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Title/Style of Cause:	Javier Suarez Medina v. United States
Doc. Type:	Report
Decided by:	President: Clare K. Roberts; First Vice-President: Susana Villaran; Second Vice-President: Paulo Sergio Pinheiro; Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett, Freddy Gutierrez Trejo, Florentin Melendez.
Dated:	24 October 2005
Citation:	Suarez Medina v. United States, Case 12.421, Inter-Am. C.H.R., Report No. 91/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by:	APPLICANTS: Sandra L. Babcock and Lydia M.V. Brandt
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I. SUMMARY

1. This Report concerns a petition dated July 23, 2002 and lodged with the Inter-American Commission on Human Rights (hereinafter "the Commission") on July 24 2002 by Sandra L Babcock and Lydia M.V. Brandt Attorneys at Law (hereinafter "the Petitioners") against the United States of America (hereinafter the "United States" or "the State"). The petition was filed on behalf of Javier Suarez Medina (hereinafter the "alleged victim"), a Mexican national incarcerated on death row in the state of Texas whose execution was scheduled to take place on August 14, 2002. Despite precautionary measures granted by the Commission in favor of Mr. Suarez Medina requesting that the State preserve his life pending the Commission's consideration of his petition, Mr. Suarez Medina was executed as scheduled on August 14, 2002.

2. The petition claims violations of Articles I, II, VIII, XXIV XXV 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. Suarez Medina of his right to consular notification under Article 36 of the Vienna Convention on Consular Relations, the introduction during the penalty phase of Mr. Suarez Medina's trial of evidence of an unadjudicated offense, the time spent by Mr. Suarez Medina on death row coupled with the scheduling of his execution on 14 occasions, and the State's failure to comply with the Commission's precautionary measures.

3. The State has opposed the petition on the basis that it fails to state facts to establish any violation of the American Declaration and is manifestly groundless. The State has argued in particular that the Commission lacks the competence to consider alleged violations of the Vienna

Convention on Consular Relations and to issue precautionary measures in respect of a non-state party to the American Convention on Human Rights. The State has also argued that evidence concerning an unadjudicated offense alleged to have been committed by Mr. Suarez Medina was properly introduced during his sentencing hearing, and that any delay in Mr. Suarez Medina's execution resulted from his own conduct in pursuing post-conviction proceedings and therefore cannot be used by him to impugn his death sentence.

4. Owing to the exceptional circumstances of the case, the Commission decided to consider the admissibility of Mr. Medina'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. Medina in respect of Articles I, XVIII, XXV and XXVI of the American Declaration. The Commission also concluded that the State is responsible for violations of Articles I, XVIII, XXV and XXVI of the American Declaration in the trial, conviction, sentencing to death, and execution of Mr. Suarez Medina and recommends that the State provide Mr. Suarez Medina's next of kin with an effective remedy, which includes compensation.

II. PROCESSING BEFORE THE COMMISSION

5. By note dated July 29, 2002, the Commission transmitted the pertinent parts of the Petitioners' petition to the State with a request for information within two months as provided for in Article 30 of the Commission's Rules of Procedure. In the same communication, the Commission requested precautionary measures from the United States pursuant to Article 25(1) of the Commission's Rules of Procedure for the United States to preserve Mr. Suarez Medina's life pending the Commission's investigation of the allegations in his petition.

6. By note dated August 1, 2002, the U.S. Mission to the OAS replied to the Commission's July 29, 2002 request for precautionary measures by indicating that it was coordinating with the State of Texas and the Office of the Legal Advisor in the Department of State to provide a response as soon as possible. The Commission transferred the State's observations to the Petitioners by communication dated August 7, 2002.

7. By letter dated August 13, 2002, the Commission transmitted a further communication to the State reiterating the Commission's July 29, 2002 request for precautionary measures in light of information indicating that Mr. Suarez Medina's execution remained scheduled to take place on August 14, 2002. In a note of the same date, the Commission informed the Petitioners of its reiteration of the precautionary measures to the State. The Commission subsequently learned that despite its request for precautionary measures, Mr. Suarez Medina was executed on August 14, 2002.

8. Also in a note dated August 13, 2002 and received by the Commission on August 14, 2002, the State provided the Commission with a copy of a letter from the U.S. Department of State Legal Adviser to the Chairman of the Texas Board of Pardons and Paroles, in which he indicated based upon information received from Texas authorities that there had been a failure to comply with the consular notification obligations under Article 36(1) of the Vienna Convention in Mr. Suarez Medina's case, asked that the Board give consideration to this failure in the course

of its deliberations on Mr. Suarez Medina's petition for clemency, and recommended that in rendering its decision the Board consider preparing a written statement setting out its consideration of the consular notification issue. The Commission transmitted the State's communication to the Petitioners in a note dated August 19, 2002.

9. By communications dated September 13, 2002, the Commission informed the parties that in response to an application by the Petitioners, it had scheduled a hearing in the matter to take place on October 14, 2002 during the Commission's 116th regular period of sessions to address the issue of the binding nature of the Commission's precautionary measures. The hearing was subsequently rescheduled to take place on October 17, 2002.

10. In a note dated September 30, 2002, the State requested an extension of time to October 15, 2002, within which to deliver a response to the Petitioners' petition. By communication dated October 1, 2002 the Commission granted the State's request.

11. Subsequently, by communication dated October 15, 2002 and received by the Commission on October 16, 2002, the State responded to the Petitioners' petition. The Commission provided the petitioners with a copy of the State's response during the October 17, 2002 hearing and also transmitted the observations to the Petitioners by letter dated October 21, 2002.

12. On October 17, 2002, the hearing before the Commission took place with the representatives of the Petitioners and the State in attendance. Both parties made written and oral and written representations to the Commission and responded to questions.

13. In a letter dated December 19, 2002, the Petitioners requested an extension of time to January 31, 2003 in order to respond to the State's observations, which the Commission granted in a note dated January 6, 2003. On January 31, 2003, the Petitioners delivered their reply dated January 30, 2003, which the Commission transmitted to the State by note dated February 4, 2003 with a response requested within 30 days. On February 5, 2003, the Petitioners delivered copies of exhibits to their reply, which the Commission transmitted to the State by note of February 4, 2003.

14. In a communication dated May 20, 2003, the Commission informed the parties that due to exceptional circumstances and in accordance with Article 37(3) of the Commission's Rules of Procedure, the Commission had opened a case in respect of the petition, designated as case 12.421, but deferred its treatment of admissibility until the debate and decision on the merits of the matter. In the same communication, the Commission requested any additional observations on the merits from the Petitioners within 2 months in accordance with Article 38(1) of the Rules.

15. By note dated July 25, 2003, the Commission informed the State that it had not received additional observations from the Petitioners in accordance with its May 20, 2003 communication, and requested that the State submit its additional observations on the merits within 2 months in accordance with Article 38(1) of the Commission's Rules. As of the date of this report, the Commission had not received any additional observations from the parties.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioner

16. According to the Petitioners, Javier Suarez Medina is a national of Mexico who was convicted on May 14, 1989 by a jury in a Texas state trial court for the murder of undercover police officer Lawrence Cadena. On June 5, 1989, the same jury sentenced Mr. Suarez Medina to death by lethal injection. The Texas Court of Criminal Appeals subsequently affirmed Mr. Suarez Medina's conviction and sentence on direct appeal on May 5, 1993.

17. The Petitioners state that at the time of the crime, Mr. Suarez Medina was not aware that Mr. Cadena was a police officer. According to the trial evidence, the plainclothes officer was shot while on an undercover "buy-bust" operation in which Mr. Cadena was posing as a purchaser of narcotics for the purpose of effecting an arrest. After Mr. Suarez Medina threw a bag of white powder into Mr. Cadena's car, he shot at the officer and killed him. A police officer who had observed the drug transaction from his undercover vehicle fired back at Mr. Suarez Medina, hitting him twice. From his hospital bed, Mr. Suarez Medina admitted to the shooting but insisted that he fired only because he feared for his own life after hearing gunshots.[FN1]

[FN1] Petitioners' petition dated July 23, 2002, p. 5.

18. In their petition and subsequent submissions, the Petitioners allege that the State is responsible for violating Mr. Suarez Medina's rights under Articles I II, VIII, XXIV XXV and XXVI of the American Declaration on four main grounds, namely that the State failed to inform Mr. Suarez Medina of his right to consular notification under Article 36 of the Vienna Convention on Consular Relations contrary to his right to due process and a fair trial, that the State introduced evidence of an adjudicated offense during the penalty phase of Mr. Suarez Medina's trial contrary to his right to due process and a fair trial as well as his right to equality before the law, that the State violated Mr. Suarez Medina's right to humane treatment based upon the time he spent on death row and by scheduling his execution on 14 separate occasions, and that the State contravened Mr. Suarez Medina's right to life and to petition for a remedy by executing him in violation of the precautionary measures adopted by the Commission.

19. With regard to the admissibility of the petition, the Petitioners argue that Mr. Suarez Medina has exhausted available domestic remedies, as he has pursued direct appeals from his sentence and conviction as well as proceedings for post conviction relief that have been available to him, or that he should be excused from the exhaustion requirement. With regard to the Petitioners' claim concerning the use of evidence of an adjudicated offense during the punishment phase of Mr. Suarez Medina's trial, the Petitioners indicate that Mr. Suarez Medina filed appeals in both state and federal courts seeking a reversal of his conviction and sentence based upon this argument and that every court has refused the remedy that he seeks, with the U.S. Supreme Court dismissing his final petition for a writ of certiorari on June 28, 2002.[FN2]

[FN2] Petitioners' petition dated July 23, 2002, p. 9.

20. With respect to their claims concerning the failure of consular notification, the Petitioners argue that Mr. Suarez Medina has been precluded from raising this issue on appeal because the issue was "procedurally defaulted." More particularly, the Petitioners state that because authorities failed to notify Mr. Suarez Medina of his rights under Article 36 of the Vienna Convention, he was unaware of his right to consular notification or access, and his defense counsel was likewise unaware of this right. As a result, his attorney failed to object to the Article 36 violation at the time of Mr. Suarez Medina's trial, and under applicable domestic law Mr. Suarez Medina was considered to have waived his right to raise this objection. Further, the Petitioners state that both Texas and the United States Congress have passed legislation that virtually precludes the filing of second, or "successive", post-conviction applications.[FN3] Thus, according to the Petitioners, Mr. Suarez Medina fell victim to both his court-appointed attorneys' incompetence and to domestic limitations denying him access to judicial review and remedies for the human rights violations raised in his petition. The Petitioners therefore argue that any attempt to meet the strictest requirement for exhaustion of domestic remedies by raising new legal arguments, such as the violation of consular rights, would be likely to fail.[FN4] The Petitioners also argue that it is clear that the procedural default provisions under state and federal law do not afford due process of law for protection of the right or rights that have allegedly been violated and therefore that Mr. Suarez Medina is not required to present this claim to the domestic courts before the Commission may exercise jurisdiction over his petition.[FN5]

[FN3] Petitioners' petition dated July 23, 2002, p. 10, citing Texas Code of Criminal Procedure, Art. 11.01, Sec. 5(a), which, according to the Petitioners, provides that "Texas courts may not consider the merits of a subsequent application unless the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application); 28 U.S.C. §2244(b)(2), which, according to the Petitioners, states 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.

[FN4] Petitioners' petition dated July 23, 2002, p. 10, n. 2, citing as examples the successive habeas petitions filed by German nationals Karl and Walter LaGrand to obtain a remedy for the violation of their consular rights, which were held by the appellate courts to be procedurally defaulted. *LaGrand v. Lewis*, 883 F. Supp. 451 (D.Ariz. 1995); *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998); *LaGrand v. Stewart*, 119 S.Ct. 422 (1998).

[FN5] Petitioners' petition dated July 23, 2002, p. 11 (stating that in the LaGrand Case the International Court of Justice specifically recognized that the operation of procedural default rule violates Article 36 of the Vienna Convention on Consular Relations if, as applied in a particular case, they prevent a foreign national from challenging his conviction and sentence based upon a prior violation of Article 36. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. (Judgment of June 27, 2001).

21. Further, the Petitioners argue that Mr. Suarez Medina is excused from exhausting his claim that he has been subjected to cruel, inhuman or degrading treatment or punishment, by virtue of his prolonged incarceration and exposure to repeated execution dates, on the basis that both the Texas Court of Criminal Appeals and the U.S. Supreme Court have refused to consider similar arguments in other cases and therefore that to pursue claims of this nature would be an exercise in futility.[FN6] Finally, the Petitioners contend that exhaustion is not required where there has been unwarranted delay in rendering a final judgment under domestic law, and that this rule applies in the present case on the basis that even if Mr. Suarez Medina filed a petition for writ of habeas corpus the courts would not issue a final decision until the eve of his execution.[FN7]

[FN6] Petitioners' petition dated July 23, 2002, p. 11.

[FN7] Petitioners' petition dated July 23, 2002, pp. 11-12.

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

23. With regard to the merits of the petition, the Petitioners first argue that the State failed to inform Mr. Suarez Medina of his right to consular assistance under Article 36 of the Vienna Convention on Consular Relations and that this failure demonstrably undermined his right to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration and directly contributed to his death sentence in violation of Article I of the Declaration.[FN8] According to the Petitioners, police authorities were aware of Mr. Suarez Medina's nationality at the time of his arrest and detention but failed to inform him of his right to consular notification pursuant to Article 36 of the Vienna Convention.[FN9] In this respect, Petitioners state that Mexican consular officials first heard of Mr. Suarez Medina's case from media reports, undertook inquiries of the arresting authorities, and were twice misinformed by those authorities regarding Mr. Suarez Medina's nationality. According to the Petitioners, the Mexican authorities were not able to confirm Mr. Suarez Medina as a Mexican national until after he had been convicted and sentenced to death.

[FN8] The Petitioners note in this connection that the United States unconditionally ratified the Vienna Convention on Consular Relations in November 24, 1969, that the treaty entered into force for the United States on December 24, 1969, and that it has been a part of the supreme law of the United States for more than 30 years under the Article VI of the U.S. Constitution. Petitioners' petition dated July 23, 2002, p. 20, citing 21 U.S.T. 77, TIAS 6820, 596 U.N.T.S. 261; U.S. Constitution, Art. VI.

[FN9] Petitioners' petition dated July 23, 2002, pp. 7-8, 23-24.

24. Further, the Petitioners argue that this failure demonstrably undermined Mr. Suarez Medina's right to a fair trial and directly contributed to his death sentence in violation of Articles

I, XVIII and XXVI of the American Declaration. The claim that by failing to comply with its consular notification obligations, the State prevented Mexican consular authorities from providing effective and far-reaching legal assistance when it was most urgently required.[FN10] The Petitioners claim that this assistance would have included, inter alia: retaining competent counsel to assist Mr. Suarez Medina in developing legal claims and challenging the evidence of the unadjudicated crime presented by the prosecution during the trial; gathering and presenting mitigating evidence favorable to Mr. Suarez Medina, which post-conviction investigations have revealed to include information indicating that Mr. Suarez Medina's childhood was violent and unstable and that he suffered from mental and emotional problems, including mild to moderate brain damage, learning disabilities, attention deficit disorder and post-traumatic stress disorder;[FN11] and assistance in plea negotiations which may have had a significant impact on the exercise of prosecutorial discretion.[FN12]

[FN10] Petitioners' observations dated January 30, 2003, pp. 7-9 (indicating that Mexican consular officials hired a bilingual investigator to travel to Mexico and gather information about Mr. Suarez Medina's background, family and other details); Exhibit E (affidavit of dated , describing assistance that Mexican consular authorities have provided since 1989 to national facing capital charges in the United States).

[FN11] Petitioners' observations dated January 30, 2003, pp. 9-13 and Exhibit B (affidavit of Ricardo Weinstein, Ph.D. dated July 6, 2002). Exhibit C (Affidavit of Gilda Kessner, Psy.D., dated July 29, 2002), Exhibit D (affidavit of Tena S. Francis dated August 2, 2002).

[FN12] Petitioners' observations dated January 30, 2003, p. 14.

25. In summary, the Petitioners argue that had Mexican consular officials been notified of Mr. Suarez Medina's arrest without delay, they would have rendered meaningful assistance that would have provided the jury with a fully-informed opportunity to choose a life sentence for Mr. Suarez Medina over the death penalty.[FN13]

[FN13] Petitioners' petition dated July 23, 2002, pp. 6-7.

26. Second, the Petitioners allege that in allowing the admission of unadjudicated testimony during the sentencing phase of Mr. Suarez Medina's trial, the State is responsible for violating Mr. Suarez Medina's right to life, to equality before the law, to a fair trial and to a due process of law under Articles I, II, XVIII, and XXVI of the American Declaration. The Petitioners contend that the unadjudicated testimony was of an aggravating nature and that its presentation was persuasive in convincing the jury to find that Mr. Suarez Medina represented a future danger to society, a necessary element in the imposition of a death sentence in Texas.

27. In particular, the Petitioners submit that during the penalty phase of Mr. Suarez Medina's trial, the prosecution relied in part upon evidence of a crime – the shooting of Michael Mesley – for which Mr. Suarez Medina was never charged or tried, and which the Petitioners now claim evidence shows he did not commit. According to the Petitioners, after the prosecution and

defense had concluded their sentencing phase presentations, the prosecution produced Mr. Mesley as a surprise witness who, over objections by the defense, testified that Mr. Suarez Medina shot him and his wife in 1987. Mr. Mesley claimed that he had recognized Mr. Suarez Medina from a television photo as the same man who fired a shotgun in his face during a robbery, also injuring his wife in the head and leaving her with permanent disfiguring scars.[FN14]

[FN14] Petitioners' petition dated July 23, 2002, p. 7.

28. The Petitioners state that in response, the defense produced Mr. Suarez Medina's employment records from a Burger King restaurant proving that he was working on the night of the Mesley shooting and did not punch out until two hours after the shooting. The prosecution implied, however, that another employee could have punched out for Mr. Suarez Medina, even though there was no evidence to support this assumption. According to the Petitioners, the jury was not instructed to apply or consider any standard of proof when weighing the Mesley testimony, nor did the defense request such an instruction. The defense did not present or seek to present rebuttal testimony on the inherent unreliability of the Mesley identification. The Petitioners state that despite Mr. Suarez Medina's alibi, the jury returned a death sentence based upon Mr. Mesley's testimony.[FN15]

[FN15] Petitioners' petition dated July 23, 2002, p. 7.

29. The Petitioners note in this respect that in its initial presentation during the punishment phase of the trial, the best the prosecution had to offer in terms of aggravating evidence were allegations that Mr. Suarez Medina refused to obey the instructions of a principal to leave an elementary school campus, was counseled because he went upstairs after being told not to do so, failed to obey a school official to leave an area where other students were, ran past a friend or neighbor and allegedly made the statement that he "was going to get a car", and was with three other people joy riding in a stolen automobile.[FN16] In light of this evidence, the Petitioners argue that absent the Mesley testimony, no reasonable juror could have been persuaded that Mr. Suarez Medina represented a future danger to society, and emphasize in this respect that without a unanimous determination by the jury, no death sentence can be imposed in Texas. The Petitioners also observe that the prosecution chose to introduce the Mesley testimony only after both sides had concluded their presentations during the penalty phase, and argue that this constitutes clear evidence that the prosecution felt it necessary to rely on an unadjudicated offense to secure Mr. Suarez Medina's death sentence.[FN17]

[FN16] Petitioners' petition dated July 23, 2002, p. 27.

[FN17] Petitioners' petition dated July 23, 2002, p. 27.

30. Based upon these circumstances, the Petitioners submit that the introduction of the evidence of the crime alleged to have been committed against Mr. Mesley violated Mr. Suarez Medina's rights to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration. The Petitioners rely in this regard on this Commission's decision in the case of Juan Raul Garza v. U.S., in which the Commission declared that the introduction of evidence of unadjudicated foreign crimes alleged to have been committed by Mr. Garza was inconsistent with the due process and fair trial protections under the American Declaration.[FN18] Indeed, the Petitioners argue that the circumstances of Mr. Suarez Medina are even more egregious as, unlike the standard of proof considered in the Garza case, capital juries in Texas are not required to determine specifically that each element introduced by the prosecution as an aggravating fact, including an unadjudicated crime, was committed beyond a reasonable doubt and that no direction on the standard of proof was given or required under Texas law. Rather, the Petitioners indicate that the jury only needs to find the totality of the evidence establishes beyond a reasonable doubt that the defendant committed the crime deliberately and represents a future danger to society.[FN19] Also according to the Petitioners, had Mr. Suarez Medina's matter been a non-capital case, the Mesley testimony would not have been admissible at all during the penalty phase of his trial.[FN20] In addition, the Petitioners claim that a majority of state courts in the United States to consider the issue have refused to allow the use of unadjudicated crimes in capital cases,[FN21] and other state courts that have reached a contrary decision have nevertheless required that the unadjudicated crime itself be proven either "beyond a reasonable doubt" or by "clear and convincing evidence." [FN22]

[FN18] Petitioners' petition dated July 23, 2002, p. 28, citing Case 12.243, Report 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2000, para. 110).

[FN19] Petitioners' petition dated July 23, 2002, p. 28.

[FN20] Petitioners' petition dated July 23, 2002, p. 29, citing Tex. Code Crim. Proc. Art. 37.07, §3(a) (Vernon Supp. 1993).

[FN21] Petitioners' petition dated July 23, 2002, p. 30, citing *State v. Bobo*, 727 S.W. 2d 945, 952-953 (Tenn.), cert. denied 484 U.S. 872 (1987); *State v. Bartholomew*, 683 P.2d 1079, 1082 (Wash 1984); *Scott v. State*, 465 A.2d 1126, 1135 (MD. 1983); *State v. McCormick*, 397 N.E. 2d 276, 279 (Ind. 1979); *Cook v. State*, 369 So. 2d 1251, 1257 (Ala. 1979); *Prevence v. State*, 377 So. 2d 783, 786 (Fla. 1976); *State v. Debler*, 856 S.W. 2d 641 (Mo. 1993)(en banc); Stephen P. Smith, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials*, 63 Colum. L. Rev. 1249 (1993).

[FN22] Petitioners' petition dated July 23, 2002, p. 30, citing *State v. Brooks*, 541 So. 2d 801 (La. 1989); *People v. Balderas*, 711 P. 2d 480, 515 (Cal. 1985.).

31. Finally, the Petitioners argue that because of the disparity between Texas law and that of other executing states on the instruction and weighing of unadjudicated offenses at the penalty phase, Mr. Suarez Medina's death sentence was imposed on the basis of where the crime was committed contrary to his right to equality before the law under Article II of the American Declaration.[FN23]

[FN23] Petitioners' petition dated July 23, 2002, pp. 30-31, citing Case 9647, Res. 3/97, Roach and Pinkerton v. United States, Annual Report of the IACHR 1986-87 (22 September 1987).

32. Third, the Petitioners allege that the United States has violated its obligation Article XXV and XXVI of the American Declaration to treat Mr. Suarez Medina humanely during the time he was in custody by holding him on death row for a prolonged period of 13 years and by scheduling him for execution on fourteen occasions during that time.[FN24] The Petitioners allege in this respect that the scheduling of new execution dates at every stage of the appellate process was deliberate and unwarranted and had exposed Mr. Suarez Medina to gratuitous and excessive suffering.

[FN24] Petitioners' petition dated July 23, 2002, pp. 8-9 (indicating that Mr. Suarez Medina was scheduled to be executed on the following dates: January 18, 1995; July 12, 1995; August 15, 1995; March 1, 1996; May 31, 1996; August 29, 1996; December 10, 1996; May 14, 1997; September 16, 1997; December 9, 1997; March 18, 1998, June 15, 1998; August 14, 2002).

33. The Petitioners argue that while the State has a legitimate interest in obtaining finality in sentencing, no justification was possible in Mr. Suarez Medina's case because the penalties imposed by U.S. courts for failure to meet filing deadlines in the submission of appeals are so draconian that the deliberate setting of execution dates cannot be said to facilitate expeditious flings by the defense. According to the Petitioners, there is no indication from the record that Mr. Suarez Medina sought to obstruct the appellate process, but rather all of his appeals were filed in a timely manner, consistent with the scheduled set by the appellate courts.[FN25]

[FN25] Petitioners' petition dated July 23, 2002, p. 31.

34. The Petitioners therefore argue that the only attributable purpose of this deliberate policy by Texas is an illegitimate one, namely to harass the defense and undermine due process and, possibly, to serve as a constant reminder to the prisoner of his or her impending execution. In this respect, the Petitioners state that on each of the 14 occasions on which Mr. Suarez Medina's execution was scheduled, he entered the ritual of the execution countdown: preparing to say farewell to family, friends and fellow prisoners; choosing his last meal; distributing his few belongings and informing the authorities of the disposition of his remains. According to the Petitioners, although rationally aware that the courts would likely intervene to stay the execution, a prisoner repeatedly subjected to this experience cannot fail to suffer profound stress and anxiety, and none of the pain and suffering can be justified, in legal or moral terms.[FN26]

[FN26] Petitioners' petition dated July 23, 2002, p. 31.

35. In substantiating their claim, the Petitioners cite decisions of this Commission as well as the European Court of Human Rights, which they claim support the proposition that time and conditions on death row and the multiple scheduling of execution dates, as well as the anticipation of punishment and the imminence of execution itself, can amount to cruel, infamous or unusual punishment contrary to Articles XXV and XXVI of the American Declaration.[FN27]

[FN27] Petitioners' petition dated July 23, 2002, p. 31, citing Case 11.139, Report 57/96, William Andrews v. United States, Annual Report of the IACHR 1996, para. 178; Eur. Court H.R., Tyrer v. United Kingdom, 2 E.H.R.R. 1 (1979-80), para. 33; Eur. Court H.R., Soering v. United Kingdom, 11 E.H.R.R. 439 (1989), para. 11.

36. Finally, the Petitioners argue that the State's failure to act on the Commission's precautionary measures granted in favor of Mr. Suarez Medina is inconsistent with his right to life and his right to petition for a remedy, protected under Articles I and XXIV of the American Declaration. Specifically, the Petitioners argue that the obligatory nature of precautionary measures issued by international tribunals is a well-settled principle recognized by such bodies as the Inter-American Court of Human Rights, the United Nations Human Rights Committee, the European Court of Human Rights and the International Court of Justice, and by this Commission. [FN28] The Petitioners also distinguish contrary authorities cited by the State, including decisions by the European Court of Human Rights and the Ontario Court of Appeal, largely on the basis that those decisions involved interim measures in the context of deportation proceedings rather than the death penalty.[FN29]

[FN28] Petitioners' petition dated July 23, 2002, p. 141, citing I/A Court H.R., Loayza Tomayo Case, Judgment of September 17, 1997, para. 80; Piandiong et al. v. The Philippines, Communication No. 869/1999, paras. 5.4, 8; I.A Court H.R., James et al. Case, Order for Provisional Measures dated August 29, 1998; Case 12.243, Report 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2001, para. 117; International Court of Justice, Case Concerning the Vienna Convention on Consular Relations (Germany v. U.S.A.), Request for the Indication of Provisional Measures, Order of March 3, 1999, I.C.J. General List No. 104, paras. 22, 28; Eur. Court H.R., Ocalan v. Turje, Indication of Interim Measures Pursuant to Rule 39 of the Rules of the European Court of Human Rights, November 30, 1999.

[FN29] Petitioners' observations dated January 30, 2003, pp. 6-8, responding to the State's reliance on the cases of Cruz Varas and others, No. 46/1990/237/307, E.C.H.R. (1991); Ahani v. A.G. of Canada, 156 O.A.C. 37 (2002).

37. In the context of Mr. Suarez Medina's case, the Petitioners argue that if other member states of the OAS were to adopt the same intransigent attitude as that displayed by the United States, the efficacy of the inter-American system for the protection of human rights would be fatally undermined. They therefore submit that the wholesale failure of the United States to act on the Commission's requests imperiled Mr. Suarez Medina's right to life and his right to petition for a remedy.[FN30]

[FN30] Petitioners' submissions at October 17, 2003 hearing before the Commission.

38. With regard to the actions taken by the State in response to the Commission's request for precautionary measures, namely to coordinate with the state of Texas in responding to the measures and to request that the Texas Board of Pardons and Paroles given specific attention to the failure of authorities to provide Mr. Suarez Medina with consular notification, the Petitioners argue that that the State could have done more and that, in any event, the acts taken by the State were ineffective. The Petitioners contend in this respect that the State could have met with the Board of Pardons and Paroles, made a public statement on the case, or petitioned the federal courts for a stay of execution. The Petitioners note that instead, the Board refused Mr. Suarez Medina's request for clemency without even meeting, and disregarded the request by the U.S. Department of State Legal Adviser that they provide a written explanation for their decision on clemency.[FN31]

[FN31] Petitioners' observations dated January 30, 2003, p. 3.

39. Based upon their submissions, the Petitioners request that the Commission find Mr. Suarez Medina's claims to be admissible and to find the State responsible for violations of his rights under Articles I, II, XVIII, XXIV, XXV, and XXVI of the American Declaration.

B. Position of the State

40. The factual context of Mr. Suarez Medina's case provided by the State essentially mirrors that of the Petitioners and includes the following description:

In 1989, Javier Suarez Medina was convicted and sentenced to death by a state trial court in Texas for the murder of undercover police officer Larry Cadena. His conviction was affirmed on direct appeal by the Court of Criminal Appeals of Texas in May 1993.

Mr. Suarez Medina filed his first Texas state application for writ of habeas corpus in June 1995, alleging twenty grounds for relief. More than a year later, in July 1996, he filed a "First Amended" application, alleging three more grounds for relief. In December 1996 he filed a supplement to his first amended application, which included additional arguments on previous grounds for relief and also set out two new grounds. Mr. Suarez Medina then filed, in June 1997, a "Second Amended" application, alleging ix more grounds (for a total of 31). In September 1998, the Court of Criminal Appeals denied all requested relief, affirming Suarez Medina's conviction and sentence.

A year later, in September 1999, Mr. Suarez commenced litigation in federal court under the federal habeas corpus statute. In May 2001, the federal district court denied habeas relief. The Fifth Circuit Court of Appeals affirmed the decision of the district court in January 2002, and in

February 2002 the Fifth Circuit denied a petition for rehearing and rehearing en banc. The United States Supreme Court denied a petition for a writ of certiorari in June 2002.

On July 22, 2002, Mr. Suarez Medina filed a clemency request with the Board of Pardons and paroles. On August 7, 2002, six days before his scheduled execution, he filed a Subsequent Application for writ of habeas corpus with the Texas Court of Criminal Appeals. Both the clemency request and Subsequent writ application were denied, and he was executed on August 13, 2002.[FN32]

[FN32] State's observations dated October 15, 2002, p. 1.

41. With regard to the admissibility of the Petitioners' petition, the State has contended that the Commission should dismiss Mr. Suarez Medina's petition for failure to state facts that tend to establish a violation of the American Declaration. In this connection the State notes that Mr. Suarez Medina received the full panoply of procedural protections available to him under U.S. law and that the claims before the Commission have been scrutinized and uniformly rejected by courts at every level of the U.S. judicial system as lacking merit either as a matter of fact or law. According to the State, the petition fails to present any basis to revisit any of these decisions.[FN33]

[FN33] State's observations dated October 15, 2002, p. 2.

42. Specifically concerning the Petitioners' allegations regarding the absence of consular notification, the State argues that the determination of the meaning and extent of the U.S. obligations pursuant to the Vienna Convention on Consular Relations does not fall within the competence of the Commission.[FN34] The State contends in this regard that the consular notification obligations under the Vienna Convention establish neither a prerequisite for the observance of human rights in criminal cases, nor an independent source of individual human rights.[FN35]

[FN34] State's observations dated October 15, 2002, p. 3.

[FN35] State's observations dated October 15, 2002, p. 3, referring to the State's position as put forward in Case 11.753, Report 52/02, Ramon Martinez Villareal v. United States, Annual Report of the IACHR 2002, and I/A Court H.R., Advisory Opinion OC-16/99.

43. The State also submits that it nevertheless takes its obligations under the Vienna Convention regarding consular notification and access very seriously and has since 1998 undertaken an intensive, on-going and now permanently institutionalized effort to improve compliance by federal, state and local government officials. According to the State, these efforts

have included the publication of a 72-page brochure on Vienna Convention requirements as well as a pocket reference cards for arresting officials and a training video.[FN36]

[FN36] State's observations dated October 15, 2002, p. 4.

44. The State similarly argues that the Petitioners' allegations concerning the use of unadjudicated crimes during the punishment phase of Mr. Suarez Medina's trial fail to disclose a violation of the American Declaration.[FN37] In this respect, the State emphasizes that during the punishment phase of a trial, a jury in Texas must find the totality of the evidence establishes beyond a reasonable doubt that the defendant committed the crime deliberately and represents a future danger to society before they can impose the death penalty, and therefore that the standard of proof is not, as the Petitioners contend, less rigorous than that applicable to the guilt/innocence phase of the trial.[FN38] The State also submits that criminal defendants, like the prosecution, are free to submit otherwise inadmissible evidence in support of a punishment other than death. The State argues that this latitude, available to both the prosecution and the defense, reflects a longstanding principle of U.S. law that in making a sentencing determination a jury should have available to it all relevant evidence about the defendant, both aggravating and mitigating.[FN39] In this respect, the State rejects as lacking justification any suggestion by the Petitioners that the submission of otherwise inadmissible evidence should be available to the defense but not to the prosecution.

[FN37] State's observations dated October 15, 2002, pp. 4-5, referring to the State's observations submitted in Case 12.143, Report 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2000.

[FN38] State's observations dated October 15, 2002, p. 4.

[FN39] State's observations dated October 15, 2002, p. 4, citing *Gregg v. Georgia*, 428 U.S. 153, 203-204 (1976).

45. Based upon these submissions, the State contends that in Mr. Suarez Medina's case, there was simply far more aggravating evidence than mitigating evidence, and that as a consequence he received a sentence of death.[FN40] Insofar as the Petitioners rely on the Commission's decision in the case of Juan Raul Garza, the State rejects that Commission's conclusions in that case as inconsistent with U.S. jurisprudence under the Eighth Amendment to the U.S. Constitution.

[FN40] State's observations dated October 15, 2002, p. 5.

46. In respect of the Petitioners' arguments relating to Mr. Suarez Medina's time on death row and his multiple execution dates, the State argues that the rescheduling of execution dates is not an indication of cruel, inhuman or degrading treatment, but is instead evidence that Mr.

Suarez Medina received full due process of law. The State adds that, as Mr. Suarez Medina was responsible for each of his appeals, he cannot now claim that the consequences of his appellate practices – the delay of his execution and the consequent rescheduling of execution dates – was cruel, inhuman or degrading treatment.[FN41]

[FN41] State’s observations dated October 15, 2002, p. 5.

47. The State similarly rejects the Petitioners’ arguments as to the obligatory nature of the Commission’s precautionary measures, based upon the State’s submissions on this issue in the context of the precautionary measures granted by the Commission in 2002 in favor of the detainees in Guantanamo Bay. More particularly, the State argues that the Commission has no authority to make binding requests for precautionary measures because the Statute of the Commission refers to precautionary measures only in the context of the Commission’s ability under Article 19 to request that the Inter-American Court of Human Rights adopt provisional measures in respect of states parties to the American Convention on Human Rights. The State contends that, in contrast, there is no parallel provision in the OAS Charter, the American Convention on Human Rights, or the Commission Statute relating to non-States Parties to the American Convention – at most the Commission’s authority is limited under Article 20 of its Statute to making “recommendations.” [FN42]

[FN42] State’s observations dated October 15, 2002, p. 6.

48. Also according to the State, where the OAS thought it appropriate for one of its bodies to be authorized to request provisional or precautionary measures, it expressly created such authority, for instance under Article 63 of the American Convention on Human Rights. The State asserts that the Commission was not given such authority vis a vis non-state parties such as the United States. In this connection, the State indicates that it disagrees with the Commission’s conclusion in the Garza Case that OAS member states have implicitly undertaken to implement precautionary measures where doing so is essential to preserving the Commission’s mandate. The State argues that neither the nature of the Commission’s authority nor its mandate should be considered to expand without any basis in the document creating the Commission.[FN43] The State also submits that the writings of scholars fail to support the proposition that the Commission’s precautionary measures are binding.[FN44]

[FN43] State’s observations dated October 15, 2002, p. 8.

[FN44] State’s observations dated October 15, 2002, pp. 9-10.

49. Concerning the jurisprudence of other international tribunals, the State asserts that the Commission should follow the approach of the European human rights system, where the European Court of Human Rights held in respect of the former European Commission on Human

Rights that, absent a specific provision in the European Convention on Human Rights, the European Commission did not have the power to order legally-binding interim measures.[FN45] With respect to the findings of the U.N. Human Rights Committee, the State argues that most scholars are of the view that the Committee does not have the mandate to issue binding precautionary measures and that, in any event, the Committee has premised its views on a country having specifically accepted an obligation to allow the Committee to consider international communications as a party to a treaty that specifically granted the Committee such competence, which the State considers is a different situation than that of this Commission.[FN46]

[FN45] State's observations dated October 15, 2002, p. 8, citing *In the Case of Cruz Varas and others v. Sweden*, Eur. Ct. H.R., Ser. A No. 46/1990/237/307, at 34-35 (1991).

[FN46] State's observations dated October 15, 2002, p. 9.

50. Based upon the foregoing arguments, therefore, the State argues that Mr. Suarez Medina's petition should be dismissed by the Commission on that basis that it fails to state facts that tend to establish a violation of the American Declaration and is manifestly groundless.

51. Finally, with respect to the admissibility requirement of non-duplication, the State argues that identical questions to each of those raised by the Petitioners in the present case were or are being considered by the Commission in other proceedings, as referenced in the State's foregoing submissions. The State also contends that the Commission's authority with respect to non-state parties to the American Convention on Human Rights is limited to making recommendations to bring about more effective observation of fundamental human rights. In this context, therefore, the State asserts that as the Commission has already had opportunities to make recommendations with respect to the subject matter of each question raised in the present case, to replicate these considerations would be contrary to Article 33 of the Commission's Rules of Procedure governing duplication.[FN47]

[FN47] State's observations dated October 15, 2002, pp. 10-11.

IV. ADMISSIBILITY

52. 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*

53. 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, Javier

Suarez Medina, 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 the Commission's creation, as a Member State of the OAS that deposited its instrument of ratification of the OAS Charter on June 19, 1951.[FN48]

[FN48] Article 20 of the Statute of the IACHR provides that, in respect of those OAS member states that are not parties to the American Convention on Human Rights, the Commission may examine communications submitted to it and any other available information, to address the government of such states for information deemed pertinent by the Commission, and to make recommendations to such states, when it finds this appropriate in order to bring about more effective observance of fundamental human rights. See also Charter of the Organization of American States, Arts. 3, 16, 51, 112, 150; Regulations of the Inter-American Commission on Human Rights, Arts. 26, 51-54; I/A. Court H.R., Advisory Opinion OC-10/8 "Interpretation of the Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights," July 14, 1989, Ser. A No. 10 (1989), paras. 35-35; I/A Comm. H. R., James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87 paras. 46-49

54. The Commission is competent *ratione temporis* to examine the complaints because the petition alleges facts that occurred on and after Mr. Suarez Medina was arrested in 1998 for the murder of Lawrence Cadena. The facts alleged, therefore, occurred subsequent to the date on which the United States' obligations under the American Declaration took effect.

55. The Commission is also 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.

56. Finally, inasmuch as the Petitioners have filed complaints alleging violation of Articles I, II, XVIII, XXV and XXVI of the American Declaration, the Commission is competent *ratione materiae* to examine the complaint. The Commission notes in this respect, however, that the State has objected to the competence of the Commission to consider the Petitioners' petition to the extent that it alleges violations of the State's obligations under the Vienna Convention on Consular Relations. The State argues in this connection that the Commission was fundamentally established to hear petitions and communications regarding the American Convention and the American Declaration, not the Vienna Convention on Consular Relations. The State also indicates that it does not agree with the finding by the Inter-American Court of Human Rights in its Advisory Opinion OC-16/99 that failure of consular notification is a violation of human rights or of due process.

57. In considering the State's objection on this point, the Commission observes that in its October 2002 decision in the case of Ramon Martinez Villareal v. United States,[FN49] as well as in subsequent decisions,[FN50] the Commission determined that it was appropriate to

consider compliance with Article 36 of the Vienna Convention on Consular Relations by a state party to that treaty when interpreting and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to trial or to custody pending trial, or is detained in any other manner by that state. In particular, the Commission found that it could consider the extent to which a state party has given effect to the requirements of Article 36 of the Vienna Convention 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. In reaching this conclusion, the Commission found support in the Inter-American Court's Advisory Opinion OC-16/99 on the Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, as well as the judgment of the International Court of Justice in the LaGrand Case,[FN51] the latter of which has been followed by similar conclusions in the Case of Avena and other Mexican Nationals (Mexico v. United States of America).[FN52] Based upon the information and arguments before it in the present case, the Commission sees no reason to depart from its previous conclusions. The State did not challenge the Commission's subject matter jurisdiction to entertain the other claims raised in the Petitioners' petition.

[FN49] Case 11.753, Report 52/02, Ramon Martinez Villareal v. United States, Annual Report of the IACHR 2002, para. 77.

[FN50] See, e.g., Petition P4446/02, Report 61/03, Roberto Moreno Ramos v. United States, Annual Report of the IACHR 2003, paras. 41-43; Case 11.331, Report 99/03, Cesar Fierro v. United States, Annual Report of the IACHR 2003.

[FN51] Ramon Martinez Villareal v. United States, *supra*, paras. 65-75, citing I/A Court H.R., Advisory Opinion OC-16/99 of October 1, 1999, The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Ser. A No. 16 (1999); International Court of Justice, LaGrand Case (Germany v. United States), Judgment of June 27, 2001, General List No. 104.

[FN52] International Court of Justice, Avena and other Mexican Nationals (Mexico v. United States of America), Judgment of March 31, 21004, General List No. 128.

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

B. Duplication

59. The Petitioners have indicated that the subject matter of Mr. Suarez Medina'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, on the other hand, has contested the issue of duplication of procedures on the basis that the Commission already has been presented with the opportunity to make recommendations with respect to the subject matter of each issue raised in the Petitioners' petition and therefore that for the Commission to consider

the same issues in this case would contravene the terms of Article 33 of the Commission's Rules of Procedure.

60. In this regard, the Commission has previously held that 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.[FN53] Accordingly, 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.[FN54]

[FN53] See, e.g., Case 11.827, Report 96/98, *Peter Blaine v. Jamaica*, Annual Report of the IACHR 1998, para. 43.

[FN54] *Id.*, para. 45.

61. In the present case, the record indicates that Mr. Suarez Medina has not previously lodged a complaint with the Commission, raising the legality of his death sentence under the American Declaration or otherwise. As this petition cannot be said to involve the same parties as those in the cases cited by the State in its observations, the Commission finds no bar to the admissibility of the Petitioners' claims under Article 33 of its Rules of Procedures.[FN55]

[FN55] See similarly Case 12.285, Report 62/02, *Michael Domingues v. United States*, Annual Report of the IACHR 2002, para. 102; Case 12.412, Report 101/03, *Napoleon Beazley v. United States*, Annual Report of the IACHR 2003, paras. 38-40.

C. Exhaustion of Domestic Remedies

62. Article 31(1) of the Commission's Rules of Procedure specifies that in order for a case to be admitted, "remedies of the domestic legal system [must] have been pursued and exhausted in accordance with the generally recognized principles of international law." When domestic remedies are unavailable as a matter of fact or law, however, the requirement that they be exhausted may be excused. Article 31(2) of the Commission's Rules of Procedure specifies that this exception applies if the domestic legislation of the state concerned does not afford due process of law for protection of the right allegedly violated, if the party alleging the violation has been denied access to domestic remedies or prevented from exhausting them, or if there has been an unwarranted delay in rendering a final judgment under the domestic remedies.

63. In addition, the Inter-American Court of Human Rights has observed that domestic remedies, in order to accord with generally accepted principles of international law, must be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they were designed.[FN56]

[FN56] I/A Court H.R., Velasquez Rodriguez Case, Merits, Judgment of July 29, 1988, Ser. A No. 4 (1988), paras. 64-66.

64. Further, when a petitioner alleges that he or she is unable to prove exhaustion, Article 31(3) of the Commission's Rules of Procedure provides that it shall be up to the State to demonstrate that the remedies under domestic law have not been exhausted.

65. According to the information available in the present case, Mr. Suarez Medina has pursued numerous domestic avenues of redress since his conviction and sentencing to death in 1989. As described by the Petitioners and the State, these have included a direct appeal from his conviction and sentence before the state courts in Texas up to and including the U.S. Supreme Court, which dismissed his petition for a writ of certiorari on September 16, 1998, as well as post-conviction relief in the form of a petition for habeas corpus pursued before the U.S. federal courts upon to and including U.S. Supreme Court, which dismissed his second and final petition for a writ of certiorari on June 28, 2002. Finally, on July 22, 2002 Mr. Suarez Medina filed a petition for clemency in the Texas Board of Pardons and Paroles and on August 7, 2002 filed a subsequent application for a writ of habeas corpus with the Texas Court of Criminal Appeals. Both the clemency petition and the writ application were denied and Mr. Suarez Medina was executed on August 14, 2002.

66. Based upon this procedural history, the Petitioners have argued with respect to the claims raised in their petition that domestic remedies have been exhausted, or that one or more of the exceptions to exhaustion under Article 31(2) of the Commission's Rules of Procedure apply to the circumstances of his case.

67. The State has not opposed the petition on the basis of the exhaustion of domestic remedies requirement. To the contrary, the State has asserted that prior to his execution, Mr. Suarez Medina received the full panoply of procedural protections available to him under U.S. law and that the claims before the Commission have previously been considered and uniformly rejected by courts at every level of the U.S. judicial system.[FN57]

[FN57] State's Observations dated October 15, 2002, p. 2.

68. Based upon the information and arguments before it, therefore, the Commission finds that the requirements of Article 37 of the Commission's Rules of Procedure have been satisfied in respect of the Petitioners' petition.

D. Timeliness of the Petition

69. Pursuant to Article 38(1) of the Commission's Rules of Procedure, the Commission must refrain from taking up petitions that are lodged after the six month period following the date on

which the complaining party has been notified of the final ruling, in cases where the remedies under domestic law have been exhausted. In the present case, the Petitioners' petition was lodged on July 24, 2002 and therefore within six months from June 28, 2002, the date on which the U.S. Supreme Court dismissed Mr. Suarez Medina's final petition for a writ of certiorari. The State has not 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

70. 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 relevant principles and jurisprudence, and without prejudging the merits of the matter, the Commission considers that the petition states facts that tend to establish violations of rights under the American Declaration and is not manifestly groundless or out of order. While the Commission will not undertake a fourth instance review of domestic court acting within their competence and with due judicial guarantees,[FN58] the Commission is empowered to undertake its own evaluation of the evidence presented in the proceeding before it, in light of the principles and jurisprudence of the inter-American human rights system, in order to determine whether a violation of a state's international commitments may be involved.[FN59] In light of the allegations and information submitted by the Petitioners in this matter and existing Commission jurisprudence relating to the issues raised by the Petitioners, the Commission considers that the petition raises colorable claims of violations of the American Declaration that should be evaluated on the merits of this case. Accordingly, the Commission concludes that the Petitioners' petition should not be declared inadmissible under Article 34 of the Commission's Rules of Procedure.

[FN58] See case 11.673, Report No. 39/96 Santiago Marzioni v. Argentina, Annual Report of the IACHR 1996, paras. 48-52.

[FN59] See similarly Petition 790/01, Report 74/03, Chief Grand Michael Mitchell v. Canada (Admissibility), October 22, 2003, para. 37.

F. Conclusions on Admissibility

71. 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. Medina in respect of Articles I, II, XVIII, XXIV, XXV and XXVI of the American Declaration and continue with the analysis of the merits of the case.

V. MERITS

A. Standard of Review

72. 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,[FN60] and has been articulated and applied by the Commission in previous capital cases before it.[FN61]

[FN60] 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.).

[FN61] 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.

73. 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.

74. In the present petition, the Petitioners allege that the State is responsible for violating Mr. Suarez Medina's rights under Articles I II, VIII, XXIV XXV and XXVI of the American Declaration on four main grounds, namely that the State failed to inform Mr. Suarez Medina of his right to consular notification under Article 36 of the Vienna Convention on Consular Relations contrary to his right to due process and a fair trial, that the State introduced evidence of an unadjudicated offense during the penalty phase of Mr. Suarez Medina's trial contrary to his

right to due process and a fair trial as well as his right to equality before the law, that the State violated Mr. Suarez Medina's right to humane treatment based upon the time he spent on death row and by scheduling his execution on 14 separate occasions, and that the State contravened Mr. Suarez Medina's right to life and to petition for a remedy by executing him in violation of the precautionary measures adopted by the Commission.

B. Use of Evidence of an Unadjudicated Offense

75. The Petitioners have contended, and the State has not contested, that during the sentencing phase of Mr. Suarez Medina's trial, the prosecution introduced evidence of an additional crime that Mr. Suarez Medina was alleged to have committed, namely the shooting of Michael Wesley, for which he was never charged, tried or convicted. According to the record, the testimony of Mr. Mesley was relied upon by the prosecution as an aggravating factor for the jury to consider in determining whether Mr. Suarez Medina may have constituted a continuing threat to society and therefore warranted a death sentence.

76. As the parties noted in their submissions, this Commission's decision in the case of Juan Raul Garza v. United States is relevant to this aspect of the Petitioners' arguments, as it constituted the first occasion upon which the Commission considered the compatibility with the American Declaration of the use of evidence of unadjudicated offenses during the punishment phase of capital proceedings. In that case, Mr. Garza challenged the introduction during the sentencing phase of his federal capital proceedings of four unadjudicated murders that he was alleged to have perpetrated in Mexico and that had been considered by the jury in determining that he should be sentenced to death.[FN62] In particular, the jury concluded beyond a reasonable doubt during the sentencing hearing that Mr. Garza committed the four killings in Mexico, and took his responsibility for these crimes in account as a factor supporting the imposition of a death sentence in his case.

[FN62] Case 12.243, Report 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2000.

77. After considering the arguments presented on behalf of the parties in the Garza Case, the Commission concluded that the state's conduct in introducing evidence of unadjudicated crimes during Mr. Garza's sentencing hearing was "antithetical to the most basic and fundamental judicial guarantees applicable in attributing responsibility and punishment to individuals for crimes." [FN63] This conclusion was based upon the Commission's finding that the intent and consequence of using evidence of unadjudicated crimes in this manner is, effectively, to determine the defendant's guilt and punishment for the other unadjudicated crimes, but through a sentencing hearing rather than a proper and fair trial process accompanied by all of the substantive and procedural protections necessary for determining individual criminal responsibility.[FN64] Viewing the introduction of the evidence of unadjudicated crimes in this light, the Commission also found that Mr. Garza was not tried for these additional crimes before an impartial tribunal, as the jury that convicted and sentenced Mr. Garza for the crimes prosecuted during the guilt/innocence phase of his trial could not reasonably have been

considered impartial in subsequently determining his criminal liability for the additional unadjudicated crimes during the sentencing hearing. The Commission also found that the prejudice resulting from the use of the evidence relating to these other alleged crimes was compounded by the fact that lesser standards of evidence were applicable during the sentencing process.[FN65]

[FN63] Id., para. 110.

[FN64] Id., para. 105.

[FN65] Id., para. 108.

78. In the present case, as in *Garza*, the facts establish that the State permitted the introduction of evidence during Mr. Suarez Medina's sentencing hearing concerning a separate crime that he was alleged to have committed, but for which he was never charged, tried or convicted and against which he could not properly defend through strict rules of evidence and other due process protections applicable during the guilt/innocence phase of a criminal prosecution. In addition, the jury concluded during the sentencing hearing that Mr. Suarez Medina committed the separate crime and relied upon this finding in determining the Mr. Suarez Medina should be sentenced to death. Further, as noted by the Petitioners, applicable Texas law, unlike the federal law at issue in *Garza*, did not prescribe the standard of proof applicable for the jury in considering the evidence relating to the unadjudicated crime, nor was the jury given any such direction from the judge. Rather, the jury was only required to conclude beyond a reasonable doubt that there was a probability that Mr. Suarez Medina would commit criminal acts of violence that would constitute a continuing threat to society.[FN66] Accordingly, the possibility that the jury determined Mr. Suarez Medina's responsibility for the Mesley crime based upon a standard of proof lower than that required for determining individual criminal responsibility, namely proof beyond a reasonable doubt, further compounded the risk that Mr. Suarez Medina was held responsible for and punished for a crime based upon potentially prejudicial and unreliable eye-witness evidence and absent full due process protections.

[FN66] See Texas Code of Criminal Procedure, Chapter 37, Article 37.0711 (Procedure in capital case for offense committed before September 1, 1991), sections (b)(1), (2), (c), (g).

79. Also in this case, as in *Garza*, the State appears to argue that the unadjudicated murders were simply another aggravating factor properly taken into account in determining the appropriate sentence for Mr. Garza. The Commission must again emphasize, however, that a significant and substantive distinction exists between the introduction of evidence of mitigating and aggravating factors concerning the circumstances of an offender or his or her offense, for example whether the age or infirmity of the offender's victim or whether the defendant had a prior criminal record, and an effort to attribute to an offender individual criminal responsibility and punishment for violations of additional serious offenses that have not be charged and tried pursuant to a fair trial offering the requisite due process guarantees.

80. Based upon the foregoing, the Commission concludes that the State's conduct in permitting the introduction of evidence of an unadjudicated crimes during Mr. Suarez Medina's capital sentencing hearing resulted in the imposition of the death penalty upon Mr. Suarez Medina in a manner that violated his right to a fair trial under Article XVIII of the American Declaration, as well as his right to due process of law under Article XXVI of the Declaration.

C. Consular Notification

81. The Petitioners have also alleged that the State is responsible for further violations of Mr. Suarez Medina's rights to due process and to a fair trial because State the State failed to inform Mr. Suarez Medina of his right to consular notification under Article 36 of the Vienna Convention on Consular Relations and thereby caused prejudice to his defense.

82. As indicated above, the Commission has determined in previous cases[FN67] that it is appropriate to consider compliance with Article 36 of the Vienna Convention on Consular Relations by a state party to that treaty when interpreting and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to trial 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.[FN68] The Commission adopts for the purposes of this report its findings in the Villareal Case and will analyze Mr. Suarez Medina's circumstances in light of those findings.

[FN67] See, e.g., Case 11.753, Report 52/02, Ramón Martínez Villareal v. United States, Annual Report of the IACHR 2002.

[FN68] Id., para. 77.

83. In the present case, the Petitioners have alleged that Mr. Suarez Medina was at all pertinent times a national of Mexico and that arresting authorities in Texas were aware of this fact from the time that they detained him in connection with the murder of Lawrence Cadena. In addition, Mr. Medina has stated that he was never informed of his right to consular notification when he was arrested or subsequent thereto, nor did his defense attorney seek consular assistance. Further, the Petitioners claim on at least two occasions, authorities in Texas obstructed efforts by Mexican consular officials to confirm whether Mr. Suarez Medina was a national of their country, and as a result Mexico did not learn that Mr. Suarez Medina was a Mexican national until after Mr. Suarez Medina was convicted and sentenced.

84. For its part, the State has not specifically disputed the Petitioners contentions. Concerning the failure of consular notification in particular, the Legal Adviser to the U.S. Department of State stated in his August 5, 2002 letter to the Chairman of the Texas Board of Pardons and Paroles that "[t]he information we have received from Texas authorities indicates that there has

been a failure to comply with the consular notification obligations under Article 36(1) of the Vienna Convention [on Consular Relations].”[FN69]

[FN69] Letter from the Legal Adviser of the Department of State to the Chairman of the Texas Board of Pardons and Paroles, August 5, 2002, p. 2.

85. Accordingly, based upon the information and arguments presented, the Commission concluded that Mr. Suarez Medina was not notified of his right to consular assistance at or subsequent to the time of his arrest and detention by authorities in Texas, and did not have access to consular officials until after his trial had ended and he had been convicted and sentenced to death.

86. In addition, the Commission is not satisfied, based upon the State’s observations or otherwise, that Mr. Suarez Medina’s criminal proceedings complied with the due process and fair trial requirements of the American Declaration notwithstanding the absence of consular notification and access. In particular, it is apparent from the record before the Commission that following Mr. Suarez Medina’s conviction and sentencing, consular officials were instrumental in gathering significant evidence concerning Mr. Suarez Medina’s character and background and that this evidence, if presented, could have had a decisive impact upon the jury’s evaluation of aggravating and mitigating factors in the circumstances of Mr. Suarez Medina’s case. This evidence included information from Mr. Suarez Medina’s family in Mexico concerning his violent and unstable childhood, as well as expert evidence indicating that Mr. Suarez Medina suffered from mental and emotional problems including mild to moderate brain damage, learning disabilities, attention deficit disorder and post-traumatic stress disorder. In the Commission’s view, this information was clearly relevant to the jury’s determination as to whether the death penalty was the appropriate punishment for Mr. Suarez Medina in light of his circumstances and those of the offense. The Commission emphasizes in this regard its previous decisions concerning the necessity of individualized sentencing in capital cases, where a defendant must be entitled to present submissions and evidence in respect of all potentially mitigating circumstances relating to his or her person or offense for consideration by the sentencing court in determining whether the death penalty is a permissible or appropriate punishment.[FN70] The potential significance of the additional evidence in Mr. Suarez Medina’s case is enhanced by the fact that apart from the circumstances of his crime, the only aggravating factors against Mr. Suarez Medina consisted of evidence of an unadjudicated crime, which the Commission has found was improper and should not have been introduced, as well as information concerning several minor disciplinary incidents in which Mr. Suarez was alleged to have been involved. As a consequence, the evidence gathered through the assistance of the consular officials may have had a particularly significant impact upon the jury’s determination of the appropriate punishment for Mr. Suarez Medina.

[FN70] See, e.g., Case 12.023, Report 41/00, Desmond McKenzie et al. v. Jamaica, Annual report of the IACHR 1999, paras. 207-209.

87. Based upon the foregoing, the Commission concludes that the State's obligation under Article 36(1)(b) of the Vienna Convention on Consular Relations to inform Mr. Suarez Medina of his right to consular notification and assistance 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 deprived Mr. Suarez Medina of a criminal process that satisfied the minimum standards of due process and a fair trial required under Articles XVIII and XXVI of the Declaration.[FN71]

[FN71] Ramón Martínez Villareal v. United States, *supra*, para. 84.

D. The scheduling of Mr. Suarez Medina's execution and non-compliance with the Commission's request for precautionary measures

88. The Petitioners argue that the State violated Mr. Suarez Medina's right to be treated humanely and his right not to be subjected to cruel, infamous or unusual punishment under Articles XXV and XXVI of the American Declaration by incarcerating him on death row for 13 years and scheduling his execution on 14 occasions without justification. They have also argued that, by carrying out Mr. Suarez Medina's execution on the fourteenth occasion in contravention of the precautionary measures requested by the Commission, the State is responsible for violating Mr. Suarez Medina's right to life and his right to petition under Articles I and XXIV of the American Declaration.

89. In response, the State argues that rescheduling of execution dates is not an indication of cruel, inhuman or degrading treatment, but is instead evidence that Mr. Suarez Medina received full due process of law. The State also contends that the Commission lacks the authority to make binding requests for precautionary measures in respect of states that are not party to the American Convention on Human Rights.

90. In its decision in the case of *Juan Raul Garza v. United States*, the Commission held that in capital cases, 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, and accordingly is inconsistent with the state's human rights obligations.[FN72] The Commission premised these obligations on a finding that OAS member states, by creating the Commission and mandating it through the OAS Charter and the Commission's Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission's mandate.[FN73] The Commission found support for this determination in its own jurisprudence as well as the findings of other regional and international adjudicative bodies, including the UN Human Rights Committee, the European Court of Human Rights and the International Court of Justice.[FN74] In the Commission's view, this jurisprudence articulates a principle common to the functioning of international adjudicative systems that requires the

systems' member states to implement interim or precautionary measures when doing so is necessary to preserve the very purposes for which the systems were created and to prevent irreparable harm to the parties whose interests are determined through those systems.

[FN72] Case 12.243, Report 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2000, para. 117. See similarly ; 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.

[FN73] Id.

[FN74] Id., citing 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.

91. Upon carefully considering the observations of the parties in this case, the Commission finds no grounds for varying its previous findings on this issue. The State has emphasized differences in the nature of the governing instruments for the various international bodies under consideration. However, in the Commission' view, the fundamental precepts upon which states' obligations are based, namely preserving the essential effectiveness of the supervisory bodies and preventing irreparable harm to the rights of their constituents, apply equally to all of the bodies concerned, regardless of the particular modality through which states choose to create those bodies or define their mandates.

92. Accordingly, in the present case, the Commission considers that the State abrogated its international obligations under the OAS Charter and the American Declaration by failing to implement the Commission's request to preserve Mr. Suarez Medina's life and integrity until the Commission decided upon his petition. In addition, by scheduling Mr. Suarez Medina's execution on fourteen occasions based upon death sentence that was imposed in contravention of Mr. Suarez Medina's rights to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration and was therefore arbitrary, and by ultimately executing Mr. Suarez Medina on August 14, 2002, the Commission considers that the State is responsible for serious violations of Mr. Suarez Medina's right to life, his right to petition for a remedy, and his right not to receive cruel, infamous or unusual punishment, contrary to Articles I, XXIV and XXVI of the American Declaration.[FN75]

[FN75] See similarly Case 11.193, Report 97/03, Shaka Sankofa v. United States, Annual Report of the IACHR 2003, para. 54; Case 12.412, Report 1-1/03, Annual Report of the IACHR 2003, para. 53; Case 11.139, Report 57/96, William Andrews v. United States, Annual Report of the IACHR 1997, para 178.

VI. PROCEEDINGS SUBSEQUENT TO REPORT 28/05

93. On March 7, 2005, the Commission adopted Report 28/05 pursuant to Article 43 of its Rules of Procedure, setting forth its analysis of the record and its findings and recommendations in this matter.

94. Report 28/05 was transmitted to the State by note dated May 12, 2005, 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.

95. By communication dated September 6, 2005 and received by the Commission on the same date, the State delivered a response to the Commission's request for information. In its response, the State indicated that it disagreed with the conclusions and recommendations based upon the reasons expressed in the State's original response to the petition.

96. The State also indicated that, as a courtesy to the Commission, and without prejudice to its contention that the determination of the meaning and extent of a State's obligations pursuant to the Vienna Convention on Consular Relations does not fall within the competence of the Commission, it wished to provide information that might be of interest to the Commission to the extent that it related to the Commission's recommendations, in particular Recommendation 3.

97. In particular, the State informed the Commission that the President of the United States had determined that the United States would comply with the judgment of the International Court of Justice in the Avena Case. According to the State, the government's amicus brief filed with the Supreme Court in the first of the 51 cases affected by Avena (the Jose Ernesto Medellin case) reflected the U.S. commitment to compliance with its international legal obligations, and that under the President's determination, 51 Mexican nationals, including Medellin, may file petitions in state courts seeking review and reconsideration as provided for in the Avena judgment. The State also indicated that the decision to provide review and reconsideration in these cases does not mean that there must be a different outcome and that this is consistent with the Avena judgment. The State contended in this respect that the issue for the courts to decide is whether the failure to provide consular notification caused actual prejudice to the defense either at trial or at sentencing. In addition, the State indicated that on May 23, 2005, the United States Supreme Court dismissed Medellin's petition for certiorari as improvidently grant, noting that Mr. Medellin had filed a successive state application for a writ of habeas corpus just four days before oral arguments and "[t]hat state proceeding may provide Medellin with the review and reconsideration of his Vienna Convention claim that the ICJ required...".

98. In its response, the State also indicated that its amicus brief in the Medellin case reflected the United States Government's longstanding interpretation of the Vienna Convention on Consular Relations and that the ICJ in Avena interpreted the Vienna Convention on Consular Relations in ways that the State did not anticipate, which in turn may have unanticipated implications for the State's domestic criminal justice system. Therefore, according to the State,

although the President had determined that the State should comply with the ICJ's judgment in *Avena*, the United States is concerned about the breadth of the ICJ's decisions interpreting the Vienna Convention on Consular Relations. In this respect, the State also indicated that it had decided to withdraw from the Optional Protocol to the Vienna Convention on Consular Relations which, according to the State, is a purely jurisdictional treaty separate from the Vienna Convention on Consular Relations that gives the ICJ jurisdiction over disputes concerning the interpretation of that Convention. According to the State, by withdrawing from the Optional Protocol, it has joined 70% of countries that are party to the Vienna Convention on Consular Relations but have chosen not to be a party to the Optional Protocol.

99. Finally, the State emphasized that it remains a party to the Vienna Convention on Consular Relations and remains committed to fully meeting its obligations to provide consular notification and access in the cases of detained foreign nationals, and that it continues to work to ensure all law enforcement agencies in the United States understanding their responsibilities in this regard.

100. Upon considering the State's response to the Commission's Report 28/05 in this matter, the Commission is encouraged by the State's decision to comply with the judgment of the International Court of Justice in the *Avena* Case. As the Commission noted in its decision, the extent to which a state party to the Vienna Convention on Consular Relations has given effect to the requirements of Article 36 of that Convention can be a significant factor in determining whether the State has complied with the due process rights of a foreign national. Accordingly, implementation of the ICJ judgment in the *Avena* Case may provide the individuals implicated by that decision with an opportunity to have the fairness of their criminal proceedings evaluated by a court in light of any failure on the part of the State to comply with the requirements of Article 36 of the Vienna Convention on Consular Relations. To this extent, the Commission considers that there has been partial compliance with its third recommendation to the State in this case.

101. At the same time, the information provided by the State does not indicate whether it has taken measures to review its laws, procedures and practices to ensure that all 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 will be informed without delay of their right to consular assistance, or whether it has taken steps to implement any other recommendations set forth in the Commission's Report 28/05.

102. Accordingly, based upon the response of the United States, the Commission has decided to ratify its conclusions and reiterate its recommendations in this case, as set forth below.

VII. CONCLUSIONS

The Commission, based on the foregoing considerations of fact and law, concludes that:

103. The Petitioners' claims are admissible as to the alleged violations of Articles I, II, XVIII, XXIV, XXV and XXVI of the American Declaration.

104. The State is responsible for violations of Articles XVIII and XXVI of the American Declaration in the trial, conviction and sentencing to death of Javier Suarez Medina, by permitting the introduction of evidence of an unadjudicated crime during Mr. Suarez Medina's capital sentencing hearing and by failing to inform Mr. Suarez Medina of his right to consular notification and assistance.

105. The State is responsible for violations of Article I, XXIV and XXVI of the American Declaration, by scheduling Mr. Suarez Medina's execution on fourteen occasions pursuant to a death sentence that was imposed in contravention of Mr. Suarez Medina's rights to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration, and by executing Mr. Suarez Medina pursuant to that sentence on August 14, 2002 notwithstanding the existence of precautionary measures granted in his favor by this Commission.

VIII. RECOMMENDATIONS

Based on the analysis and the conclusions in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS TO THE UNITED STATES THAT IT:

1. Provide the next-of-kin of Mr. Suarez Medina with an effective remedy, which includes compensation.
2. Review its laws, procedures and practices to ensure that persons who are accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII and XXVI of the Declaration, and in particular by prohibiting the introduction of evidence of unadjudicated crimes during the sentencing phase of capital trials.
3. 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.
4. Review its laws, procedures and practices to ensure that requests for precautionary measures granted by the Commission are implemented so as to preserve the Commission's functions and mandate and to prevent irreparable harm to persons.

IX. NOTIFICATION AND PUBLICATION

106. In light of the above, and given the exceptional circumstances of the present case, where the State has indicated that it disagrees with the conclusions and recommendations of the Commission, the Commission has decided pursuant to Article 45(2) and (3) of its Rules of Procedure to set no further time period prior to publication for the parties to present information on compliance with the recommendations, to transmit this Report to the State and to the Petitioner's representatives, 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.

Done and signed in the city of Washington, D.C., on the 24th day of the month of October, 2005.
(Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez Trejo, and Florentín Meléndez, Commissioners.