

REPORT No. 63/12¹
ADMISSIBILITY
PETITION 1762-11
VIRGILIO MALDONADO RODRIGUEZ
UNITED STATES
March 29, 2012

I. SUMMARY

1. On December 9, 2011, the Inter-American Commission on Human Rights (the “Inter-American Commission” or the “IACHR”) received a petition from Sandra L. Babcock from Northwestern University School of Law (the “petitioners”) against the United States of America (the “State” or “the United States”). The petition was presented on behalf of Virgilio Maldonado Rodríguez, a Mexican national who is deprived of his liberty on death row in the state of Texas.

2. The petitioners claim that Mr. Maldonado suffers from severe mental disabilities; that the court-appointed attorney who represented him was ineffective; that the police failed to notify him of his right to consular notification in violation of Article 36 of the Vienna Convention on Consular Relations; and that the lethal injection as currently practiced in Texas creates an unacceptable risk of causing excruciating pain and suffering to the inmate. The State argues that the petition is inadmissible and without merit and requests the IACHR to dismiss it.

3. As set forth in this report, having examined the information and arguments provided by the parties on the question of admissibility, and without prejudicing the merits of the matter, the Inter-American Commission decided to declare the petition admissible with respect to Articles I (Right to life, liberty and personal security), XVIII (Right to a fair trial), XXV (Right of protection from arbitrary arrest) and XXVI (Right to due process of law) of the American Declaration of the Rights and Duties of Man (the “American Declaration”). Consequently, the Inter-American Commission will notify the parties of the report, continue with the analysis of the merits of the case, and publish this report and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS BEFORE THE IACHR

4. Following receipt of the petition on December 9, 2011, the Inter-American Commission transmitted the pertinent parts of the complaint to the State by means of a note dated December 21, 2011, with a request for observations within two months in accordance with Article 30(3) of the Commission’s Rules of Procedure. On January 5, 2012, the IACHR received a note from the State indicating that the request was forwarded to the Governor, Attorney General and Board of Pardons and Paroles of the State of Texas. This response was transmitted to the petitioners on January 17, 2012.

5. On January 18, 2012, the Commission received supplemental observations from petitioners; the pertinent parts of which were duly forwarded to the State. By means of a note dated February 21, 2012, the IACHR reiterated the request for observations to the State. As of the date of the adoption of this report, the Inter-American Commission has not received any written observations from the State.

¹ Commissioner Dinah Shelton did not take part in the discussion and voting on this case, pursuant to Article 17(2) of the Commission’s Rules of Procedure. Commissioner José de Jesús Orozco Henríquez, a Mexican national, considered that, based on Article 17(3) of the Rules of Procedure of the IACHR, he should abstain from participating in the study and decision of this matter. Commissioner Orozco Henríquez explained that the alleged victim in this case is one of the persons included in the *Case concerning Avena and Other Mexican Nationals (Mexico v. the United States of America)*, which Mexico filed with the International Court of Justice. The Inter-American Commission accepted his recusal, with the result that Commissioner Orozco Henríquez did not participate in the deliberation or vote on this case.

6. At the request of the petitioners, the IACHR held a public hearing on March 27, 2012, during its 144th regular session. The petitioners and representatives of the United States Government attended the hearing.

Precautionary measures

7. On December 21, 2011, the IACHR notified the State that precautionary measures had been granted on behalf of the alleged victim, and requested a stay of execution until such time as it should pronounce on the merits of the petition.

III. POSITION OF THE PARTIES

A. Position of the petitioners

8. According to the information submitted by the petitioners, on April 11, 1996, Mr. Maldonado, a Mexican national, was arrested in Houston, Texas, for a bank robbery unrelated to the murder of Augustin Saucedo, for which he was ultimately convicted. They state that Mr. Maldonado was appointed a lawyer to represent him on the robbery charge, who advised him not to talk to the police. After the alleged victim refused to talk to a police officer, the police supposedly re-initiated contact with him. According to the petitioners, "only then did Mr. Maldonado "confess" in response to the police interrogation". They argue that the resulting confession was not only invalid and illegally obtained; it was the only factual basis for Mr. Maldonado's conviction. Mr. Maldonado was convicted of capital murder and sentenced to death on October 6, 1997. The Texas Court of Criminal Appeals denied Mr. Maldonado's appeal on June 30, 1999, and denied rehearing on September 15, 1999.

9. The petitioners allege that Mr. Maldonado's death sentence violates the American Declaration for the following reasons: he suffers from mental retardation; the attorneys appointed by the State to represent him were inexcusably negligent; the State failed to inform him of his right to consular notification in violation of Article 36 of the Vienna Convention on Consular Relations; and lethal injection as currently practiced in Texas creates an unacceptable risk of causing excruciating pain and suffering.

10. With regard to the first allegation, the petitioners state that, as the result of childhood neglect and abuse, Mr. Maldonado suffers from severe mental disabilities. Experts have allegedly estimated Mr. Maldonado's IQ to be in the range of 61 to 66, scores that meet the threshold for establishing mental retardation. The information in the petition indicates that as a young child, the alleged victim was frequently deprived of food for days at a time. In particular, it is mentioned that when he cried from hunger and distress, his mother, an alcoholic, fed him alcohol to appease him and that she also beat him severely. Moreover, they allege that Mr. Maldonado's prenatal exposure to alcohol, combined with the malnutrition and traumatic head injury he endured at a young age, led to severely diminished intellectual functioning.

11. The petitioners contend that at a post-conviction hearing all of the psychological experts who examined Mr. Maldonado concluded that his scores on standardized tests used to determine intellectual functioning were within the range that demonstrates mental retardation. Mr. Maldonado's two experts, both of whom were bilingual, allegedly concluded that Mr. Maldonado meets the three criteria for mental retardation established by the American Association on Intellectual and Developmental Disabilities.

12. However, according to the petitioners, the state court rejected evidence of Maldonado's mental retardation based on the testimony of the state's sole expert, Dr. George Denkowski, a psychologist who did not speak Spanish, and reportedly evaluated Mr. Maldonado through an interpreter. The petitioners argue that Dr. Denkowski found that Mr. Maldonado had a full scale IQ of 72 and that he informed the court that the alleged victim's true score was suppressed because of poor test-taking skills, as well as cultural and educational factors. Dr. Denkowski supposedly testified that he had unilaterally decided to change the IQ score from 72 to 83.

13. The petitioners indicate that on April 14, 2011, Dr. Denkowski was reprimanded by the Texas State Board of Examiners of Psychologist for his methodology in Mr. Maldonado's case, among others. Under the terms of the settlement reached with the Board, he is no longer permitted to conduct mental retardation assessments in criminal cases. The petitioners mention that in a case decided after Mr. Maldonado's case involving a different Mexican national with mental retardation, the Texas Court of Criminal Appeals found Dr. Denkowski's methodology to be illegitimate and lacking in scientific basis, and refused to credit his findings. Nonetheless, according to the petitioners, the state court in Mr. Maldonado's case relied on Denkowski's findings in concluding that Mr. Maldonado is not mentally retarded.

14. The petitioners also indicated at the public hearing that the United States recognizes that people who are insane at the time of the crime may not be found culpable for criminal offenses and that individuals who are not mentally competent at trial may not be prosecuted. However, according to the petitioners, this case looks at whether or not a state should be permitted to carry out the execution of someone who has a severe mental disability regardless of whether that person was insane at the time of the crime or whether they were competent at the time of the trial.

15. With regard to this claim, the petitioners conclude that the imposition of the death sentence in the case of Mr. Maldonado constitutes inhuman treatment and is an arbitrary deprivation of life in violation of Articles I, XXV and XXVI of the American Declaration.

16. Concerning the alleged ineffective assistance of counsel, petitioners indicate that at his 1997 trial, Mr. Maldonado was represented by a court-appointed attorney who failed to meaningfully investigate, develop, and present substantial mitigating evidence that could have swayed the jury to spare his life. According to the petitioners, Mr. Maldonado was sentenced to death by a jury who did not know of his mental retardation, horrific childhood, and the extreme poverty he endured in Mexico. In this respect, the petitioners state that at the penalty phase, trial counsel presented Mr. Maldonado's biological father, who abandoned his family before Virgilio was even born and who only saw him a total of 30 minutes up until the time he was 21 years old, as the only character witness. The petitioners argue that Mr. Maldonado's family members, schoolteachers in Mexico and former employers would have been available to testify at trial. Further, petitioners contend that there is a reasonable probability that Mr. Maldonado would not have been sentenced to death but for the defense counsel's errors and lack of effort.

17. In addition, petitioners point out that in his appeal to the Texas Court of Criminal Appeals, the alleged victim's court-appointed appellate counsel failed to raise the violation of Article 36 of the Vienna Convention. They state that the appeal was rejected and that subsequent appeals based on ineffective assistance of counsel and violations of the Vienna Convention have failed based on the court's findings that such claims were foreclosed by procedural default. Accordingly, petitioners allege that the United States violated Articles XVIII and XXVI of the American Declaration by providing incompetent defense counsel in a capital case.

18. Regarding the purported violation of Mr. Maldonado's consular rights, petitioners point out that, although the police were aware that he was a Mexican national, they failed to notify him of his right to consular notification in violation of Article 36 of the Vienna Convention. In this respect, they state that Mr. Maldonado was born and raised in Mexico until the age of twenty-one; that he spoke no English at the time of his arrest; and that he told the police that he went to school in Mexico. This violation, according to the petitioners, had a devastating impact on the fairness of the capital murder proceedings. In particular, given his intellectual disabilities and the language barrier, Mr. Maldonado allegedly did not comprehend that he had the right to a lawyer or that his statements to police outside the presence of an attorney or a judge would have evidentiary value during trial.

19. The petitioners contend that the Mexican Consulate did not learn of Mr. Maldonado's detention until one month before the start of trial, and after *voir dire* had begun. They indicate that the Mexican Consulate only learned of Mr. Maldonado's detention when an employee happened to see Mr. Maldonado's story on the television. They conclude that, had the Consulate been notified sooner, the office would have offered Mr. Maldonado flexible and far-reaching assistance to avoid the imposition of

the death penalty. The execution of Mr. Maldonado would therefore violate Articles I, XVIII, and XXVI of the American Convention according to the petitioners.

20. Further, referring to the Avena Case decided by the International Criminal Court,² petitioners highlight that, on January 9, 2003, the Government of Mexico initiated proceedings in the ICJ against the United States, alleging violations of the Vienna Convention in the cases of Mr. Maldonado and 53 other Mexican nationals. They point out that, despite the good intentions of the executive branch, Congress has failed to pass the legislation necessary to implement the Avena judgment. In this respect, they state that on June 14, 2011, Senator Patrick Leahy introduced the Consular Notification Compliance Act, which seeks to implement the Avena judgment by providing federal courts with jurisdiction to review potential violations of Article 36 of the Vienna Convention in cases of foreign nationals sentenced to death in the United States. Petitioners also indicate that, as of March 27, 2012, the legislation had not yet passed.

21. Finally, petitioners argue that Mr. Maldonado faces execution by lethal injection when that mode of execution as currently practiced in Texas allegedly creates an unacceptable risk of causing excruciating pain and suffering to the inmate, while also leaving the inmate unable to express the pain he is expecting. In particular, they claim that there are numerous problems with Texas's lethal injection protocol, including: the recently announced substitution of pentobarbital for sodium thiopental despite a lack of clinical evidence showing its safety and effectiveness in executions; the unacceptable risk of suffering due to the drug combination; the use of potassium chloride which causes pain despite the availability of other drugs that would cause a painless death; the lack of required training for those administering the drugs; and the use of a lethal injection protocol that is not permitted for animal euthanasia under standards promulgated by the American Veterinary Medical Association.

22. According to the petitioners, these defects, in combination with a lack of regulatory oversight by the U.S. Food and Drug Administration, and an absence of meaningful state oversight, make lethal injection a cruel, infamous and unusual punishment, in violation of Article XXVI of the American Declaration.

23. With regard to the exhaustion of domestic remedies, the petitioners indicate that a Petition for Writ of Habeas Corpus in the federal district court was dismissed on June 11, 2003. After filing a Second Petition for a Writ of Habeas Corpus, the Texas Court of Criminal Appeals remanded the Eighth Amendment claim raising mental retardation to the District Court for further proceedings. Following an evidentiary hearing the trial court concluded that Mr. Maldonado's Eighth Amendment claims should be denied.

24. On March 26, 2005, Mr. Maldonado filed a Third Petition for a Writ of Habeas Corpus, asserting that his rights under Article 36 of the Vienna Convention on Consular Relations had been violated. The Court of Criminal Appeals dismissed the claim on September 12, 2007. A Petition asserting violations of the Fifth, Sixth, and Eighth Amendments and the Vienna Convention was also denied on September 24, 2009. On August 10, 2010, the Fifth Circuit held that Mr. Maldonado was entitled to a Certificate of Appealability on the issue of whether he was mentally retarded and thus ineligible for execution. The habeas relief was denied as well as a rehearing. Mr. Maldonado's petition for a writ of certiorari was denied by the United States Supreme Court on October 3, 2011. According to the petitioners, Mr. Maldonado's execution could be scheduled for July 2012.

25. At the public hearing the petitioners, referring to the argument of the State that Mr. Maldonado has received five layers of review in United States courts, contended that this argument is misleading because of the rules that govern the habeas corpus process in the United States. These rules require that federal courts defer to state courts' factual and legal determination, so there is a very heavy presumption that the state court findings are correct. They pointed out that in this case the United States does not dispute that those state court findings rested on the evaluation of a psychologist who is no

² *Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2004 I.C.J. 12 (Judgment of March 31, 2004).

longer permitted to conduct evaluations of mental retardation because of the flaws in his methodology that were applied in this very case.

26. The petitioners argue that Mr. Maldonado has already litigated three of the claims raised in this petition: mental retardation, ineffective assistance of counsel, and denial of consular rights. They indicate that the lethal injection claim has been litigated before and the practice upheld by courts in the United States and that relitigating such a claim would be futile. In this respect, petitioners point out that in *Baze v. Rees*, the Supreme Court held that the petitioner had failed to establish that lethal injection constitutes cruel and unusual punishment.³ They contend that while a small number of states have continued to hear challenges to the lethal injection process, not one court has held that the lethal injection protocol followed by Texas is unconstitutional. Moreover, since 2006 the state of Texas has allegedly executed at least thirteen prisoners who have challenged the state's lethal injection protocols.

27. At the public hearing, the petitioners responded to the state's argument that it is misleading to say that there are no remedies available with respect to this claim, by indicating that in the *Baze* decision the Supreme explicitly stated that any prisoner challenging a lethal injection protocol similar to Kentucky's would have no chance of success, and that the protocol that is used in Texas is virtually identical to the one at issue in *Baze*.

28. Further, the petitioners point out that, even if Mr. Maldonado attempted to present his lethal injection claim in state or federal Courts, the state would contend that the claim is subject to procedural default given state and federal legislation imposing draconian limitations on the presentation of "successive" post-conviction petitions. For these reasons, according to the petitioners, the lethal injection claim has no prospect of success and should therefore be deemed admissible under Article 31 of the Commission's Regulations.

29. Finally, the petitioners request that the Inter-American Commission on Human Rights join consideration of admissibility with review of the merits in an effort to conserve time, given that Mr. Maldonado could face execution as early as July 2012. They state that there can be no real dispute that the petition is admissible, since domestic remedies with regard to three of the claims raised in the petition were fully exhausted.

B. Position of the State

30. At the time of the adoption of the present report, the State has not submitted its written observations to the petition. However, at the public hearing held on March 27, 2012, the State presented its observations with regard to the claims raised by the petitioners.

31. According to the State, most of petitioners' claims have been extensively reviewed by state and federal courts as well as the International Court of Justice (ICJ) and Mr. Maldonado was awarded extensive due process protection with regard to his criminal case. It argues that due process protection and criminal proceedings in the United States are no less robust for foreign nationals than they are for citizens.

32. The State alleges that the Commission should not consider the claim regarding compliance with the Vienna Convention and the claim challenging Texas' lethal injection protocol. The first contention is not, according to the State, a matter within the Commission's competence and the second is raised despite petitioners' failure to exhaust domestic remedies.

33. With regards to the Vienna Convention claim, the State alleges that it does not contest that the United States has violated its Vienna Convention obligation in Mr. Maldonado's case, as found by the ICJ in the *Avena* Case. However, the State asserts that the Commission lacks competence to review claims under the Vienna Convention. Consular notification claims, according to the State, do not raise a

³ The petitioners cite *Baze v. Rees*, 553 U.S. 35 (2008).

violation of a human right enshrined in any international instrument to which the United States is a party or has endorsed. Thus, Article 20 of the Commission's Statute and Articles 23 and 27 of its Rules of Procedure allegedly preclude their consideration.

34. The State indicates that consular notification is not a human right and that the Vienna Convention's consular notification protections are based on principles of reciprocity, nationality, and function. In this regard, it indicates that the availability of consular notification access is premised on the existence of consular relations between governments, and consular access is undeniably a right exercised by the detained individual's State of nationality; therefore, persons do not enjoy these protections by mere virtue of their human existence. Moreover, it argues that the American Declaration's due process rights are not defined by the provisions of the Vienna Convention; that it is up to the State representatives to determine whether to provide assistance; and that the Vienna Convention does not provide the detained individual any right to enforce its provisions.

35. The State emphasizes that the United States takes its consular notification obligations very seriously and that it is committed to honoring its obligations under Avena. Accordingly, in July 2011 the Consular Notification Compliance Act was introduced in the United States Senate with the full support of the Executive branch. This legislation, if passed, would give Mr. Maldonado and other foreign nationals under sentence of death at the time of enactment, the chance to show a federal court that a Vienna Convention violation prejudiced their conviction or sentence. In the meantime, the Commission remains, according to the State, an inappropriate forum for review of this kind of claim.

36. Regarding the lethal injection claim, the State argues that petitioners have not exhausted domestic remedies. It contends that the argument of the petitioners that exhausting domestic remedies would be futile is without merit procedurally and substantively. The State points out that in *Baze* the Supreme Court held that Kentucky's lethal injection protocol, a combination of three drugs used at the time by at least 30 other states including Texas, did not constitute cruel or unusual punishment despite risks of improper administration. Nonetheless, several state and federal courts are currently hearing challenges to the lethal injection protocols at the state and federal level. Therefore, according to the State, these cases are not futile to the extent that the challengers can distinguish the relevant methods of execution from the one at issue in *Baze*.

37. With regard to the petitioners' argument that Texas' procedural default rules would preclude Mr. Maldonado from raising a lethal injection challenge on state or federal habeas, the State argues that Mr. Maldonado is not required to raise the issue on habeas. It indicates that the United States Supreme Court has specifically held that the challenges to execution protocols may be raised under Section 1983 of Title 42 of the US Code, obviating the need to meet the procedural requirements of state or federal habeas.

38. Further, the State argues that the protocol challenged by the petitioners is notably different from the one at issue in *Baze*. Given this difference, petitioners cannot allegedly maintain that *Baze* forecloses its domestic challenge to Texas' current protocol. For these reasons the Commission should not, according to the State, accept petitioners' contention that exhausting domestic remedies with respect to the lethal injection claim would be futile, and should find this claim inadmissible.

39. Regarding the claims of mental retardation and ineffective assistance of counsel, the State argues that both claims are inadmissible under Article 34(a) of the Commission's Rules of Procedure because they fail to state facts that tend to establish a violation of the American Declaration. The State contends that the United States' criminal justice system gives full effect to the fair trial protections and procedural guarantees contained in the Declaration and it has done so in Mr. Maldonado's case. These protections are, according to the State, among the strongest in the world. The United States Constitution, which applies to both federal and state criminal proceedings, establishes a wide range of rights for individuals charged with criminal offenses. These protections are applicable to all regardless of race, gender, ethnicity, national origin or status of foreign nationals.

40. Concerning the claim that Mr. Maldonado suffers severe mental impairment, the State argues that capital punishment, when carried out only for the most serious crimes and in accordance with due process, is consistent with international law, including applicable human rights instruments. In *Atkins*, the United States Supreme Court held that the execution of a severely mentally impaired person violates the United States Constitution's ban on cruel and unusual punishment. According to the State, petitioners argue that a similar prohibition on the execution of a mentally impaired can be derived from several Declaration rights. However, the State argues that Mr. Maldonado has failed to persuade any of the five different courts that any deficiencies from which he suffers render him severely mentally impaired and ineligible for the death penalty.

41. The State also points out that, in order to establish ineligibility for capital punishment, the defense needed to establish that Mr. Maldonado had significant sub average intellectual functioning and adaptive deficits that originated prior to age 18. The Texas habeas court, according to the State, carefully considered the evidence and determined that the defense had not proven severe mental impairment within the meaning of *Atkins*. The Texas Court of Criminal Appeal reviewed and confirmed this conclusion.

42. Regarding Dr. Denkowski's credibility, the State indicates that federal courts acknowledged these concerns but concluded that even discounting his testimony entirely, and resting only on the other evidence presented, Mr. Maldonado could not meet the burden of showing by clear and convincing evidence that the state courts' findings on severe mental impairment were incorrect. According to the State, the record clearly shows that the Texas and federal courts fully considered and addressed Mr. Maldonado's severe mental impairment claim as he manifestly received a fair chance in United States courts to demonstrate that he qualified for relief under *Atkins*. The State concludes that the Courts written opinions extensively detail the reasoning supporting the conclusion that the evidence did not show him to be mentally impaired.

43. With regard to the alleged violation of due process and fair trial based on the incompetence of state appointed trial counsel, the State argues that these are all claims that have been raised and received multiple layers of judicial review in domestic courts. According to the State, the jury heard about Mr. Maldonado's sad and difficult childhood through his father's testimony. Despite this evidence of the alleged victim's background, the jury concluded that the mitigating circumstances did not warrant a life sentence.

44. Based on the above arguments, the State requests that the IACHR dismiss this petition as inadmissible and without merit.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

45. The petitioners are entitled, under Article 23 of the IACHR's Rules of Procedure, to lodge complaints with the IACHR. The petition names, as its alleged victim, an individual whose rights are protected under the American Declaration. The State is bound to respect the provisions of the American Declaration, and the Commission is competent to receive petitions alleging violations of that instrument by the State by virtue of its ratification of the OAS Charter on June 19, 1951 and in conformity with Article 20 of the IACHR's Statute and Article 51 of its Rules of Procedure.⁴ The IACHR therefore has

⁴ Article 20(b) of the Statute of the IACHR provides that, in respect of those OAS member states that are not parties to the American Convention on Human Rights, the IACHR may examine communications submitted to it and any other available information, to address the government of such states for information deemed pertinent by the IACHR, and to make recommendations to such states, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights. See also Charter of the Organization of American States, Arts. 3, 16, 51, 112, 150; IACHR's Rules of Procedure, Arts 50 and 51; I/A. Court H.R., Advisory Opinion OC-10/8 "Interpretation of the Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights," July 14, 1989, Ser. A N° 10 (1989), paras. 35-45; I/A Comm. H.R., *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, paras. 46-49.

competence *ratione personae* to examine the complaint. The Commission has also competence *ratione loci* to deal with the petition since it alleges violations of rights protected by the American Declaration occurring within the territory of the United States.

46. The Commission has competence *ratione temporis*, since the obligation of respecting and ensuring the rights protected by the American Declaration was already in force for the State on the date on which the incidents described in the petition allegedly occurred. Finally, the Commission has competence *ratione materiae* since the petition describes possible violations of human rights that are protected by the American Declaration. The IACHR notes that the State contends that the Commission lacks jurisdiction to review claims under the Vienna Convention. The Commission has determined in previous cases 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 detained in any other manner by that state.⁵

B. Admissibility requirements

1. Exhaustion of domestic remedies

47. The Inter-American Commission must verify whether the remedies of the domestic system have been pursued and exhausted in accordance with generally recognized principles of international law, pursuant to Article 31(1) of its Rules of Procedure. However, Article 31(2) of the Rules 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 is prevented from exhausting them; or if there has been an unwarranted delay in reaching a final judgment under the domestic remedies.

48. According to the information provided, after the Texas Court of Criminal Appeals denied Mr. Maldonado's appeal and rehearing, the alleged victim presented, among others, three federal petitions for writ of habeas corpus, a petition asserting violations of the Fifth, Sixth, and Eighth Amendments and the Vienna Convention, and a petition for a writ of certiorari before the United States Supreme Court, all of which were denied.

49. The petitioners state that the only claim that has not been resolved by domestic courts is the lethal injection claim. They argue that litigating such a claim would be futile as it has no prospect of success and that even if Mr. Maldonado attempted to litigate it, the state would contend the claim is subject to procedural default given the existence of draconian limitations on the presentation of "successive" post-conviction petitions. According to the petitioners, in *Baze v. Rees* the Supreme Court held that the claimant had failed to establish that lethal injection constitutes cruel and unusual punishment. Moreover, not one court has allegedly held that the lethal injection protocol followed by Texas is unconstitutional and this state has supposedly executed at least thirteen prisoners since 2006 who have challenged the state's lethal injection protocols.

50. With regard to the lethal injection claim, the State argues that petitioners have not exhausted domestic remedies and that the argument that exhausting domestic remedies would be futile is without merit procedurally and substantively. The State points out that, despite *Baze*, several state and federal courts are currently hearing challenges to the lethal injection protocols at the state and federal level. In addition, it indicates that the challenges to execution protocols may be raised under Section 1983 of Title 42 of the US Code, obviating the need to meet the procedural requirements of state or federal habeas.

⁵ 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.

51. Based on the above factors, the Inter-American Commission concludes that the petitioners properly exhausted all domestic remedies available within the legal system with respect to the claims of mental retardation, ineffective assistance of counsel and denial of consular rights. Regarding the lethal injection claim, based on the information provided, the IACHR concludes that the claim raised in the present case has been litigated multiple times before the domestic courts, including before the United States Supreme Court, and that it is not necessary for the petitioners to relitigate the same claim as a condition of admissibility.

2. Timeliness of the petition

52. Article 32(1) of the Rules of Procedure requires that for a petition or communication to be admitted, it must be lodged within a period of six months from the date on which the party alleging the violation of his rights was notified of the final judgment.

53. In the present case, the writ of certiorari was denied by the United States Supreme Court on October 3, 2011, and the petition was filed on December 9, 2011. Therefore, the IACHR concludes that the requirement of Article 32(1) of the Rules of Procedure has been fulfilled.

3. Duplication of proceedings and international *res judicata*

54. Article 33(1) of the IACHR's Rules of Procedure provides that the admissibility of a petition before the Inter-American Commission requires that the subject of the petition is not pending in another international proceeding for settlement.

55. The Commission notes that Mr. Maldonado's claim regarding consular notification was included in the Avena Case litigated before the ICJ. While the basis for the claim before the Commission is essentially the same, and concerns the same alleged victim, the jurisdiction of the ICJ differs from that of the IACHR in significant respects, particularly insofar as the ICJ deals with interstate litigation whereas the Commission deals with petitions brought by individuals against states, and insofar as the rights at issue and the remedies provided by the Commission correspond directly to the individual presumably concerned. Accordingly, the Commission considers that the Avena litigation provides no bar to the admissibility of the present petition.

4. Colorable claim

56. For admissibility purposes, the Inter-American Commission must decide whether the alleged facts, if proven, could tend to establish a violation of the American Declaration, as required by Article 34(a) of the IACHR's Rules of Procedure, or whether the petition is "manifestly groundless" or is "obviously out of order," in accordance with section (b) of that same article. The level of conviction regarding those standards is different from that required in deciding on the merits of a complaint; the IACHR must perform a *prima facie* evaluation, not to establish the existence of a violation, but to examine if the petition establishes grounds for a possible or potential violation of a right guaranteed by the Declaration. That determination is a preliminary analysis and does not represent a prejudgment on the merits of the matter.

57. The petitioners allege that Mr. Maldonado suffers from severe mental disabilities, which was allegedly confirmed by psychological experts who found that his scores are within the range that demonstrates mental retardation. They also state that the alleged victim was represented by a court-appointed attorney who failed to meaningfully investigate, develop, and present substantial mitigating evidence that could have swayed the jury to spare his life. Moreover, the police purportedly failed to notify Mr. Maldonado of his right to consular notification in violation of Article 36 of the Vienna Convention on Consular Relations and his right to due process, although the police were aware that he was a Mexican national. Finally, petitioners argue that Mr. Maldonado faces execution by lethal injection when that mode of execution as currently practiced in Texas allegedly creates an unacceptable risk of causing excruciating pain and suffering to the inmate.

58. The State argues that the claims of mental retardation and ineffective assistance of counsel are both inadmissible under Article 34(a) of the Commission's Rules of Procedure because they fail to state facts that tend to establish a violation of the American Declaration. The State contends that the United States criminal justice system gives full effect to the fair trial protections and procedural guarantees contained in the Declaration and it has done so in Mr. Maldonado's case.

59. Taking into consideration the more rigorous degree of scrutiny that the Inter-American Commission has applied in death penalty cases,⁶ the IACHR observes that if proven, the petitioners' allegations would characterize violations of Articles I, XVIII, XXV and XXVI of the American Declaration. The IACHR must again underscore the point that it has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration.⁷

60. In conclusion, the Commission decides that the petition is not manifestly groundless or obviously out of order and finds that *prima facie*, the petitioners have complied with the requirements established in Article 34 of the Rules of Procedure of the Inter-American Commission.

IV. CONCLUSIONS

61. The Inter-American Commission concludes that it is competent to hear this case and that the petition is admissible according to Article 34 of its Rules of Procedure. Based on the arguments in fact and in law set forth above, and with no pre-judgment on the merits of the matters,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS DECIDES TO:

1. Declare the claims in the petition admissible with respect to Articles I, XVIII, XXV and XXVI of the American Declaration;
2. Give notice of this decision to the State and to the petitioners;
3. Continue with the analysis of the merits of the case; and
4. Publish this report and include it in the Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 29 day of the month of March, 2012.
(Signed): Tracy Robinson, First Vice-President; Felipe González, Second Vice-President; Rosa Maria Ortiz and Rose-Marie Antoine, Commissioners.

⁶ See, IACHR, Report No. 60/11, Petitions P-11.575 and others, Admissibility, Clarence Allen Lackey, March 24, 2011, paragraph 158; Report No. 77/09, Petition 1349-07, Admissibility, Orlando Cordia Hall, United States, August 5, 2009, paragraph 47; and Report No.61/03, Petition 4446-02, Admissibility, Roberto Moreno Ramos, United States, paragraph 66.

⁷ IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, paragraph 43.