

REPORT N° 52/02*
MERITS
CASE 11.753
RAMÓN MARTINEZ VILLAREAL
UNITED STATES
October 10, 2002

I. SUMMARY

1. On May 16, 1997, the Inter-American Commission on Human Rights (the "Commission") received a petition from the Center for Justice and International Law (the "Petitioners") against the United States of America (the "State" or "United States"). The petition was presented on behalf of Mr. Ramón Martínez Villareal, a Mexican national who is incarcerated on death row in Florence Prison in the State of Arizona. The petition and information subsequently submitted in the case indicate that on April 27, 1983 Mr. Martínez Villareal was convicted of two counts of first degree murder and one count of first degree burglary, and was sentenced to death on May 20, 1983 for his murder convictions. The initial petition also stated that Mr. Martínez Villareal was scheduled to be executed on May 21, 1997. His execution has since been postponed on several occasions and as of the date of this report his death sentence had not yet been carried out.

2. The Petitioners have alleged that the State is responsible for violations of Mr. Martínez Villareal's rights under Articles I, XVIII and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter the "American Declaration"), because his attorney failed to provide him with effective representation, and because Mr. Martínez Villareal suffers from mental illness and was therefore incompetent to stand trial or to be sentenced to death, and remains incompetent to be executed. The Petitioners have also alleged that the State is responsible for further violations of Mr. Martínez Villareal's rights under Articles I, XVIII and XXVI of the American Declaration because of the State's failure to comply with its obligations under Article 36 of the Vienna Convention on Consular Relations. Further, the Petitioners have alleged violations of Mr. Martínez Villareal's rights under Articles XVIII and XXVI of the Declaration as a consequence of the delay in the rendering of a final decision in his case. Finally, the Petitioners claim violations of Mr. Martínez Villareal's right to equality before the law under Article II of the American Declaration because of the manner in which the death penalty is administered by states in the United States.

3. The State claims in response that the Vienna Convention on Consular Relations does not vest any private rights in a criminal defendant and that in any event the Mexican Government was in a position to know about Mr. Martínez Villareal's case from news media and other sources. As to the adequacy of Mr. Villareal's legal representation, the State argues that domestic courts ultimately determined that Mr. Martínez Villareal was procedurally precluded from challenging the adequacy of his legal representation under domestic law because he failed to present the issue in his initial post-conviction review proceedings, with no acceptable cause for the default. In relation to the Petitioners' contentions respecting Mr. Martínez Villareal's

* Commission Member Professor Robert Goldman did not take part in the discussion and voting on this case, pursuant to Article 17(2) of the Commission's Rules of Procedure.

mental competence to be tried and executed, the State argues principally that these allegations are flawed because they assume as true a fact which has never been proven, namely that Mr. Martinez Villareal had mental problems around the time of his trial. With respect to the Petitioners' allegations respecting the delay in Mr. Martinez Villareal's criminal proceedings, the State contends that such delays are attributable to Mr. Martinez Villareal, and that in any event, arguments that he suffered unduly from delays in his case cannot be grounded in U.S. law. Finally, in respect of the Petitioners' alleged violations of the right to equality under Article II of the Declaration, the State argues that this demonstrates a misunderstanding of the American legal system, as all states in the United States that choose to utilize capital punishment are equally bound to meet the standards for such cases established by the U.S. Supreme Court.

4. In Report N° 108/00 adopted by the Commission on December 4, 2000, the Commission decided to admit the claims raised in the petition in respect of Articles I, II, XVIII and XXVI of the American Declaration and to continue with the analysis of the merits of the case.

5. As set forth in this Report, having examined the information provided by the parties and their contentions on the merits of the case, the Commission concludes that the United States is responsible for violations of Articles XVIII and XXVI of the American Declaration in the trial, conviction and sentencing to death of Ramon Martinez Villareal by reason of the State's failure to inform Mr. Martinez Villareal of his right to consular assistance under Article 36(1)(b) of the Vienna Convention on Consular Relations. The Commission also concludes that, should the State execute Mr. Martinez Villareal pursuant to the criminal proceedings at issue in this case, the State will perpetrate a grave and irreparable violation of the fundamental right to life under Article I of the American Declaration.

II. PROCEEDINGS BEFORE THE COMMISSION

6. Upon receipt of the Petitioners' petition, the Commission, by note dated May 19, 1997 advised the State that the Commission had been informed of Mr. Martinez Villareal's May 21, 1997 execution date, and requested that the State stay the execution for humanitarian reasons until the Commission had an opportunity to investigate the matter, or alternatively to commute Mr. Martinez Villareal's death sentence to one of life imprisonment.

7. On May 20, 1997, the Commission decided to open Case N° 11.753 and transmitted the pertinent parts of the petition to the Government of the United States by means of a note of the same date. The Commission requested the State's observations within 90 days as established by the Commission's prior Regulations.¹ Also by note dated May 20, 1997 the Commission informed the Petitioners that a case had been opened in respect of their petition, that the State had been advised of the situation set forth in their communication, and that the Commission had requested that the State stay Mr. Martinez Villareal's execution until it had the opportunity to investigate the allegations in the petition, or alternatively that the State commute his death sentence.

¹ During its 109th special session in December 2000, the Commission approved the Rules of Procedure of the Inter-American Commission on Human Rights, which replaced the Commission's prior Regulations of April 8, 1980. Pursuant to Article 78 of the Commission's Rules of Procedure, the Rules entered into force on May 1, 2001.

8. By communication dated July 8, 1997 the Petitioners delivered to the Commission further information respecting Mr. Martinez Villareal's situation. In a note dated July 22, 1997, the Commission transmitted the pertinent parts of the Petitioners' July 8, 1997 observations to the State, with a response requested within 90 days.

9. In a note dated December 18, 1997 the State delivered to the Commission observations on the Petitioners' July 8, 1997 observations. The State also provided observations on the substance of the Petitioners' petition. The pertinent parts of the State's response were transmitted to the Petitioners by note dated January 7, 1998 with observations requested within 30 days. In a letter dated March 19, 1998 the Petitioners requested that the deadline for their observations be extended until March 29, 1998.

10. By communication dated March 30, 1998 the Petitioners delivered to the Commission observations respecting the State's December 18, 1997 communication. In a note dated March 31, 1998, the Commission transmitted the pertinent parts of the Petitioners' observations to the State, with a response requested within 30 days.

11. The State responded by note dated September 8, 1998, in which it provided additional information on the admissibility of Mr. Martinez Villareal's petition. By communication dated November 25, 1998 the Commission transmitted the pertinent parts of the State's observations to the Petitioners, with a response requested within 30 days.

12. In a communication dated January 20, 1999 the Petitioners delivered to the Commission a response to the State's September 8, 1998 observations. By note dated February 5, 1999 the Commission transmitted the pertinent parts of the Petitioners' January 20, 1999 observations to the State, with a response requested within 30 days.

13. By note dated October 6, 1999 the State submitted to the Commission observations on the Petitioners' January 20, 1999 response. In a note dated October 20, 1999 the Commission transmitted the pertinent parts of the State's observations to the Petitioners, with a response requested within 30 days.

14. On November 19, 1999 the Petitioners delivered observations on the State's October 6, 1999 response. The Commission transmitted the Petitioners' observations to the State in a letter dated January 31, 2000 and requested a response within 30 days.

15. In a communication dated August 14, 2000 to the Petitioners, the Commission requested that the Petitioners provide the Commission with information concerning certain aspects of Mr. Martinez Villareal's case, with a response requested within 30 days. The Commission subsequently reiterated its August 14, 2000 request for information in a further note to the Petitioners dated October 24, 2000. By letter dated November 13, 2000 the Petitioners responded to the Commission's previous requests for information.

16. On December 4, 2000, during its 109th period of sessions, the Commission adopted Report N° 108/00 in which it decided to admit the claims in Mr. Martinez Villareal's petition in respect of Articles I, II, XVIII and XXVI of the American Declaration. The Commission transmitted the report to the parties in a communication dated December 8, 2000 in which the Commission also placed itself at the disposal of the parties with a view to reaching a friendly settlement of the case pursuant to Articles 18 and 20 of the Commission's Statute. The

Commission requested that the parties provide the Commission with a response within 30 days if they were interested in accepting the Commission's offer. As of the date of the present report, the Commission had not received any further information or observations from the Petitioners or the State concerning the Commission's friendly settlement offer or otherwise.

17. By communication dated December 8, 2000 the Commission also transmitted a copy of admissibility Report N° 108/00 to the United Mexican States and requested pursuant to Articles 18(d) and 20(b) of the Commission's Statute any information that Mexico might have respecting Mr. Villareal's claim that the United States did not comply with Article 36 of the Vienna Convention on Consular Relations. As of the date of the present report, the Commission had not received a response from the State of Mexico to the Commission's December 8, 2000 communication.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

18. In their initial petition and subsequent observations, the Petitioners provided information concerning the procedural history of Mr. Martinez Villareal's criminal proceedings. In this connection, they indicate that in April 1983 the Santa Cruz Superior Court of Arizona found Mr. Martinez Villareal guilty of two counts of first degree murder and one count of first degree burglary, and sentenced him to death for the murder convictions on May 20, 1983. The Arizona Supreme Court subsequently dismissed Mr. Martinez Villareal's appeals from his conviction and sentence.

19. The Petitioners also indicate that Mr. Martinez Villareal brought several petitions for post-conviction relief in the Arizona state courts and in the U.S. federal courts, as outlined in the Commission's admissibility Report N° 108/00 in this matter.² These proceeding were ultimately unsuccessful.

20. The Petitioners raise five claims of violations of Mr. Martinez Villareal's rights in their petition: the failure of the State to provide notice of consular assistance under Article 36(1)(b) of the Vienna Convention on Consular Relations;³ the failure of the State to provide and guarantee effective assistance of counsel to Mr. Martinez Villareal; the failure of the State to take into account Mr. Martinez Villareal's mental competence at the guilt/innocence and penalty phases of his criminal proceeding and its obligation not to execute Mr. Martinez Villareal due to his mental incompetence; the delay in Mr. Martinez Villareal's execution; and the unequal application of the death penalty throughout the United States.

1. Notification under the Vienna Convention on Consular Relations

² See IACHR, *Martinez Villareal v. United States*, Case N° 11.753, Report N° 108/00 dated December 4, 2000, Annual Report of the IACHR 2000, paras. 62-71.

³ Vienna Convention on Consular Relations, U.S.T. 77, T.I.A.S. N° 6820, 596 U.N.T.S. 261. Done at Vienna on April 24, 1963; entered into force on March 16, 1967.

21. The Petitioners allege first that in its Advisory Opinion OC-16/99 of October 1, 1999⁴ the Inter-American Court of Human Rights determined that Article 36(1)(b) of the Vienna Convention on Consular Relations vests an individual right in a detained foreign national to information concerning consular assistance. The Court concluded further that a State's failure in its obligations in this regard affects the guarantees of due process, and that the application of the death penalty under such conditions would constitute an arbitrary taking of an individual's life.

22. The Petitioners assert in this regard that the obligation of a state party to the Vienna Convention on Consular Relations to comply with the notification requirements under Article 36 of that treaty was acknowledged by the United States in its brief to the Inter-American Court in the proceedings pertaining to Advisory Opinion OC-16/99, where, according to the Petitioners, the U.S. stated that the lack of notification may result in a violation of rights. The United States is said to have concluded that relevant factors in this regard include the ability of the detained national to comprehend English, the quality and character of the legal representation provided and the need for and presence of interpreters and other forms of assistance.⁵

23. The Petitioners also claim that the State has not denied that it failed to provide Mr. Martinez Villareal with notice of his rights under Article 36 of the Vienna Convention on Consular Relations. They point out, however, that the State has steadfastly asserted that Article 36 of the Vienna Convention does not vest a right in the detained foreign national and has shown by its practice that it will not recognize such a right or provide a remedy for its alleged violation.

24. The Petitioners assert that the purpose of Article 36 of the Vienna Convention on Consular Relations is threefold, to assist the defendant in his navigation through a foreign and unfamiliar court system, to assist the defense attorney in gathering information from the defendant's home country, and to oversee the proceedings to ensure that the notions of fundamental fairness and trial procedure are not violated. In this context, the Petitioners argue that the state of Arizona had an affirmative duty to inform Mr. Martinez Villareal that as a Mexican National he had the right to consult with the Mexican Consulate in the earliest stages of his proceedings, and that the state of Arizona had an affirmative duty to expressly inform the Mexican Consulate that a Mexican National was to be tried for murder.

25. Further, the Petitioners contend that particular prejudice resulted in Mr. Martinez Villareal's case as a result of the violation of the Vienna Convention on Consular Relations, as he did not speak or understand English at the time of his trial, was represented by counsel who was by that counsel's own admission seriously incompetent, and was not provided with translation during his initial hearings. The Petitioners assert in particular that Mr. Martinez Villareal did not understand which people in the court room comprised the jury or what the purpose of the jury was, and that the *voir dire* proceedings were not translated into a language that he could understand. They also claim that the defense attorney did not contact Mr. Martinez Villareal's family in Mexico and was generally severely inexperienced.

⁴ 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).

⁵ Petitioners' Observations dated January 20, 1999, pp. 5-6.

26. On this basis, the Petitioners argue that had Mr. Martinez Villareal been informed of his right to consult with the consulate, it would have been possible for the consulate to become involved at the earliest stages of the proceedings, aiding Mr. Martinez Villareal's defense counsel and protecting his due process rights. Also on this basis, the Petitioners assert that, by the United States' own standards as articulated during the OC-16 proceedings, lack of notification in Mr. Martinez Villareal's case resulted in a violation of his due process rights that should be addressed, but that, according to the Petitioners, the United States will not acknowledge or remedy.

27. On this basis, the Petitioners allege that the State should be found in violation of Mr. Martinez Villareal's rights to a fair trial and to due process under Articles XVIII and XXVI of the American Declaration and that application of the death penalty under these circumstances would arbitrarily deprive Mr. Martinez Villareal of his right to life contrary to Articles I and XXVI of the Declaration.

2. Adequacy of Legal Representation

28. The Petitioners claim that Mr. Martinez Villareal received ineffective assistance of counsel during his criminal proceedings, contrary to Articles I, II, XVIII and XXVI of the American Declaration. The Petitioners allege in particular that Mr. Villareal's trial attorney was inexperienced and failed to investigate Mr. Martinez Villareal's mental competence, despite prevailing evidence that he may be mentally ill. The Petitioners also refer in this regard to the failure of Mr. Martinez Villareal's attorney to seek a change of venue for his trial and thereby ensure him an impartial trial, despite the publicity and other potentially prejudicial circumstances surrounding his prosecution. In support of these allegations, the Petitioners provided an affidavit sworn by Mr. Martinez Villareal's trial attorney on March 19, 1993 in which he attests to his own inexperience and ineffectiveness in representing Mr. Martinez Villareal.

29. According to the Petitioners, these deficiencies in representation also had the effect of precluding Mr. Martinez Villareal, on grounds of "procedural default," from raising before domestic courts his corollary claims of mental illness or incompetence in respect of the guilt/innocence and sentencing phases of his proceeding, also in violation of Articles I, II, XVIII and XXVI of the American Declaration.

3. Mr. Martinez Villareal's Competence to be Tried and Executed

30. The Petitioners challenge before the Commission Mr. Martinez Villareal's competence to be tried, sentenced to death and executed. In this regard, as part of the domestic procedural history of the case, the Petitioners indicated that a special hearing took place in the Arizona Superior Court on April 6 and May 6 to May 8, 1997 respecting Mr. Martinez Villareal's competence to be executed, and that the Court ultimately found that Mr. Martinez Villareal suffered from mental illness, mental retardation, and/or organic brain damage but that he was nevertheless competent to be executed. According to the Petitioners, Mr. Martinez Villareal petitioned the Superior Court in relation to this proceeding to allow him to obtain and admit the results of a Magnetic Resonance Image (MRI) of his brain. The Petitioners claim that an MRI is equivalent to an x-ray of soft tissue, in this case the brain, and could conclusively show whether or not Mr. Martinez Villareal is suffering from deterioration of the

frontal lobe. The Petitioners allege that the Superior Court denied Mr. Martinez Villareal's request and ruled that an MRI would be inadmissible.

31. The Petitioners also contend in this connection that a petition for special action was subsequently filed in the Arizona Supreme Court to review the trial court's determination of competency, and the Supreme Court held in a May 16, 1997 decision that the finding was correct. According to the Petitioners, however, two concurring justices noted that "the evidence makes it clear that defendant is mildly retarded and seriously mentally ill" and stated that "this is a case which raises serious doubts about the propriety of the death sentence."

32. Based in part upon these circumstances, the Petitioners allege that Mr. Martinez Villareal has been precluded from obtaining in domestic proceedings evidence of his mental illness in the form of a Magnetic Resonance Imaging scan of his brain, also in violation of his due process rights under the American Declaration. Further, the Petitioners indicate that this evidence could conclusively show whether or not the victim is suffering from deterioration of the frontal lobe and therefore is mentally ill and has been since birth.

33. On these grounds, the Petitioners contend that the State is responsible for violations of Mr. Martinez Villareal's rights to a fair trial and to due process of law under Articles XVIII and XXVI of the American Declaration for having tried and sentenced him to death for a capital crime. In this respect, the Petitioners argue that a binding norm of international law has developed among the member states of the OAS and domestically within the United States whereby states are obliged to refrain from executing the mentally incompetent, and that the United States is bound by this norm.

4. Delay in Mr. Martinez Villareal's Execution

34. The Petitioners have alleged that there has been unwarranted delay in the rendering of a final decision in Mr. Martinez Villareal's case, which in turn has led to a violation of Mr. Martinez Villareal's right to a fair trial, to due process of law, and to be free from cruel, infamous or unusual punishment contrary to Articles XVIII and XXVI of the American Declaration.

35. The Petitioners emphasize in this regard that Mr. Martinez Villareal was sentenced to death on May 20, 1983 and therefore as of the date of filing of their petition had been on death row for 14 years. As a consequence of this delay, the Petitioners argue that Mr. Martinez Villareal was the victim of unnecessary suffering, stress and trauma, and accordingly that the State failed to comply with its obligation to ensure that the death penalty is imposed in a humane manner.

36. The Petitioners also contend in this regard that the prolonged delay in Mr. Martinez Villareal's case is not attributable to him, but rather to the court system in which he has been engaged which permits such delays. The Petitioners therefore urge that delays of this nature do not bar assertions that the delays have violated Mr. Martinez Villareal's rights.⁶

⁶ Petitioners' submissions of July 8, 1997, p. 10, citing Pratt Morgan v. Attorney General for Jamaica [1993] All E.R. 769 (P.C.).

5. Right to Equal Protection

37. The Petitioners allege that the application of the death penalty in circumstances in which Mr. Martinez Villareal's rights under Articles XVIII and XXVI have been violated would contravene his right to life under Article I of the American Declaration, as well as his right to equality before the law under Article II of the Declaration. According to the Petitioners, this is in part because in the United States, individual states regulate whether and the manner in which the death penalty is implemented, and therefore the penalty is not equally applied in the United States.

B. Position of the State

38. As a context for its observations, the State provided the Commission with particulars concerning the circumstances of Mr. Martinez Villareal's crimes. According to the State, in October of 1982, an American ranch foreman and his assistant were shot to death in Santa Cruz County, Arizona and their truck and some personal belongings were stolen. Ramon Martinez Villareal, a Mexican national who the State alleges repeatedly entered the United States illegally, was convicted in a jury trial of the two murders and a previous burglary of the Bailey residence where the guns and ammunition used in the murder were also stolen. The State also claims that Mr. Martinez Villareal pleaded guilty to a subsequent burglary at the Aycock residence. On May 20, 1983, he was sentenced to death on each of the murder convictions and to consecutive prison terms of 10 years and 2 ½ years on the burglary convictions. The death penalty was based on two aggravating factors, depravity and commission for pecuniary gain, which were not offset by mitigating factors.⁷

39. With respect to the Petitioners' contentions regarding the Vienna Convention on Consular Relations, the State indicates that the Vienna Convention does not vest any private rights in a criminal defendant and therefore that reliance on this instrument by Mr. Martinez Villareal is misplaced.

40. More particularly, the State alleges that because no issue of treaty compliance was raised on Mr. Martinez Villareal's behalf until 1997, little information is available about what steps may have been taken to inform representatives of Mexico about Mr. Martinez Villareal's case. The State nevertheless contends that the Mexican Government was in a position to know about Mr. Martinez Villareal's case from news media and other sources. The State claims in particular that Mexico maintains consulates in Nogales, where Mr. Martinez Villareal was held and tried, and in Tucson. The State also makes reference in this connection to one story that was published in the Arizona Daily Star in Tucson on January 8, 1983 indicating that Mr. Martinez Villareal was a Mexican national, that he would be tried for the murders at issue, and that the prosecutor would probably seek the death penalty. Further, the State relies upon the recorded questioning of the prospective jurors for Mr. Martinez Villareal's trial, which it claims reflects that there had been substantial news coverage of the case not only in the Star, but also in the local Nogales papers such as the "Herald" and the "International" and the broadcast media, to the point where virtually all of the prospective jurors were aware of the case.

⁷ State's observations of December 18, 1997, p. 1.

41. Moreover, the United States claims that according to the records of the Santa Cruz County Jail Mr. Martinez Villareal was in fact visited by someone from the Mexican consulate on April 19, 1983, the first day of his trial. Based upon this information, the State argues that it must be assumed that the Mexican consular staffs in both Tucson and Nogales were also aware of the case, even if there had not been formal notification.

42. The State also contends that Tom McGrew, a son of one of the victims, had sworn in an affidavit that he personally contacted a Mexican consular officer in Nogales about the case and was told that the "Mexican Government was concerned with the proceedings and would monitor those proceedings."⁸

43. Regarding the Petitioners' claims pertaining to the fairness of Mr. Martinez Villareal's proceedings generally, the State argues that the petition is manifestly groundless because the Petitioners have failed to articulate any international "due process" standard that has allegedly been violated. The State also contends that according to the record, Mr. Martinez Villareal had been afforded due process consistent with the U.S. Constitution and applicable international norms.

44. Further, the State stresses that the domestic courts ultimately determined that Mr. Martinez Villareal was procedurally precluded from challenging the adequacy of his legal representation under domestic law because he failed to present the issue in his initial post-conviction review proceedings, with no acceptable cause for the default.

45. With respect to the Petitioners' complaints regarding a change of venue for Mr. Martinez Villareal's trial in particular, the State contends that these arguments ignore the fact that the trial court expended an entire day in the jury selection process, that issues concerning exposure to news accounts and contacts with the families of the victims were part of the *voir dire* process in choosing the jury members, and that it has not been shown that this process was inadequate or that the jury which heard the case was not impartial. Rather, the State argues that the real question regarding fairness in this context is the prejudicial effect of the publicity not its extensiveness, and that a *voir dire* is an effective method for determining whether such prejudice has been engendered in the community that a change in venue is necessary.⁹

46. In relation to the Petitioners' contentions respecting Mr. Martinez Villareal's mental competence to be tried and executed, the State argues that these allegations are flawed because they assume as true a fact which has never been proven, namely that Mr. Martinez Villareal had mental problems around the time of his trial. The State claims that this contention is nothing more than "unsupported extrapolation from testimony that he may have mental problems now."¹⁰ Indeed, the State contends that even the existence of significant current mental problems on Mr. Martinez Villareal's part has not been satisfactorily proved.

⁸ State's observations of December 18, 1997, pp. 1-2.

⁹ *Id.*, pp. 11-12, citing *Murphy v. Florida*, 421 U.S. 794; *State v. Greenawalt*, 128 Ariz. 150, 160-63, 624 P.2d 828, 840-41, cert. Denied, 454 U.S. 882 (1981).

¹⁰ *Id.*, p 10.

47. In this regard, the State points out that no claim of incompetency or mental problems was raised at the time of Mr. Martinez Villareal's trial and that the judge, who was of Hispanic background, "presumably would be particularly alert to indications of mental disorder in a Hispanic accused such as the Defendant."¹¹ As neither the trial judge nor Mr. Martinez Villareal's attorney perceived anything to suggest to them that Mr. Martinez Villareal suffered from any sort of mental problem and as the transcripts of those hearings do not contain anything indicating that they should have been concerned, the State asserts that there is substantial contemporary evidence that Mr. Martinez Villareal was acting normally at the time of the trial. The State notes further that the Federal District Court in 1994 concluded that there was insufficient evidence that, at the time of Mr. Martinez Villareal's trial eleven years earlier, his attorney should have entertained a *bona fide* doubt at Mr. Martinez Villareal's capacity to stand trial. In these circumstances, the State contends that it is unrealistic to suggest that Mr. Martinez Villareal's attorney would have searched for evidence of yet earlier mental problems in hopes of offering it as mitigation.¹²

48. The State also emphasizes that the Pinal County Superior Court, after conducting the 1997 hearing concerning Mr. Martinez Villareal's competence for execution, did not find that Mr. Martinez Villareal actually suffered from mental illness, mental retardation, or organic brain damage. Rather, according to the State, the Court found credible evidence on both sides of the issue, including credible evidence negating the existence of a legally-significant mental problem. Moreover, this determination was upheld by the Arizona Supreme Court and the U.S. Supreme Court denied certiorari in May 1997. The State further notes that the Arizona Board of Clemency then heard two days of testimony, including claims regarding Mr. Martinez Villareal's mental condition and effectiveness of trial counsel, but was not persuaded that there were grounds to grant Mr. Martinez Villareal a reprieve or commutation.

49. With respect to the Petitioners' allegations respecting the delay in Mr. Martinez Villareal's criminal proceedings, the State contends that such delays are attributable to Mr. Martinez Villareal, and that in any event, arguments that he suffered unduly from delays in his case cannot be grounded in U.S. law. The State relies in this regard upon jurisprudence from the U.S. courts according to which the existence of appellate delay designed to provide an appellant with procedural safeguards does not violate fundamental human rights, under the Sixth, Eighth or Fourteenth Amendments to the U.S. Constitution or otherwise.¹³

50. Finally, in respect of the Petitioners' alleged violations of the right to equality under Article II of the Declaration, the State contends that this demonstrates a misunderstanding of the American legal system, as all states in the United States that choose to utilize capital punishment are equally bound to meet the standards for such cases established by the U.S. Supreme Court. These include decisions applying the Fourteenth Amendment to the U.S. Constitution respecting due process of law, and the Eighth Amendment prohibiting cruel and unusual punishment. Accordingly, the State suggests that the Petitioners have failed to substantiate a violation of Article II of the Declaration in respect of Mr. Martinez Villareal.

¹¹ *Id.*, p. 9.

¹² *Id.*, p. 10, citing *Strickland v. Washington*, 466 U.S. 668 (1984).

¹³ *Id.*, p. 9, citing *McKenzie v. Day*, 57 F.2d 1461, 1466-67, adopted by en banc court, 57 F.3d 1493 (9th Cir., 1995); *Carter v. Johnson*, 110 F.3d 1098, 113 n.21 (5th Cir., 1997).

IV. ANALYSIS

A. Standard of Review

51. 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. As the right to life is widely-recognized as the supreme right of the human being, respect for which the enjoyment of all other rights depends, the Commission considers that it has an enhanced obligation to ensure that any deprivation of life that an OAS member state proposes to perpetrate through the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. This heightened scrutiny test is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty,¹⁴ and has been articulated and applied by the Commission in previous capital cases before it.¹⁵

52. This approach requires in particular strict adherence to the rules and principles of due process and fair trials in the context of capital cases. The Commission has previously emphasized that, due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.¹⁶

53. The Commission also notes that this heightened scrutiny test applicable to death penalty cases is not precluded by the Commission's fourth instance formula. According to this formula, the Commission in principle will not review the judgments issued by domestic courts acting within their competence and with due judicial guarantees.¹⁷ Where a possible violation of an individual's rights under applicable inter-American human rights instruments is involved, however, the Commission has consistently held that the fourth instance formula has no application and the Commission may consider the matter.¹⁸

¹⁴ 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", *supra*, 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"); UNHRC, *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.)

¹⁵ See e.g. Report N° 57/96 (*Andrews v. United States*), Annual Report of the IACHR 1997, paras. 170-171; Report N° 38/00 (*Baptiste v. Grenada*), Annual Report of the IACHR 1999, paras. 64-66; Report N° 41/00 (*McKenzie et al. v. Jamaica*), Annual Report of the IACHR 1999, paras. 169-171.

¹⁶ See e.g. *McKenzie et al. v. US*, *supra*, para. 188, citing, *inter alia*, *Woodson v. North Carolina*, 449 U.S. 944, 961 (U.S.S.C.).

¹⁷ See Report N° 39/96 (*Santiago Marzioni v. Argentina*), Annual Report of the IACHR 1996, p. 76, paras. 48-52. See also Report N° 29/88 (*Clifton Wright v. Jamaica*), Annual Report of the IACHR 1987-88, p. 154.

¹⁸ See e.g. *Marzioni v. Argentina*, *supra*; *Wright v. Jamaica*, *supra*; *Baptiste v. Grenada*, *supra*, para. 65; *McKenzie et al. v. Jamaica*, *supra*, para. 170.

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

B. Articles I, XVIII and XXVI of the American Declaration – the Right to Life, the Right to Due Process and a Fair Trial, and the Vienna Convention on Consular Relations

55. Articles I, XVIII and XXVI of the American Declaration provide as follows:

Article I – Right to life, liberty and personal security

Every human being has the right to life, liberty and the security of his person.

Article XVIII – Right to a fair trial

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XXVI – Right to due process of law

Every accused person is presumed to be innocent until proven guilty.

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

56. Among the claims raised by the Petitioners is the allegation that the State failed to comply with Article 36 of the Vienna Convention on Consular Relations in relation to the criminal proceedings against Mr. Martinez Villareal, as a consequence of which the State is said to have violated Mr. Martinez Villareal's rights to due process and a fair trial under Articles XVIII and XXVI of the American Declaration of the Rights and Duties of Man. The Petitioners also contend that in these circumstances, Mr. Martinez Villareal's execution would constitute an arbitrary deprivation of life contrary to Articles I and XXVI of the Declaration.

57. The text of Article 36 of the Vienna Convention is set forth below:

Article 36

COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.¹⁹

58. The Commission observes that the United States signed this instrument on April 24, 1963 and deposited its instrument of ratification of the treaty on November 24, 1969 absent any declarations or reservations²⁰ and therefore is and was at all relevant times bound by its provisions.²¹

59. Before proceeding further with the analysis of this issue, the Commission wishes to clarify the jurisdictional basis upon which the Commission considers Mr. Martinez Villareal's rights and the State's obligations under the Vienna Convention on Consular Relations. Neither the Vienna Convention on Consular Relations nor any other international instrument explicitly endows the Commission with jurisdiction to determine violations of that Convention, on the part of the United States or other states parties to the agreement. Accordingly, based upon the current jurisprudence of the Inter-American Court, the Commission does not consider that it has competence to adjudicate upon the State's responsibility for violations of the Vienna Convention on Consular Relations *per se*.²²

¹⁹ Vienna Convention on Consular Relations, *supra*, Article 36.

²⁰ United National Treaty Data Base, Vienna Convention on Consular Relations (last modified August 30, 2001) <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapter11/treaty29.asp>>.

²¹ Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF/39/27 (1969), Article 26 (providing that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.")

²² See I/A Court H.R., Las Palmeras Case, Judgment on Preliminary Objections of February 4, 2000, Annual Report 2000, p. 125 at 36 (finding that the procedure initiated in contentious cases before the Commission should refer specifically to rights (Continued...))

60. At the same time, the Commission has previously noted that in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged.²³ Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.

61. In this context, the Commission observes that the Vienna Convention on Consular Relations, as a treaty binding on the United States, prescribes procedural rights and obligations relating to foreign nationals who are arrested or committed to prison or to custody pending trial or are detained in any other manner by states parties to the treaty. In particular, Article 36(1)(b) of the Vienna Convention on Consular Relations obliges authorities of a receiving State to inform a foreign national in these circumstances without delay of his right to communicate with the consular post of his State, such that if he so requests the competent authorities of the receiving State shall, again without delay, inform the consular post of the sending State of the foreign national's arrest or detention and forward any communication addressed to the consular post by that person.²⁴

62. Moreover, the Commission considers that compliance with the rights of a foreign national under the Vienna Convention on Consular Relations is particularly relevant to determining whether a state has complied with the provisions of the American Declaration pertaining to the right to due process and to a fair trial as they apply 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.²⁵

(...Continuation)

protected by the American Convention or other convention that has been ratified by the State and that confers competence on the Inter-American Court or Commission to hear violations of the rights protected by that treaty.)

²³ See *Garza v. United States*, Case No 12.243, Annual Report of the IACHR 2000, paras. 88-89. See also I/A Court H.R., Advisory Opinion OC-10/89 of July 14, 1989, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, (Ser. A) No 10 (1989), para. 37 (pointing out that in determining the legal status of the American Declaration, it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948); ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31 stating that "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation". The Inter-American Court of Human Rights recently reiterated its endorsement of an evolutive interpretation of international human rights instruments, which takes into account developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions. Advisory Opinion OC-16/99, *supra*, para. 114, *citing, inter alia*, the decisions of the European Court of Human Rights in *Tryer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), and *Louizidou v. Turkey* (1995).

²⁴ Vienna Convention on Consular Relations, *supra*, Article 36(1)(b). See *similarly* Advisory Opinion OC-16/99, *supra*, para. 84 (concluding that "Article 36 of the Vienna Convention on Consular Relations endows a detained foreign national with individual rights that are the counterpart to the host State's correlative duties.").

²⁵ See *similarly* OC-16/99, *supra*, paras. 87, 137 (concluding that the consular communications to which Article 36 of the Vienna Convention on Consular Relations refers concern the protection of the rights of the national of the sending state and may be of benefit to him, and moreover, that failure to afford these rights is prejudicial to the guarantees of due process of law under the relevant provisions of international human rights treaties such as the American Convention on Human Rights and the International Covenant on Civil and Political Rights).

63. More particularly, in accordance with the Commission's previous jurisprudence²⁶ as well as the terms of pertinent international instruments and general principles of international law, the requisite due process and fair trial protections guaranteed under Articles XVIII and XXVI of the American Declaration include most fundamentally the right of a defendant to be presumed innocent until proven guilty according to law,²⁷ the right to prior notification in detail of the charges against him,²⁸ the right to adequate time and means for the preparation of his defense,²⁹ the right to be tried by a competent, independent and impartial tribunal previously established by law,³⁰ 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,³¹ and the right not to be compelled to be a witness against himself or to plead guilty.³²

64. The Commission considers that these protections in turn are of such a nature that, in the absence of access to consular assistance, a foreign national may be placed at a considerable disadvantage in the context of a criminal proceeding taken against him or her by a state. This could arise, for example, by virtue of foreign national's inability to speak the language of the state, a lack of familiarity with its legal system, or an inability to gather relevant information, such as mitigating evidence, from his or her home country. Disadvantages of this nature could in turn undermine the effectiveness of the foreign national's due process rights to, for example, understand the charges against him and to adequately prepare his or her defense. It is also apparent that access to consular assistance could potentially mitigate such disadvantages by such means as the provision of linguistic and legal assistance as well as the identification and collection of pertinent information from the defendant's state of nationality.³³

65. The Commission finds support for this approach in recent judgments of the Inter-American Court of Human Rights in its Advisory Opinion OC-16/99³⁴ and by the International

²⁶ See e.g. *Garza v. U.S.*, *supra*, para. 101.

²⁷ Universal Declaration of Human Rights, GA Res. 217A, UN Doc. A/810 at 71 (1948), Article 11(1); American Declaration of the Rights and Duties of Man, Article XXVI; International Covenant on Civil and Political Rights, 999 U.N.T.S. 3, entered into force Jan. 3, 1976, Article 14(2); American Convention on Human Rights, Article 8(2).

²⁸ Universal Declaration of Human Rights, Article 11(1); International Covenant on Civil and Political Rights, Article 14(3)(a); American Convention on Human Rights, Article 8(2)(b).

²⁹ Universal Declaration of Human Rights, Article 11(1); International Covenant on Civil and Political Rights, Article 14(3)(b); American Convention on Human Rights, Article 8(2)(c).

³⁰ Universal Declaration of Human Rights, Article 10; American Declaration of the Rights and Duties of Man, Arts. XVIII, XXVI; International Covenant on Civil and Political Rights, Article 14(1); American Convention on Human Rights, Article 8(1).

³¹ Universal Declaration of Human Rights, Article 11(1); International Covenant on Civil and Political Rights, Article 14(3)(b), (d); American Convention on Human Rights, Article 8(2)(d).

³² See International Covenant on Civil and Political Rights, Article 14(3)(g); American Convention on Human Rights, Article 8(2)(g). See also Advisory Opinion OC-16/99, *supra*, para. 117 (identifying the right not to incriminate oneself as one example of a new procedural right that has developed as part of the right to the due process of law under international human rights law).

³³ See similarly Advisory Opinion OC-16/99, *supra*, para. 121 (finding in the context of capital prosecutions in particular that

the real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance. In such circumstances, it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person.).

³⁴ Advisory Opinion OC-16/99, *supra*.

Court of Justice (the "ICJ") in the LaGrand Case (Germany v. United States),³⁵ in which these tribunals also had occasion to interpret the Vienna Convention on Consular Relations in the context of capital proceedings.

66. The Inter-American Court's Advisory Opinion OC-16/99 resulted from a request by the government of the United Mexican Republic pursuant to Article 64(1) of the American Convention on Human Rights³⁶ for an opinion on several questions, among which were the following points relating to the Vienna Convention on Consular Relations:

In relation to the Vienna Convention on Consular Relations:

[...]

4. From the point of view of international law and with regard to aliens, what should be the juridical consequences of the imposition and application of the death penalty in the light of failure to give the notification referred to in Article 36(1)(b) of the Vienna Convention?

[...]

With regard to the International Covenant on Civil and Political Rights:

[...]

10. In connection with the Covenant and with regard to persons of foreign nationality, what should be the juridical consequences of the imposition and application of the death penalty in the light of failure to give the notification referred to in Article 36(1)(b) of the Vienna Convention [on Consular Relations]?

[...]

With regard to the OAS Charter and the American Declaration of the Rights and Duties of States:

12. With regard to aliens in the framework of Article 3(1) of the OAS Charter and Articles I, II and XXVI of the Declaration, what should be the juridical consequences of the imposition and execution of the death penalty when there has been a failure to make the notification referred to in Article 36(1)(b) of the Vienna Convention [on Consular Relations]?³⁷

67. In addressing these aspects of Mexico's request, the Inter-American Court emphasized the strict standard of due process that must be considered to apply in the prosecution of capital offenses. The Court recalled in this regard its previous Advisory Opinion OC-3/83, in which it observed that

the application and imposition of capital punishment are governed by the principle that "no one shall be arbitrarily deprived of his life." Both Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the Convention require strict observance of legal procedure and

³⁵ International Court of Justice, LaGrand Case (Germany v. United States), Judgment of June 27, 2001, General List N° 104.

³⁶ Article 64(1) of the American Convention on Human Rights provides: "1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of any other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court."

³⁷ OC-16/99, *supra*, para. 125.

limit application of this penalty to "the most serious crimes." In both instruments, therefore, there is a marked tendency toward restricting application of the death penalty and ultimately abolishing it.³⁸

68. The Inter-American Court interpreted this tendency as an "internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases."³⁹ According to the Court, "because 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."⁴⁰

69. In respect of a defendant's right to information under Article 36(1)(b) of the Vienna Convention on Consular Relations in particular, the Court concluded that owing to the linguistic and other disadvantages faced by foreign nationals, this right is among the minimum guarantees essential for foreign nationals to adequately prepare their defense and receive a fair trial. Accordingly, the Court considered that respect for the requirements of the Vienna Convention on Consular Relations renders it possible for the right to the due process of law upheld in Article 14 of the International Covenant on Civil and Political Rights to have practical effect in tangible cases.⁴¹ It also observed that this obligation

becomes all the more imperative here, given the exceptionally grave and irreparable nature of the penalty that one sentenced to death could receive. If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life.⁴²

70. Based upon this analysis, the Court concluded that a failure to comply with Article 36 of the Vienna Convention on Consular Relations in respect of a particular foreign national in a capital case would give rise to an arbitrary deprivation of life under international human rights principles. According to the Court

nonobservance of a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be "arbitrarily" deprived of one's life, in the terms of the relevant provisions of the human rights treaties (e.g. the American Convention on Human Rights, Article 4; the International Covenant on Civil and Political Rights, Article 6) with the juridical consequences inherent in a violation of this nature, i.e., those pertaining to the international responsibility of the State and the duty to make reparations."⁴³

71. The International Court of Justice likewise recently pronounced judgment in the LaGrand Case (Germany v. United States)⁴⁴ in connection with a failure on the part of the United States to adhere to the Vienna Convention on Consular Relations in a specific capital

³⁸ OC-16/99, *supra*, para. 134, citing I/A Court H.R., Advisory Opinion OC-3/83 of September 8, 1983, Restrictions to the Death Penalty (Articles 4(2) and 4(4) of the American Convention on Human Rights), (Ser. A) N° 3 (1983).

³⁹ *Id.*, para. 135.

⁴⁰ *Id.*, para. 136.

⁴¹ *Id.*, paras. 119-124.

⁴² *Id.*, para. 135.

⁴³ *Id.*, paras. 134-137.

⁴⁴ LaGrand case, *supra*.

prosecution. The LaGrand case related to the conviction and sentencing to death in 1984 for first degree murder in Arizona of two German nationals, brothers Karl and Walter LaGrand. Karl LaGrand was executed on February 24, 1999 and on the day before the scheduled execution date for Walter LaGrand, March 2, 1999, Germany brought the case to the ICJ.

72. On the merits of the case, Germany alleged that the United States failed to comply with its obligation under Article 36 of the Vienna Convention on Consular Relations to inform the LaGrand brothers upon their arrest and without delay of their right to communicate with the consulate of Germany. Germany also contended that the LaGrand brothers had been precluded by the U.S. legal doctrine of “procedural default” from raising the Vienna Convention on Consular Relations breach before U.S. courts. The United States acknowledged its failure to ensure compliance with Vienna Convention on Consular Relations, but argued that the Vienna Convention confers no rights on individual nationals and therefore had no bearing on domestic procedures in criminal cases. The United States also submitted that it had apologized to Germany and was taking substantial measures aimed at preventing any recurrence.

73. In its Judgment on the merits of the case, the ICJ found by fourteen votes to one that by not informing the LaGrand brothers without delay following their arrest of their rights under Article 36(1)(b) of the Vienna Convention on Consular Relations the United States breached its obligations to Germany and to the LaGrand brothers under that provision. It also found that the United States breached its obligation to Germany and to the LaGrand brothers under Article 36(2) of the Vienna Convention on Consular Relations to give full effect under its laws and regulations to the rights under Article 36(1), by not permitting the review and reconsideration of the LaGrand brothers’ convictions and sentences after the violations of the Vienna Convention on Consular Relations had been established.

74. In reaching these conclusions, the ICJ found that by its plain terms Article 36 creates individuals rights which, in the context of the ICJ jurisdiction, could be invoked by the national State of the detained person and which had been violated by the United States in respect of the LaGrands:

The Court notes that Article 36, paragraph 1(b), spells out the obligations the receiving State has towards the detained persons and the sending State. It provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the Individual’s detention “without delay”. It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State “without delay”. Significantly, this subparagraph ends with the following language: “The said authorities shall inform the person concerned without delay of *his rights* under this subparagraph” (emphasis added). Moreover, under Article 36, paragraph 1(c), the sending State’s right to provide consular assistance to the detained person may not be exercised “if he expressly opposes such action”. The clarity of these provisions, viewed in this context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand. [. . .] Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case.⁴⁵

75. Therefore, as with the Inter-American Court of Human Rights, the International Court of Justice recognized that a failure to provide notification under Article 36 of the Vienna

⁴⁵ *Id.*, para. 77.

Convention on Consular Relations entails breaches of international legal obligations owed to both the sending State and the individual concerned, which may in turn give rise to the international responsibility of the receiving State. While the ICJ declined to address the potential nature of this right as a human right,⁴⁶ the Inter-American Court determined that Article 36(1)(b) of the Vienna Convention on Consular Relations also gives rise to human rights obligations as prescribed in the due process provisions of international human rights treaties.⁴⁷

76. The Commission notes that the significance of compliance with the Vienna Convention on Consular Relations for the protection of foreign nationals has been explicitly recognized in other international fora, including the UN Commission on Human Rights⁴⁸ and the General Assembly of the Organization of American States.⁴⁹ Moreover, in a previous proceeding before the International Court of Justice, the United States itself asserted the existence of a right under Article 36 of the Vienna Convention on Consular Relations on the part of foreign nationals to consular access and emphasized the importance of compliance with those obligations.⁵⁰

77. Therefore, the Commission considers that it is appropriate to consider compliance by a state party to the Vienna Convention on Consular Relations with the requirements of Article 36 of that treaty in interpreting and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to prison or to custody pending trial, or is detained in any other manner by that state.⁵¹ In particular, the Commission may consider the extent to which a state party has given effect to the requirements of Article 36 of the Vienna Convention on Consular Relations for the purpose of evaluating that state's compliance with a foreign national's due process rights under Articles XVIII and XXVI of the American Declaration.

78. In the circumstances of Mr. Martinez Villareal's case, the Petitioners have alleged that the State failed to comply with its obligations under Article 36(1)(b) of the Vienna Convention on Consular Relations in respect of Mr. Martinez Villareal's arrest and subsequent prosecution. For its part, the State has not contended that the requirements of Article 36(1)(b) of the Vienna Convention on Consular Relations were satisfied in the present case. The State

⁴⁶ *Id.*, para. 78.

⁴⁷ OC-16/99, *supra*, paras 121-124, 137.

⁴⁸ See UN Human Rights Commission, The Question of the Death Penalty, U.N. Doc. N° E/CN.4/RES/2001/68 (April 25, 2001), item 4(d) (calling upon all UN member states that still retain the death penalty to "comply fully with their international obligations, in particular with those under the Vienna Convention on Consular Relations.").

⁴⁹ Organization of American States, General Assembly Resolution 1717 (XXX), AG/RES. 1717 (XXX-0/00), The Human Rights of All Migrant Workers and Their Families (reaffirming "emphatically, the duty of states to ensure full respect and observance of the 1963 Vienna Convention on Consular Relations, particularly with regard to the right of foreign nationals, regardless of their immigration status, to communicate with a consular officials of their own state in case of detention and the obligation of the state in whose territory the detention occurs to inform the foreign national of that right.").

⁵⁰ ICJ, United States Diplomatic and Consular Staff in Tehran (USA v. Iran), ICJ Pleadings, at 174 (asserting on behalf of the United States that

[t]he channel of communication between consular officers and nationals must at all time remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations [...] Article 36 [of the Vienna Convention on Consular Relations] establishes rights not only for the consular officer but, perhaps more importantly, for the nationals of the sending state who are assured access to consular officers and through them to others.").

⁵¹ See *similarly* OC-16/99, *supra*, paras. 87, 137.

argues, however, that the publicity surrounding Mr. Martinez Villareal's trial was such that it should be assumed that the Mexican consular staffs in Tucson and Nogales were aware of the case. The State also refers in this regard to documentary and other evidence suggesting that consular staff had commented on Mr. Martinez Villareal's trial and may in fact have visited him on the first day of his trial.

79. The Commission notes in this respect that the State has not provided the Commission with evidence substantiating its allegations concerning the state of knowledge of the Mexican consular staff in Texas. Further, in light of the strict standard of due process to which capital defendants are entitled under prevailing international human rights law and the United State's clear and positive obligation under the Vienna Convention on Consular Relations to ensure formal notification of the initiation of criminal proceedings such as those against Mr. Martinez Villareal, the Commission does not consider it to be appropriate or adequate to rely upon speculation as to whether and to what extent Mexico may have been aware of Mr. Martinez Villareal's situation.

80. Moreover, even if the Mexican consulates had been aware of the proceedings against Mr. Villareal as the State suggests, this would on the State's submissions have occurred at the earliest at the outset of Mr. Martinez Villareal's trial and therefore after crucial preliminary stages of his criminal proceedings transpired, including the retaining of his attorney, the presentation of the charges against him and the development of his defense. It would not have occurred "without delay" as required under Article 36(1)(b) of the Vienna Convention on Consular Relations. And in any event, conjecture as to the possible state of knowledge of the Mexican consular staff does nothing to address Mr. Martinez Villareal's independent entitlement to be informed of his right to consular assistance as the individual best placed to gauge his potential need for such support.

81. The Commission therefore concludes that the State failed to inform Mr. Martinez Villareal of his rights under Article 36(1)(b) of the Vienna Convention on Consular Relations and likewise failed to inform the Mexican consulates of Mr. Martinez Villareal's arrest and subsequent prosecution as required under that provision.

82. Further, the Commission finds that in the context of Mr. Martinez Villareal's case, the absence of notification under Article 36(1)(b) of the Vienna Convention on Consular Relations could on the information available have had a significant effect on the fairness of Mr. Martinez Villareal's criminal proceedings. According to the record, Mr. Martinez Villareal was a Mexican national who was arrested and tried in the United States, but who did not speak English and was represented by an attorney who did not speak Spanish. The record also indicates that Mr. Martinez Villareal was not familiar with the U.S. legal system and that this, together with his linguistic limitations, affected his understanding of and participation in the criminal proceedings against him despite the presence of a translator. The Petitioners claim, for example, that Mr. Villareal did not understand which people in the courtroom comprised the jury or what the purpose of the jury was, and that the *voir dire* proceedings were not translated into a language that he could understand. The record also indicates Mr. Martinez Villareal's attorney failed to contact his family in Mexico and, moreover, personally attested through an affidavit as to his overall inexperience and ineffectiveness in handling Mr. Martinez Villareal's case. Further, there is evidence suggesting that Mr. Martinez Villareal suffered from some degree of mental deficiency during at least certain stages of the criminal proceedings against him.

83. These circumstances strongly suggest that the quality of due process afforded to Mr. Martinez Villareal suffered as a consequence of his status as a foreign national, a circumstance that compliance with the notification requirements under Article 36(1)(b) of the Vienna Convention on Consular Relations may well have mitigated. The Commission also cannot find that the standard of due process owing to Mr. Martinez Villareal under the American Declaration and under general principles of international law was satisfied based upon the State's contentions in this matter as to the possible state of knowledge or involvement of Mexican consular officials.

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

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

86. In a case such as the present, where a defendant's conviction has occurred as a result of proceedings that fail to satisfy the minimal requirements of fairness and due process, the Commission considers that the appropriate remedy includes a re-trial in accordance with the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration or, where a re-trial in compliance with these protections is not possible, Mr. Martinez Villareal's release.⁵²

87. In light of the Commission's finding regarding the violation of Mr. Martinez Villareal's rights to due process and to a fair trial under Article XVIII and XXVI of the Declaration in connection with the absence of notification under Article 36 of the Vienna Convention on Consular Relations, and its corresponding recommendation that Mr. Martinez Villareal be afforded a new trial or alternatively released, the Commission does not consider it necessary to determine the remaining claims raised by the Petitioners in this case.

⁵² See *similarly* IACHR, Peter Benjamin et al. v. Trinidad and Tobago, Case N° 12.148, Report N° 53/00, para. 283, n. 131. In this regard, the Inter-American Court made the following pertinent comments in its May 30, 1999 Judgment in the *Castillo Petruzzi* case:

If the proceedings upon which the judgment rests have serious defects that strip them of the efficacy they must have under normal circumstances, then the judgment will not stand. It will not have the necessary underpinning, which is litigation conducted by law. The concept of nullification of a proceeding is a familiar one. With it, certain acts are invalidated and any proceedings that followed the proceeding in which the violation that caused the invalidation occurred, are repeated. This, in turn, means that a new judgment is handed down. The legitimacy of the judgment rests upon the legitimacy of the process.

I/A Court H.R., *Castillo Petruzzi et al.*, Judgment of May 30, 1999, Annual Report 1998, para. 219.

V. PROCEEDINGS SUBSEQUENT TO REPORT 114/01

88. On October 15, 2001, the Commission adopted Report 114/01 pursuant to Article 43 of its Rules of Procedure, setting forth its analysis of the record, findings and recommendations in this matter.

89. Report 114/01 was transmitted to the State by note dated October 19, 2001, with a request that the State provide information as to the measures it had taken to comply with the recommendations set forth in the report within a period of two months, in accordance with Article 43(2) of the Commission's Rules.

90. By communication dated December 26, 2001 and received by the Commission on December 27, 2001, the State delivered a response to the Commission's request for information, in which it requested that the Commission "reconsider the legal basis of its conclusions and recommendations, withdraw Report No. 114/01, and order the petition dismissed."

91. Prior to discussing these objections in further detail, the Commission emphasizes that the purpose of transmitting a preliminary merits report to the state concerned in accordance with Article 43(2) of the Commission's Rules of Procedure is to receive information concerning what measures have been adopted to comply with the Commission's recommendations.⁵³ At this stage of the process, the parties have had opportunities to argue their positions, the admissibility and merits phases of the process are completed, and the Commission has rendered its decision. Therefore, while a state may provide its views on the factual and legal conclusions reached by the Commission in its preliminary report, it is not for a state at this point to reiterate its previous arguments, or to raise new arguments, concerning the admissibility or merits of the complaint before the Commission, nor is the Commission obliged to consider any such submissions prior to adopting its final report on the matter.

92. In light of the significance of the legal issues raised in this matter and their potential implications beyond of the circumstances of the present case, however, and without detracting from the procedural considerations noted above, the Commission has decided to summarize and provide observations on certain aspects of the State's response. In this respect, the State based its rejection of the Commission's report on three grounds: that the American Declaration on the Rights and Duties of Man is no more than a recommendation to the American states that does not create legally binding obligations; that even if it were possible for a state to violate the Declaration, the petition does not state facts that would constitute a violation of any of the provisions of the Declaration; and that the meaning and extent of the United States' obligations pursuant to the Vienna Convention on Consular Relations does not fall within the competence of the Commission.

93. The United States contended in particular that Mr. Martinez Villareal's arguments concerning his rights to a fair trial and to due process, as well as those pertaining to his mental

⁵³ Article 43(2) of the Commission's Rules of Procedure provides: "If [the Commission] establishes one or more violations, it shall prepare a preliminary report with the proposals and recommendations it deems pertinent and shall transmit it to the State in question. In so doing, it shall set a deadline *by which the State in question must report on the measures adopted to comply with the recommendations*. The State shall not be authorized to publish the report until the Commission adopts a decision in this respect." [emphasis added]

competency, have been carefully reviewed by the courts of the United States and that he continues to seek relief through domestic procedure available to him. The State argued further that, notwithstanding these protections, the Commission found Mr. Martinez Villareal's conviction and sentence to be fundamentally flawed because he was not advised at the time of his arrest that he could request consular assistance from Mexico as required under Article 36 of the Vienna Convention on Consular Relations. The State challenged the Commission's reasoning in this respect, and disputed in particular the Commission's reliance upon the views of the Inter-American Court of Human Rights in its Advisory Opinion OC-16/99, as "the United States fundamentally disagrees with the Court's reasoning and conclusions in that proceeding."

94. The State also reiterated its submission before the Inter-American Court and before this Commission that the "consular notification obligation of the Vienna Convention establishes neither a prerequisite for the observance of human rights in criminal cases, nor an independent source of individual human rights." In addition, the State asserted that the Commission's findings are beyond the appropriate scope of its competence, to the extent that the Commission suggests that a violation of the obligations of Article 36 of the Vienna Convention requires that a criminal defendant be accorded a new trial or set free, notwithstanding the Commission's finding that it did not consider itself competent to adjudicate upon the State's responsibility for violations of the Vienna Convention on Consular Relations *per se*.

95. Finally, the State provided the following concluding observations:

The United States nevertheless reiterates that it takes its obligations under the Vienna Convention regarding consular notification and access very seriously. Since 1998, the United States has undertaken an intensive effort to improve compliance by Federal, state and local government officials. That effort is ongoing and has been permanently institutionalized. The Department of State has published a 72-page booklet (Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, 1998), a pocket reference card for arresting officials, and a training video to assist with this effort, and continues to work closely with state as well as federal officials to ensure compliance with consular notification obligations.

96. With regard to the State's assertion that the American Declaration constitutes no more than a recommendation to OAS member states, the Commission reiterates the well-established precept, articulated in the admissibility report in this matter, that the American Declaration is a source of international obligations for the United States and other OAS member states that are not parties to the American Convention on Human Rights.⁵⁴

97. As to the Commission's competence in relation to the Vienna Convention on Consular Relations, it was clearly determined in the merits decision in this matter that the Commission may properly consider the extent to which a state party to the Vienna Convention on Consular Relations has given effect to the requirements of Article 36 of that treaty, insofar as these requirements constitute part of the *corpus juris gentium* of international legal rules applicable in evaluating that state's respect for the rights under the American Declaration. As the Commission concluded in the circumstances of Mr. Martinez Villareal's complaint, non-

⁵⁴ Case No. 11.753, Report No. 108/00, Ramón Martínez Villareal v. United States (Admissibility), Annual Report of the IACHR 2000, para. 57, n. 7, citing, *inter alia*, I/A Court H.R., Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, Ser. A No. 10 (1989), paras. 35-45.

compliance with the obligation under Article 36 can have a direct and deleterious effect on the quality of due process afforded to a defendant and thereby call into question compliance with the requirements of Articles XVIII and XXVI of the American Declaration as well as similar provisions of other international human rights instruments.

98. With regard to the State's concluding submissions, the Commission is encouraged that the United States has taken measures to enhance compliance with its obligations under the Vienna Convention on Consular Relations regarding consular notification and access, fundamental as these obligations are to the proper and effective guarantee of the rights of individuals who find themselves arrested, committed to prison or to custody pending trial or otherwise detained in a state of which they are not nationals. To this extent, the State appears to have taken some measures to implement the Commission's second recommendation, as reproduced below. No information has been provided, however, concerning implementation of the Commission's first and most immediate recommendation, namely to provide an effective remedy to the individual victim in this case. The Commission therefore concludes that the State has failed to take measures to comply fully with the Commission's recommendations. On this basis, and having considered the State's observations, the Commission has decided to ratify its conclusions and reiterate its recommendations, as set forth below.

VI. CONCLUSIONS

99. The Commission, based upon the foregoing considerations of fact and law, and in light of the response of the State to Report 114/01, hereby ratifies the following conclusions.

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

VII. RECOMMENDATIONS

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

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

1. Provide Mr. Martínez Villareal with an effective remedy, which includes a re-trial in accordance with the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration or, where a re-trial in compliance with these protections is not possible, Mr. Martínez Villareal's release.
2. Review its laws, procedures and practices to ensure that foreign nationals who are arrested or committed to prison or to custody pending trial or are detained in any other manner in the United States are informed without delay of their right to consular assistance and that, with his or her concurrence, the appropriate

consulate is informed without delay of the foreign national's circumstances, in accordance with the due process and fair trial protections enshrined in Articles XVIII and XXVI of the American Declaration.

VIII. NOTIFICATION AND PUBLICATION

102. In light of the above, and given the exceptional circumstances of the present case, where the victim remains under imminent threat of execution pursuant to a death sentence that the Commission has determined to be invalid and where the State has clearly indicated its intention not to comply with the Commission's recommendations concerning violations of the American Declaration of the Rights and Duties of Man, the Commission has decided pursuant to Article 45(2) and (3) of its Rules of Procedure to set no further time period prior to publication for the parties to present information on compliance with the recommendations, to transmit this Report to the State and to the Petitioners, 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 that govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until they have been complied with by the United States.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on this the 10th day of October 2002. Signed: Juan Méndez, President; Marta Altolaguirre, First Vice President; José Zalaquett, Second Vice President; Julio Prado Vallejo, and Clare K. Roberts, Commission members.

CONCURRING OPINION OF COMMISSIONER HÉLIO BICUDO⁵⁵

1. Although I endorse the findings, reasoning and motives of my fellow commissioners in this report, I would like to take the matter further and express my understanding concerning the lawfulness of the death penalty in the inter-American system.

2. The American Declaration of the Rights and Duties of Man (hereinafter "American Declaration"), approved at the Ninth International American Conference, which took place in Santa Fe de Bogotá in May and June of 1948, affirms that "Every human being has the right to life, liberty and the security of his person" (Article I) and, moreover, that "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor" (Article II).

3. Article 4 of the American Convention on Human Rights (hereinafter "American Convention"), approved on November 22, 1969 in San Jose, Costa Rica, states that "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

4. At the same time, the American Convention, by including the right to personal integrity in the civil and political rights framework, affirms that "No one shall be subjected to torture or to cruel, inhumane, or degrading punishment or treatment."

5. However, death penalty is provided for in the American Convention in its original version. Article 4, Section 2 allows the death penalty to be applied by member states only for the most serious crimes.

6. There is a contradiction among the aforementioned articles which repudiate torture, cruel, inhumane or degrading punishment or treatment.

7. The American Declaration considers life to be a fundamental right, and the American Convention condemns torture or the imposition of cruel, inhumane or degrading punishment or treatment. The elimination of a life could be deemed torture or cruel, inhumane or degrading punishment or treatment.

8. It seems that the tolerance expressed in Article 4, Section 2 of the American Convention reveals the sole adoption of a political position of conciliation between all member states in order to approve a more general article, the one about the right to life.

9. Before analyzing what it means for some States to retain the death penalty as a part of their legal systems, it is important to note that the Inter-American Convention to Prevent and Punish Torture, signed in Cartagena de Indias, Colombia, on December 9th, 1985, describes the meaning of torture as follows: "Torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for

⁵⁵ When the preliminary merits report in this matter was approved pursuant to Article 43 of the Commission's Rules of Procedure, the Commission's composition included Prof. Hélio Bicudo, who at that time adopted a separate opinion. Accordingly, Prof. Bicudo's separate opinion has been included with the final report in this case approved under Article 45 of the Commission's Rules, even though Prof. Bicudo's term as a Commission Member expired on December 31, 2001.

purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose” (Article 2).

10. Notice that this article addresses torture as a personal punishment or penalty in all circumstances.

11. The death penalty brings immeasurable suffering to the individual. Is it possible to imagine the anguish that the individual feels when he/she is informed of the verdict? Or the moments leading up to the actual execution? Would it be possible to evaluate the suffering of those who wait on death row for execution, in some cases for several years? In the United States, fifteen, sixteen or seventeen year-old minors, who committed homicide and subsequently received the death penalty, wait for fifteen years or longer for their execution. Is it possible to imagine a fate worse than remaining between hope and despair until the day of execution?

12. The OAS member states, by adopting the Convention on Forced Disappearance of Persons, reaffirms that “the true meaning of American solidarity and good neighborliness can be none other than that of consolidating in the Hemisphere, in the framework of democratic institutions, a system of individual freedom and social justice based on respect for essential human rights.”

13. It is important to mention that in 1998 and 1999, the United States was the only country in the world known for executing minors under 18 years of age. To that extent, it is important to note that the United States has accepted the International Covenant on Civil and Political Rights since September 1992, Article 6(5) of which establishes that the death penalty cannot be imposed on minors under 18 years old or on pregnant women. The U.S. Senate opted to express its reservation to this section at the moment of its ratification but currently there is an international consensus opposed to that reservation based on Article 19(c) of the Vienna Convention on the Law of Treaties. This Convention gives the State the possibility to formulate reservations, but these reservations cannot be incompatible with the object and purpose of the treaty.

14. In June 2000, Shaka Sankofa, formerly known as Gary Graham, was convicted in the State of Texas for a crime he committed when he was 17 years old. He was executed after waiting 19 years on death row, although the Inter-American Commission on Human Rights (hereinafter “IACHR” or “Commission”) had formally presented requests to the American government to suspend the act until the case was decided by the Commission. There were serious doubts regarding whether Shaka Sankofa had really committed the crime. The U.S. Government did not respond to the Commission’s recommendation but could not escape from the jurisdiction of the IACHR on the protection of human rights, according to the American Declaration. The Commission thus sent out a press release condemning the U.S. decision, since it was not in accordance with the inter-American system of protection of human rights.⁵⁶

⁵⁶ Press Release N° 9/00, Washington, D.C. June 28, 2000:

“The Inter-American Commission on Human Rights deplores the execution of Shaka Sankofa, formerly known as Gary Graham, in the state of Texas on June 22, 2000. Mr. Sankofa was executed, despite formal requests by the Commission for the United States to ensure a suspension of Mr. Sankofa’s execution pending the determination of a complaint lodged on his behalf before the Commission.

15. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter "Convention of Belem do Pará"), approved in Belem do Pará, Brazil, on June 9, 1994, does not allow the imposition of the death penalty on women. Article 3 states "Every woman has the right to be free from violence in both the public and private spheres" and Article 4 states that "Every woman has the right to have her life respected". Regarding the duties of States, the Convention of Belem do Pará establishes that States should "refrain from engaging in any act or practice of violence against women and ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation". Therefore, if every woman has the right to life, and the right to be free from violence, and the State is denied the practice of violence against women, it seems that the Convention of Belem do Pará prohibits the application of the death penalty to women. There is no discrimination against men or children. It cannot be argued that it is "positive discrimination" or "affirmative action", because it only serves to preserve the inherent rights of the individual. For instance, pregnant women or women with children are entitled to rights based solely on the fact of their exclusive female condition. Thus, the same rights cannot be extended to men. Positive discrimination is usually applied to bring about equality, through temporary and proportional measures, to groups of people that experience *de facto* inequality. There is no inequality between men and women with regard to the right to life. In any case, the imposition of the death penalty is not a proportional measure, as we will see later on. When it comes to common rights—such as the right to life—we cannot argue positive discrimination. All persons are equal

(...Continuation)

In 1993, the Commission received a complaint on behalf of Mr. Sankofa, alleging that the United States, as a Member State of the Organization of American States, had violated Mr. Sankofa's human rights under the American Declaration of the Rights and Duties of Man, including his right to life under Article I of that instrument. In particular, it was contended that Mr. Sankofa was sentenced to death for a crime that he was alleged to have committed when he was 17 years of age, that he was innocent of that crime, and that he had been subjected to legal proceedings that did not comply with international due process standards.

On August 11, 1993, the Commission opened Case N° 11.193 in respect of Mr. Sankofa's complaint. Following a hearing on the matter on October 4, 1993, the Commission transmitted to the United States on October 27, 1993 a formal request for precautionary measures under Article 29(2) of the Commission's Regulations, asking that the United States ensure that Mr. Sankofa's death sentence was not carried out, in light of his pending case before the Commission. At that time, Mr. Sankofa's execution, which had previously been scheduled for August 17, 1993, was postponed pending the completion of domestic judicial procedures.

In February 2000, the Commission was informed that Mr. Sankofa's domestic proceedings were nearly completed, and that the issuance of a new warrant of execution was imminent. Accordingly, in a February 4, 2000 letter to the United States, the Commission reiterated its October 1993 request for precautionary measures. Subsequently, in May 2000, the Commission received information that Mr. Sankofa's petition before the U.S. Supreme Court had been dismissed and that his execution was scheduled for June 22, 2000. Accordingly, on June 15, 2000, during its 107th Period of Sessions, the Commission adopted Report N° 51/00, in which it found Mr. Sankofa's petition to be admissible and decided that it would proceed to examine the merits of his case. Also in this report, the Commission again reiterated its request that the United States suspend Mr. Sankofa's death sentence pending the Commission's final determination of his case.

By communication dated June 21, 2000, the United States acknowledged the receipt of the Commission's February 4, 2000 communication and indicated that it had forwarded the same to the Governor and Attorney General of Texas. On June 22, 2000, however, the Commission received information that the Texas Board of Pardons and Paroles declined to recommend that Mr. Sankofa be granted a reprieve, commutation or pardon, and that his execution was to proceed on the evening of June 22, 2000. Consequently, by communication of the same date, the Commission requested that the United States provide an urgent response to its previous request for precautionary measures. Regrettably, the United States did not respond to the Commission's June 22, 2000 request, and Mr. Sankofa's execution proceeded as scheduled.

The Commission is gravely concerned that, despite the fact that Mr. Sankofa's case had been admitted for consideration by a competent international human rights body, the United States failed to respect the Commission's requests to preserve Mr. Sankofa's life so that his case could be properly and effectively reviewed in the context of the United States' international human rights obligations. In light of the irreparable damage caused by such circumstances, the Commission calls upon the United States and other OAS Member States to comply with the Commission's requests for precautionary measures, particularly in those cases involving the most fundamental right to life."

before the law. The prohibition of the death penalty for women was based on both the female condition and the human condition.

16. Article 24 of the American Convention affirms that all persons are equal before the law, and consequently, they are entitled, without discrimination, to equal protection of the law. Although that Convention does not define discrimination, the IACHR understands that discrimination includes distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life (Manual on the Preparation of Reports on Human Rights, International Covenant on Civil and Political Rights, Article 26.)

17. It is also important to note that Article 37(a) of the Convention on the Rights of the Child prohibits the imposition of the death penalty on minors under 18 years of age.

18. The above-mentioned Convention is considered a universal legal instrument in the area of human rights. (Only the United States and Somalia have failed to ratify it.)

19. Article 37 of the Convention on the Rights of Child states: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”

20. Although the U.S. has not ratified the Convention on the Rights of the Child, it became a signatory to the Convention in February 1995, and has thus accepted its legal obligations. Article 18 of the Vienna Convention on the Law of Treaties establishes that the States that have signed a treaty, but not ratified it, shall refrain from engaging in any act that is contrary to its purpose until it has decided to announce its intention of not becoming part of that treaty. Despite the fact that the U.S. has not ratified the Convention, the U.S. State Department has already recognized that the Vienna Convention on the Law of Treaties serves as a precedent for international treaty proceedings. The U.S. State Department considers the Convention a declaration of customary law based on the Vienna Convention on the Law of Treaties, which establishes the importance of treaties as sources of international law as well as a method of peaceful development and cooperation between nations, no matter what their Constitutions and social systems entail.

21. As mentioned above, the imposition of the death penalty against women is not a case in which positive discrimination could be applied because Article 37(a) of the Convention on the Rights of the Child aims to preserve rights that are created not only for children but for all human beings.

22. If that is the case, then Article 4 of the American Convention has lost its previous meaning. Therefore States that have signed and ratified it as well as other international instruments cannot impose the death penalty upon any person, regardless of gender or any other personal condition.

23. The issue will be examined under legal hermeneutics of positive law. International law presupposes [normative] dispositions that are above [the] State [law]. As set forth by the illustrious Italian jurist, Norberto Bobbio, *universalism*—which international law attempts to embody—reappears today, specially after the end of WWII and the creation of the

UN, no longer as a belief in an eternal natural law [order], but as the will to constitute, in the end, a single body of positive law of the social and historical development (as natural law and the state of nature). He also ponders that the idea of the single global State is the final limit of the idea of the contemporary juridical universalism, that is the establishment of a universal positive law (Cf. *Teoria do Ordenamento Jurídico*, Universidade de Brasília, 1991, p. 164).

24. In the present case, we cannot allow a previous law with the same content of a new law to supersede the new law. That would be considered as antinomy, and therefore it has to be solved. What are the rules that should prevail? There is no doubt that they are incompatible. But how could we solve the problem?

25. According to Mr. Bobbio, the criteria to solve an antinomy are the following: a) chronological criteria, b) hierarchical criteria, c) specialty criteria.⁵⁷

26. According to the chronological criteria the new law prevails over the previous law—*lex posteriori derogat priori*. According to the hierarchy criteria, international law prevails over national law. Lastly, the specialty criteria could also apply in this case, since it is a specific law with a specific purpose.

27. It is impossible to argue that death penalty as described in the Section 2 of Article 4 of the American Convention is a specific law as opposed to general law of the right to life. It is also not possible to accept the idea that death penalty is considered a particular penalty that does not entail a violation of right to life or torture or any other cruel or inhumane treatment.

28. The Inter-American Court of Human Rights affirms that the imposition of restrictions on the death penalty should be effected by setting up a limit through an irreversible and gradual process, which would be applied both in countries that have not abolished the death penalty and in those that have done so. (Advisory Opinion – OC-3/83)

29. The Court also understands that the American Convention is progressive to the extent that, without deciding to abolish the death penalty, it adopts certain measures to limit it and diminish its application until it is no longer applicable.

30. It is worth reviewing the preparatory work of the American Convention that illustrates the interpretation of Article 4. The proposal to outlaw the death penalty made by several delegations did not receive any opposing vote, despite the fact that the majority of votes had not been reached. The development of negotiations in the Conference can be reviewed in the following declaration presented before the Plenary Session of Completion and signed by 14 of 19 participants (Argentina, Costa Rica, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela):

“The delegations that sign below, participants of the Specialized Inter-American Conference on Human Rights, taking into consideration the highly prevailing feeling, expressed in the course of the debates on the abolishment of the death penalty, in accordance with the purest humanistic traditions of our peoples, solemnly declare our firm aspiration of seeing the application of the

⁵⁷ Op.cit 2, p.92.

death penalty in the American context eradicated as of now, and our indeclinable purpose of effecting all possible efforts so that, in the short term, an additional protocol to the American Convention on Human Rights 'Pact of San Jose, Costa Rica' might be adopted, consecrating the definitive abolition of the death penalty, and putting America once more in the forefront of the protection of fundamental human rights." (author's translation from the original in Spanish, Acts and documents, OAS/Ser. K-XVI-II2, Washington – DC, 1973, hereafter Acts and Documents, repr. 1978, Spanish version, p. 161, 195, 296 and 449/441).

31. In agreement with these assertions, the Commission's Rapporteur made clear, on this article, his firm tendency towards the abolition of this penalty. (Acts and documents, supra, n.296)

32. Moreover, the rule of law (*Estado de derecho*) implies, when punishment is imposed, the knowledge of what the penalty actually means. When the purpose of the punishment applied is not only retribution, but the recuperation or rehabilitation of the convict, he or she knows what will happen in his or her future. If the punishment is purely retributive, as in a sentence imposing imprisonment for life, the convict still envisages his future. But if the convict is sentenced to death, the State does not point to what the elimination of his being will bring him. Science, with all its developments, has not managed, up to now, to unveil the after-death: future life, with prize or punishment? Pure and simple elimination?

33. In this sense, the rule of law forbids the imposition of a penalty whose consequences cannot be unveiled.

34. In truth, all punishment enacted by the legislator constitutes *species* of sanctions, distributed according to a rational scale that attempts to take into consideration a series of factors specific to each hypothesis of unlawfulness.

35. The right and obligation to punish which belongs to the State expresses itself in a variety of figures and measures, according to gradual solutions, measurable in money or in amounts of time. This gradual order is essential to criminal justice, for it would not be realized without a superior criterion of equality and proportionality in the distribution of punishment, for transgressors would then receive more than their just deserts.

36. With the imposition of the death penalty, however, the aforementioned serial harmony is abruptly and violently shattered; one jumps from the temporal sphere into the non-time of death.

37. With what objective criterion or with what rational measure (for *ratio* means reason and measure) does one shift from a penalty of 30 years imprisonment or a life sentence to a death penalty? Where and how is proportion maintained? What is the scale that ensures proportionality?

38. It could be argued that there is also a qualitative difference between a fine and detention, but the calculus of the former can be reduced to chronological criteria, being determined, for instance, in terms of work days lost, so that it has a meaning of punishment and suffering to the perpetrator, linked to his patrimonial situation. In any circumstance, these are rational criteria of convenience, susceptible to contrast with experience, that govern the passage from one type of punishment to the other, whereas the notion of "proportion" is submerged in face of death.

39. Summing up, the option for the death penalty is of such order that, as Simmel affirmed, it emphasizes all contents of the human life, and it could be said that it is inseparable from a halo of enigma and mystery, of shadows that cannot be dissipated by the light of reason: to attempt to fit it into the scheme of penal solutions is equal to depriving it from its essential meaning to reduce it to the violent physical degradation of a body (quoted by Miguel Reale, in *O Direito como experiencia*).

40. Hence, the conclusion of the eminent philosopher and jurist Miguel Reale: Analyzed according to its semantic values, the concept of punishment and the concept of death are logically and ontologically impossible to reconcile and that, therefore the “death penalty” is a “*contradictio in terminis*” (cf. *O Direito como Experiencia*, 2nd edition, Saraiva, Sao Paulo, Brasil)

41. The jurist Hector Faundez Ledesma writes on this topic: “as the rights consecrated in the Convention are minimum rights, it cannot restrict their exercise in a larger measure than the one permitted by other international instruments. Therefore, any other international obligation assumed by the State in other international instruments on human rights is of utmost importance, and its coexistence with the obligations derived from the Convention must be taken into consideration insofar as it might be more favorable to the individual.”

42. “The same understanding”, continues the jurist, “is extensive to any other conventional provision that protects the individual in a more favorable way, be it contained in a bilateral or multilateral treaty, and independently of its main purpose” (*El Sistema Interamericano de Protección de los Derechos Humanos*, 1996, pp. 92-93).

43. Moreover, Article 29(b) of the American Convention establishes, in the same line of thought, that no disposition of the Convention may be interpreted in the sense of “restricting the enjoyment or exercise of any right or freedom recognized by the virtue of the laws of any State Party”. In this sense, it is opportune to refer to the IACHR report on Suriname, and the Advisory Opinions 8 and 9 (of the Inter-American Court on Human Rights, 1987).

44. On this opportunity, the IACHR affirmed that the prohibition of imposing the death penalty in cases where the offender was a minor at the time of the crime was an emerging principle of international law. Twelve years later there is no doubt that this principle is totally consolidated. The ratification of the Convention on the Rights of the Child by 192 States, where the death penalty of minor offenders is prohibited, is a irrefutable proof of the consolidation of the principle (Cf. Report presented by Amnesty International to the IACHR, in Washington, on March 5th, 1999).

45. It is true that the Universal Declaration on Human Rights does not refer specifically to the prohibition of the death penalty, but consecrates in its Article 3 the right of every person to his life, liberty and security (the same provision can be found on Article I of the American Declaration of the Rights and Duties of Man). Adopted by the General Assembly of the United Nations in 1948, under the guise of a recommendatory resolution, the Universal Declaration is held—by many important scholars—to be a part of the body of international customary law and a binding norm (*jus cogens*)—as defined in Article 53 of the Vienna Convention on the Law of Treaties. *Mutatis Mutandi*, it would be lawful to affirm that the Convention on the Rights of the Child, by reason of its breadth and binding character, must also

be observed by the only two States that have not ratified it, as has already been said, and has been recognized by the Department of State of the United States of America.

46. It is convenient to observe, furthermore, that the European Court of Human Rights, in its decision in the Soering Case—Jens Soering, born in Germany, in detention in England and submitted to an extradition procedure on behalf of the government of the United States pending charges of murder committed in Virginia, a State that punishes this crime with the death penalty—made opportune comments regarding Article 3 of the European Convention, which establishes the interdiction of torture, inhuman, cruel or degrading treatment or punishment. The Court considered that the request could not be granted unless the person subject to extradition would be guaranteed his or her rights under Article 3 of the Convention (cf. *Jurisprudence de la Cour européenne des droits de l'homme*, 6th ed. 1998, Sirey, Paris, pp. 18 and ff.).

47. The Court concluded that the extradition to a country that applied the death penalty did not constitute a breach of the right to life or to the right to personal integrity since the death penalty is not, in itself, explicitly prohibited by the European Convention. Nonetheless, the possibility that the condemned could spend years waiting for the moment—totally unpredictable, by the way—of the execution of the punishment, the so called “death row syndrome”, was considered by the Court as constituting a cruel treatment and, therefore, a breach of the right to personal integrity.

48. It is, doubtlessly, an ambiguity: if there is a delay in imposing the penalty, there is violation of the right; if the sentence is carried out immediately, the State’s action will not be considered a breach of the fundamental right to life.

49. This decision gives rise to the conclusion that little by little, the traditional vision, the positivistic application of the law, is being abandoned. Instead of a literal interpretation of the texts in discussion, a teleological hermeneutics is searched, in this case, of the European Convention, to achieve the major conclusion that the death penalty should not be permitted in any hypothesis.

50. Therefore, the absolute prohibition, in the European Convention, of the practice of torture or of inhuman or degrading treatment or punishment shows that Article 3, referred to above, proclaims one of the fundamental values of democratic societies. The judgment underlines that provisions in the same sense can be found in the International Covenant on Civil and Political Rights of 1966, and in the American Convention on Human Rights of 1969, protecting, in all its extension and depth, the right of the human person. The Court concludes that it is an internationally approved norm.

51. It is true that the concept of inhuman or degrading treatment or punishment depends upon a whole set of circumstances. It is not for any other reason that one should have utmost care to ensure the fair balance between the requirements of the communities’ general interest and the higher imperatives of the protection of the fundamental rights of the individual, that take form in the principles inherent to the European Convention taken as a whole.

52. Amnesty International has affirmed that the evolution of the norms in Western Europe concerning the death penalty leads to the conclusion that it is an inhuman punishment,

within the meaning of Article 3 of the European Convention. It is in this sense that the judgment of the court in the Soering case should be understood.

53. For its part, the Inter-American Court on Human rights has already affirmed that "The right to life and the guarantee and respect thereof by States cannot be conceived in a restrictive manner. That right does not merely imply that no person may be arbitrarily deprived of his or her life (negative obligation). It also demands of the States that they take all appropriate measures to protect and preserve it (positive obligation)." (Cf. *Repertorio de Jurisprudencia del Sistema Interamericano de Derechos humanos*, 1998, Washington College of Law, American University, 1/102)

54. It was for the same reason that the European Court, in the aforementioned Soering decision, considered that "Certainly, the Convention is a living instrument which ... must be interpreted in the light of present-day conditions"; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 (art. 3), "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field" (par. 102).

55. In fact, to determine whether the death penalty, because of current modifications of both domestic and international law, constitutes a treatment prohibited by Article 3, it is necessary to take into consideration the principles that govern the interpretation of that Convention. In this case, both in the European Convention and in the American Convention, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" (Article 3 of the European Convention); "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." (Article 5(2) of the American Convention on Human Rights).

56. In the same line of thought, in the case between Ireland and the United Kingdom, the European Court had already decided that "The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (...) Article 3 (Art. 3) makes no provision for exceptions (...)the only relevant concepts are "torture" and "inhuman or degrading treatment", to the exclusion of "inhuman or degrading punishment".(par. 163-164)

57. More recently, in its Advisory Opinion OC-16, of October 1st, 1999, requested by Mexico, the Inter-American Court of Human Rights considered it opportune to state that, as regards the right to information about consular assistance, as part of the due process guarantees, that "in a previous examination of Article 4 of the American Convention, the Court observed that the application and imposition of capital punishment are governed by the principle that "no one shall be arbitrarily deprived of his life." Both Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the Convention require strict observance of legal procedure and limit application of this penalty to "the most serious crimes." In both instruments, therefore, there is a marked tendency toward restricting application of the death penalty and ultimately abolishing it. (par. 134)

58. It is reasonable to ask what is still lacking for the universal elimination of the death penalty? Simply the total recognition of the rights emanated from the treaties.

59. In support of this idea, we find the concurring vote, in the above-mentioned Advisory Opinion requested by Mexico, of Judge Cançado Trindade, wherein relevant assertions are made concerning the hermeneutics of law in face of the new protection demands.

60. In his concurring vote, the illustrious international legal scholar and current President of the Court (1999/2001) underlines that “The very emergence and consolidation of the *corpus juris* of the International Law of Human Rights are due to the reaction of the *universal juridical conscience* to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law (*el Derecho*) came to the encounter of the human being, the ultimate addressee of its norms of protection.” (Concurring vote, par.4)

61. The author of the concurring vote also warns that “In the same sense the case-law of the two international tribunals of human rights in operation to date has oriented itself, as it could not have been otherwise, since human rights treaties are, in fact, living instruments, which accompany the evolution of times and of the social milieu in which the protected rights are exercised” (*ibid*, par. 10)

62. In this sense the European Court on Human Rights, in its Tyrer vs. United Kingdom Case (1978), when determining the unlawfulness of physical punishment applied to teenagers in the Isle of Man, affirmed that the European Convention on Human Rights is “a living instrument which ... must be interpreted in the light of present-day conditions”.

63. Finally, with the demystification of the postulates of the voluntarist legal positivism, it has become clear that the answer to the problem of the basis and the validity of general international law can only be found in the universal legal consciousness, from the affirmation of an idea of objective justice.

64. Furthermore, in a meeting of representatives of the human rights treaty bodies, it was emphasized that conventional procedures are part of a broad international system of human rights protection, which has—as a basic postulate—the indivisibility of human rights (civil, political, economic, social and cultural). To ensure in practice the universalization of human rights, the meeting recommended the universal ratification, up to the year 2000, of the six core human rights treaties of the United Nations (the two International Covenants of 1966; the conventions on the elimination of racial discrimination and discrimination against women; the UN Convention against Torture; and the Convention on the Rights of the Child), of the three regional conventions on human rights (European, American and African), and the ILO Conventions that concern basic human rights. The representatives at the meeting warned that the non-compliance by the states in respect of their obligation to ratify constituted a breach of conventional international obligations and that the invocation of state immunity, in this context, would result in a “double standard” that would punish the States that duly complied with their obligations. (Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol 1, Fabris Ed. 1997, pp. 199-200)

65. Article 27 of the Vienna Convention on the Law of Treaties of 1969 forbids the invocation of domestic law to justify the non-compliance of an international obligation. Moreover, according to Article 31 of the Vienna Convention: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”. It follows also that, according to the doctrine of “*effet utile*”,

the interpreter must not deny any term of a normative provision its value in the text: no provision can be interpreted as not having been written.

66. In effect, the Inter-American Court, in its Advisory opinion OC-14/94, has held that: "Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions [Greco-Bulgarian "Communities", Advisory Opinion, 1930, P.C.I.J., Series B, N° 17, p.32; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, N° 44, p. 24; Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, N° 46, p. 167; and, I.C.J. Pleadings, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Case of the PLO Mission) (1988) 12, at 31-2, para. 47]." (par. 35)

67. In view of the considerations presented here, it can be said that the norm of article 4, section 2 of the American Convention has been superseded by the aforementioned conventional provisions, following the best hermeneutic of the International Law of Human Rights, with the result that it is prohibitive, for domestic law—even if older than the American Convention—to apply cruel punishment, such as the death penalty.

68. This result also follows from the principle of the International Law of Human Rights that all action must have as its basic goal the protection of victims.

69. In light of these considerations, provisions such as Article 4(2) of the American Convention on Human Rights should be disregarded, in favor of legal instruments that better protect the interests of the victims of violations of human rights.

Done and signed by the Inter-American Commission on Human Rights, in the city of Washington, D.C., the 15th day of the month of October, 2001. (Signed): Hélio Bicudo.