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First Vice-President: Susana Villaran;
Second Vice-President: Paulo Sergio Pinheiro;
Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett, Freddy Gutierrez, Florentin Melendez.
Dated: 28 January 2005
Citation: Moreno Ramos v. United States, Case 12.430, Inter-Am. C.H.R., Report No. 1/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by: APPLICANT: the law firm of Sergi & Associates
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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. On May 10, 2004, the Petitioners informed the Commission that on May 3, 2004, the Assistant Criminal District Attorney in Hidalgo County, Texas had filed a motion with the District Court requesting that it set a September 30, 2004 execution date for Mr. Moreno Ramos.

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 Human Rights (hereinafter the “American Declaration” or the “Declaration”), based upon deficiencies in the fairness of the criminal proceedings against him. In particular, the Petitioners allege that Mr. Moreno Ramos was not notified 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 he was not give competent legal representation, and that the prosecution made discriminatory comments during the punishment phase of his trial and thereby deprived him of the right to equality before the law. The Petitioners also claim that Mr. Moreno Ramos 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 based upon the inadequacy of his legal representation, and therefore that he is excused from exhausting domestic remedies.

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. In Report 61/03 adopted on October 10, 2003, the Commission decided to admit the claims in Mr. Moreno Ramos' 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, subject to its decision to join the question of exhaustion of domestic remedies to the merits of the case based upon the interrelationship between the availability of domestic remedies and the competence of his legal counsel. As set forth in the present report, having examined the information available and the contentions of the parties on the merits of the case, the Commission concluded that Mr. Moreno Ramos was denied access to domestic remedies because of the State's failure to afford him effective legal representation and therefore that Mr. Moreno Ramos is excused from exhausting internal remedies in respect of the claims raised before the Commission. The Commission has also concluded that the State is responsible for violations of Mr. Moreno Ramos' rights under Articles II, XVIII and XXVI of the American Declaration in respect of the criminal proceedings against him and that, if the State executes Mr. Moreno Ramos based upon those proceedings, it would commit a grave and irreparable violation of his right to life under Article I of the American Declaration. The Commission has also recommended that the State provide Mr. Moreno Ramos with an effective remedy, which includes providing him with a new sentencing hearing in accordance with the equality, due process and fair trial protections under the American Declaration.

II. PROCEEDINGS SUBSEQUENT TO ADMISSIBILITY REPORT 61/03

5. In Report 61/03 adopted on October 10, 2003, the Commission declared that Mr. Moreno Ramos' petition was admissible in respect of Articles I, II, XVIII, XXV and XXVI of the American Declaration and that it would continue with its analysis of the merits of the case. Concerning the question of exhaustion of domestic remedies, however, the Commission decided that in light of the interplay between the effective availability to Mr. Moreno Ramos of domestic procedures and the competence of Mr. Moreno Ramos' legal representation as argued on the merits of the complaint, it would join this aspect of admissibility to the merits of the case.

6. Report 61/03 was transmitted to the State and to the Petitioners by notes dated October 27, 2003, and pursuant to Article 38(1) of the Commission's Rules of Procedure, the Commission set a period of two months for the Petitioners to present additional observations on the merits of the matter. In the same communications, the Commission placed itself at the disposal of the parties with a view to seeking a friendly settlement of the complaint.

7. In a letter dated January 15, 2004, the Petitioners requested a hearing on the case during the Commission's next period of sessions. In notes dated February 2 and February 4, 2004 the Commission informed the State and the Petitioners that a hearing in the case was scheduled to

take place on March 5, 2004 at the Commission's headquarters in Washington, D.C. The hearing took place as scheduled with representatives of the State and the Petitioners in attendance. During the hearing, the parties presented oral and written representations and responded to questions posed by the Commissioners.

8. On or about April 1, 2004, the Commission received information that on March 31, 2004, the International Court of Justice issued its judgment in the Case of Avena and other Mexican Nationals (Mexico v. United States of America), in which that Court found that the United States had breached its obligations to 51 Mexican nationals on death row, including Mr. Moreno Ramos, and to Mexico under the Vienna Convention on Consular Relations.

9. Subsequently, by communication dated April 28, 2004 and received by the Commission on May 4, 2004, the Petitioners provided additional written observations in follow up to the hearing in the matter. The Commission transmitted the pertinent parts of the Petitioners' observations to the State by note dated May 5, 2004 and granted until July 2, 2004 within which to provide its observations.

10. On May 10, 2004, the Petitioners informed the Commission that on May 3, 2004, the Assistant Criminal District Attorney in Hidalgo County, Texas had filed a motion with the District Court requesting that it set a September 30, 2004 execution date for Mr. Moreno Ramos.

11. In a communication dated July 2, 2004, the State provided the Commission with a response to its May 5, 2004 request for observations, which the Commission transmitted to the Petitioners by note dated July 7, 2004.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

12. 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.

13. With respect to the issue of exhaustion of domestic remedies, which remains before the Commission, 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. They argue, 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 or providing specialized representation in death penalty cases.[FN1]

[FN1] 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).

14. 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, 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[FN2] 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.[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] The Petitioners also claim that proceedings of this nature would have no prospect of success in any event, in light of the fact that in June 2002, the U.S. Supreme Court denied a petition for a writ of certiorari concerning the issue of the Vienna Convention on Consular Relations in the case of Mexican national Javier Suarez Medina, who was subsequently executed in August 2002. Finally, the Petitioners contend 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.[FN5]

[FN2] Petitioners' petition dated November 2, 2002, p. 6, citing Tex. Code Crim. P. 11.071, Sec. 5 (a) (providing that an 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) (providing that a 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.

[FN3] 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.

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

[FN5] 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).

15. With regard to the merits of the petition, the Petitioners alleged that Mr. Moreno Ramos was denied a fair trial based upon three main grounds: 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; Mr. Moreno Ramos' attorneys failed to properly represent him, which included failing to investigate or present any mitigating evidence at the penalty phase of his trial and failing to present or pursue legal arguments before the courts, and 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.

16. Concerning the issue of the Vienna Convention on Consular Relations, the Petitioners state that Mr. Moreno Ramos is a Mexican national who was born in Aguascalientes, Mexico on May 23, 1954, spent his entire childhood and adolescence in Mexico, and migrated to the United States with his family in his late teens.

17. The Petitioners also claim that on March 20, 1992, police arrested Mr. Moreno Ramos after questioning him regarding the disappearance of his wife and children, held him on a variety of traffic warrants for the next several days and interrogated him, and subsequently charged Mr. Moreno Ramos on April 7, 2002 with the murders of Leticia, Abigail and Jonathan Ramos.

18. The Petitioners assert that the United States ratified the Vienna Convention on Consular Relations unconditionally on November 24, 1969 and that the treaty entered into force for the United States on December 24, 1969.[FN6] According to the Petitioners, State authorities were well aware that Mr. Moreno Ramos was a Mexican national and indeed traveled to Mexico during their investigations of the case. The Petitioners contend that nevertheless, authorities did not inform Mr. Moreno Ramos of his right to consular notification and access as required under Article 36(1)(b) of the Vienna Convention on Consular Relations and that the State has not denied this fact. The Petitioners contend that Mexican consular authorities learned of Mr. Moreno Ramos' case through the radio approximately eleven months after his arrest, and that, although consular officials attended the trial, their intervention came too late to affect the quality of the investigation in the case, as the trial was already underway and Mr. Moreno Ramos was sentenced to death weeks later.

[FN6] Petitioners' petition, p. 10, citing 21 U.S.T. 77; T.I.A.S. 6820; 596 U.N.T.S. 261.

19. The Petitioners also argue that the right to consular assistance embodied in Article 36 of the Vienna Convention on Consular Relations is analogous to several provisions of the American Declaration, including the right to due process under Article XXVI of the Declaration. In this respect, the Petitioners assert 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.[FN7] Relying in part upon the Inter-American Court of Human Rights' Advisory Opinion OC-16/99, the Petitioners contend that consular notification and access are necessary in order to correct the real disadvantages facing foreign nationals in judicial proceedings and that consular notification is one of the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial.[FN8]

[FN7] 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.

[FN8] Petitioners' petition, pp. 12-13, citing I/A Court H.R., Advisory Opinion OC-16/99 Right to Information on Consular Assistance in the Framework of the Guarantee of the Due Process of Law, Ser. A N° 16 (1999); OAS General Assembly Resolution AG/RES.1717 (XXX-O/00), "The Human Rights of all Migrant Workers and their Families."

20. According to the Petitioners, the violation of the Vienna Convention on Consular Relations in Mr. Moreno Ramos' case requires that his death sentence be vacated. They assert in this regard that, had consular officials been given timely notification of Mr. Moreno Ramos' arrest, they would have provided extensive and far-reaching assistance, particularly during the critical pre-trial investigation of the criminal proceeding. They claim, for example that consular officials could have assisted in consulting with and recommending legal counsel and could have intervened with the District Attorney at an early stage of the process. The Petitioners also assert that the consular officials could have assisted in gathering mitigating evidence pertaining to Mr. Moreno Ramos, something which the Petitioners claim the Mexican government has since done, and could have assisted with the cultural aspects of his situation. While the State has argued that Mr. Moreno Ramos' family in the United States were involved in bringing his case to the attention of police and have not offered him support, the Petitioners claim that his family in Mexico has since come forward in support of his situation and therefore may have been available during the trial if they had been contacted.

21. The Petitioners also dispute the State's arguments to the effect that Mexican consular officials did nothing but observe the trial once they learned of the proceedings against Mr. Moreno Ramos. The Petitioners contend that in Article 36 of the Vienna Convention on Consular Relations, the proper focus is not what consular officials may or may not have done upon learning of Mr. Moreno Ramos' criminal proceedings, but rather upon what Mr. Moreno Ramos may have done had he been properly advised without delay of his right to consular notification. The Petitioners also argue that in any event, the consulate was notified too late to have provided effective assistance in the most crucial pre-trial stages of Mr. Moreno Ramos' criminal proceedings.

22. Second, the Petitioners allege that Mr. Moreno Ramos' attorneys failed to properly represent him, which included failing to investigate or present any mitigating evidence at the penalty phase of his trial. In particular, the Petitioners argue 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 rigorous 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 expertise and resources necessary to properly defend their clients, and that, as a result, capital defendants frequently receive deficient legal representation.[FN9] According to the Petitioners, these circumstances are inconsistent with the right to effective appointed counsel as an essential component of due process, especially in death penalty cases, as well as the state's obligation to appoint competent counsel, or replace ineffective counsel, as reflected in applicable international instruments.[FN10]

[FN9] Petitioners' petition, p. 5, citing Texas Defender Service, *A State of Denial: Texas, Justice and the Death Penalty* (2000).

[FN10] Petitioners' written observations for March 5, 2004 hearing, p. 3, citing ECOSOC Resolution 1989/64, 24 May 1989, UN Doc. E/1989/INF/7, at 128; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/1996/4, at para. 547; Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 118 (1990); *Kelly v. Jamaica* (253/1987), 8 April 1991, Report of the HRC (A/46/40), 1991, at 248, para. 5.10; Eur. Court H.R., *Artico Case*, 13 May 1980, 37 Ser. A 16, para. 36.

23. In the present case, the Petitioners assert that Mr. Moreno Ramos' legal representatives failed in several respects. First, they claim that Mr. Moreno Ramos' trial counsel failed to ensure that notification under the Vienna Convention on Consular Relations was given to him. In this respect, the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases include confirmation of consular notification among the requirements in the proper representation of foreign nationals.[FN11]

[FN11] American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition)(February 2003), Guideline 10.6B "Additional Obligations of Counsel Representing a Foreign National" (providing that "Unless predecessor counsel has already done so, counsel representing a foreign national should: 1. immediately advise the client of his or her right to communicate with the relevant consular office; and 2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest. A. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.").

24. The Petitioners also argue that Mr. Moreno Ramos' trial counsel failed to conduct a mitigation investigation or to present a proper case on mitigation during the sentencing phase of the trial. In this regard, the Petitioners contend that the investigation and presentation of mitigating evidence is an essential attribute of effective counsel in every capital case in the United States, and rely upon statements by the American Bar Association concerning the importance of preparing a case on mitigation.[FN12] Further, the Petitioners argue that without the development of a thorough social history that considers all aspects of the defendant's background, origins and upbringing, it is impossible for trial counsel to make an accurate and complete presentation of the mitigating factors that jurors must consider in making their life-or-death decisions, and assert that a thorough mitigation investigation encompasses all the forces which molded the client's life, both nature and nurture, the confluence and convergence of genetic predispositions and environmental influences...Investigation of the client's childhood includes the climate of caregiving in the home, the quality of relationships, hygiene, nutrition, education, exposure to toxins (in the air, in the dwelling, in utero, etc.)[FN13]

[FN12] Petitioners' written observations for March 5, 2004 hearing, p. 2, citing American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, pp. 81-82, February 2003.

[FN13] Petitioners' written observations for March 5, 2004 hearing, p. 2, citing Russell Stetler, Mitigation Evidence in Death Penalty cases, The Champion, January/February 1999.

25. In Mr. Moreno Ramos' particular circumstances, the Petitioners assert that given the strength of the State's case against Mr. Moreno Ramos in the guilt phase of the proceedings, an acquittal was unlikely from the start, and therefore that defense counsel's primary responsibility was to develop a convincing mitigating explanation for the crime that would convince the jury to sentence Mr. Moreno Ramos to life imprisonment. The Petitioners also assert that had defense counsel investigated Mr. Moreno Ramos' background, they would have discovered substantial mitigating evidence, including information indicating that as a child Mr. Moreno Ramos had been sadistically abused by his father.[FN14] The Petitioners claim, however, that defense counsel did virtually nothing to prepare for the penalty phase of the trial. They note in particular that defense counsel's closing argument filled only 6 pages of the trial transcript and lasted less than 10 minutes and that defense counsel never even asked the jury to return a life sentence.[FN15] The Petitioners argue that as a consequence, in the absence of mitigating evidence, there were no reasons for the jury to choose life over death and therefore that Mr. Moreno Ramos was not afforded the minimal procedural guarantees of fairness and due process requisite in capital proceedings. The Petitioners also highlight in this regard that under applicable domestic law, it only takes one juror to deny a death sentence and therefore that it is inappropriate, as the State suggests, to speculate that all of the members of the jury would have imposed the same sentence had a proper case in mitigation been presented.[FN16]

[FN14] Petitioners' written observations for March 5, 2004 hearing, pp. 2-3.

[FN15] State of Texas v. Roberto Moreno Ramos, Cause N° CR-1430-92-B, 93rd District Court of Hidalgo County, Texas, Transcript [hereinafter “Trial Transcript”], Vol. 84, pp. 76-81.

[FN16] Petitioners’ petition, pp. 15-16.

26. Further, the Petitioners argue that the counsel appointed by the State to represent Mr. Moreno Ramos on his state habeas corpus petition did not raise any claims that were not on the record, including those before the Commission, and indeed did not raise any cognizable habeas corpus claims, and that this failure doomed Mr. Moreno Ramos in his federal post-conviction proceedings by precluding him from raising them based upon the earlier omission[FN17]

[FN17] Petitioners’ written observations for March 5, 2004 hearing, p. 3, citing Ramos v. State, 943 S.W. 2d 3581 (Tex. Cr. App. 1996).

27. Based upon the poor quality of Mr. Moreno Ramos’ legal representation, therefore, the Petitioners argue that he is absolved of the obligation to exhaust domestic remedies in respect of the claims raised before the Commission, and further that he has been the victim of the right to due process and to a fair trial as reflected in Articles XVIII and XXVI of the American Declaration.

28. In addition, the Petitioners argue that the prosecution made inflammatory arguments during the sentencing phase of Mr. Moreno Ramos’ trial designed to draw jurors’ attention to Mr. Moreno Ramos’ status as an undocumented Mexican immigrant. Specifically, the Petitioners claim that during his closing arguments at the penalty phase of Mr. Moreno Ramos’ trial, the prosecution encouraged the jury to return a death sentence, appealing to patriotism and pointing out that Mr. Moreno Ramos was a foreign national.[FN18]

[FN18] Petitioners’ written observations for March 5, 2004 hearing, p. 4, citing Trial Transcript, Vol. 84, p. 81.

29. The Petitioners claim that the comments by the prosecutor were designed to draw the jury’s attention to Mr. Moreno Ramos’ status as a foreign national, distinguishing between the nationality of the jurors, prosecutors and those in the audience, and that of Mr. Moreno Ramos, and that these comments had the effect of encouraging the jury to consider Mr. Moreno Ramos’ nationality in assessing whether he should live or die. The Petitioners also note that the prosecutor’s comments had no relevance to the issues before the jury, that Mr. Moreno Ramos’ nationality had no relation to the alleged homicide, nor could the jury conclude that he would present a danger to society merely because he chose to enter the United States. Accordingly, the Petitioners contend that there can be little doubt that the prosecutor’s inflammatory comments presented a real danger of prejudice to Mr. Moreno Ramos, and therefore that the State is responsible for violations of Mr. Moreno Ramos’ right to equality before the law under Article II

of the American Declaration, and additional violations of his right to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration.[FN19]

[FN19] Petitioners' written observations for March 5, 2004 hearing, p. 4, citing Case 11.139, Report 57/96, William Andrews (United States), Annual Report of the IACHR 1997.

30. 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

31. In its initial response to the petition and subsequent oral and written observations in the case, the State reiterated its position that the Commission should declare the Petitioners' claims inadmissible on the ground that Mr. Moreno Ramos has failed to exhaust his domestic remedies, that Mr. Moreno Ramos' due process claims are without merit, and that the petition fails to state facts that constitute a violation of principles under the American Declaration.

32. Concerning the factual and procedural history to the case, the State notes that 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. The State described the circumstances of Mr. Moreno Ramos' crime in the following way:

[. . .] 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 dies 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.[FN20]

[FN20] State's response dated February 13, 2003, p. 2.

33. Concerning the issue of exhaustion of domestic remedies, the State reiterated its position that the claims before the Commission were not pursued before the United States courts, notwithstanding the fact that Mr. Moreno Ramos had since 1993 to raised these claims. The State disputed the Petitioners' argument that Mr. Moreno Ramos' attorneys were incompetent and therefore precluded him from exhausting domestic remedies, and further argued that in any event, Mr. Moreno Ramos admitted that he failed to raise his ineffective assistance of counsel claim in court and therefore waived it.

34. More particularly, the State asserts that Mr. Moreno Ramos failed to raise or preserve his claims in the U.S. courts when he clearly could have, including those relating to the Vienna Convention on Consular Relations, ineffective assistance of counsel and inflammatory statements allegedly made to the jury. The State also argued that Mr. Moreno Ramos is not excused from pursuing his claims based upon an exception to the exhaustion requirement, for example on the basis of futility or the existence of a "sham" proceeding, or on the basis of ignorance or where due process has been provided. Further, the State contended that the death penalty per se is not contrary to international law and therefore that this cannot provide the basis for an exception to the exhaustion requirement. The State emphasized that the exhaustion requirement must be interpreted to have effect and that international bodies are not intended to take the place of domestic courts.

35. The State argued that in the present case, it has provided Mr. Moreno Ramos with a comprehensive and expansive system of review and protection of his rights and has allocated time and resources considering his case and affording him judicial review, and that the procedures provided have been fair. According to the State, the protections given to Mr. Moreno Ramos under U.S. law are numerous and include the following:

- (a) the right to be tried before a fair and impartial tribunal under the Fifth and Fourteenth Amendments to the U.S. Constitution;
- (b) the right not to be subjected to discrimination by federal and state authorities based upon their race gender, ethnicity or national origin;
- (c) the right to be informed of the privilege against self-incrimination (the "right to remain silent") and the right not to be incriminated by his or her own statements unless they have knowingly and intelligently waived this constitutional privilege;
- (d) the right under the Sixth Amendment to be informed promptly and in detail of all charges made against them, a public trial by jury in all criminal prosecutions, effective legal

representation supplied at public expense if they cannot afford an attorney, and adequate time and opportunity to prepare a defense and consult with counsel;

(e) the right under the Fifth and Sixth Amendments to the U.S. Constitution to be assisted by an interpreter if a defendant does not understand English language proceedings;

(f) the right under the Sixth and Fourteenth Amendments to the U.S. Constitution to the assistance of investigators and experts where a particularized need for such assistance can be demonstrated;

(g) the prohibition under the ex post facto clause of the U.S. Constitution of retroactive increases in the penalties available in criminal cases and the prohibition against imposing a penalty, including the death penalty, on an offender for a crime that was not subject to such punishment at the time it was committed; and

(h) the requirement that the death penalty 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 appeals.[FN21]

[FN21] State's written observations for March 5, 2004 hearing, pp. 6-7.

36. Further, the State argued that the foregoing rights are guaranteed to non-nationals regardless of whether such person receives information about requesting consular notification or receives consular assistance, and reiterated its position that the failure to provide consular notification does not violate due process rights and protections and cannot itself cause or constitute a violation of these rights and protections.

37. Concerning the particulars of the instant case, the State argued that Mr. Moreno Ramos received full protection of his due process rights and protections. The State indicates, for example, that upon his arrest Mr. Moreno Ramos was read his Miranda rights in Spanish, including his right to counsel. The State also claims that Mr. Moreno Ramos raised 63 counts of objection on his first appeal, none of which were issues raised before the Commission. Specifically regarding the Petitioners' claims of ineffective assistance of counsel, the State contended that the claims are without foundation because they are based upon speculation, in that there is no evidence that there was a lack of investigation of mitigating evidence. In this respect, the State argues that the applicable standard should require the Petitioners to demonstrate that evidence existed, that there was an available witness to give that evidence, and that it may have affected the outcome of the proceeding.

38. In Mr. Moreno Ramos' case, the State contends that there is no evidence concerning who might have testified as to, for example, the abuse alleged to have been suffered by him or whether it would have affected the jury's deliberations. Further, the State argues that mitigating evidence must be shown to have provided an explanation or justification for the crime to be relevant, but that in the present case there cannot be any explanation for Mr. Moreno Ramos' crime. In addition, the State asserts that there were sufficient aggravating factors that went to future dangerousness, including evidence relating to prior offenses, which justified the death penalty in any event. The State reiterated its position 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, the State contends that he has not been the victim of a violation of Article I of the Declaration. Finally, the State argues that the fact that the arguments presented by the defense during the sentencing phase of Mr. Moreno Ramos' trial comprised 6 pages of the transcript, in and of itself, says little, as arguments vary widely from one case to another and may simply reflect a situation where there was little to say.

39. With regard to the Petitioners' arguments concerning the absence of consular notification, the State asserted its position taken during the admissibility stage of the proceeding that the Commission is without competence to review claims brought under the Vienna Convention on Consular Relations, and that a failure of consular notification does not amount to a violation of human rights or of due process of law. In particular, the State claims that the Vienna Convention on Consular Relations is not a human rights instrument and that the protections provided thereunder are conferred on the basis of reciprocity, nationality and function and do not have the characteristics of human rights. The State also rejects any suggestion that the failure to notify is a per se violation as it would create profoundly illogical results, and argues that the Inter-American Court's Advisory Opinion OC-16/99 is fundamentally wrong to the extent that it suggests otherwise. Further, the State asserts that consular information and notification have never been understood by the international community to be an essential element of due process and fairness and that no criminal justice system gives them that status.[FN22] The State asserts that the discretionary nature of consular assistance and the limited ability of many states to provide such assistance to their nationals suggest that the consular notification obligation could never attain the status of a human right and that fair trial and due process rights guaranteed under domestic law, including the U.S. Constitution, cannot and should not depend on the consular intervention of other states.[FN23]

[FN22] State's written observations for March 5, 2004 hearing, p. 13.

[FN23] State's written observations for March 5, 2004 hearing, pp. 13-14.

40. Alternatively, the State contends that the Petitioners' reasoning as to the alleged violations of Article 36 of the Vienna Convention on Consular Relations 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 cannot identify any 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 the situation sooner. In addition, the State alleges that the Petitioners have failed to demonstrate that the failure to inform Mr. Moreno Ramos of his right to consular notification impacted his case to such a degree as to call into question the State's observance of due process and a fair trial. The State argues, for example, that the Petitioners have not shown that any pre-trial rights

relevant to Mr. Moreno Ramos' criminal trial were violated, that his rights were not fully protected during trial, or that consular notification would have affected his trial.

41. The State argues further that the text and negotiation history of the Vienna Convention on Consular Relations fail to support any argument by the Petitioners, based on the decisions of the International Court of Justice in the *LaGrand* or *Avena et al.* Cases, 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 this respect, the State provided the Commission with copies of its counter memorial and related annexes in the *Avena et al.* proceeding before the International Court of Justice. The State argues further that, in any event, 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 U.S. 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,[FN24] that the Hidalgo County District Court judge seized of Mr. Moreno Ramos' case agreed to hear the Mexican General Consul's concerns regarding Mr. Moreno Ramos, and that if he so wished, he could seek review and reconsideration of his sentence through the established parole process of the State of Texas.

[FN24] 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.

42. Concerning the comments made by the prosecutor during the sentencing phase of Mr. Moreno Ramos' trial, the State argued during the March 5, 2004 hearing before the Commission that the statements, while "unfortunate", need to be read in context. According to the State, based upon the prosecutor's submissions considered as a whole, the jury would not have understood the statements as influencing punishment but rather would have understood them as meaning that they were to follow the law. The State similarly argues that the failure of Mr. Moreno Ramos' attorney to inform the jury of the possibility of a sentence of imprisonment may well have been considered an aggravating factor in the circumstances of his case and therefore that a competent counsel could have decided not to raise the matter.

IV. ANALYSIS

1. Standard of Review

43. Before addressing the merits of the present case, the Commission wishes to reaffirm and reiterate its well-established doctrine that it will apply a heightened level of scrutiny in deciding capital punishment cases. The right to life is widely-recognized as the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other rights. The Commission therefore considers that it has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. This "heightened scrutiny test" is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty,[FN25] and has been articulated and applied by the Commission in previous capital cases before it.[FN26]

[FN25] See e.g. I/A Court H.R., Advisory Opinion OC-16/99 (1 October 1999) "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law", para. 136 (finding that "[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result"); U.N.H.R.C., Baboheram-Adhin et al. v. Suriname, Communication Nos. 148-154/1983, adopted 4 April 1985, para. 14.3 (finding that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.); Report by the U.N. Special Rapporteur on Extra-judicial Executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, U.N. Doc.E/CN.4/1995/61 (14 December 1994) (hereinafter "Ndiaye Report"), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trials to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life.).

[FN26] See e.g. 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.

44. The Commission will therefore review the Petitioners' allegations in the present case with a heightened level of scrutiny, to ensure in particular that the right to life, the right to due process, and the right to a fair trial as prescribed under the American Declaration have been properly respected by the State.

2. Right to a Fair Trial and to Due Process of Law

45. In the present case, the first issue before the Commission is whether Mr. Moreno Ramos received a fair trial consistent with the requirements under the American Declaration, in light of two interrelated aspects of his criminal proceedings: the quality of his legal representation; and

the State's uncontested failure to provide Mr. Moreno Ramos with notification of his right to consular assistance in compliance with Article 36 of the Vienna Convention on Consular Relations.

46. First, the Petitioners have claimed that the State failed to provide Mr. Moreno Ramos with adequate legal representation, based principally upon the failure of his trial counsel to adequately investigate and present pertinent mitigating evidence during the punishment phase of Mr. Moreno Ramos' trial, and the failure of his representatives at trial and in post-trial proceedings to present and preserve certain issues for the consideration of the state and federal courts. The State essentially contends that the Petitioners have failed to establish that Mr. Moreno Ramos' legal representatives did not meet applicable standards of competence, or that any failures in this regard have been shown to have affected the fairness of the proceedings against him.

47. In considering the arguments and information presented by the parties, the Commission must keep in mind the importance of strict compliance with fair trial standards, particularly in capital proceedings. The Commission has previously recognized that the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, due in part to its irrevocable and irreversible nature, and therefore warrants a particularly stringent need for reliability in determining whether death is the appropriate punishment in a given case.[FN27] Further, the Inter-American Court of Human Rights recently noted the existence of an "internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases," such that "[i]f the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life."[FN28] The Commission considers that these protections apply to all aspects of a defendant's criminal trial, regardless of the manner in which a state may choose to organize its criminal proceedings. Consequently, where, as in the present case, the State has chosen to establish separate proceedings for the guilt/innocence and punishment stages of a criminal prosecution, the Commission considers that due process protections apply throughout.[FN29]

[FN27] See e.g. McKenzie et al. v. US, supra, para. 188, referring in part to Woodson v. North Carolina, 449 L Ed 944, 961 (U.S.S.C.).

[FN28] Advisory Opinion OC-16/99, supra, para. 135. See similarly UNHRC, Champagne, Palmer and Chisholm v. Jamaica, Communication N° 445/991, U.N. Doc. CCPR/C/51/D/445/1991 (1994), para. 9 (finding that in capital punishment cases, "the obligations of states parties to observe vigorously all the guarantees of a fair trial set out in Article 14 of the Covenant [on Civil and Political Rights] admits of no exception.").

[FN29] See similarly Garza, supra, para. 102; Eur. Comm. H.R., Jaspers v. Belgium, 27 D.R. 61 (1981) (applying the principle of equality of arms to sentencing proceedings)

48. According to the Commission, the fundamental due process requirements for capital trials include the obligation to afford a defendant a full and fair opportunity to present mitigating evidence for consideration in determining whether the death penalty is the appropriate punishment in the circumstances of his or her case. The Commission has stated in this respect that the due process guarantees under the American Convention and the American Declaration applicable to the sentencing phase of a defendant's capital prosecution guarantee an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of the defendant's case, in light of such considerations as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.[FN30]

[FN30] See Baptiste, *supra*, paras. 91, 92; McKenzie et al., *supra*, at paras. 204, 205; Edwards et al., *supra*, paras. 151-153. See similarly I/A Court H.R., Hilaire, Constantine and Benjamin et al. Case v. Trinidad and Tobago, Judgment of 21 June 2002, Ser. C N° 94, paras. 102, 103.

49. Similar requirements are reflected under domestic standards of legal practice in the United States.[FN31] In particular, the American Bar Association, the principal national organization for the legal profession in the United States, has prepared and adopted guidelines and related commentaries that emphasize the importance of investigating and presenting mitigating evidence in death penalty cases.[FN32] They indicate, for example, that the duty of counsel in the United States to investigate and present mitigating evidence is now "well-established" and emphasize that

[b]ecause the sentencer in a capital case must consider in mitigation, 'anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant,' "penalty phase preparation requires extensive and generally unparalleled investigation in to personal and family history." In the case of the client, this begins with the moment of conception.[FN33]

[FN31] Petitioners' written observations for March 5, 2004 hearing, p. 2, citing American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, February 2003, pp. 81-82.

[FN32] American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised editions)(February 2003) (<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>), Guideline 10.7 – Investigation.

[FN33] *Id.*, at 82 [footnotes omitted]

50. The Guidelines also emphasize the need for prompt and early mitigation investigation, stating that

[t]he mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.[FN34]

[FN34] Id., at 83 [footnotes omitted].

51. The Commission recognizes that the laws of the United States offer extensive due process protections to individuals who are the subject of criminal proceedings, including the right to effective legal representation supplied at public expense if an individual cannot afford an attorney. While it is fundamental for these protections to be prescribed under domestic law, it is also necessary for States to ensure that these protections are provided in practice in the circumstances of each individual defendant.

52. In the present case, the Petitioners have indicated, and the State has not contested, that Mr. Moreno Ramos was indigent and was represented by court-appointed lawyers. After carefully considering the record in this matter, for the reasons below the Commission is not satisfied that Mr. Moreno Ramos received adequate legal representation in the course of the criminal proceedings against him, as required under applicable international human rights standards, and that the deficiencies in his representation would have been evident to the courts considering Mr. Moreno Ramos' case so as to engage the responsibility of the State.[FN35]

[FN35] See, e.g., Case 12.275, Report 58/02, Denton Aitken v. Jamaica, Annual Report of the IACHR 2002, paras. 142-143.

53. In particular, notwithstanding the serious implications of Mr. Moreno Ramos' penalty hearing, there is no information indicating that his trial counsel conducted a mitigation investigation, and a review of the transcript from Mr. Moreno Ramos' prosecution indicates that his counsel presented absolutely no mitigating evidence to the jury pertaining to Mr. Moreno Ramos' personal history or otherwise,[FN36] a fact that would have been evident to the presiding judge.

[FN36] Trial Transcript, supra, Vol. 84, pp. 45-47.

54. Moreover, according to the record, a reasonable investigation would have revealed potentially relevant mitigating evidence. Specifically, the Petitioners have indicated, and the State has not contested, that Mr. Moreno Ramos was the victim of abuse at the hands of his father. The Petitioners have also submitted that members of Mr. Moreno Ramos family in Mexico with knowledge of his background have, since his trial, come forward in support of his situation and therefore may have been available to provide evidence concerning Mr. Moreno

Ramos' history had they been contacted at the time of the trial. In the Commission's view, evidence as to the possible connection between his childhood abuse and subsequent acts of violence against his own family is potentially relevant to the motivation for Mr. Moreno Ramos' conduct and therefore constitutes the type of information that should be available to a judge or jury in determining whether the death penalty is the appropriate punishment in a particular case. Based upon these circumstances, the Commission finds that the failure of Mr. Moreno Ramos' trial attorney to properly investigate and, as appropriate, present evidence concerning his childhood abuse to the jury deprived him of the benefit of the jury's consideration of potentially significant information in determining his punishment. As a consequence, Mr. Moreno Ramos was not provided with adequate legal representation as a fundamental component of his right to a fair trial.

55. The Commission also considers that Mr. Moreno Ramos legal representation was inadequate insofar as his legal representatives failed to raise certain arguments in his favor before the domestic courts, with the effect that domestic courts either were not asked to consider those arguments, or were precluded from doing so based upon counsel's earlier failure to raise those issues. The disregarded issues included those presently before the Commission, namely the failure of the State to notify Mr. Moreno Ramos of his right to consular assistance, the comments made by the prosecutor during the sentencing phase of the trial, and the adequacy of Mr. Moreno Ramos' legal representation. With respect to the third issue in particular, the record indicates that Mr. Moreno Ramos was precluded from raising the issue of his legal representatives' competence in subsequent stages of his proceedings as a result of the failure of his allegedly incompetent legal representatives to raise the issue at an earlier stage. As a consequence, Mr. Moreno Ramos had no forum in which to effectively challenge his trial lawyers' performance and no domestic court evaluated the adequacy of Mr. Moreno Ramos' legal representation. In the Commission's view, this constitutes a serious gap in the protection of the fundamental due process rights of capital defendants before the State's domestic courts.

56. In this regard, the Commission wishes to express its particular concern respecting the Petitioners' submissions on the deficient state of the capital public defender system in the state of Texas. According to the Petitioners, Texas has no state-wide agency responsible for providing specialized representation in capital cases. They also claim that a great majority of lawyers who handle death penalty cases in Texas are sole practitioners lacking the expertise and resources necessary to properly defend their clients, and that as a result, capital defendants frequently receive deficient legal representation. In support of their allegations, the Petitioners refer to a November 2002 report entitled A State of Denial: Texas Justice and the Death Penalty,[FN37] prepared by the Texas Defender Service[FN38] based upon a study of hundreds of death penalty cases in the state of Texas. The Report identifies many instances of poor representation by defense lawyers in capital trials and state habeas corpus proceedings, which in some cases result from the State's refusal to both appoint lawyers with sufficient experience and training and to fund an adequate defense.[FN39] The Report also indicates that the Texas Court of Criminal Appeals routinely denies any remedies to inmates whose court-appointed lawyers performed poorly.[FN40]

[FN37] Texas Defender Service, *A State of Denial: Texas. Justice and the Death Penalty* (2000) (<http://texasdefender.org/state%20of%20denial/Part1.pdf>). which according to the information available is a private, non-profit organization that has since 1995 provided direct representation to indigent inmates on Texas' death row, consulted with other lawyers litigating such cases, and intervened in unusual cases where legal assistance was urgently needed.

[FN38] According to the Report, the Texas Defender Service is a private, non-profit organization that has since 1995 provided direct representation to indigent inmates on Texas' death row, consulted with other lawyers litigating such cases, and intervened in unusual cases where legal assistance was urgently needed.

[FN39] *A State of Denial*, supra, Chapter 6 – The Right to Counsel in Texas: You Get What you Pay For.

[FN40] *Id.*, Chapter 7 – Sham Appeals: The Appearance of Representation in State Habeas Corpus.

57. The systemic problems in the Texas justice system alleged by the Petitioners were not fully briefed by both parties in this case, and therefore the Commission considers that any observations in this regard are necessarily tentative. At the same time, in light of the high degree of due process requirements applicable under international law, and in the absence of conflicting information or evidence from the State, the Commission wishes to express its concern regarding the strong possibility that the quality of public defender services offered in death penalty cases in Texas may be deficient in part due to the lack of effective oversight by the State and that this may have contributed to the deficiencies in Mr. Moreno Ramos' representation. Accordingly, the Commission urges the State to take the appropriate measures to ensure that the quality of legal representation provided by the State to indigent capital defendants throughout the United States, including the state of Texas, satisfy the high degree of fair trial protection applicable in death penalty proceedings.

58. Based upon the foregoing, the Commission considers that Mr. Moreno Ramos was not afforded his right to competent legal representation for the purposes of the proceeding against him. As a consequence, the Commission concludes that Mr. Moreno Ramos was denied access to remedies under domestic law for the alleged violations of his rights or has been prevented from exhausting them for the purposes of Article 31(2) of the Commission Rules of Procedure and therefore that his is excused from exhausting domestic remedies concerning the issues raised before this Commission. The Commission also concludes that the State is responsible for violating Mr. Moreno Ramos' right to a fair trial under Article XVIII of the American Declaration, and his right to due process of law under Article XXVI of the American Declaration, by failing to provide him with competent legal representation in the course of the criminal proceedings against him.

59. The Petitioners have also challenged the fairness of Mr. Moreno Ramos' criminal proceedings on the basis that he was not provided with notification of his right to consular assistance in accordance with Article 36 of the Vienna Convention on Consular Relations. In this regard, in its decision in the case of *Ramón Martínez Villareal v. United States*[FN41] 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.[FN42] The Commission adopts for the purposes of this report its findings in the Villareal Case and will analyze Mr. Moreno Ramos' circumstances in light of those findings.

[FN41] Ramón Martínez Villareal v. United States, Case N° 11.753, Report N° 52/02, Annual Report of the IACHR 2002. See also Case 11.331, Report 99/03, Cesar Fierro . United States, Annual Report of the IACHR 2003.

[FN42] Martínez Villareal, *supra*, para. 77.

60. The Commission notes in this respect that the significance of consular notification to the due process rights of foreign nationals in capital proceedings has also been recognized by the American Bar Association, which has indicated in its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases that

[u]nless predecessor counsel has already done so, counsel representing a foreign national should: 1. immediately advise the client of his or her right to communicate with the relevant consular office; and 2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest [...]"[FN43]

[FN43] American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised Edition)(February 2003), Guideline 10.6B "Additional Obligations of Counsel Representing a Foreign National."

61. In the present complaint, the Petitioners have alleged, and the State has not contested, that Mr. Moreno Ramos was at all relevant times a Mexican national and that police in the state of Texas arrested him on March 20, 1992 after questioning him regarding the disappearance of his wife and children, held him on a variety of traffic warrants for the next several days and interrogated him, and on April 7, 2002, charged him with the murders of Leticia, Abigail and Jonathan Ramos. It is also uncontested that Mr. Moreno Ramos was never informed of his right to consular notification and assistance under Article 36 of the Vienna Convention on Consular Relations, during the period of his detention or interrogation or otherwise.[FN44] Mr. Moreno Ramos was subsequently prosecuted, convicted on March 18, 2003 of the capital murders of his wife and two children, and sentenced to death on March 23, 2003.

[FN44] The Commission notes that in its judgment in the Case of Avena and other Mexican Nationals (Mexico v. United States), the International Court of Justice concluded that the United States breached the obligations incumbent upon it under Article 36(1) and (2) of the Vienna Convention on Consular Relations in respect of Mr. Moreno Ramos. *Avena*, supra, paras. 106, 114, 153.

62. The Petitioners and the State disagree as to whether the failure to provide Mr. Moreno Ramos with notification of his right to seek consular assistance affected the fairness of the criminal proceedings against him. The Commission emphasizes in this respect that the fact that a state may have breached its obligations under Article 36 of the Vienna Convention on Consular Relations in respect of a defendant does not necessarily lead to the conclusion that the defendant has been denied his or her right to due process, but rather is a factor that must be evaluated together with all of the other circumstances of each case in order to determine whether a defendant received a fair trial. At the same time, in cases in which a state party to the Vienna Convention on Consular Relations fails to fulfill its consular notification obligation to a foreign national, a particular responsibility falls to that state to put forward information indicating that the proceeding against a foreign national satisfied the requirements of a fair trial notwithstanding the state's failure to meet its consular notification obligation.

63. Based upon the information and evidence on the record, it is not apparent to the Commission that Mr. Moreno Ramos' proceedings were fair notwithstanding the State's failure to comply with the consular notification requirements. To the contrary, the Commission considers, based upon the information presented, that the State's failure in this regard had a potentially serious impact upon the fairness of Mr. Moreno Ramos' trial. In particular, as noted above, the Petitioners have alleged that significant mitigating evidence concerning Mr. Moreno Ramos' treatment at the hands of his father existed and that, if this information was investigated prior to trial, it could have provided the jury with additional pertinent information concerning the circumstances of Mr. Moreno Ramos' crime. Had Mr. Moreno Ramos been properly notified of his right to consular assistance and assisted by competent counsel, information about his history could have been communicated to his Consulate and the Consulate could have been engaged to assist in contacting Mr. Moreno Ramos' family in Mexico and in investigating other evidence potentially relevant to his case. Indeed, according to the Petitioners, such efforts have since been undertaken, although too late to have been of assistance in Mr. Moreno Ramos' sentencing hearing.

64. Based upon the foregoing, the Commission concludes that Mr. Moreno Ramos' right to consular 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 resulted in additional violations of Mr. Moreno Ramos' rights to due process and to a fair trial under these provisions of the Declaration.[FN45]

[FN45] Ramón Martínez Villareal v. United States, supra, para. 84.

3. Right to Equal Protection of the Law in the Context of a Fair Trial

65. Finally, the Petitioners have alleged that the State is responsible for violating Mr. Moreno Ramos' right to equal protection of the law under Article II of the Declaration based upon statements made by the prosecution during the punishment phase of the trial that highlighted the fact that Mr. Moreno Ramos was a foreign national. The State has not denied that these statements were made, but argued that the comments must be read in context, such that the jury would not have understood the statements to consider Mr. Moreno Ramos' nationality as a factor in sentencing, but rather simply that all persons, whether citizens or foreign nationals, must follow the law.

66. The Commission notes in this respect that the Petitioners' allegations relating to Article II of the American Declaration arise in the context of the fair trial requirements under inter-American human rights instruments, which include the requirement that the tribunal concerned is impartial and affords a party equal protection of the law, without discrimination of any kind. In systems that employ a jury system, these requirements apply both to judges and to juries. The Commission has previously recognized in this connection that the international standard on the issue of "judge and juror impartiality" employs an objective test based on "reasonableness, and the appearance of impartiality." [FN46] According to this standard, it must be determined whether there is a real danger of bias affecting the mind of the relevant juror or jurors. [FN47] Where this bias may relate to a prohibited ground of discrimination, such as race, language, religion, or national or social origin, it may also implicate a violation of the principle of equality and non-discrimination, which the Inter-American Court recently declared to have attained the status of a *jus cogens* norm. [FN48]

[FN46] William Andrews v. United States, Report N° 11.139, Annual Report of the IACHR 1997, para. 159. See similarly See e.g. Eur. Court H.R., Remli v. France, Judgment (Merits and Just Satisfaction), April 23, 1996, R.J.D. 1996-11, N° 8, paras. 43-48.

[FN47] *Id.*, n. 96.

[FN48] I/A Court H.R., Advisory Opinion OC-18/03 of September 17, 2003, Juridical Condition of Rights of Undocumented Migrants, Ser. A N° 18.

67. In the case of William Andrews v. United States, for example, the Commission addressed the question of whether the jury before which Mr. Andrews, an African American defendant on death row in Utah, was tried had a reasonable appearance of bias, based upon a racially derogatory note found among the jurors during the trial. The Commission ultimately found the State responsible for violations of both the right to equality before the law under Article II of the Declaration and the right to a fair trial under Article XXVI of the Declaration, concluding that

in assessing the totality of the facts in an objective and reasonable manner the evidence indicates that Mr. Andrews did not receive an impartial hearing because there was a reasonable appearance of "racial bias" by some members of the jury, and the omission of the trial court to

voir dire the jury tainted the trial and resulted in him being convicted, sentenced to death, and executed. The record before the Commission reflects ample evidence of "racial bias." [FN49]

[FN49] Id., para. 165.

68. After carefully reviewing the allegations and information presented by the parties on this issue in the present case, the Commission considers that, viewed objectively and in the context of the circumstances of Mr. Moreno Ramos' crime and the purpose of the sentencing hearing more broadly, there is a real danger that Mr. Moreno Ramos' nationality was considered by the jurors in determining his punishment. This conclusion is suggested by numerous aspects of Mr. Moreno Ramos' punishment hearing, including the fact that the prosecutor referred to Mr. Moreno Ramos' status as a foreign national in the following terms:

We are a nation of laws. We are a people of laws. And, we are governed by our nation's laws. And the flags that you see in this courtroom are merely symbols of our great nation. If you look back, you'll see the flag of the United States. It is a great nation, but merely a symbol of who we are. And if a man chooses to enter this country, then that man must abide by the laws, And he must walk this country, understanding that our country is governed by laws...And so Robert Moreno Ramos chose to enter the United States...And if you look in the audience, you'll see the State of Texas...You decide the message that people of this State will receive by your verdict.[FN50]

[FN50] Trial Transcript, supra, Vol. 84, p. 81.

69. The Commission also notes that in the context of the present case, Mr. Moreno Ramos' nationality was entirely irrelevant to and unconnected with the issues under consideration at the punishment phase of his trial, raising a particular danger that this evidence would be relied upon as a consideration in determining an appropriate sentence.[FN51] The Commission observes in this regard that no steps were taken, by the trial judge or otherwise, to clarify that the jurors were not to consider Mr. Moreno Ramos' nationality as an element in deciding upon his punishment. All of these factors together, viewed objectively, give rise to a real possibility that the jurors took into account Mr. Moreno Ramos' status as a foreign national in determining whether he should be executed for his crime, and thereby failed to afford him his right to be tried by an impartial tribunal as well as his right to equal protection of the law without discrimination.

[FN51] In this respect, the Inter-American Court of Human Rights recently emphasized the need to ensure due process of law to all persons irrespective of their immigration status, in full compliance with the principle of equality and non-discrimination, and cautioned against cultural prejudices concerning non-nationals that exacerbate the vulnerable status of such persons, including ethnic prejudice, xenophobia and racism. Advisory Opinion OC-18/03, supra, paras. 111-127. See similarly, Advisory Opinion OC-16/99, supra, paras. 97, 115.

70. Accordingly, the Commission finds that the State is responsible for violations of its obligations under Articles XVIII and XXVI of the American Declaration, together with a violation of Article II of the Declaration, based upon the statements made by the prosecutor during his punishment hearing concerning the fact that Mr. Moreno Ramos was a national of Mexico.

4. Right to Life

71. In previous decisions, the Commission has found that Article I of the Declaration prohibits the application of the death penalty when doing so would result in an arbitrary deprivation of life.[FN52] In addition, the Commission has included among the deficiencies that will result in an arbitrary deprivation of life through the death penalty the failure of a State to afford an accused strict and rigorous judicial guarantees of a fair trial.[FN53] Accordingly, where the right of a condemned prisoner to a fair trial has been infringed in connection with the proceedings that led to his or her death sentence, the Commission has held that executing the individual pursuant to that sentence will constitute a deliberate and egregious violation of the right to life under Article I of the American Declaration.[FN54]

[FN52] See, e.g., Roach and Pinkerton, *supra*; Andrews, *supra*; Garza, *supra*, para. 90

[FN53] See, e.g., Andrews, *supra*; para. 172; Garza, *supra*, paras. 110, 111.

[FN54] See, e.g., Garza, *supra*, para. 111.

72. In the instant case, the Commission has concluded that the State is responsible for violations of its obligations under Articles XVIII and XXVI of the American Declaration, based upon its failure to provide him with competent legal representation in the course of the criminal proceedings against him, its failure to afford Mr. Moreno Ramos his right to consular information under Article 36(1)(b) of the Vienna Convention on Consular Relations, and statements made by the prosecutor during his punishment hearing concerning the fact that Mr. Moreno Ramos was a national of Mexico. Therefore, should the State execute Mr. Moreno Ramos pursuant to his death sentence, it will commit a deliberate and egregious violation of Article I of the American Declaration.

73. Rather, in the circumstances of the present complaint, where a defendant's conviction has occurred as a result of sentencing proceedings that fail to satisfy the minimal requirements of fairness and due process, the Commission considers that the appropriate remedy includes the convocation of a new sentencing hearing in accordance with the equality, due process and fair trial protections prescribed under Articles II, XVIII and XXVI of the American Declaration.[FN55]

[FN55] See similarly *Ramón Martínez Villareal v. United States*, *supra*, para. 86; *Joseph Thomas v. Jamaica*, Case N° 12.183, Report N° 127/01, Annual Report of the IACHR 2001, para. 146.

5. Precautionary Measures

74. According to the information presently available, the Assistant Criminal District Attorney in Hidalgo County, Texas has filed a motion with the District Court requesting that it set a September 30, 2004 execution date for Mr. Moreno Ramos. In this connection, the Commission recalls its jurisprudence concerning the legal effect of its precautionary measures in the context of capital punishment cases. According to this doctrine, 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.

75. 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.[FN56]

[FN56] 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.

76. In light of these fundamental principles, and in light of the Commission's findings in the present report, 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 implementation of the Commission's recommendations in the matter.

V. PROCEEDINGS SUBSEQUENT TO REPORT 39/04

77. On August 10, 2004, the Commission adopted Report 39/04 pursuant to Article 43 of its Rules of Procedure, setting forth its analysis of the record and its findings and recommendations in this matter.

78. Report 39/04 was transmitted to the State by note dated September 13, 2004, 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. By communication of the same date, the Petitioners were informed in accordance with Article 43(3) of the Commission's Rules that the report had been adopted.

79. By communications dated October 5 and October 13, 2004 and received by the Commission on, respectively, October 7 and October 14, 2004, the State delivered responses to the Commission's request for information. In its responses, the State indicated that it understood that the Texas authorities had not set an execution date for Mr. Moreno Ramos and that it would update the Commission further as the situation developed. The State also indicated that it respectfully disagreed with the analysis and conclusions in the Commission's Report 39/04 for the reasons set out in its previous oral and written observations in the case before the Commission as well as in the Counter-Memorial of the United States in the Avena Case before the International Court of Justice. The State also restated its position that the Commission does not have the authority to make requests for precautionary measures to non-States Parties to the American Convention on Human Rights and referred in this respect to its observations concerning the Precautionary Measures N° 259 issued by the Commission concerning the Detainees in Guantanamo Bay. The State has not provided the Commission with information concerning the measures taken by it to comply with the recommendations contained in report 39/04.

80. Based upon the response of the United States, the Commission finds that the State has failed to take measures to comply fully with the Commission's recommendations. On this basis, and having considered the State's observations, the Commission has decided to ratify its conclusions and reiterate its recommendations, as set forth below.

VI. CONCLUSIONS

81. The Commission, based on the foregoing considerations of fact and law, ratifies the following conclusions.

82. The Commission hereby concludes that the Petitioners' claims under Articles II, XVIII and XXVI of the American Declaration fall within an exception to the exhaustion of domestic remedies requirement under Article 31 of the Commission's Rules of Procedure and are therefore admissible.

83. The Commission hereby concludes that the State is responsible for violations of Articles II, XVIII and XXVI of the American Declaration in the criminal proceedings against Mr. Moreno Ramos. The Commission also concludes that, should the State execute Mr. Moreno Ramos pursuant to the criminal proceedings at issue in this case, the State will commit a grave

and irreparable violation of the fundamental right to life under Article I of the American Declaration.

VII. RECOMMENDATIONS

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

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE UNITED STATES:

1. Provide Mr. Moreno Ramos with an effective remedy, which includes a new sentencing hearing in accordance with the equality, due process and fair trial protections prescribed under Articles II, XVIII and XXVI of the American Declaration, including the right to competent legal representation.

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.

3. Review its laws, procedures and practices to ensure that defendants in capital proceedings are not denied the right to effective recourse to a competent court or tribunal to challenge the competency of their legal representation on the basis that the issue was not raised at an earlier stage of the process against them.

85. 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. Moreno Ramos' life and physical integrity pending the completion of the proceedings before the Commission in this matter, including implementation of the Commission's final recommendations.

VIII. PUBLICATION

86. By communication dated November 4, 2004, the Commission transmitted this report, adopted as Report N° 82/04 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.

87. In a communication dated December 6, 2004 and received by the Commission on December 7, 2004, the State responded to the Commission's request, by referring the Commission to the State's previous oral and written observations in the case before the Commission as well as in the Counter-Memorial of the United States in the Avena Case before the International Court of Justice.

88. In light of the above, and upon considering the State's response to Report N° 82/04, 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.

89. The Commission wishes to note that, according to the most recent information available, an execution date has not yet been scheduled for Mr. Moreno Ramos. According to the Petitioners' submissions during the March 5, 2004 hearing before the Commission, this state of affairs resulted from a November 12, 2002 hearing before the 93rd District Court of Hidalgo, Texas, where the presiding judge, with the concurrence of Mr. Moreno Ramos' attorneys and the assistant criminal district attorney, agreed to postpone setting an execution date in light of the petition before the Commission and its March 7, 2002 request for precautionary measures. The Commission observes that this arrangement has given practical effect to the Commission's precautionary measures by preserving Mr. Moreno Ramos' life and physical integrity pending the Commission's consideration of his complaint, and the Commission commends the efforts taken within the Texas judicial system to preserve Mr. Moreno Ramos' right of effective access to the inter-American human rights system. Consistent with this precedent, the Commission also calls upon the State to implement the Commission's final recommendations in this case and thereby ensure Mr. Moreno Ramos' right to benefit from the results of the Commission's deliberations.

Done on the 28th day of the month of January, 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez and Florentín Meléndez, Commissioners.