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Title/Style of Cause: Jose Ernesto Medellin, Ruben Ramirez Cardenas and Humberto Leal Garcia v. United States
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Decided by: President: Luz Patricia Mejia Guerrero;
First Vice President: Victor Abramovich;
Second Vice President: Felipe Gonzalez;
Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro.
Commission President Paolo Carozza did not take part in the discussion and voting on this case, pursuant to Article 17(2) of the Commission's Rules of Procedure.
Dated: 7 August 2009
Citation: Medellin v. United States, Case 12.644, Inter-Am. C.H.R., Report No. 90/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by: APPLICANT: Sandra L. Babcock
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I. SUMMARY

1. On November 22, 2006, the Inter-American Commission on Human Rights (hereinafter the “Commission” or the “IACHR”) received a petition from Sandra L. Babcock, Clinical Professor of Law of Northwestern University School of Law[FN1] (hereinafter the “petitioner”), on behalf of Mr. José Ernesto Medellín, a citizen of Mexico, incarcerated on death row in the State of Texas, United States of America (hereinafter the “State” or “United States”). On December 12, 2006, the Commission received two petitions from the same petitioner, on behalf of two other citizens of Mexico incarcerated on death row in the State of Texas, Messrs. Rubén Ramírez Cardenas and Humberto Leal García.

[FN1] The initial petitions and subsequent briefs were signed by Professor Babcock. Alternatively, they were also signed by her students Atif Mian, Jennifer Cassel and Elizabeth Lee.

2. The petitioner claimed that the United States is responsible for violations of Messrs. Medellín, Ramírez Cardenas and Leal García’s rights under Articles I, XVIII, and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter the “American Declaration” or the “Declaration”), based upon deficiencies in the fairness of the criminal proceedings against

them. In particular, the petitioner alleges that, at the time of their arrest, they were not informed of their right to consular notification and access, in violation of Article 36 of the Vienna Convention on Consular Relations (hereinafter “the Vienna Convention”); that they were not afforded competent legal representation by the State; that the mode of execution as currently practiced in Texas creates an unacceptable risk of excruciating pain; that they have been denied a meaningful opportunity to present their cases to a clemency authority prior to execution; and that the conditions in Texas’ death row violate the right to humane treatment. The petitioner also requested that the Commission issue precautionary measures calling upon the United States to ensure that Messrs. Medellín, Ramírez Cardenas and Leal García’s lives would be preserved while these claims were pending before the IACHR.

3. The Commission referred these petitions to the State separately for observations and granted precautionary measures requesting that the United States take measures to preserve Messrs. Medellín, Ramírez Cardenas and Leal García’s lives, pending the Commission’s investigation of the allegations in the petitions. In view of the impending risk of execution, on January 15, 2008, the Commission consolidated these three petitions into case 12.644 and informed the parties that it would examine the admissibility and merits of the case jointly.

4. In a hearing held before the Commission in March, 2008, the State claimed that Messrs. Medellín, Ramírez Cardenas and Leal García had failed to exhaust domestic remedies as required under the Commission’s Rules of Procedure. The State contended that the Commission was barred from considering the issues raised in the case due to the duplication of proceedings vis-a-vis the decision of the International Court of Justice (hereinafter “the ICJ”) in the Avena Case. In a latter written submission the State argued that the case was inadmissible because the Commission lacked competence to review issues arising from the Vienna Convention and notification claims did not raise human rights violations. The State also contended that the petitioner’s due process claims were without merit.

5. In view of the information available and the contentions of the parties, the Commission concluded in Preliminary Report No. 45/08 on this case that the claims brought on behalf of Messrs. Medellín, Ramírez Cardenas and Leal García were admissible and that the State is responsible for violations of their rights under Articles I, XVIII and XXVI of the American Declaration in respect of the criminal proceedings leading to the imposition of the death penalty against them. It also concluded that should the State execute Messrs. Medellín, Ramírez Cardenas and Leal García, it would commit an irreparable violation of their right to life as guaranteed in the aforementioned provision. The Commission recommended that the State provide Messrs. Medellín, Cardenas and Leal García with an effective remedy, including new sentencing hearings in accordance with the due process and fair trial protections under the American Declaration.

II. PROCESSING

6. Following the receipt of Mr. Medellín’s petition –which was designated as P1323/06— the Commission transmitted the pertinent parts of the complaint to the United States by means of a note dated December 6, 2006 with a request for observations within two months, as established by the Commission’s Rules of Procedure. On December 6, 2006, the Commission also granted

precautionary measures in favor of Mr. Medellín, whose execution date was, at that time, to be scheduled shortly, given the refusal by the Texas Criminal Court of Appeals to review his case. The Commission requested that the United States take the necessary measures to preserve Mr. Medellín's life pending the Commission's investigation of the allegations in his petition.

7. Following receipt of Messrs. Ramírez Cardenas and Leal García's petitions –which were designated as P1388/06 and P1389/06, respectively— the Commission transmitted the pertinent parts of their respective complaints to the United States on January 30, 2007 with a request for observations within two months, as established by the Commission's Rules of Procedure. Also on January 30, 2007, the Commission granted precautionary measures in favor of Messrs. Ramírez Cardenas and Leal García. The Commission requested that the United States take the necessary measures to preserve their lives pending the Commission's investigation of the allegations in their petitions.

8. In a note dated February 22, 2007, the United States responded to the IACHR's request for precautionary measures on behalf of Mr. Medellín by reporting that it had communicated with the relevant state authorities by letter of January 12, 2007. The State enclosed copies of communications addressed to the Attorney General of Texas, the Presiding Officer of the Texas Board of Pardons and Paroles, and the Governor of Texas. In the same note the State requested an extension of time to file its response to the petition. By communication to the State dated February 27, 2007, the Commission granted the State's request for an extension of time.

9. In a note dated March 27, 2007, the United States informed the Commission that it had responded to the request for precautionary measures on behalf of Mr. Ramírez Cardenas by communicating with the relevant state authorities on January 31, 2007. The State enclosed copies of communications addressed to the Attorney General of Texas, the Presiding Officer of the Texas Board of Pardons and Paroles, and the Governor of Texas.

10. Also on March 27, 2007, the United States informed the Commission that it had responded to the request for precautionary measures on behalf of Mr. Leal García by communicating with the relevant state authorities by letter of January 31, 2007. The State enclosed copies of communications addressed to the Attorney General of Texas, the Presiding Officer of the Texas Board of Pardons and Paroles, and the Governor of Texas.

11. On January 7, 2008, the Commission received a communication from the petitioner requesting that the decision on the admissibility and the merits of the claims in petitions P1323/06, 1388/06 and 1389/06 be consolidated. The petitioner also requested a hearing and pointed out the risk that Messrs. Medellín, Ramírez Cardenas and Leal García could be executed before the Commission's 2008 session and that "a hearing at the March [2008] session may be the only opportunity to hear these cases while the[y] [...] are still alive."

12. On January 15, 2008, the Commission notified the parties that it had decided to consolidate the aforementioned petitions pursuant to Article 29(1)(d) of its Rules of Procedure in view of the fact that they addressed similar facts and revealed the same alleged pattern of conduct. The Commission also decided to defer the treatment of admissibility until the debate

and decision on the merits, according to Article 37.7 of its Rules of Procedure, and examine the consolidated matter under number 12.644.

13. On February 7, 2008, the Commission convened a hearing scheduled for March 7, 2008, during the IACHR's 131st period of sessions. In a note dated February 28, 2008, the United States indicated that the case presented two issues which were then pending before the Supreme Court of the United States and that therefore, "the Commission should not proceed with hearings on matters where the requirement of exhaustion of domestic remedies has so clearly not been met." The State added that the situation "would place US authorities in an extremely awkward position of attempting to present views before the Commission without taking into account the forthcoming judgments of the Supreme Court." As a result, the State requested that the hearing be postponed to a future period of sessions. On March 7, 2008, the Commission held the public hearing on the case, as convened, with the participation of both parties.[FN2]

[FN2] Audio available at <http://www.cidh.org/Audiencias/select.aspx>

14. On March 14, 2008, the Commission received the petitioner's supplemental observations on admissibility and the merits. On March 17, 2008, the Commission forwarded to the State these observations, as well as additional documents submitted by the petitioner during the hearing, with two months to present a response. On March 26, 2008, the Commission transmitted to the State additional observations on the merits submitted by the petitioner. In a note dated May 7, 2008, the United States requested an extension of time to submit a response. The Commission granted the State's request for an extension until June 17, 2008. The State failed to present its response within the extension granted by the Commission.

15. On June 5, 2008, the Commission received a communication from the petitioner indicating that the 339th District Court of Harris County, Texas, had scheduled Mr. Medellín's execution for August 5, 2008. In light of this information, the Commission reiterated the precautionary measures adopted on December 6, 2006, in which the Commission requested that the United States take measures to preserve Mr. Medellín's life pending the investigation of the allegations in the petition. On June 23, 2008, the United States informed the Commission that the State had responded the IACHR's request by communicating with the relevant state authorities. The State enclosed copies of communications addressed to the Attorney General of Texas, the Presiding Officer of the Texas Board of Pardons and Paroles, and the Governor of Texas. This communication was forwarded to the petitioner on June 24, 2008.

16. On July 8, 2008, the State submitted its sole written submission on the admissibility and the merits of the case.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

1. Claims relating to the trial, conviction and sentencing of Messrs. Medellín, Ramírez Cardenas and Leal García

a. José Medellín

17. The petitioner indicates that on June 29, 1993, law enforcement authorities arrested José Medellín in connection with the murder of Elizabeth Peña perpetrated in Houston, Texas. The petitioner alleges that although he informed them, as well as Harris County Pre-Trial Services, that he was born in Mexico and was not a US citizen, he was not advised of his rights under Article 36 of the Vienna Convention to contact and receive assistance from the Mexican consulate.[FN3] The petitioner indicates that José Medellín was 18 years old at the time of his arrest.

[FN3] Harris County Pre-Trial Services Agency, Defendant Interview, Respondent's Original Answer, Ex. C, Medellín v. State, No. 675430-A (Tex. 339th Dist. Ct).

18. The petitioner indicates that, since Medellín was indigent, the Texas trial court appointed counsel to represent him. The petitioner argues that during the course of the investigation and prosecution of the case, his counsel was under a six month suspension from the practice of law for ethics violations in another case. Prior to trial this lawyer was held in contempt of court and arrested for seven days for violating his suspension. The petitioner indicates that, once the Texas State Bar instituted a second disciplinary proceeding against him, he spent much of the time that should have been allotted to representing Mr. Medellín defending himself before the District Court and the Court of Appeals.

19. The petitioner alleges that Mr. Medellín's state appointed counsel spent a total of eight hours on the investigation prior to the commencement of jury selection.[FN4] Allegedly, during jury selection he failed to strike jurors who revealed their inclination to impose automatically the death penalty; during the trial he called no witnesses; during the penalty phase—that lasted a total of two hours—he presented only one expert witness: a psychologist who had never interviewed Mr. Medellín and whose testimony was detrimental to the alleged victim's case.

[FN4] Petition alleging the violation of human rights of José Ernesto Medellín, November 21, 2006, Exhibit E.

20. The petitioner indicates that on September 16, 1994, Mr. Medellín was convicted of capital murder and on October 11, 1994, he was sentenced to death. On March 16, 1997 the Texas Court of Criminal Appeals affirmed Mr. Medellín's conviction and sentence.[FN5]

[FN5] Texas Court of Criminal Appeals, State v. Medellín, No. AP-71, 997, March 9, 1997.

21. The petitioner alleges that on April 29, 1997, nearly four years after his arrest, Mexican consular authorities first learned of Mr. Medellín's arrest, trial and sentence. In March 26, 1998, Mr. Medellín filed a habeas corpus petition, alleging a violation of Article 36 of the Vienna Convention. On January 22, 2001, he was denied relief on the basis that a Texas procedural rule barred the Vienna Convention claim because Mr. Medellín had no individual right to raise an Article 36 violation.[FN6] He was also denied a request for an evidentiary hearing. This order was affirmed on October 3, 2001 by the Texas Court of Criminal Appeals.[FN7] On November 28, 2001, Mr. Medellín instigated federal habeas corpus proceedings. On July 26, 2003, the District Court denied relief and a certificate of appealability.[FN8]

[FN6] Ex Parte Medellín, Order at *19-20, No. 675430-A (339th Dist. Ct. Jan 22, 2001).

[FN7] Ex Parte Medellín, No. 50191-01 (Tex. Crim. App. Oct .3, 2001).

[FN8] Medellín v. Cockerel, Civ. No. H-01-4078 (S.D. Tex. Apr. 17, 2003).

22. The petitioner indicates that, separately, on January 9, 2003, the Government of Mexico commenced proceedings against the U.S. for alleged violations of Article 36 of the Vienna Convention, regarding Mr. Avena, and 54 other Mexican nationals, including Mr. Medellín. On March 31, 2004, the ICJ held that in the case of 51 Mexican nationals, the U.S. had breached its obligation under Article 36(1)(b) "to inform detained Mexican nationals of their rights under that paragraph;" that in 49 of those cases the US had breached its obligation "to notify the Mexican consular post of their detention," under Article 36(1)(a); and that in 34 of those cases the U.S. had breached its obligation "to enable Mexican consular officers to arrange for legal representation of their nationals," under Article 36(1)(c). Mr. Medellín was expressly included in all the alleged breaches. The ICJ held that as a remedy for the violation of these provisions the U.S. should, by means of its own choosing, review and reconsider the convictions and sentences of the Mexican nationals identified in the decision.[FN9]

[FN9] The ICJ established that the review should be carried "within the overall judicial proceedings relating to the individual defendant concerned;" the procedural default doctrine could not bar the required review and reconsideration; the review and reconsideration must take account of the Article 36 violation on its own terms, and not require that it qualify also as a violation of some other procedural or constitutional right; and the forum of review must be capable of examining the facts and in particular the prejudice and its causes. ICJ Avena and other Mexican Nationals (Mexico v. United States of America), Judgment of 31 March 2004 <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=18&case=128&code=mus&p3=5> para.153(5-9).

23. The petitioner indicates that on October 24, 2003, once the Avena pleadings had been filed with the ICJ but not decided, Mr. Medellín sought a certificate of appealability from the Court of Appeals. On May 20, 2004, after the ICJ had rendered judgment, the Court of Appeals denied Mr. Medellín's application.[FN10] On December 10, 2004, the US Supreme Court

granted certiorari in Mr. Medellín's case to review questions regarding the enforceability of the Avena Judgment.

[FN10] The Court of Appeals indicated that it was bound to disregard the decision in Avena unless and until the Supreme Court or the Court of Appeals en banc, decided otherwise. Medellín v. Dretke, 371 F.3d 270 (5th Cir. 2003) at 280.

24. The petitioner indicates that on February 28, 2005, President Bush issued a Memorandum stating that the United States would discharge its international obligations by having state courts give effect to the ICJ's decision. On March 8, 2005, Mr. Medellín requested the Supreme Court to stay his case and hold it in abeyance while he proceeded before the Texas State Court system in accordance with the President's determination. Relying on the Avena judgment and the President's Memorandum, on March 24, 2005, Mr. Medellín filed a second state-court habeas application challenging his murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention Rights. On November 15, 2006, the Texas Court of Criminal Appeals dismissed Mr. Medellín's application as an abuse of the writ, concluding that neither the Avena Judgment nor the President's Memorandum was binding federal law that could displace the limitations under state law on filing successive habeas applications.[FN11]

[FN11] Ex parte Medellín_S.W.3d_, 2006 WL 3302630 at *10 (Tex. Crim. App. 2006).

25. In March 2008, once the petitioner had presented all the submissions required under the Commissions Rules of Procedure, the US Supreme Court handed down its decision in Medellín v. Texas on the enforceability of the ICJ Judgment.[FN12]

[FN12] Medellín V. Texas 552 U.S._ (2008).

b. Rubén Ramírez Cardenas

26. The petitioner indicates that on February 23, 1997 law enforcement officers arrested Mr. Rubén Ramírez Cardenas—a citizen of Mexico who emigrated to the US when he was a child—in connection with the kidnapping and murder of Mayra Laguna, his 16 year old cousin.[FN13] Mr. Ramírez Cardenas had no criminal record prior to his arrest. The petitioner alleges that Mr. Ramírez Cardenas was never informed of his right to consular notification, communication, and assistance when arrested, and that consular officers did not learn of his detention until roughly five months later, in violation of Article 36 of the Vienna Convention.

[FN13] According to the petitioner, Ramírez Cardenas was initially arrested and charged with burglary of a habitation with intent to commit a kidnapping, because he gave inconsistent statements about his whereabouts the night Mayra disappeared.

27. The petitioner alleges that in an interrogation on February 23,, 1997, Mr. Ramírez Cardenas denied that Mayra had been kidnapped or that she was dead.[FN14] Mr. Ramírez Cardenas was then brought before the McAllen Municipal Court for arraignment under Article 15.17 of the Texas Code of Criminal Procedure. The petitioner alleges that no counsel was appointed to represent Mr. Ramírez Cardenas at the arraignment, even though he was indigent and was constitutionally entitled to legal representation. The petitioner alleges that shortly after the arraignment, Mr. Ramírez Cardenas was interrogated again by the Police and confessed to kidnapping, raping and murdering Mayra Laguna, while under the combined influence of alcohol and cocaine. He then took the Police to the area where Mayra’s body was found.

[FN14] According to the petitioner he said Mayra “wanted to get out of the house” and that they had staged a kidnapping, but she was with a friend. petitioner’s cite 10 RP 8; 44 RP 218-219; 45 RP 111-114, 240-242; 46 RP 106-108).

28. The petitioner indicates that on February 24, 1997, Mr. Ramírez Cardenas was charged with capital murder, and was again arraigned. Again, no counsel was appointed. The Police continued to interrogate him and took several statements from him after the second arraignment, and obtained his consent to search his home and to take blood and hair samples.[FN15]

[FN15] petitioner’s cite 45 RP 157-160, 174-180.

29. The petitioner indicates that on February 26, 1997, Mr. Ramírez Cardenas executed a written request for counsel before a notary public.[FN16] Counsel was not assigned until March 5, 1997 –nine days after he was arrested. After the written request for counsel was made and submitted to the court, and before counsel was appointed, the Police continued to question and take written statements from Mr. Ramírez Cardenas.[FN17] On February 27, 1997, the Police reportedly even asked him whether “they had appointed a lawyer for him.”[FN18]

[FN16] petitioner’s cite Def. Ex. 4; CP 19.

[FN17] petitioner’s cite 10 RP 57-73; 46 RP 78-88.

[FN18] petitioner’s cite 46 RP 181.

30. The petitioner argues that Mr. Ramírez Cardenas’ various statements were both inconsistent with each other and with other evidence. For instance, although Mr. Ramírez Cardenas told the Police that he had sex with Mayra prior to killing her, there was no semen

discovered in Mayra's body or on her underwear. Similarly, although a small blood stain with DNA consistent with Mayra's profile (which would match one of eighteen Hispanics) was found on a floor mat in Mr. Ramírez Cardenas mothers' car, there was no other blood (or semen) found in the car. The petitioner considers that the lack of a significant quantity of blood or semen is inconsistent with one version of Mr. Cardenas' confession that he had sex and killed Mayra in the car, that she coughed up blood in the car, and that he then transported the body to another location in the vehicle. The petitioner argues that neither Mr. Ramírez Cardenas' nor Mayra's fingerprints were discovered in the car and that prints belonging to a friend Mr. Ramírez Cardenas' –also detained by the Police for interrogation—were in the vehicle. Finally, none of Mr. Ramírez Cardenas' fingerprints were located at the Laguna residence.

31. The petitioner alleges that although there was no evidence of sexual assault, the State of Texas charged Mr. Ramírez Cardenas with the capital murder of Mayra Laguna upon the ground that he killed her intentionally during the course either of kidnapping her or of sexually assaulting her. Since extensive forensic testing failed to link him conclusively to the crime, the prosecution relied heavily on the inculpatory statements made by Mr. Ramírez Cardenas to the Police.

32. The petitioner indicates that the defense moved to suppress the custodial statements to the Police on 5th Amendment grounds, but failed to raise a Sixth Amendment challenge based on the failure to appoint counsel. They likewise failed to raise a challenge based upon the alleged Vienna Convention violation.

33. The petitioner indicates that the jury found Mr. Ramírez Cardenas guilty within an hour and a half of beginning their deliberation, without specifying whether the verdict rested on a sexual assault or kidnapping. The penalty phase of the trial took place on one day. Since Mr. Ramírez Cardenas had no criminal record, the prosecution introduced evidence that he had stolen from an employer years earlier, in 1991, in a case that did not result in any criminal charges.

34. The defense called an expert witness who concluded that Mr. Ramírez Cardenas was a person of “low average to borderline intellectual functioning.”[FN19] He testified that the use of drugs and alcohol can impair the rational judgment of such people, that prisons do not rehabilitate and that “the more violent incarcerated offender is more likely to prey on the less violent incarcerated.” In closing, the prosecutor argued, on the defense expert witness' testimony, that Mr. Ramírez Cardenas would continue committing violent acts while in prison, preying on less violent offenders.[FN20]

[FN19] petitioner's cite 49 RP 137-142.

[FN20] petitioner's 50 RP 184-85.

35. Mr. Ramírez Cardenas appealed to the Court of Criminal Appeals, where he raised issues including attacks on the admission of the confessions, instructional errors, sufficiency of the evidence, and ineffective assistance of counsel. The ineffective assistance claim was based on defense counsels' failure to raise a Vienna Convention claim at trial, failure to strike a juror,

failure to call relevant witnesses, and failure to produce testimony regarding Mr. Ramírez Cardenas' good conduct while detained. Appellate counsel did not, however, seek a remand for an evidentiary hearing to support any of the factual allegations they made for the first time on appeal.

36. New counsel for Mr. Ramírez Cardenas provided a new psychological report on his lack of dangerousness. However, even though new counsel argued that trial counsel was ineffective for failing to investigate and present mitigation evidence at the penalty phase of the proceedings, apart from the psychological report regarding future dangerousness, no additional mitigation evidence was supplied to the court in order to show prejudice.

37. After the Texas court rejected Mr. Ramírez Cardenas' post-conviction petition, he filed a federal petition for a writ of habeas corpus, raising claims relating to Vienna Convention violations, instructions and jury selection. Both the district and circuit courts rejected the claims, and the United States Supreme Court denied certiorari on June 30, 2006.

38. Mr. Ramírez Cardenas was one of the listed defendants in the Avena Case before the ICJ and on March 31, 2004, the ICJ held that he was entitled to review and reconsideration of his conviction and sentence.[FN21] The petitioner indicates that a second post-conviction petition raising a Vienna Convention claim and requesting a hearing pursuant to the Avena judgment was filed before the Texas Court of Criminal Appeals. At the moment of filing the original petition before the IACHR this application was pending a determination of whether the Vienna Convention violation caused actual prejudice to Mr. Ramírez Cardenas in the criminal prosecution. However, the petitioner argues that the questions raised in Mr. Ramírez Cardenas' petition have already been decided in the case of José Medellín.

[FN21] That review should be carried "within the overall judicial proceedings relating to the individual defendant concerned"; the procedural default doctrine could not bar the required review and reconsideration; the review and reconsideration must take account of the Article 36 violation on its own terms, and not require that it qualify also as a violation of some other procedural or constitutional right; and the forum of review must be capable of examining the facts and in particular the prejudice and its causes. ICJ Avena and other Mexican Nationals (Mexico v. United States of America), Judgment of 31 March 2004 <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=18&case=128&code=mus&p3=5> para.153(9).

39. As indicated above, on February 28, 2005, President Bush issued a Memorandum stating that the United States would discharge its international obligations by having state courts give effect to the ICJ's decision. Relying on the Avena judgment and the President's Memorandum, on March 24, 2005, Mr. Medellín filed a second state-court habeas application challenging his murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention Rights. On November 15, 2006, the Texas Court of Criminal Appeals dismissed Medellín's application as an abuse of the writ, concluding that neither Avena nor the President's Memorandum was biding federal law that could displace the limitations under state law on fling successive habeas applications.[FN22] In March 2008, once the petitioner had presented all the

submissions required under the Commissions Rules of Procedure, the US Supreme Court handed down its decision in *Medellín v. Texas* on the non-enforceability of the ICJ Judgment.[FN23]

[FN22] *Ex parte Medellín*, S.W.3d_, 2006 WL 3302630 at *10 (Tex. Crim. App. 2006).

[FN23] *Medellín V. Texas* 552 U.S._ (2008).

c. Humberto Leal García

40. The petitioner indicates that on May 21, 1994, San Antonio Police officers arrested Humberto Leal García, aged 21, on suspicion of kidnapping, sexual assault and murder of 16 year old Audria Salceda. At pretrial hearings and trial, it was clearly documented for the authorities that Mr. Leal García was a Mexican national. The petitioner alleges that, nevertheless, at no time during his pretrial detention and subsequent capital murder trial did Texas police or prosecutors inform Mr. Leal García of his rights to consular assistance under Article 36 of the Vienna Convention.

41. The petitioner argues that Mr. Leal García was represented at trial by lawyers who were grossly ineffective. One of them had been disciplined on three occasions for violating state ethics rules and twice he had been given a probated suspension for neglecting legal matters.

42. In order to obtain a capital conviction the prosecution had to prove that Mr. Leal García had either sexually assaulted or kidnapped Ms. Saucedo, prior to her murder. The petitioner argues that the prosecution relied heavily on a few key pieces of evidence that have been discredited since trial, largely through the assistance of experts retained with funds provided by the consulate of Mexico: the testimony of a “bitemark expert,” who testified that Mr. Leal García’s teeth had a pattern consistent with one of the bitemarks found in Ms. Saucedo’s body; the testimony of a DNA expert indicating that blood found on Mr. Leal García’s underwear was consistent with that of Ms. Saucedo; the testimony of Police Officer Warren Titus, who stated that he had sprayed Luminol on the interior of Leal García’s car, which had revealed the presence of human blood; the argument that her blouse had been found in Leal García’s home.[FN24]

[FN24] Trial Transcript, Prosecution’s closing argument at 826.

43. As far as bitemarks –which allegedly result in 63.5% false positives[FN25]—are concerned, the petitioner indicates that post-conviction counsel retained a forensic odontologist whose testimony shed serious doubt on the reliability of the bite mark analysis used in Leal García’s case, because of the way in which the evidence was handled and explored.[FN26] The petitioner alleges that this evidence is particularly compelling in light of the fact that Ms. Saucedo had been sexually assaulted by several men on the night she was killed but the prosecution never attempted to match their dental impressions with the marks found in her body.

[FN25] petitioners cite K. Arheart and I. Pretty, Results of the 4th ABFO Bitemark Workshop, 1999 Forensic Science International, Volume 124, 2001.

[FN26] Post Conviction Hearing, Vol. V, pp. 70-81.

44. As far as DNA evidence is concerned, one of the state's experts testified that the blood found in the underwear was a mixed sample consistent with Mr. Leal García, his girlfriend and Ms. Saucedo.[FN27] The petitioner indicates that in post-conviction proceedings the consulate of Mexico provided funds to so that appellate counsel could retain another DNA expert who testified that the lab conducting the testing had not followed accepted protocols, had made mistakes handling the blood samples, and had failed to provide complete results. The expert also indicated that the prosecution had erroneously argued and the defense had erroneously conceded that the blood on Mr. Leal García's underwear could only have come from Ms. Saucedo.[FN28]

[FN27] Trial Transcript Vol. XVI, at 670-679.

[FN28] Post- Conviction Transcript pp. 13-35.

45. As far as the Luminol test is concerned, the petitioner argues that the defense attorney failed to ask Detective Titus a single question on cross examination, and that he admitted that he did not know that Luminol testing would result in false positives if exposed to a wide range of environmental, domestic and industrial substances or that it reacts more strongly to old blood.[FN29] The defense attorney failed to present the testimony of Leal García's father who would have testified that he used the car to go deer hunting.

[FN29] Post- Conviction Hearing , Vol. III, pp 45 and 46.

46. The petitioner argues that the defense failed to exploit suspicious gaps in the prosecution's investigation such as pubic hairs and semen taken from Ms. Saucedo's body which were never subjected to DNA testing.[FN30]

[FN30] Post- Conviction Hearing , Vol. II, p. 130.

47. The petitioner indicates that on July 10, 1995, Mr. Leal García was convicted of capital murder. The penalty phase hearing was convened on July 11, 1995. The petitioner indicates that at the penalty phase of the trial the prosecution introduced evidence that Mr. Leal García had sexually assaulted another teenager who was acquainted with him, an offense for which he had never been prosecuted or convicted. The defense did nothing to investigate this allegation. Moreover, counsel presented little mitigating evidence at the penalty phase of his trial. That same day Mr. Leal García was sentenced to death.

48. Mr. Leal García's direct appeal of the conviction and sentence was denied, as was his state habeas corpus petition. On October 20, 2004, a Federal District Court ruled against Mr. Leal García's plea for federal habeas corpus relief, and the Fifth Circuit Court of Appeals affirmed that decision. The Supreme Court denied certiorari on April 17, 2006.

49. On March 24, 2005, Mr. Leal García filed a successive post-conviction application in the Texas Court of Criminal Appeals based on the violation of his right under Article 36 of the Vienna Convention. He argued that he was entitled to review and reconsideration of his conviction and sentence pursuant to the judgment of the ICJ in Avena and other Mexican Nationals[FN31]. However, the petitioner argues that the questions raised in Leal García's petition have already been decided in the case of José Medellín. On November 15, 2006, the Texas Court of Criminal Appeals held that the President's determination that the United States would comply with the Avena judgment "exceeded his constitutional authority by intruding into the independent powers of the judiciary"[FN32].

[FN31] ICJ Avena and other Mexican Nationals (Mexico v. United States), March 31, 2004.

[FN32] Ex parte Medellín, __S.W.3d__, 2006 WL 3302639 at *10(Tex. Crim. App.2006).

50. As indicated above, on February 28, 2005, President Bush issued a Memorandum stating that the United States would discharge its international obligations by having state courts give effect to the ICJ's decision. Relying on the Avena judgment and the President's Memorandum, on March 24, 2005, Mr. Medellín filed a second state-court habeas application challenging his murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention Rights. On November 15, 2006, the Texas Court of Criminal Appeals dismissed Medellín's application as an abuse of the writ, concluding that neither Avena nor the President's Memorandum was binding federal law that could displace the limitations under state law on filing successive habeas applications.[FN33] In March 2008, after the petitioner had presented all the submissions required under the Commissions Rules of Procedure, the US Supreme Court handed down its decision in Medellín v. Texas on the non-enforceability of the ICJ Judgment.[FN34]

[FN33] Ex parte Medellín_S.W.3d_, 2006 WL 3302630 at *10 (Tex. Crim. App. 2006).

[FN34] Medellín V. Texas 552 U.S._ (2008).

2. Claims relating to the alleged violation of the American Declaration

51. The petitioner asserts that the United States and the State of Texas have violated Messrs. Medellín, Ramírez Cardenas and Leal García's rights under Article I (right not to be arbitrarily deprived of life), Article XVIII (right to a fair trial, appeal and effective remedies), Article XXV (right to humane treatment while in custody) and Article XXVI (due process rights and right not to receive cruel, infamous or unusual punishment) of the American Declaration of the Rights and Duties of Man.

a. Lack of consular notification and access and right to a fair trial

52. The petitioner argues that Messrs. Medellín, Ramírez Cardenas and Leal García were not advised of their right under Article 36 of the Vienna Convention to contact and receive assistance from the Mexican consulate. The petitioner argues that, as established by the Inter-American Court of Human Rights, the violation of the right to consular assistance is prejudicial to the guarantees of due process embodied in Article XXVI of the American Declaration since it is one of the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial. Therefore a state may not impose the death penalty in the case of individuals deprived of their Article 36 rights.

53. The petitioner alleges that in the case of Messrs. Medellín, Ramírez Cardenas and Leal García, Mexican consular authorities were prevented from ensuring that their nationals were represented by competent and experienced defense attorneys. By the time Mexican consular authorities learned of their respective arrests, Messrs. Medellín, Ramírez Cardenas and Leal García had been sentenced to death.

54. The petitioner argues that the prejudice suffered by Messrs. Medellín, Ramírez Cardenas and Leal García was exacerbated by the incompetence of state appointed counsel during the pre-trial investigation, the trial phase and the sentencing phase of the proceedings.

55. The petitioner alleges that Mexico's involvement in these cases would have ensured that trial counsel was effective and prepared and provided resources for experts and investigations. She adds that had trial counsel possessed the evidence now developed by Mexico, Messrs. Medellín, Ramírez Cardenas and Leal García would not be on death row. Therefore, the petitioner requests that the IACHR recommend to the US that the death sentences be commuted.

b. Lack of due process in clemency procedures

56. The petitioner argues that death row inmates in Texas have no available or effective mechanism to participate in the clemency process. Specifically, the Board of Pardons and Paroles does not advise condemned prisoners or their counsel of the date on which it will consider their clemency petition; it does not provide any opportunity for representations at the time it considers the petition; it does not allow applicants to view the evidence submitted in opposition to their clemency requests; and it does not afford them an opportunity for appeal or reconsideration of the Board's ruling. Additionally, the Texas Board of Pardons and Paroles is only required to inform the Governor of its decision and does not report on the reasons for its recommendation to reject a clemency petition. The petitioner indicates that any deficiencies in the clemency process are not subject to judicial remedy.[FN35]

[FN35] The petitioner cites *Fauder v. Texas Board of Pardons and Paroles*, 178 F.3d 343, 344 (5th Cir. 1999) which establishes that judicial review in the Texas clemency process is confined to ensuring that minimal procedural safeguards are in place and finding that Board procedures meet those requirements.

57. The petitioner also argues that the legislature has not provided a set of rules to be taken into account when making clemency determinations,[FN36] nor has the Texas Board of Pardons and Paroles adopted a list of criteria to that effect. Moreover, the petitioner argues that it has long been the practice of the Texas Board of Pardons and Paroles not to convene clemency hearings – or even meet as a body— when considering clemency petitions in death penalty cases.

[FN36] The petitioner indicates that in 2005 and 2007 the Texas Legislature considered but failed to adopt bills that would have required the Board of Pardons and Paroles to meet as a body when considering each capital clemency petition. S.S. 548, 79th Leg. (Tex. 2005); S.B. 208, 80th Leg. (2007).

58. The petitioner argues that pursuant to the current system, no clemency hearing has taken place in more than 15 years and the ratio of executions to humanitarian commutations in Texas is 200 to 1, while in other US states –such as Tennessee— the ratio is 4 to 1.

59. On the basis of these arguments the petitioner claims that clemency review in Texas falls short of the minimum standards of due process required by Article XXVI of the American Declaration and should Messrs. Medellín, Ramírez Cardenas and Leal García be executed without first providing a minimally fair clemency process, the state would be in clear violation of Article I.

c. Inhumane conditions of detention and method of execution

60. The petitioner alleges that since 1999 all male Texas death row prisoners have been incarcerated in the Polunsky Unit in Livingston, Texas. They are housed in small cells with a sink, a toilet and a narrow bed, where they spend 23 hours of isolation per day, segregated from other prisoners in every aspect of their lives. They are allowed no physical contact with loved ones or even their attorneys, from their entry into death row until their execution. The petitioner indicates that the inmates receive no educational or occupational training and, unlike any other death row in the US, Texas death row does not offer access to television. Radio is the primary source of stimulation for semi literate inmates and they are allegedly routinely removed from prisoners as a disciplinary sanction.

61. The petitioner alleges that the conditions on Texas' Death Row have caused Mr. Ramírez Cardenas, in particular, tremendous suffering. Mr. Ramírez Cardenas suffers from Nephrotic Syndrome,[FN37] a type of disease which causes the kidneys gradually to lose their ability to filter wastes and excess water from the blood. The petitioners indicate that he has been in and out of John Sealey Hospital in Galveston, Texas several times due to this disease, which appeared during his stay on death row. Although hospital policy provides that a patient cannot be removed from the hospital if his attending doctor has not previously discharged him, Mr. Ramírez Cardenas has been returned to death row without being discharged by his doctors on more than one occasion.

[FN37] The Petition indicates that Nephrotic Syndrome is a condition marked by high levels of protein in the urine; low levels of protein in the blood; swelling, especially around the eyes, feet, and hands; and high cholesterol. In adults, most of the time the underlying cause is a type of kidney disease.

62. The petitioner argues that these conditions of confinement constitute a grave violation of the state's obligation to treat Messrs. Medellín, Ramírez Cardenas and Leal García humanely, pursuant to Article XXV of the American Declaration.

63. The petitioner also alleges that lethal injection as currently practiced in Texas fails to comport with the requirements that a method of execution cause "the least possible physical and mental suffering." [FN38] She claims that the particular combination of drugs used in the lethal injection process creates a risk of extreme and unnecessary suffering and that in Texas and Virginia lethal injections are administered by individuals with no training in anesthesia.

[FN38] The petitioner cites paragraph 6 of General Comment 20 by the Human Rights Committee of the United Nations. See *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies*, UN Doc HRI/GEN/i/Rev.1 at 30 (1994).

64. The petitioner argues that given these circumstances the execution of Messrs. Medellín, Ramírez Cardenas and Leal García by lethal injection would constitute cruel, infamous and unusual punishment under Article XXVI of the American Declaration.

3. Allegations on the admissibility of the claims

65. The petitioner argues that the claims are admissible under Article 33 of the IACHR's Rules of Procedure on duplication. In her view, the ICJ decision in the Avena Case conferred certain rights upon Messrs. Medellín, Ramírez Cardenas and Leal García which are enforceable in U.S. courts, but they were not a direct party to the litigation, nor could they have been since States –and not individuals- have standing before the ICJ. The petitioner argues that Mexico's application to the ICJ can in no way be described as an individual petition under the Rules and precedents established by the IACHR: while the subject matter of the Avena Case concerned a dispute between States over the interpretation and application of the Vienna Convention, the proceedings before the IACHR involve allegations on the violation of the American Declaration, by no means limited to those stemming from the alleged victims' consular rights. The petitioner alleges that as the claims concern matters distinct from those adjudicated in the Avena Case, they cannot be considered duplication under Article 33 of the Commission's Rules.

66. As far as the exhaustion of domestic remedies is concerned, the petitioner argues that the allegations on denial of due process and a fair trial as a result of the United States' admitted

failure to inform Messrs. Medellín, Ramírez Cardenas and Leal García of their right to consular notification, have been fully litigated in domestic courts.

67. In her original submission, the petitioner indicated that Messrs. Ramírez Cardenas and Leal García's Vienna Convention claims have been litigated before state and federal courts and that there is only one pending petition in the Texas Court of Criminal Appeals. In her view, this does not bar the Commission from hearing their claim. First, because there has been an unwarranted delay in adopting a decision in their cases, and based on the Texas Courts decision in *Ex Parte Medellín*, it is certain that the courts will continue to deny Messrs. Ramírez Cardenas and Leal García a remedy for their claim.

68. Second, because other death row inmates who have presented their legal claims to all domestic courts, then filed a petition with the IACHR days before their execution, have been executed before the Commission was able to process their petitions.[FN39] The petitioner argues that, under these circumstances, to require Messrs. Ramírez Cardenas and Leal García to seek every available domestic remedy before international intervention would render the Commission powerless to protect them from an illegal execution.

[FN39] The petitioner includes a citation of IACHR Report No. 91/05 (Javier Suarez Medina), United States, Annual Report of the IACHR 2005.

69. As far as the rest of the claims are concerned, the petitioner argues that under the Commission's Rules and precedents, failure to exhaust domestic remedies with regard to some of the claims raised in this complaint is justifiable and presents no bar to admissibility. The petitioner alleges that Messrs. Medellín, Ramírez Cardenas and Leal García have not pursued claims in US courts arguing that lethal injection is an illegal manner of execution; that incarceration on Texas' death row constitutes cruel, inhuman or degrading punishment; and that Texas clemency procedures violate due process. She argues that they should not be required to bring those claims because they have been fully litigated in other cases and doing so would be an exercise in futility.

70. The petitioner argues that Messrs. Medellín, Ramírez Cardenas and Leal García are barred from presenting these claims by state and federal legislation imposing draconian limitations on the presentation of "successive" post-conviction petitions. Specifically, she argues that the Texas Code of Criminal Procedure,[FN40] as strictly interpreted by the Texas Court of Criminal Appeals, indicates that courts are barred from considering the merits of claims raised in "successive" or "subsequent" applications, even where those claims were not previously raised due to the incompetence of post-conviction counsel.

[FN40] Petitioners cite Texas Code of Criminal Procedure Article 11.071, section 5(a)(1).

71. The petitioner alleges that federal legislation establishes equally insurmountable hurdles for prisoners such as Messrs. Medellín, Ramírez Cardenas and Leal García. It is alleged that under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), they are barred from litigating these claims unless they could demonstrate that their petitions rested on (1) newly discovered evidence of innocence, or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.[FN41]

[FN41] 28 U.S.C. 2255.

72. The petitioner argues that in previous cases, the Commission has held that where a death row inmate was precluded from exhausting his domestic remedies by virtue of the draconian limits on post-conviction appeals imposed by appeals and federal legislation, the petition was found admissible under Article 31 of the Commission's Rules.[FN42] In her view, this holding reflects the established principle that domestic remedies 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.

[FN42] The petitioner includes a citation of IACHR Report No. 97/03 (Gary Graham), United States, Annual Report of the IACHR 2003.

73. Additionally, the petitioner argued in each of her respective original petitions on behalf of the alleged victims that with regard to lethal injection, the state of Texas had executed thirteen prisoners since January 2006 [until December, 2006] who had challenged the lethal injection protocols. The petitioner considers that, for this reason, it is reasonable to assume that this claim has "no reasonable prospect of success," and exhaustion should not be required. As far as conditions of confinement on death row are concerned, the petitioner alleges that both the Texas Court of Criminal Appeals and the United States Supreme Court have refused to consider arguments relating to those claims as a violation of the prisoner's right to be protected from cruel and unusual punishment.

74. Regarding exhaustion of remedies relating to clemency procedures, the petitioner alleges that there is no judicial review process for a failed clemency plea. In fact, in Texas such pleas are almost never successful: only one defendant's request for clemency has been granted since 1976. Given the refusal of the Texas Court of Criminal Appeals to examine the state's clemency procedures, and the rejection of nearly all requests for clemency. The petitioner maintains that it is clear that Messrs. Medellín, Ramírez Cardenas and Leal García have no means of redress in domestic courts.

B. Position of the State

75. In a note dated February 28, 2008, the United States indicated that the case presented two issues then pending before the Supreme Court of the United States: (1) the appropriate response

to cases of violation of the provisions of the Vienna Convention relating to consular notification (*Medellín v. Texas*); and (2) the lethal injection protocol used in implementing the death penalty (*Baze v. Kentucky*). It argued that the pendency of these issues before the Supreme Court made it obvious that domestic remedies with respect to the claims raised in the petition had not been exhausted and indicated that the decisions were expected by the end of the Supreme Court's term in mid 2008.

76. As far as the hearing scheduled for March 7, 2008 was concerned, the State argued that “the Commission should not proceed with hearings on matters where the requirement of exhaustion of domestic remedies [would] so clearly not been met.” The State added that the situation “would place US authorities in an extremely awkward position of attempting to present views before the Commission without taking into account the forthcoming judgments of the Supreme Court.” As a result, the State requested that the hearing be postponed to a future period of sessions.

77. In the public hearing held in March 2008, during the IACHR's 131 sessions, State representatives indicated that they were not in a position to discuss the merits of the case due to the fact that it involved matters pending before the Supreme Court of the United States. The State indicated that any discussion on the merits would not be productive under the circumstances. Therefore they were only prepared to present arguments on admissibility.

78. In that opportunity the State argued that the petitioner's claim failed to satisfy the requirements in Article 33 of the Commission's Rules regarding duplication of procedures. During the hearing, the State also argued that Messrs. Medellín, Ramírez Cardenas and Leal García had failed to exhaust domestic remedies in accordance with the Commission's Rules and the principles of international law. In its view, the pendency of two cases before the Supreme Court –*Medellín v. Texas* and *Baze v. Kentucky*— regarding the issues of consular notification and the legality of lethal injection, respectively, proved that domestic remedies had not been exhausted. The State argued that the US Government had joined the proceeding in *Medellín v. Texas* as an amicus and that it was “trying to comply with the ICJ Judgment” in the *Avena* Case, regarding state responsibility for consular notification under the Vienna Convention.

79. It also stated in the hearing that its position on non compliance with the exhaustion rule found support in procedural, as well as substantive, considerations. Firstly, it argued that –in procedural terms— the petitioner had disregarded available avenues to pursue remedies such as civil rights claims under section 1983, title 42 of the US Code which provides federal remedies for violations of the Constitution by state level officials. The State alleged that at least in one case, when exercised in the state of Florida –although ultimately unsuccessful— the courts had found that this remedy had been appropriately filed. Secondly, it argued that –in substantive terms— pursuing remedies regarding the legality of lethal injection could not be considered futile since this very issue was at the time pending before the Supreme Court in the matter of *Baze v. Kentucky*, “the first time in one hundred years that the US Supreme Court hears [sic] a method of execution claim.”

80. The State remarked at the hearing that, in view of the pendency of these matters before the Supreme Court, the admission of the petitioner's claim before the IACHR would constitute "an affront to the judicial process in a democratic country."

81. In its sole written submission[FN43] –presented after the Supreme Court judgments in *Medellín v. Texas* and *Ralph Baze v. John Rees*, Commissioner of the Kentucky Department of Corrections— the State provides a summary of factual and procedural history relating to Messrs. Medellín, Ramírez Cardenas and Leal García's cases, highlighting that they have been in the United States from a young age and that they spoke English at the time of their arrest.

[FN43] Submission by the United States Permanent Mission to the Organization of American States, dated July 8, 2008.

82. Specifically, the State indicates that on July 24, 1993, Mr. Medellín and five other gang members accosted and seized two girls whom they raped and finally strangled to death. Testimony at trial established that Mr. Medellín participated in raping both victims and in killing Elizabeth Peña, for which he was found guilty of capital murder. At the sentencing phase the state presented evidence of seven prior arrests, violent tendencies and the fact that an improvised weapon had been found in his cell while awaiting trial. The State alleges that his attorney offered character witnesses and called an expert who testified that Medellín did not present a future danger, to counter the prosecution's presentation. After considering the evidence, the sentencing jury imposed the death penalty, finding that Mr. Medellín presented a continuous threat to society.

83. Regarding Rubén Ramírez Cardenas, the State indicates that during the investigation of the kidnapping of Mayra Laguna, police arrested Tony Castillo, who confessed to the kidnapping and named Mr. Ramírez Cardenas as the instigator of the activities. The State argues that after having been advised of his Miranda rights to silence and counsel, Mr. Ramírez Cardenas gave a statement confessing to her rape and murder and led the Police to the scene of the rape, the place at which he had disposed of the evidence and the site of the body. At trial the prosecution presented forensic evidence that his DNA was on the duct tape used to bind Ms. Laguna's hands, and of scratches on his body, consistent with his statement that Ms. Laguna fought back after he raped her. Mr. Ramírez Cardenas was convicted of capital murder and sentenced to death.

84. The State indicates that on May 20, 1994, Humberto Leal García gave a lift to Adria Saucedo from a party, after she appeared to be extremely intoxicated. Not long after his brother was heard to say that Mr. Leal García had arrived home "full of blood, saying he had killed a girl". Mr. Leal García voluntarily went to the police station where he gave voluntary statements and consented to a search of his home. At trial the state presented extensive evidence of the gruesome nature of Ms. Saucedo's death as well as Mr. Leal García's voluntary statements, blood evidence from his car, DNA evidence from his clothing and expert testimony that bite marks on the victim matched his dentition. He was found guilty of capital murder. The State indicates that at the sentencing phase his counsel called an expert to testify to his alcohol dependence and to a possible correspondence between violent tendencies and abuse he had

suffered as a child. A jury found that a sentence of death was appropriate because there was a sufficient probability that he would commit further acts of violence and pose a continuing threat to society.

85. The State argues that subsequently Messrs. Medellín, Ramírez Cardenas and Leal García “had numerous opportunities to appeal [their] conviction and sentence before the courts of Texas and the United States and to raise due process claims, including claims concerning consular notification” and “in none of these cases [have they] shown a due process violation”.^[FN44]

[FN44] Submission by the United States Permanent Mission to the Organization of American States, dated July 8, 2008.

86. On the basis of these antecedents the State alleges that the petitioner’s claims are inadmissible and without merit.

87. Regarding the inadmissibility of the complaints, the State argues that “the Vienna Convention is not a human rights instrument which is demonstrated by the fact that its protections are based on principles of reciprocity, nationality and function which are not commonly enjoyed by all human beings by mere virtue of their human existence.” In its view the Commission was established to hear petitions regarding the rights protected in the American Convention and the American Declaration and “consular notification does not raise a human rights issue in an applicable instrument with respect to the Member States of the OAS, as required by Article 27 of the Rules of Procedure.” Therefore, the State argues that the Commission is not competent to review claims brought by petitioners on the basis of the Vienna Convention.

88. Regarding the merits of the claims, the State alleges that the petitioner fails to demonstrate that the fact that consular notification procedures were not followed amounts to a violation of the American Declaration. The State alleges that there is no support either in the Vienna Convention or the Declaration, for the claim that the Vienna Convention consular notification obligation is an integral component of the protection as set forth in Articles XVIII and XXVI of the Declaration. In that respect, the State relies on the Commission’s definition of the Declaration’s due process protections under Articles XVIII and XXVI, in paragraph 63 of Report 52/02 (Martinez Villarreal).^[FN45] The State argues that the Declaration in no way indicates that consular notification or assistance is relevant to due process protections.

[FN45] The State enumerates them as “the right of a defendant to be presumed innocent until proven guilty according to law, the right to prior notification in detail of the charges against him/her, the right to adequate time and means for the preparation of his/her defense, the right to be tried by a competent, independent and impartial tribunal previously established by law, the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing and to communicate freely and privately with his counsel, and the right not to be

compelled to be a witness against himself or to plead guilty.” Submission by the United States Permanent Mission to the Organization of American States, dated July 8, 2008, page 6.

89. The State alleges that US domestic law provides stringent due process protections to those accused of committing crimes and to criminal defendants as well as post-conviction protections. In its view these protections –which are not dependent upon consular notification, access or assistance— far exceed the guarantees of the American Declaration and “are among the strongest and most expansive in the world”.^[FN46] The State considers that the US Constitution and federal and state laws and regulations “ensure that all persons, including foreign nationals unfamiliar with English or the US judicial system, will have adequate interpreters and competent legal counsel who can advise them” and that failure to honor these protections can be corrected through appeals.^[FN47]

[FN46] Submission by the United States, dated July 8, 2008, page 7.

[FN47] Submission by the United States, dated July 8, 2008, page 7.

90. As far as the allegations on clemency proceedings are concerned, the State argues that these proceedings do not come within the scope of the American Declaration. The State indicates that when making her argument, the petitioner relies on precedents relating to countries that still impose a mandatory death sentence and where those convicted require an opportunity to make a case for a different sentence. In its view, those precedents are not relevant to the present case since Messrs. Medellín, Ramírez Cardenas and Leal García did not face a mandatory death sentence upon a finding of guilt and had the opportunity to present individualized mitigating evidence before the sentencing body.

91. Further, the State argues that the rules and precedents cited by the petitioner are based upon Article 4.6 of the American Convention, to which the US is not a party. The State indicates that in a previous admissibility decision the Commission has asserted that “minimal fairness guarantees” may apply to petitions for clemency under Article XXIV of the Declaration (right to petition) and that in support this claim, cited only mandatory death penalty cases. In its view the Texas Board of Pardons and Paroles –composed of 18 salaried members who serve full time— more than meets the standard of providing certain minimal procedural protections for condemned prisoners. The State asserts that the “petitioner makes much of the Board’s failure to meet as a group, without demonstrating [...] that that failure has any effect on the outcome of board decisions or the substantive fairness of the process.”^[FN48]

[FN48] Submission by the United States Permanent Mission to the Organization of American States, dated July 8, 2008, page 12.

92. The State also objects to the Commission’s decision to join the examination of the admissibility and the merits of the complaints. In its view, there is no indication of the existence

of “exceptional circumstances,” as required in Article 37.3 of the IACHR Rules of Procedure, in the present case.

IV. ANALYSIS ON ADMISSIBILITY

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

93. Upon considering the record before it, the Commission finds that it has competence *ratione personae* to entertain the claims filed by the petitioner. Under Article 23 of the Rules of Procedure of the Commission, the petitioner is authorized to file complaints alleging violations of rights protected under the American Declaration of the Rights and Duties of Man. The alleged victims are persons whose rights are protected under the American Declaration, the provisions of which the State is bound to respect in conformity with the OAS Charter, Article 20 of the Commission’s Statute and Article 49 of the Commission’s Rules of Procedure. The United States has been subject to the jurisdiction of the Commission since June 19, 1951, the date on which it deposited its instrument of ratification of the OAS Charter.

94. The Commission also considers that it is competent *ratione temporis* to examine the complaints because the facts relating to the claims occurred as from 1993. The allegations, therefore, refer to facts occurring subsequent to the date on which the United States’ obligations under the Charter and the American Declaration took effect.

95. In addition, the Commission finds that it is competent *ratione loci*, given that the petition indicates that Messrs. Medellín, Ramírez Cardenas and Leal García were under the jurisdiction of the United States at the time the alleged events occurred, which reportedly took place within the territory of that State.

96. With regard to competence *ratione materiae*, the State argues that the Commission was established to hear petitions regarding the rights protected in the American Convention and the American Declaration and “consular notification does not raise a human rights issue in an applicable instrument with respect to the Member States of the OAS, as required by Article 27 of the Rules of Procedure.” Therefore, the State argues that the Commission is not competent to review claims brought by petitioners on the basis of the Vienna Convention.

97. In previous cases the Commission determined that it was appropriate to consider compliance by a state party to the Vienna Convention on Consular Relations with the requirements of Article 36 of that Treaty in interpreting and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to prison or to custody pending trial, or is detained in any other manner by that state. In particular, the Commission has found that it could consider the extent to which a state party has given effect to the requirements of Article 36 of the Vienna Convention on Consular Relations for the purpose of evaluating that state’s compliance with a foreign national’s due process rights under Articles XVIII and XXVI of the American Declaration.[FN49] In reaching this conclusion, the Commission found support in the Inter-American Court’s Advisory Opinion 16/99 on the Rights to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of

Law, as well as from the judgment of the International Court of Justice in the LaGrand Case.[FN50] Based upon the information and arguments before it in the present complaint, the Commission sees no reason to depart from its conclusions in this regard.

[FN49] IACHR, Report N° 52/02, Case 11.753, Ramon Martinez Villarreal v, United States, Annual Report of the IACHR 2002, para. 77; Report 61/03 (Roberto Moreno Ramos), United States, Admissibility, Annual Report of the IACHR 2003, para 42.

[FN50] See also I/A Court H.R., Advisory Opinion OC-16/99 of October 1, 1999, The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, (Ser. A) N° 16 (1999); International Court of Justice, LaGrand Case (Germany v. United States), Judgment of June 27, 2001, General List N° 104.

98. Accordingly, the Commission considers that it is competent *ratione materiae* to examine the petitioner's claims of violations of Articles I, XVII, XVIII and XXVI of the American Declaration, including any implications that the State's alleged non-compliance with Article 36 of the Vienna Convention on Consular Relations may have had upon Messrs. Medellín, Ramírez Cardenas and Leal García's rights to due process and to a fair trial.

B. Admissibility

1. Duplication

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

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

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

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

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

100. During the hearing held on March 7, 2008, the State objected to the admissibility of the petition on the ground that its subject matter essentially duplicates a claim already examined and settled by another international governmental organization of which the United States is a member, contrary to Article 33(1) of the Commission's Rules of Procedure. In particular, the State argues that the claims refer to three of numerous cases incorporated in a proceeding brought by Mexico before the ICJ against the United States pursuant to the Vienna Convention on Consular Relations Optional Protocol Concerning the Compulsory Settlement of Disputes[FN51], known as *Avena and other Mexican Nationals (Mexico v. United States)*. [FN52] The State suggests that the same issues have been raised before the ICJ as are contained in case 12,644 and therefore consideration of these claims by the Commission is barred by the terms of Article 33 concerning duplication.

[FN51] In this connection, the United States ratified the Charter of the United Nations on August 8, 1945 and the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes on November 24, 1969. See United Nations Treaty Data Base at <http://untreaty.un.org>.

[FN52] ICJ *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004 <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=18&case=128&code=mus&p3=5>.

101. The petitioners have disputed the State's contention, essentially on the basis that Article 33 of the Commission's Rules does not apply to a decision by the ICJ. The petitioner argues that the ICJ decision in the *Avena Case* conferred certain rights upon Messrs. Medellín, Ramírez Cardenas and Leal García which are enforceable in U.S. courts, but they were not a direct party to the litigation, nor could they have been since States –and not individuals- have standing before the ICJ. The petitioner argues that Mexico's application to the ICJ in *Avena* can in no way be described as an individual petition under the Rules and precedents established by the IACHR: while the subject matter of *Avena* concerned a dispute between States over the interpretation and application of the Vienna Convention, the proceedings before the IACHR involve allegations on the violation of the American Declaration, by no means limited to those stemming from their consular rights. The petitioner alleges that as the claims concern matters distinct from those adjudicated in *Avena*, they cannot be considered duplication under Article 33 of the Commission's Rules. In the hearing they also argued that in the *Moreno Ramos Case* the Commission already decided to examine a complaint notwithstanding pending proceedings, precisely, in the *Avena Case*. [FN53]

[FN53] IACHR Report No. 61/03 (*Roberto Moreno Ramos*), United States, Admissibility, Annual Report of the IACHR 2003.

102. In this respect, the Commission takes into consideration its previous jurisprudence according to which a prohibited instance of duplication under the Commission's procedures involves, in principle, the same person, the same legal claims and guarantees, and the same facts

adduced in support thereof.[FN54] Correspondingly, claims brought in respect of different victims, or brought regarding the same individual but concerning facts and guarantees not previously presented and which are not reformulations, will not in principle be barred by the prohibition of duplication of claims.[FN55]

[FN54] IACHR, Report N° 96/98, Peter Blaine (Jamaica), Annual Report of the IACHR 1998, para. 43; and Report No. 61/03 (Roberto Moreno Ramos), Unites States, Admissibility, Annual Report of the IACHR 2003, para. 51.

[FN55] IACHR Case 11.827, Report N° 96/98, Peter Blaine (Jamaica), Annual Report of the IACHR 1998, para. 45; and Report No. 61/03 (Roberto Moreno Ramos), Unites States, Admissibility, Annual Report of the IACHR 2003, para. 51.

103. In the present case, the Commission considers on the information available that it cannot be said that the same parties are involved in the proceedings before the Commission and the ICJ, or that the proceedings raise the same legal claims and guarantees. In particular, it is evident that Messrs. Medellín, Ramírez Cardenas and Leal García were not considered a party to the ICJ claim, as participants in contentious proceedings before that Court are limited to states. While the circumstances surrounding their criminal proceedings comprised part of the matters considered by the ICJ in determining Mexico's application, Messrs. Medellín, Ramírez Cardenas and Leal García had no independent standing to make submissions in the proceedings or to request relief.

104. Nor can it be said that the same legal claims have been raised before the ICJ and the IACHR. The central issue before the ICJ was whether the United States violated its international obligations to Mexico under Articles 5 and 36 of the Vienna Convention based upon the procedures for the arrest, detention, conviction, and sentencing of 54 Mexican nationals on death row, including Messrs. Medellín, Ramírez Cardenas and Leal García. The issue before the Commission, on the other hand, is whether the United States violated Messrs. Medellín, Ramírez Cardenas and Leal García's rights to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration, based upon the alleged failure to ensure their right to access to consular notification and assistance under Article 36 of the Vienna Convention and upon the provision of incompetent defense counsel in a capital case. The petitioner also brought claims regarding humane prison conditions and method of execution. In the Commission's view, the claims brought before the Commission raise substantive issues that are distinct from those decided upon by the ICJ.

105. While the claims in both proceedings are similar to the extent that they require consideration of compliance by the United States with its obligations under Article 36 of the Vienna Convention, this matter is raised in two different contexts: the ICJ was required to adjudicate upon the United States' international responsibility to the state of Mexico for violations of the Vienna Convention, while the Commission is required to evaluate the implications of any failure to provide Messrs. Medellín, Ramírez Cardenas and Leal García with consular information and notification in connection with their individual right to due process and to a fair trial under the American Declaration. This difference highlights the broader distinction between the mandate and purpose of the ICJ and the Commission. The function of the ICJ, as

defined through Article I of the Optional Protocol to the Vienna Convention on Consular Relations, is to settle, as between states, disputes arising out of the interpretation and application of the Vienna Convention on Consular Relations. The IACHR, on the other hand, is the principal human rights organ of the Organization of American States charged with promoting the observance and protection of human rights in the Americas, which includes determining the international responsibility of states for alleged violations of the fundamental rights of persons.

106. Based upon the foregoing, the Commission considers that claims raised in case No.12,644 do not constitute duplication of those considered by the ICJ in its judgment issued in the Avena Case within the meaning of Article 33.2 of the Commission's Rules, and therefore finds no bar to the admissibility of the petitioner's claims on the ground of duplication.

2. Exhaustion of domestic remedies

107. Article 31.1 of the Commission's Rules of Procedure specifies that, in order to decide on the admissibility of a matter, the Commission must verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with generally recognized principles of international law. Article 31(2) of the Commission's Rules of Procedure specifies that this requirement does not apply if the domestic legislation of the state concerned does not afford due process of law for protection of the right allegedly violated, if the party alleging the violation has been denied access to domestic remedies or prevented from exhausting them, or if there has been an unwarranted delay in reaching a final judgment under the domestic remedies.

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

[FN56] I/A Court H.R., Velásquez Rodríguez v. Honduras Case. Judgment of July 29, 1988, Series C N° 4, paras. 64-66.

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

110. In the present case, the petitioner initially argued that Messrs. Medellín, Ramírez Cardenas and Leal García should be excused from exhausting domestic remedies pursuant to Article 31 of the Rules of Procedure since there has been an unwarranted delay in rendering judgment relating to their Article 36 of the Vienna Convention claims. The petitioner also argued in the initial complaints and during the hearing held in March, 2008 that the Supreme Court was likely to issue a decision in Medellín v. Texas shortly and predicted that, if the Supreme Court denied their claims for relief, they would soon be facing execution.

111. In addition, the petitioner argues that any attempt to exhaust domestic remedies by raising new legal arguments, such as the violation of Article 36 of the Vienna Convention, ineffective assistance of counsel at the penalty phase, or the admission of an uncharged offense would be fruitless, as state and federal legislation stringently limit the ability of individuals to bring “successive” or “subsequent” post-conviction applications when they failed to raise those issues at the initial stages of the criminal process.

112. In response, the State argued in the hearing held on March 7, 2008 that the pendency of two cases before the Supreme Court –*Medellín v. Texas* and *Baze v. Kentucky*— regarding the issues of consular notification and the legality of lethal injection, respectively, proved that domestic remedies had not been exhausted. The State argued that the petitioner had disregarded available avenues to pursue remedies such as civil rights claims under section 1983, title 42 of the US Code providing federal remedies for violations of the Constitution by state level officials. The State alleged that, at least in one case, when exercised in the state of Florida, the courts had found that this claim had been appropriately filed.

113. The State argued that pursuing remedies regarding issues such as the legality of lethal injection could not be considered futile since at the time of the hearing a decision was pending before the Supreme Court in the matter of *Baze v. Kentucky*.^[FN57] The State recognized that it would be the first time in one hundred years that the US Supreme Court would hear a method of execution claim.

[FN57] The case of *Ralph Baze v. John Rees*, Commissioner of the Kentucky Department of Corrections deals with the constitutionality of the lethal injection protocol with the Eighth Amendment’s ban on cruel and unusual punishments because of the risk of significant pain in those cases where it is not followed.

114. In the present complaint, the allegation of the petitioners, as described in Part III of this report, indicate that Messrs. *Medellín*, *Ramírez Cardenas* and *Leal García* have pursued numerous domestic avenues of redress since their conviction and sentencing to death. In particular, the information presented indicates that they pursued a direct appeal for their conviction and sentence. The information also indicates that they pursued several post-conviction proceedings before the state courts and the U.S. federal courts and that Mr. *Medellín* brought the issue of the enforceability of the *Avena* ICJ judgment before the US Supreme Court.

115. After the hearing, the Commission learned that, on March 25, 2008, the US Supreme Court handed down its decision in *Medellín v. Texas*.^[FN58] The Supreme Court held that neither the ICJ decision in *Avena* nor the President’s Memorandum seeking to enforce that judgment constitute directly enforceable federal law that pre-empts state limitations on the filing of successive habeas corpus petitions.^[FN59] Although the Supreme Court recognized that the *Avena* judgment creates an international obligation on the part of the United States, it held that it does not constitute binding domestic law in the absence of implementing legislation.

[FN58] *Medellín v. Texas* 552 U.S. (2008).

[FN59] *Medellín v. Texas*, 170 L. Ed. 2d 190, 2008 U.S. LEXIS 291 (2008).

116. In view of this decision, Messrs. Medellín, Ramírez Cardenas and Leal García appear to have no prospect for judicial review of their Vienna Convention claims, unless the US Congress were to enact the corresponding implementing legislation.

117. The Commission has also learned that on April 16, 2008, the US Supreme Court issued a decision in the case of *Ralph Baze v. John Rees*, Commissioner of the Kentucky Department of Corrections[FN60] upholding the constitutionality of the lethal injection protocol.[FN61] The parties in the present case have indicated that this is the same protocol used in Texas. Consequently, domestic remedies regarding the claim on the incompatibility of the method of execution with the right not to be subject to inhumane treatment must be deemed to have been fully exhausted.

[FN60] *Baze v. Rees* 553 U.S. (2008).

[FN61] The Supreme Court decided that in order to constitute cruel and unusual punishment an execution method must present a “substantial” or “objectively intolerable” risk of serious harm. In its view, any risk of pain is inherent if only from the prospect of error in following the required procedure and therefore the Constitution does not demand the avoidance of all risk of pain when carrying an execution through lethal injection. *Baze v. Rees* 553 U.S. (2008), pp. 8 and 9.

3. Timeliness of the petition

118. The record in this case indicates that the petition on behalf of Mr. Medellín was lodged with the Commission on November 22, 2006 and Messrs. Rubén Ramírez Cardenas and Humberto Leal García’s on December 12, 2006. In their respective submissions, the petitioner alleged that she should be excused from the requirement of exhaustion of domestic remedies on the basis of unwarranted delay in rendering judgment. In view of the fact that a final decision was issued on March 25, 2008, while the complaint was already pending before the IACHR, the Commission finds that it is not barred from consideration under Article 32 of the Commission's Rules of Procedure.

4. Colorable claim

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

120. The petitioner alleges that the State has violated Articles I, XVIII, and XXVI of the American Declaration. The Commission has outlined in Part III of this Report the substantive allegations of the petitioner. After carefully reviewing the information and arguments provided by the petitioner in light of the heightened scrutiny test applied by the Commission in capital punishment cases, and without prejudging the merits of the matter, the Commission considers that the petition states facts that, if proven, would tend to establish possible violations of Articles I, XVIII, and XXVI of the American Declaration and is not manifestly groundless or out of order. Accordingly, the Commission concludes that the petition should not be declared inadmissible under Article 34 of the Commission's Rules of Procedure.

C. Conclusions on admissibility

121. 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 Messrs. Medellín, Ramírez Cardenas and Leal García in respect of Articles I, XVIII, and XXVI of the American Declaration and continue with the analysis of the merits of the case.

V. ANALYSIS ON THE MERITS

122. 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 comply 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,[FN62] and has been articulated and applied by the Commission in previous capital cases before it.[FN63]

[FN62] 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.).

[FN63] IACHR Report N° 57/96 (Andrews v. United States), Annual Report of the IACHR 1997), paras. 170-171; Report N° 38/00 (Baptiste), Grenada, Annual Report of the IACHR 1999, paras. 64-66; Report N° 41/00 (McKenzie et al.) Jamaica, Annual Report of the IACHR 1999, paras. 169-171.

123. The Commission will therefore review the petitioner's 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.

A. Right to a fair trial and due process of law

1. Consular notification and assistance

124. The petitioner alleges that the State is responsible for violations of Messrs. Medellín, Ramírez Cardenas and Leal García's rights to due process and to a fair trial because of failure to inform them of their rights to consular notification under Article 36 of the Vienna Convention thereby causing prejudice to their defense. The State alleges that the petitioner fails to demonstrate that the fact that consular notification procedures were not followed amounts to a violation of the American Declaration. The State alleges that the Declaration does not include consular notification or assistance as an integral component of the protections set forth in Articles XVIII and XXVI of the Declaration nor does it indicate that consular notification may be relevant to due process protections. Therefore, in its view, the fact that consular notification procedures may not have been followed does not amount to a violation of the American Declaration.

125. The Commission has determined in previous cases[FN64] that it is appropriate to consider compliance with Article 36 of the Vienna Convention 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 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. Also, the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas"[FN65] adopted by the Commission in 2008 establish that

Persons deprived of liberty in a Member State of the Organization of American States of which they are not nationals, shall be informed, without delay, and in any case before they make any statement to the competent authorities, of their right to consular or diplomatic assistance, and to request that consular or diplomatic authorities be notified of their deprivation of liberty

immediately. Furthermore, they shall have the right to communicate with their diplomatic and consular authorities freely and in private.[FN66]

[FN64] IACHR Report 52/02, Case 11.753 (Ramón Martínez Villarreal), United States, Annual Report of the IACHR 2002; Report No. 91/05 (Javier Suárez Medina), United States, Annual Report of the IACHR 2005; Report No. 1/05 (Roberto Moreno Ramos), United States, Annual Report of the IACHR 2005.

[FN65] “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas” approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, <http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PD.L.htm>

[FN66] Principle V (Due Process) of the “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas” approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, <http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PD.L.htm>

126. In the present case, the petitioner alleges that Messrs. Medellín, Ramírez Cardenas and Leal García are nationals of Mexico and that law enforcement authorities in Texas were aware of this fact from the time of their detention. In addition, Messrs. Medellín, Ramírez Cardenas and Leal García have stated that they were never informed of their right to consular notification when arrested or subsequent thereto, nor did their state appointed defense attorneys seek consular assistance. The State has not disputed the petitioners contentions in this regard. Accordingly, based upon the information and arguments presented, the Commission concludes that Messrs. Medellín, Ramírez Cardenas and Leal García were not notified of their right to consular assistance at or subsequent to the time of their arrest and did not have access to consular officials until after their trials had ended.

127. The Commission notes that non-compliance with obligations under Article 36 of the Vienna Convention is a factor that must be evaluated together with all of the other circumstances of each case in order to determine whether a defendant received a fair trial. In cases in which a state party to the Vienna Convention on Consular Relations fails to fulfill its consular notification obligation to a foreign national, a particular responsibility falls to that state to put forward information indicating that the proceeding against a foreign national satisfied the requirements of a fair trial notwithstanding the state’s failure to meet its consular notification obligation.

128. It is apparent from the record before the Commission that, following Messrs. Medellín, Ramírez Cardenas and Leal García’s conviction and sentencing, consular officials were instrumental in gathering significant evidence concerning their character and background. This evidence, including information relating to their family life as well as expert psychological reports, could have had a decisive impact upon the jury’s evaluation of aggravating and mitigating factors in their cases. 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 in light of their particular circumstances and those of the offense.

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

[u]nless predecessor counsel has already done so, counsel representing a foreign national should: 1. immediately advise the client of his or her right to communicate with the relevant consular office; and 2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest [...] [FN67]

[FN67] American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised Edition)(February 2003), Guideline 10.6B "Additional Obligations of Counsel Representing a Foreign National."

130. 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. [FN68]

[FN68] IACHR, Report 41/00 (Desmond McKenzie et al.), Jamaica, Annual Report of the IACHR 1999, paras. 207-209.

131. The potential significance of the additional evidence in Mr. Leal García's case is enhanced by the fact that apart from the circumstances of his crime, the only aggravating factors against him consisted of evidence of an unadjudicated crime. Moreover, the petitioner made additional submissions based on evidence gathered before and after his conviction and sentencing, which raises serious doubts regarding the criminal conduct attributed to him. These elements confirm that the evidence gathered through the assistance of the consular officials may have had a particularly significant impact upon the jury's determination of responsibility or at the very least the appropriate punishment for Mr. Leal García.

132. Based upon the foregoing, the Commission concludes that the State's obligation under Article 36.1 of the Vienna Convention on Consular Relations to inform Messrs. Medellín, Ramírez Cardenas and Leal García of their right to consular notification and assistance constituted a fundamental component of the due process standards to which they were entitled under Articles XVIII and XXVI of the American Declaration, and that the State's failure to respect and ensure this obligation deprived them 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.

2. Competent counsel

133. The petitioner alleges that the prejudice suffered by Messrs. Medellín, Ramírez Cardenas and Leal García was exacerbated by the incompetence of state appointed counsel during the pre-trial investigation, the trial phase and the sentencing phase of the proceedings. The State, for its part, asserts that the US Constitution and federal and state laws and regulations “ensure that all persons, including foreign nationals unfamiliar with English or the US judicial system, will have adequate interpreters and competent legal counsel who can advise them” and that failure to honor these protections can be corrected through appeals.[FN69]

[FN69] Submission by the United States, dated July 8, 2008, page 7.

134. As the Commission has established, the fundamental due process requirements for capital trials include the obligation to afford a defendant a full and fair opportunity to present mitigating evidence for consideration in determining whether the death penalty is the appropriate punishment in the circumstances of his or her case. The Commission has stated in this respect that the due process guarantees under the American Convention and the American Declaration applicable to the sentencing phase of a defendant’s capital prosecution guarantee an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of the defendant’s case, in light of such considerations as the offender’s character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.[FN70]

[FN70] See Report N° 38/00 (Baptiste), Grenada, Annual Report of the IACHR 1999, paras. 91, 92; Report N° 41/00 (McKenzie et al.) Jamaica, Annual Report of the IACHR 1999, paras. 204, 205; Case N° 12.067 (Michael Edwards et al.), The Bahamas, Annual Report of the IACHR 2000, paras. 151-153. See also I/A Court H.R., Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago Case. Judgment of June 21, 2002, Series C N° 94, paras. 102, 103.

135. Similar requirements are reflected under domestic standards of legal practice in the United States. In particular, the American Bar Association, the principal national organization for the legal profession in the United States, has prepared and adopted guidelines and related commentaries that emphasize the importance of investigating and presenting mitigating evidence in death penalty cases.[FN71] They indicate, for example, that the duty of counsel in the United States to investigate and present mitigating evidence is now “well-established” and emphasize that:

[b]ecause the sentencer in a capital case must consider in mitigation, ‘anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant,’ “penalty phase preparation requires extensive and generally unparalleled investigation in to personal and family history.” In the case of the client, this begins with the moment of conception.[FN72]

[FN71] American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised editions) (February 2003) (<http://www.abanet.org/legalservices/downloads/%20sclaid/deathpenaltyguidelines.pdf>), Guideline 10.7 – Investigation.

[FN72] American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised editions) (February 2003) (<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>), Guideline 10.7 – Investigation, at 82.

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

[t]he mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.[FN73]

[FN73] American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised editions) (February 2003) (<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>), Guideline 10.7 – Investigation, at 83.

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

138. In the present case, the State has not contested the specific allegations of the petitioner that the attorneys provided by the state for Messrs. Medellín. Ramírez Cardenas and Leal García were inadequate and negligent. The information in the record of the case indicates that in two cases the attorneys were suspended from the practice of law for ethics violations in other cases; one of the attorneys was held in contempt of court and arrested for seven days for violating his suspension and spent a total of eight hours on the investigation of the case prior to the commencement of jury selection; during jury selection two of the attorneys failed to strike jurors

who revealed their inclination to impose automatically the death penalty; in all of the cases few or no witnesses or expert witnesses were called during the trial phase; there was no cross examination on the credibility or relevance of fingerprint, DNA, Luminol and other evidence produced by the prosecution; in all of the cases the attorneys failed to exploit suspicious gaps in the prosecution's investigation; in all of the cases few or no witnesses or expert witnesses were called during the sentencing phase; in two cases expert witnesses were called whose testimony was detrimental to the alleged victim's case; (see supra Section III, paras. 18, 19, 30, 42-47).

139. In this regard, the Commission wishes to reiterate[FN74] its concern respecting the petitioner's submissions on the deficient state of the capital public defender system in the state of Texas, which has no state-wide agency responsible for providing specialized representation in capital cases. A great majority of lawyers who handle death penalty cases in Texas are sole practitioners lacking the expertise and resources necessary to properly defend their clients, and as a result, capital defendants frequently receive deficient legal representation.[FN75]

[FN74] See IACHR Report No. 1/05 (Roberto Moreno Ramos), United States, Annual Report of the IACHR 2005, para 56.

[FN75] See Texas Defender Service A State of Denial: Texas Justice and the Death Penalty (2000) available at <http://texasdefender.org/state%20of%20denial/Part1.pdf>. The report was based upon a study of hundreds of death penalty cases in the state of Texas. The Report identifies many instances of poor representation by defense lawyers in capital trials and state habeas corpus proceedings, which in some cases result from the State's refusal to both appoint lawyers with sufficient experience and training and to fund an adequate defense. The Report also indicates that the Texas Court of Criminal Appeals routinely denies any remedies to inmates whose court-appointed lawyers performed poorly.

140. The Commission has found in a previous case[FN76] that the systemic problems in the Texas justice system are linked to deficiencies in part due to the lack of effective oversight by the State. The Commission considers that this may have contributed to the deficiencies in Messrs. Medellín, Ramírez Cardenas and Leal García's legal representation.

[FN76] IACHR Report No. 1/05 (Roberto Moreno Ramos), United States, Annual Report of the IACHR 2005, para. 57.

141. Based upon the information and evidence on the record, it is not apparent to the Commission that the proceedings were fair notwithstanding the State's failure to comply with the consular notification requirements. To the contrary, the Commission considers, based upon the information presented, that the State's failure in this regard had a potentially serious impact upon the fairness of Messrs. Medellín, Ramírez Cardenas and Leal García's trial.

142. Based upon the foregoing, the Commission concludes that the State's obligation under Articles XVIII and XXVI of the American Declaration include the right to adequate means for the preparation of a defense, assisted by adequate legal counsel and that the State's failure to respect and ensure this obligation resulted in additional violations of their rights to due process and to a fair trial under these provisions of the Declaration.

143. In the circumstances of the present case, where the defendants' convictions have occurred as a result of sentencing proceedings that fail to satisfy the minimal requirements of fairness and due process, the Commission considers that the appropriate remedy includes the convocation of new sentencing hearings, in accordance with the due process and fair trial protections prescribed under Articles I, XVIII and XXVI of the American Declaration.[FN77]

[FN77] IACHR Report N° 52/02 (Ramón Martínez Villarreal), United States, Annual Report of the IACHR 2002, para. 86; Report N° 127/01, Case N° 12.183, (Joséph Thomas), Jamaica, Annual Report of the IACHR 2001, para. 146.

3. Use of evidence of an unadjudicated offense

144. The petitioners have contended, and the State has not contested, that during the sentencing phase of Mr. Leal García's trial, the prosecution introduced evidence of an additional crime that he was alleged to have committed, for which he was never charged, tried or convicted. According to the record, this evidence was presented and relied upon by the prosecution as an aggravating factor for the jury to consider in determining whether Mr. Leal García may have constituted a continuing threat to society and therefore warranted a death sentence.

145. The Commission has decided in previous cases that the state's conduct in introducing evidence of unadjudicated crimes during a sentencing hearing was "antithetical to the most basic and fundamental judicial guarantees applicable in attributing responsibility and punishment to individuals for crimes." [FN78] This conclusion is based upon the Commission's finding that the consequence of using evidence of unadjudicated crimes in this manner is, effectively, to presume the defendant's guilt and impose 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. The Commission has also found that the prejudice resulting from the use of the evidence relating to these other alleged crimes is compounded by the fact that lesser standards of evidence are applicable during the sentencing process.

[FN78] IACHR Report N° 52/02 (Ramón Martínez Villarreal), United States, Annual Report of the IACHR 2002; Report N° 127/01, Case N° 12.183, (Joséph Thomas), Jamaica, Annual Report of the IACHR 2001.

146. In the present case, the facts establish that the State permitted the introduction of evidence during Mr. Leal García'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 he committed the separate crime and relied upon this finding in determining that he should be sentenced to death. Further, applicable Texas law, 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.

147. The Commission must again emphasize 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, 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 been charged and tried pursuant to a fair trial offering the requisite due process guarantees.

148. Based upon the foregoing, the Commission concludes that the State's conduct in permitting the introduction of evidence of an unadjudicated crime during Mr. Leal García's capital sentencing hearing contributed to the imposition of the death penalty upon Mr. Leal García 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.

B. Clemency proceedings

149. The petitioner alleges that clemency review in Texas falls short of the minimum standards of due process required by Article XXVI of the American Declaration. The State alleges that the Texas Board of Pardons and Paroles –composed of 18 salaried members who serve full time— “more than meets” the standard of providing certain minimal procedural protections for condemned prisoners, as required by the IACHR in its interpretation of Article XXIV of the American Declaration. The State also makes a distinction between clemency review in the case of defendants who face a mandatory death sentence as in prior cases decided by the Commission, upon a finding of guilt and clemency proceedings in the case of Messrs. Medellín, Ramírez Cardenas and Leal García who had the opportunity to present individualized mitigating evidence before the sentencing body.

150. The Commission has previously held that right to apply for amnesty, pardon or commutation of sentence under inter-American human rights instruments, while not necessarily subject to full due process protections, is subject to certain minimal fairness guarantees for condemned prisoners in order for the right to be effectively respected and enjoyed.[FN79] These procedural protections have been held to include the right on the part of condemned prisoners to submit a request for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel to the competent authority, and to receive a decision from that authority within a reasonable period of time prior to his or her execution.[FN80]

[FN79] See, IACHR, Case N° 12.023 (Desmond McKenzie et al.), Jamaica, Annual Report of the IACHR 1999, para. 228; Case N° 12.067 (Michael Edwards et al.), The Bahamas, Annual Report of the IACHR 2000, para. 170.

[FN80] See, IACHR, Case N° 12.023 (Desmond McKenzie et al.), Jamaica, Annual Report of the IACHR 1999, para. 228; Case N° 12.067 (Michael Edwards et al.), The Bahamas, Annual Report of the IACHR 2000, para. 170.

151. As indicated supra, the Commission has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty comply strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. Therefore, the allegations in the present case require a heightened level of scrutiny to ensure that the rights to life, due process, and fair trial as prescribed under the American Declaration have been properly respected by the State. In the case of Clemency proceedings pending the execution of a death sentence, the minimal fairness guarantees afforded to the applicant should include the opportunity to receive an impartial hearing.

152. The allegations of the parties indicate that the practice followed by the Texas Board of Pardons and Paroles when considering petitions filed on behalf of persons sentenced to death does not allow for opportunities to view the evidence submitted in opposition to clemency requests and that this body does not report on the reasons for its recommendation to reject a clemency petition. The State has not denied the assertion that there is no set of rules or criteria to be taken into account when making clemency determinations regarding death penalty cases in Texas. Therefore, the Commission finds that the procedure in place falls short of establishing minimal safeguards to prevent arbitrary decisions concerning evidence submitted either in favour or in opposition of a clemency request pending the execution of a death sentence.

153. Based upon the foregoing, the Commission concludes that the clemency procedures in Texas fail to guarantee the right to an impartial hearing pursuant to Article XXVI of the American Declaration and that the State's failure to ensure this obligation may result in an additional violations of their rights to a fair trial under the Declaration.

C. Right to life

154. In previous decisions, the Commission has found that Article I of the Declaration prohibits the application of the death penalty when its implementation would result in an arbitrary deprivation of life.[FN81] In addition, the Commission has included among the deficiencies that will result in an arbitrary deprivation of life through the death penalty the failure of a State to afford an accused strict and rigorous fair trial guarantees.[FN82] Accordingly, where the right of a condemned prisoner to a fair trial has been infringed in connection with the proceedings that led to his or her death sentence, the Commission has held that executing the individual pursuant to that sentence will constitute a deliberate and egregious violation of the right to life under Article I of the American Declaration.

[FN81] IACHR, Report No. 52/02 (Ramon Martinez Villarreal), United States, Annual Report of the IACHR 2002, para. 84.

[FN82] IACHR, Report No. 57/96 (William Andrews) United States, Annual Report of the IACHR 1997, para. 172.

155. In the instant case, the Commission has established that the State is responsible for violations of its obligations under Articles XVIII and XXVI of the American Declaration, based upon its failure to provide the victims with competent legal representation in the course of the criminal proceedings, and its failure to afford Messrs. Medellín, Ramírez Cardenas and Leal García their right to consular information under Article 36.1.b of the Vienna Convention. Therefore, the Commission finds that the imposition of the death penalty in the instant case involves an arbitrary deprivation of life, prohibited by Article I of the Declaration. Additionally, once the State executed Mr. Medellín pursuant to his death sentence, it committed a deliberate and egregious violation of Article I of the American Declaration; likewise, should it execute Messrs. Ramírez Cardenas and Leal García, it would also commit the same violation.

156. In view of the above, the Commission does not deem necessary to examine the petitioner's claim relating to the method of execution of capital punishment, referred to supra at III.A.2.c.

VI. CONCLUSIONS AND RECOMMENDATIONS OF PRELIMINARY REPORT N° 45/08

157. The Commission hereby concludes that the State is responsible for violations of Articles I, XVIII and XXVI of the American Declaration against Messrs. Medellín, Ramírez Cardenas and Leal García in respect of the criminal proceedings leading to the imposition of the death penalty against them. The Commission also concludes that, should the State execute them pursuant to the criminal proceedings at issue in this case, it would commit an irreparable violation of the fundamental right to life under Article I of the American Declaration.

158. According to the information presently available, the 339th District Court of Harris County, Texas, has scheduled Mr. Medellín's execution for August 5, 2008. In this connection, the Commission recalls its jurisprudence concerning the legal effect of its precautionary measures in the context of capital punishment cases. As the Commission has emphasized on numerous occasions, it is beyond question that the failure of an OAS member state to preserve a condemned prisoner's life pending the completion of the proceedings before the IACHR, including implementation of the Commission's final recommendations, undermines the efficacy of the Commission's process, deprives condemned persons of their right to petition in the inter-American human rights system, and results in serious and irreparable harm to those individuals. For these reasons, the Commission has determined that a member state disregards its fundamental human rights obligations under the OAS Charter and related instruments when it fails to implement precautionary measures issued by the Commission in these circumstances.[FN83]

[FN83] Report No. 52/01 (Juan Raul Garza), United States, Annual Report of the IACHR 2000, para. 117; IACHR, Fifth Report on the Situation of Human Rights in Guatemala, Doc. OEA/Ser.L/V/II.111 doc.21 rev. (6 April 2001), paras. 71 and 72. See similarly I/A Court H.R., Provisional measures adopted in the James et al. Case, Order of August 29, 1998, Series E; International Court of Justice, Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America), Request for the Indication of Provisional Measures, Order of 3 March 1999, I.C.J. General List, N° 104, paras. 22-28; United Nations Human Rights Committee, Dante Piandiong and others v. The Philippines, Communication N° 869/1999, U.N. Doc. CCPR/C/70/D/869.1999 (19 October 1999), paras. 5.1-5.4; Eur. Court H.R., Affaire Mamatkulov et Abdurasulovic c. Turkey, Reqs. Nos. 46827/99, 46951/99 (6 February, 2003), paras. 104-107.

159. In light of these fundamental principles, and in light of the Commission's findings in the present report, the Commission hereby reiterates its requests of December 6, 2006 and January 30, 2007, pursuant to Article 25 of its Rules of Procedure that the United States take the necessary measures to preserve Messrs. Medellín's, Ramírez Cardenas' and Leal García's lives and physical integrity pending the implementation of the Commission's recommendations in the matter.

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

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

1. Vacate the death sentences imposed and provide the victims with an effective remedy, which includes a new trial in accordance with the equality, due process and fair trial protections, prescribed under Articles I, XVIII and XXVI of the American Declaration, including the right to competent legal representation.
2. Review its laws, procedures and practices to ensure that foreign nationals who are arrested or committed to prison or to custody pending trial or are detained in any other manner in the United States are informed without delay of their right to consular assistance and that, with his or her concurrence, the appropriate consulate is informed without delay of the foreign national's circumstances, in accordance with the due process and fair trial protections enshrined in Articles XVIII and XXVI of the American Declaration.
3. Review its laws, procedures and practices to ensure that 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.
4. Review its laws, procedures and practices to ensure that persons who are accused of capital crimes can apply for amnesty, pardon or commutation of sentence with minimal fairness guarantees, including the right to an impartial hearing.

VII. ACTIONS SUBSEQUENT TO PRELIMINARY REPORT N° 45/08

161. On July 24, 2008, the IACHR adopted Report No. 45/08 on the admissibility and merits of this case. The report was sent to the State on that same date, with a time period of two months to inform the Inter-American Commission on the measures taken to comply with its recommendations.

162. On August 5, 2008, the State sent a communication to the IACHR in which it informed that the above mentioned report was forwarded to “the relevant authorities” of the state of Texas on August 1st 2008. These authorities were the Governor of Texas, the Attorney General of the state, and the Presiding Officer of the Texas Board of Pardons and Paroles.

163. José Ernesto Medellín was executed in Texas on August 5, 2008. The following day, the Inter-American Commission issued Press Release 33/08 in which it “deplored the failure on the part of the United States to recognize the Commission’s requests that it respect the life of Mr. Medellín, as well as the lives of other persons sentenced to death in similar circumstances condemning the execution”.^[FN84]

^[FN84] <http://www.cidh.oas.org/Comunicados/English/2008/33.08eng.htm>

164. On August 25, 2008, the petitioner informed the IACHR that José Ernesto Medellín was executed in Texas on August 5, 2008. The petitioners also expressed:

Before his execution, Mr. Medellín sought to obtain a stay of execution from the Texas Court of Criminal Appeals, the Fifth Circuit Court of Appeals, and the United States Supreme Court (...) Mr. Medellín also informed each of these courts that the Commission had issued (and reiterated) precautionary measures requesting that the United States refrain from carrying out his execution. Finally, Mr. Medellín advised the Texas Board of Pardons and paroles as well as Texas Governor Rick Perry of the Commission’s ruling, and urged them to grant a reprieve and/or commute Mr. Medellín’s death sentence on that basis.

165. Finally, the petitioner mentioned that “no execution dates have yet been set for petitioners Rubén Ramírez Cárdenas and Humberto Leal García.”

166. On May 27, 2009, the Commission transmitted Report N° 31/09 to the parties in accordance with Article 45(2) of its Rules of Procedure, and requested the State to present information on compliance with the recommendation within one month from the date of transmittal. No further information on compliance with the recommendations was received from either party. Accordingly, based upon the information available, the Commission decided to ratify its conclusions and reiterate its recommendation in this case, as set forth below.

VIII. FINAL CONCLUSIONS AND RECOMMENDATIONS

167. As the IACHR takes the decision to publish its final report in the present case, it must necessarily reiterate that the execution of the death sentence against Mr. Medellín represents a failure on the part of the State to implement both the precautionary measures and the recommendations issued on the merits of the claims on July 24, 2008 and notified to the State on that same date.

168. By permitting Mr. Medellín's execution to proceed in these circumstances, the IACHR considers that the United States failed to act in accordance with its fundamental human rights obligations as a member of the Organization of American States. This is not the first time the United States has executed a person who has been the beneficiary of precautionary measures granted by the IACHR. The Inter-American Commission views the State's omissions in this regard as extremely grave and calls upon the United States to take all steps necessary to comply in any future matter with the IACHR's requests for precautionary measures.

169. In light of the facts and information provided, the IACHR finds that the State has not taken measures toward compliance with the above mentioned recommendations. Accordingly,

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

1. Vacate the death sentences imposed on Messrs. Ramírez Cardenas and Leal García and provide the victims with an effective remedy, which includes a new trial in accordance with the equality, due process and fair trial protections, prescribed under Articles I, XVIII and XXVI of the American Declaration, including the right to competent legal representation.
2. Review its laws, procedures and practices to ensure that foreign nationals who are arrested or committed to prison or to custody pending trial or are detained in any other manner in the United States are informed without delay of their right to consular assistance and that, with his or her concurrence, the appropriate consulate is informed without delay of the foreign national's circumstances, in accordance with the due process and fair trial protections enshrined in Articles XVIII and XXVI of the American Declaration.
3. Review its laws, procedures and practices to ensure that 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.
4. Review its laws, procedures and practices to ensure that persons who are accused of capital crimes can apply for amnesty, pardon or commutation of sentence with minimal fairness guarantees, including the right to an impartial hearing.

AND DECIDES:

On the basis of the foregoing analysis and subsequent execution of José Ernesto Medellín, to recommend that the State provide reparations to the family of Mr. Medellín as a consequence of the violations established in this report.

IX. PUBLICATION

170. In light of the above and in accordance with Article 45(3) of its Rules of Procedure, the Commission decides 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.

Done and signed in the city of Washington, D.C., on the 7th day of the month of August, 2009.
(Signed): Luz Patricia Mejia, President; Victor E. Abramovich, First Vice-President; Felipe González, Second Vice-President; Sir Clare K. Roberts and Paulo Sergio Pinheiro, Commissioners.