petitioners' claims are admissible as to the alleged violations of Articles II, XVIII and XXVI of the American Declaration.

71. The Commission hereby concludes that the State is responsible for violations of Articles XVIII and XXVI of the American Declaration in the trial, conviction and sentencing to death of Cesar Fierro. The Commission also concludes that, should the State execute Mr. Fierro pursuant to the criminal proceedings at issue in this case, the State will perpetrate a grave and irreparable violation of the fundamental right to life under Article I of the American Declaration.

VIII. RECOMMENDATIONS

72. In accordance with the analysis and the conclusions in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES ITS RECOMMENDATIONS TO THE UNITED STATES THAT IT:

1. Provide Mr. Fierro with an effective remedy, which includes a re-trial in accordance with the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration or, where a re-trial in compliance with these protections is not possible, Mr. Fierro's release.

2. Review its laws, procedures and practices to ensure that foreign nationals who are arrested or committed to prison or to custody pending trial or are detained in any other manner in the United States are informed without delay of their right to consular assistance and that, with his or her concurrence, the appropriate consulate is informed without delay of the foreign national's circumstances, in accordance with the due process and fair trial protections enshrined in Articles XVIII and XXVI of the American Declaration.

73. The Commission also hereby reiterates its request pursuant to Rule 25 of the Commission's Rules of Procedure that the United States take the necessary measures to preserve Mr. Fierro's life and physical integrity pending the completion of the proceedings before the Commission in this matter, including implementation of the Commission's final recommendations.

IX. PUBLICATION

74. By communication dated October 29, 2003, the Commission transmitted this report, adopted as Report N° 56/03 pursuant to Article 45(1) of the Commission's Rules of Procedure, to the State and to the Petitioners in accordance with Rule 45(2) of the Commission's Rules and requested information within 30 days as to measures adopted by the State to implement the Commission's recommendations.

75. In a note dated November 26, 2003 and received by the Commission on December 1, 2003, the State responded to the Commission's October 29, 2003 request for information. In its communication, the State indicated that it disagreed with the conclusions contained in the Commission's report, for the reasons stated in its previous submissions in the matter. In this respect, the United States informed the Commission that it had recently filed its Counter-memorial before the International Court of Justice in the Avena Case, in which the State reviewed its laws and regulations applicable to Mr. Fierro, and restated its position that Mr. Fierro was accorded all guarantees of due process and a fair trial under applicable international and domestic law. With regard to the first recommendation in the Commission's report, the State informed the Commission that it declined to order a re-trial or release of Mr. Fierro. With regard to the second recommendation in the Commission's report, the State indicated that its efforts to ensure that relevant domestic practice is consistent with the Vienna Convention on Consular Relations and to ensure that public law enforcement officials fully implement Article 36 of the Convention are ongoing and intensive. At the same time, the State disagreed with the recommendation's assumption that consular notification is a prerequisite for the observance of due process protections as set forth in Articles XXVI and XVIII of the American Declaration.

76. The Commission did not receive a response from the Petitioners to its request for information within the time period specified in its October 29, 2003 note.

77. In light of the information received from the State, the Commission in conformity with Article 45(3) of its Rules of Procedure decides to ratify the conclusions and reiterate the recommendations in this Report, to make this Report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Commission, according to the norms contained in the instruments which govern its mandate, will continue

evaluating the measures adopted by the United States with respect to the above recommendations until they have been complied with by the United States.

Approved on the 29th day of the month of December, 2003. José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; and Julio Prado Vallejo, Commissioner.