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CASE 12.254

REPORT ON THE MERITS (PUBLICATION)

VICTOR SALDAÑO
UNITED STATES

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I. SUMMARY

1. On June 23, 1998, the Inter-American Commission on Human Rights ("the Inter-American Commission" or "the IACHR") received a petition presented by Juan Carlos Vega, Lidia Guerrero, Rodolfo Ojea Quintana, Tomas Ojea Quintana and Carlos Hairabedian ("the petitioners")² against the United States of America ("the State" or "the United States").³ The petition was filed in the name of Víctor Hugo Saldaño ("the alleged victim" or "Mr. Saldaño") who was tried and sentenced to death in the state of Texas, where he remains on death row awaiting a final decision in the criminal process against him.

2. The petitioners allege several violations of the American Declaration of the Rights and Duties of Man ("the Declaration" or "the American Declaration"). In particular, they argue the violation of the rights to justice and due process to the detriment of Mr. Saldaño. They also allege violations of the right to equality before the law, as the death penalty was imposed in a discriminatory manner and taking into account the race and ethnicity of the alleged victim. They maintain that when Mr. Saldaño was subjected to the second trial in the case his mental health situation had deteriorated severely due to his prolonged detention on death row, and that his mental health was not taken into account in determining his capacity to stand trial, and was improperly taken into account as a factor against him. They allege that the prolonged process against him and the conditions on death row have caused serious harm to his mental health and constitute a violation of the right to humane treatment. They claim that the eventual execution of Víctor Saldaño in the circumstances in which the death penalty was imposed, would be contrary to the right to life.

3. The State argues that the death penalty does not constitute a violation of the American Declaration or of any other international treaty. It indicates that all the rights of Mr. Saldaño were respected through constitutional protections, which were detailed by the State in its written presentations. It indicates that these protections include those relating to appropriate conditions of detention, due process and non-discrimination. The State alleges that federal and state legislation provide sufficient guarantees regarding persons with mental disabilities subject to criminal prosecution and conviction. It indicates that the petitioners' claims have been fully and properly examined by the internal judicial system. Finally, the State alleges that domestic remedies have not been exhausted, so that the matter is inadmissible.

4. Having examined the positions of the parties and the established facts, the Inter-American Commission concluded that the United States is responsible for violating Articles I (right to life, liberty and personal security), II (right to equality before the law), XVIII (right to a fair trial), XXV (right of protection from arbitrary arrest) and XXVI (right to due process of law) of the American Declaration in the case of Víctor Saldaño. In the event the execution of Mr. Víctor Saldaño is carried out, the State would also be responsible for a serious and irreparable violation of the fundamental right to life protected in Article I of the American Declaration.

¹ Commissioner James Cavallaro, a U.S. national, did not participate in the discussion or decision on this case, in accordance with Article 17.2.a of the IACHR's Rules of Procedure.

² At a later date, Mr. Jonathan Miller became a co-petitioner in the case.

³ Although the initial petition was filed against the State of Argentina, at a later date the petitioners requested that it be considered with respect to the United States.

II. PROCEEDINGS BEFORE THE COMMISSION

5. On June 23, 1998, the Inter-American Commission received the petition against the State of Argentina. On February 25, 1999, the petitioners filed a communication requesting, in the event that the petition against Argentina were declared inadmissible, that the IACHR analyze the petition's compliance with the requirements to be considered with respect to the United States as the country denounced.

6. On March 11, 1999 the IACHR approved Report No. 38/99 and declared inadmissible the petition against Argentina. By communication of March 19, 1999 the Commission informed the petitioners about this decision. Also, the Commission requested that the petitioners update the information regarding the complaint against the United States, specifically with respect to the exhaustion of domestic remedies pursuant to Article 37 of the Rules of Procedure then in force.

7. On February 21, 2000 the Commission received communications from the petitioners in which they reiterated their request that the petition be processed against the United States.

8. On March 13, 2000 the Commission forwarded to the United States the pertinent parts of the petitions received on June 23, 1998 and February 21, 2000, giving it 90 days to submit its response in accordance with the Rules of Procedure then in force. On the same date, the IACHR informed the petitioners that the petition had been opened for processing and requested that they present updated information, as well as copies of the transcription of Victor Saldaño's trial and of the judicial proceedings before the respective Courts of Appeals in the United States. By communication of April 24, 2000, the IACHR reiterated its request that the State provide information.

9. On May 16, 2000, the State submitted its response to the petition. On June 12 and September 1, 2000, the petitioners submitted additional information and requested a public hearing on the case. By communication of September 14, 2000, the IACHR informed the petitioners that it was not possible to grant a hearing during the 108^o Period of Sessions. Likewise, the Commission requested the petitioners to present updated information on the domestic proceedings. The petitioners responded to this request for information on October 11, 2000.

10. On November 2, 2000 the petitioners submitted additional information, asked for a public hearing on the case, and requested the IACHR to grant precautionary measures. By communication of November 10, 2000, the IACHR reiterated to the petitioners its decision of March 13, 2000 on the precautionary measures (see *infra*).

11. On February 15, 2001, the petitioners submitted a request for the IACHR to appoint an observer to be present during the hearing scheduled in the trial for February 28, 2001. Likewise, the petitioners asked the IACHR to place itself at the disposal of the parties with a view toward reaching a friendly settlement of this matter. By communication of February 22, 2001, the Commission informed the petitioners that it declined their request to appoint an observer for the hearing in the domestic proceeding. With regard to the possibility of a friendly settlement, the IACHR informed the petitioners that this decision was pending until information on the results of the hearing scheduled in the criminal process. The IACHR also indicated that it had convened the parties for a public hearing scheduled for the next period of sessions of the Commission.

12. On February 28, 2001, the Inter-American Commission held a public hearing on the case during its 110^o Period of Sessions.

13. By letter of March 9, 2001, and following-up on the public hearing, the IACHR requested the State to present, within 30 days, its response to the proposal of the petitioners to seek a friendly settlement in the case as well as all the information it deemed relevant on the case.

14. On March 9, 2001 the State submitted additional information. On April 4, 2001, the State informed the Commission that there was no possibility of initiating a friendly settlement in the case. These communications were duly transmitted to the petitioners.

15. On April 10, 2001 the petitioners submitted additional observations and reiterated their interest in seeking a friendly settlement. This communication was forwarded to the State, requesting that it present its observations within 30 days.

16. On April 30, 2001 and March 21, 2002, the petitioners submitted additional information which was duly transmitted to the State.

17. On April 10, 2002, the Commission received an *amicus curiae* brief from the Center for Legal and Social Studies which it forwarded to the parties for their information.

18. On June 3, 2002, the petitioners submitted additional information, reiterated their interest in seeking a friendly settlement, and requested a public hearing. This communication was forwarded to the State and the Commission informed the petitioners that their hearing request was not granted.

19. On September 13, 2002, the IACHR notified the parties that it had decided to defer its decision on the admissibility of the petition until the decision on the merits pursuant to Article 37.2 of its Rules of Procedure then in force. In light of this, the Commission requested the petitioners to present their additional observations on the merits within two months.

20. On September 11, 2002, the State submitted additional observations, which were transmitted to the petitioners. On November 27, 2002, given the lack of response of the petitioners, the IACHR reiterated to the parties its decision under Article 37.2 of the Rules of Procedure, and again requested that the petitioners present their observations within two months.

21. Given the lack of response of the petitioners, by communication of May 18, 2003, the Commission requested the State to present its additional observations on the merits within two months in accordance with the Rules of Procedure then in force.

22. On July 10, 2003, the IACHR requested that the parties present updated information on the status of the domestic remedies within 30 days. On August 21, 2003, the State submitted additional information which was transmitted to the petitioners for their information.

23. On August 29 and September 2, 2003, the petitioners submitted their observations and additional information. These communications were transmitted to the State for its observations within one month. Specifically, the Commission requested that the State provide information on the mental health situation of Victor Saldaño and the medical treatment he was receiving. After an extension granted by the IACHR, on December 23, 2003, the State submitted additional information on the situation of Victor Saldaño.

24. On February 28 and March 10, 2004, the petitioners submitted additional and updated information on the situation of Victor Saldaño and the criminal process against him. On September 2, 2004, the petitioners submitted additional information and requested the IACHR to grant precautionary measures to address the situation concerning Víctor Saldaño's mental health.

25. In response to the new request for precautionary measures, in the context of MC-114-00, on September 13, 2004, the Commission requested that the petitioners present: i) documentation or any other evidence on the situation of Víctor Saldaño's mental health; and ii) updated information on any domestic action brought to raise Mr. Saldaño's mental health claim and his fitness to participate in the resentencing trial. On September 20, 2004, the petitioners responded to the request for information.

26. On December 15, 2004, the petitioners submitted additional information and informed that Mr. Saldaño was again sentenced to the death penalty. By communication of January 3, 2005, the IACHR

forwarded this information to the State and requested its observations within one month. On March 2, 2005, the State submitted its response which was transmitted to the petitioners for their information. Although this communication made reference to the processing of MC-114-00 it did not include specific information in response to the IACHR's request concerning that matter.

27. By communication of July 25, 2005, the IACHR requested that the petitioners present within one month: i) a copy of the resentencing trial of Víctor Saldaño; ii) information on the pending domestic remedies and the pertinent documentation; and iii) information on whether an evaluation of the physical and mental health of Mr. Saldaño had taken place.

28. On September 8, 2009, the petitioners requested a public hearing on the case.

29. On September 18, 2009, the Government of Argentina submitted an *amicus curiae* brief, which was transmitted to the parties for their information.⁴

30. On September 17 and November 2, 2009, the petitioners and the State respectively submitted additional information. These communications were duly transmitted between the parties.

31. On November 3, 2009, the IACHR held a public hearing in the case during its 137^o Period of Sessions.

32. On April 29, and July 8 and 27, 2010, the petitioners submitted additional information. On June 3, 2010, the State submitted additional information. These communications were duly transmitted between the parties.

33. On October 27, 2010, the IACHR held a working meeting with the parties during its 140^o Period of Sessions. In follow-up to this meeting, on November 10, 2010, the IACHR sent the State a request to conduct a visit to the detention center where Mr. Saldaño was being held in the state of Texas. Although the State initially expressed its willingness to allow the visit, given that the State indicated it would impose certain restrictions on a visit to Mr. Saldaño on death row, among other factors, the Commission was unable to carry out the visit.

34. During the years 2011 to 2016, the IACHR continued to receive briefs of the petitioners with additional and updated information on the situation of Víctor Saldaño.⁵

35. On November 28, 2014, July 24, 2015 and September 16, 2016 the Government of Argentina submitted *amicus curiae* briefs which were transmitted to the parties for their information.

36. By communication of September 20, 2016, the IACHR forwarded to the State several briefs submitted by the petitioners in 2015 and 2016 with updated information on the situation of Víctor Saldaño, and requested its observations within one month. As of the date of the approval of this report, no response has been received from the State.

⁴The Commission notes that, during the processing the present matter, the Permanent Mission of Argentina to the Organization of American States presented documentation related to this case on several occasions; given that the State of Argentina was not a petitioner in the case against the United States, and the petitioners never expressed the intention to incorporate the Argentine State as such, these were not incorporated as part of the case file.

⁵During this period, although some of the communications were intended to reiterate allegations on the facts and merits, most were also related to procedural issues, mainly referring to the representation of the alleged victims before the IACHR, and requests for the IACHR to take certain actions. In this section these communications are mentioned in order to describe the complete processing of the case.

Precautionary measures to address the rights to life and personal integrity of Víctor Saldaño and his sentence to the death penalty

37. In addition to the communications mentioned in the previous section, on February 18, 1999, the petitioners submitted a communication informing the IACHR that the date of April 18, 2000 had been set for the execution of Víctor Saldaño in the state of Texas.

38. On March 13, 2000, along with opening the petition for processing, the Commission granted precautionary measures in favor of Víctor Saldaño and requested the United States to guarantee his life and personal integrity until it had an opportunity to analyze the petition under study.

39. By communication of November 10, 2000, the IACHR reiterated its request for precautionary measures, and also requested that the State immediately report on the implementation of the measures.

40. On July 1, 2002, the IACHR once again reiterated its request for precautionary measures to the United States and requested that the State present information within 20 days. On August 19, 2002, the IACHR reiterated this request for information.

41. After receiving information from the petitioners that Mr. Saldaño had again been sentenced to death, on January 3, 2005, the Commission reiterated to the State its request for precautionary measures and that the latter present information in this regard.

III. POSITION OF THE PARTIES

A. Position of the petitioners

42. The petitioners state that in 1996 Víctor Hugo Saldaño, an Argentine citizen, was sentenced to death for a murder committed on November 25, 1995 in the state of Texas in the United States.

43. The petitioners state that his conviction was based on testimony with racial and discriminatory content on the issue of the “future dangerousness” of Mr. Saldaño. They say that the state of Texas requires that in order to impose the death penalty the jury must unanimously and specifically find that it is probable that the defendant would commit violent criminal acts and would accordingly present a continuing threat to society in the future.

44. They say that in order to prove that Mr. Víctor Hugo Saldaño represented a continuing threat in the future, the state of Texas presented the testimony of Dr. Walter Quijano—former chief of psychology and director of psychiatric services in the prison system of Texas—who stated that a determining factor in the future danger of a person is race. The petitioners add that the public defender assigned to Mr. Saldaño not only failed to object to that testimony, but also asked questions which raised the issue of race when he cross-examined the witness. Furthermore, the petitioners say that Dr. Quijano never interviewed Víctor Hugo Saldaño, arguing in his testimony that most of the factors are externally verifiable and did not need to be based on an interview with the accused.

45. The petitioners state that the mere fact of the race and ethnic origin of Mr. Saldaño were taken into account as a determining factor for his future dangerousness, and as a consequence the death penalty was considered the most appropriate punishment, violates his basic rights to equality before the law, a fair trial and due process of law.

46. The petitioners additionally allege that Mr. Saldaño’s trial was marked by the following irregularities: (a) he was not informed without delay in a language he could understand and in detail of the nature of the charges against him, so he never sufficiently understood the criminal charges against him, the consequences that he faced, or the different defense alternatives he had a right to use, his right to defense at the very first stage of the investigation having consisted in practice of a single interview with the public defender through a translator; (b) he never had access to satisfactory means to prepare his defense; (c) he

never had the right to choose counsel who spoke his language and never had a chance to question the principal witness at trial; (d) his sentence was handed down by a jury composed of 11 persons, of whom only one spoke Spanish, in a social context characterized by racial discrimination against Hispanics; (e) the Argentine Consulate was not authorized to have any legal participation in the judicial proceeding; and (f) his court-appointed public defenders were manifestly incompetent and professionally negligent.

47. They add that the conviction of July 11, 1996, was appealed to the Criminal Appeals Court of Texas, which upheld it on September 15, 1999. The petitioners indicate that the Court concluded that even if the prosecutor had presented expert evidence for the sole purpose of appealing to possible racial prejudice of the jury, the lack of objection by the defense counsel during the trial made it impossible to consider the issue on appeal. The petitioners allege that the Criminal Appeals Court of Texas did not even consider the inefficiency of Mr. Saldaño's legal representation.

48. They say that after this decision, the defense of Víctor Hugo Saldaño presented a *writ of certiorari* to the Supreme Court of the United States. In that writ, his defense alleged that introducing race as a factor to be considered by the jury in determining the degree of future danger to society violated his rights to due process of law, equal protection before the law, and, in general, the rights protected by the eighth amendment to the U.S. Constitution.

49. They add that, in the context of the proceedings on the *writ of certiorari*, in May 2000 the Attorney General of Texas admitted that "introducing race as a factor for the jury to weigh in its verdict violated the constitutional rights to be sentenced without consideration of skin color." They indicate that it was on that basis that the U. S. Supreme Court overruled the death penalty and returned the case to the Texas Court of Criminal Appeals for reconsideration.

50. Based on the foregoing, the petitioners allege that no one could dispute that Dr. Quijano's testimony presented in July 1996 violated Mr. Saldaño's right to equality before the law and the right to due process, as provided in Articles II, XVIII, and XXVI of the American Declaration of the Rights and Duties of Man.

51. The petitioners report that in November of 2001 the Texas legislature passed a law, which they refer to as the "Saldaño Law," which amended the Texas Criminal Procedure Code to the effect that "the State shall not present evidence to establish that the race or ethnicity of a defendant makes him more likely to commit future criminal conduct."

52. The petitioners add that in March of 2002 the Criminal Appeals Court of Texas upheld the death sentence, arguing that the Attorney General of the State was not legally authorized to recognize judicial error before the Supreme Court, and that the expert testimony of Dr. Quijano had not had any substantial effect on the imposition of Mr. Saldaño's death penalty. Against this ruling, the defense counsel of Víctor Hugo Saldaño filed an application for writ of *habeas corpus* with the District Court of the East Texas District in April of 2002, alleging once again the lack of due process and incompetent legal counsel in the first trial.

53. They state that, on June 12, 2003, the District Court granted the writ of *habeas corpus* and ordered that Mr. Saldaño be released if within the next 180 days a new sentencing trial had not begun or his penalty had not been commuted to life in prison. The petitioners state that it was not until November 2004 that the new sentencing trial was initiated, and by that time Víctor Hugo Saldaño had spent eight years on death row. They allege that these conditions of incarceration caused a serious deterioration in his mental health; so much so that when he appeared before the trial he seemed out of it and unfocused, staring fixedly and inappropriately, even masturbating in front of the jury, which made it necessary to restrain his hands and feet during the rest of the proceeding.

54. They indicate that the mental health of Mr. Saldaño began to worsen when the state of Texas changed his prison regime at the start of 2000. They describe that the new system consisted of total isolation, which caused psychotic episodes for Mr. Saldaño, who was hospitalized for 20 weeks in the psychiatric hospital of the prison system, from March 20 to August 3, 2001. The petitioners state that at the time of his

second trial, Víctor Hugo Saldaño was a totally different person from the one who was tried in 1996. They say that in 2004 Mr. Saldaño could no longer properly understand the consequences of the trial, and was unable to contribute to his own defense during the trial.

55. They add that before this re-sentencing proceeding began, Mr. Saldaño's defense counsel filed a motion alleging that the defendant had suffered a severe reduction of his mental faculties in the course of his incarceration on death row, so it was improper to subject him to a new sentencing trial in which the jury would evaluate his apparent dangerousness.

56. The petitioners indicate that as part of the motion presented, the defense of Mr. Saldaño offered the testimony of Dr. Peccora, the physician who treated Víctor Hugo Saldaño when he was confined to the psychiatric hospital. According to the petitioners, he was the only psychiatrist who knew the state of deterioration of Mr. Saldaño's mental health as a result of his incarceration on death row. They report that Dr. Peccora was not heard during the proceeding because, on the date of the hearing, the state demanded its right to examine the defendant before hearing the testimony of Dr. Peccora. They add that the judge in the proceeding, at the start of one of the sessions, ruled that he would not permit any evidence or any mention as to the state of mental health of Víctor Saldaño because that would go against an effective defense at trial. The judge argued that in this way the state of Texas would be prevented from introducing similar (psychiatric) evidence that would demonstrate the future dangerousness of Víctor Saldaño. The petitioners say that "this false reasoning by the judge forced the defense to accept this ban on any evidence on the mental health of Saldaño." They argue that this demonstrates the serious and repeated violations of the right to defense and to due process that were evident throughout the proceedings.

57. The petitioners reiterate that the court decided not to hear testimony on Mr. Saldaño's mental health, but it permitted the state of Texas to introduce testimony that was unfair, such as that of the police officers who covered the investigation of the homicide in 1995. They argue that if the only reason for the judicial proceeding was to establish the sentence, it was unfair to admit evidence received in the first trial and on the facts from 1995. They add that it was unfair and a violation of the principle of equality of arms to hear a whole day's testimony from the death row guards on Mr. Saldaño's bad behavior, without giving the defense a chance to prove that such conduct was the result of extreme isolation.

58. They report that the result of this second sentencing trial was once again the death penalty. The petitioners allege that racial discrimination was also a relevant factor in the second trial in Texas for judging a person "lacking mental capacity" in a clear state of "procedural incompetence." The petitioners allege that what happened to Mr. Saldaño shows that there was clearly a violation of the right to equality before the law because not all homicides require the death penalty, only those committed by persons of Latin American origin.

59. The petitioners add that Mr. Saldaño had to be admitted again to the psychiatric hospital of the Texas prison system from May 18 to August 17, 2006; from September 25, 2007, to January 4, 2008; and from January 8 to April 22, 2009. The petitioners say that less than 1% of death row inmates are hospitalized, and "the case of Mr. Saldaño and his history of mental illness speak for themselves." They argue that the State is obligated to take special precautions to protect the physical and mental health of incarcerated persons, especially those on death row.

60. The petitioners state that they have never maintained the innocence of Mr. Víctor Saldaño, nor have they questioned before the Commission the international legality of the death penalty, beyond the social and ethical reproach they have against it. They reiterate that their principal allegation is that racial discrimination was a central and decisive element in the judicial proceeding of "Texas vs. Víctor Saldaño" and in the death penalty imposed in the first trial. They add that the decision handed down by the U.S. Supreme Court fully validates their assertion.

61. They add that the second trial, and the time spent on death row, have constituted further and even more significant violations of Mr. Saldaño's rights to due process, humane treatment, and that he

not be subjected to cruel, inhuman, and degrading punishment. They say that an execution under these circumstances would also violate his right to life.

62. They maintain that they have exhausted all ordinary domestic remedies, because they appealed the death sentences of 1996 and 2004, and also filed various applications for *writs of certiorari* and *habeas corpus*. In communications dated June 2, 2014, and April 8, 2015, the petitioners alleged unwarranted delay because the last federal *habeas corpus* proceeding had been paralyzed for more than four years, thereby confirming that it was a completely ineffective remedy to guarantee the violated rights.

63. In a communication of July 25, 2016, the petitioners reported that they had been notified of the denial of the latest request for *habeas corpus* relief. They indicated that, the motion having been denied, the state of Texas could set an execution date for Mr. Saldaño. On August 17, 2016, the petitioners reported they had filed a motion for reconsideration on the basis that the *habeas corpus* decision had been unfounded.

64. In summary, the petitioners allege that the State has engaged in racial discrimination, has failed to provide a fair trial for Mr. Saldaño and treat him with respect for his human dignity, has imposed a cruel and arbitrary punishment, and has jeopardized his right not to be arbitrarily deprived of his life. The petitioners allege violations of the rights established in Articles I, II, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man.

B. Position of the State

65. The State argues that the death penalty does not violate the American Declaration or any other international treaty. It adds that the use of the death penalty in the United States is a decision of democratically elected governments and that the people of the United States, through their elected representatives, have decided not to abolish the death penalty. It indicates that the federal government and most of the states permit capital punishment.

66. The State adds that the U.S. Supreme Court has established on many occasions that the death penalty itself does not violate the U.S. Constitution. However, capital punishment can only be applied subject to extensive due-process guarantees and ample opportunities for review of the sentence, at both the state and federal levels and through the *habeas corpus* procedure.

67. Furthermore, it emphasizes that the very American Convention, to which the United States is not a party, provides that “in countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.”

68. The State argues that the U.S. Constitution grants legal protection against the human rights violations alleged by the petitioners, and that however difficult the situation of Mr. Saldaño may be, all his rights have been respected through constitutional protections.

69. The State reports that the right to appropriate detention conditions in institutions, whether prisons, jails, or public mental health institutions, is covered by the Due Process Clause, which prohibits deprivation of life, liberty, or property without due process. In addition, the State indicates that the right to competent legal representation in criminal proceedings is also guaranteed by that clause.

70. The State affirms that defendants in a criminal proceeding have the right to have their case heard by a fair and impartial tribunal under the Fifth and Fourteenth Amendments to the U.S. Constitution. Under the Fifth Amendment, authorities have to inform arrested persons of their right not to incriminate themselves and the right to remain silent. It indicates that this law prevents authorities from incriminating defendants with their own statements. The State adds that according to the Sixth Amendment, a person accused of a serious crime enjoys the right to (1) be informed in a detailed and timely way of all the charges against him; (2) to a public jury trial; (3) to have the assistance of effective counsel for his defense, paid for by the public treasury if he cannot afford it; and (4) the time and opportunity to prepare his defense

and consult with his legal representative. The State adds that the courts of the United States have interpreted that the Fifth and Sixth Amendments also contain the accused's right to be assisted by an interpreter if he does not understand English. The State affirms that Mr. Saldaño was granted these safeguards and that he was informed of his right to seek consular assistance.

71. The State affirms that the Fifth and Fourteenth Amendments guarantee that persons are not subject to discrimination by state or federal authorities on the basis of their race, gender, ethnicity, or country of origin. In this regard, the State recalls that the original death penalty imposed on Mr. Saldaño was annulled by the U.S. Supreme Court in 2000, based on the consideration that it had been invalidated by racial discrimination.

72. The State notes as particularly relevant to the case that both state and federal legislation offer significant protection against the trial, conviction, and punishment of persons with mental illness or disability. It says that U.S. legislation prohibits the execution of persons who are "incompetent or mentally retarded," because this would constitute cruel and unusual punishment.

73. The State has argued throughout its presentations to the Commission that the domestic remedies have not been exhausted by Mr. Saldaño, and accordingly the Commission should declare the case inadmissible. Further, the State maintains that it has examined Mr. Saldaño's complaints through the judicial system and has granted him effective remedies.

74. In its communication of November 2, 2009, the State alleges that Mr. Saldaño could benefit from all constitutional protections through the application for writ of *habeas corpus* that he presented to the federal courts on October 26, 2009. The State adds that the same allegations presented to the Commission would be addressed in that process and that it is the domestic courts that are competent to resolve the allegations of lack of due process, and of cruel and unusual treatment. In its allegations presented at the public hearing held by the IACHR in November of 2009, it reiterated that it corresponds to the U.S. justice system to resolve the problems presented before both the domestic level and the IACHR, and affirmed that criminal proceedings and the deprivation of liberty in the United States comply with international standards and the provisions of the American Declaration, and that the internal system offers timely and effective remedies.

75. The State maintains that while the petitioners allege that the passage of years shows that the available resources in the United States have been unnecessarily delayed, this has only been the period of time during which they have presented a multiplicity of appeals that have the possibility to provide a remedy for the alleged violations. Thus, it maintains that it corresponds to the State itself to determine whether the rights of Mr. Víctor Saldaño have been violated or not, and if so, provide him with effective reparation. The State requests that the Commission not decide on this case until the domestic courts rule on the violations of Mr. Saldaño's human rights.

IV. ANALYSIS OF ADMISSIBILITY

A. The Commission's competence *ratione materiae*, *ratione personae*, *ratione temporis*, and *ratione loci*

76. In accordance with Article 23 of the Rules of Procedure of the IACHR, the petitioners have *locus standi* to present petitions to the Inter-American Commission. The petition identified as the alleged victim a person for whom the United States was obligated to respect and guarantee the rights established in the OAS Charter, and for member states of the OAS the American Declaration serves to express the commitments of the Charter and is a source of obligations.⁶ With respect to the State, the Commission notes

⁶See, in general, Inter-American Court of Human Rights. 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. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 19.

that the United States is subject to the obligations established in the OAS Charter, the American Declaration and Article 20 of the Statute of the IACHR. The United States has been a member of the Organization of American States since June 19, 1951, the date on which it deposited its instrument of ratification of the OAS Charter. Therefore, the IACHR has competence *ratione personae* to consider the petition.

77. The Inter-American Commission has competence *ratione loci* to examine the petition, given that it alleges the violation of rights protected by the American Declaration that took place in the territory of the United States. The IACHR has competence *ratione temporis* because the obligation to respect and guarantee the rights protected in the OAS Charter and American Declaration was in force for the State on the date when the alleged facts occurred. Finally, the Inter-American Commission has competence *ratione materiae* because the petition alleges facts that could tend to establish the violation of rights protected by the American Declaration.

B. Requirements for Admissibility

1. Exhaustion of domestic remedies

78. Article 31.1 of the Rules of Procedure of the Inter-American Commission provides that in order for a petition to be admissible, remedies of the domestic legal system must have been pursued and exhausted in accordance with the generally recognized principles of international law. The purpose of this requirement is to afford the national authorities an opportunity to take cognizance of the alleged violation of a protected right and, if appropriate, to solve the situation before it is taken up by an international mechanism.

79. The Commission recalls that for petitions where the status of domestic remedies has changed in the interval between reception of the petition and the decision on admissibility, the admissibility requirements must be examined in light of the information available at the time the Commission pronounces on admissibility.⁷

80. According to the available information, in March 2002 the Criminal Appeals Court of Texas confirmed the death penalty of Víctor Hugo Saldaño. Because of a writ of *habeas corpus* granted to Mr. Saldaño, there was a new sentencing trial pursuant to which he was again sentenced to death in November 2004. This was upheld on appeal. Subsequently, Mr. Saldaño's counsel has presented several applications for *writs of certiorari* and *habeas corpus*, and motions for reconsideration.

81. The Commission notes that representatives of Mr. Saldaño have filed on his behalf all the ordinary and extraordinary domestic remedies available to question the first and second sentences. In this regard, through its courts the State has had multiple opportunities to take cognizance of the complaints of the petitioners and pronounce upon them. The Commission cannot fail to note that in a death penalty case, after having filed and exhausted a series of ordinary and extraordinary remedies, there is a risk that a decision will be adopted that puts an end to the domestic jurisdiction is taken and an execution date is scheduled, limiting the possibility for the Commission to decide the case in an effective manner.

82. In that sense, given the sequence of remedies exhausted to date and taking into consideration the risk that an execution date could be scheduled shortly after the decision on the request for reconsideration currently pending, the Commission considers that pursuant to the principles of international law, the available remedies have been exhausted for the purpose of the admissibility of this matter. The Commission recalls that the rule of prior exhaustion of domestic remedies should not lead to the result that access to international protection is detained or delayed to the point of being ineffective.

⁷ IACHR, Report N° 20/05, Petition 714/00 ("Rafael Correa Díaz"), February 25, 2005, Peru, para. 32; IACHR, Report N° 25/04, Case 12.361 ("Ana Victoria Sánchez Villalobos et al"), March 11, 2004, Costa Rica, para. 45; IACHR, Report N° 52/00, Cases 11.830 and 12.038 ("Dismissed Congressional Employees"), June 15, 2001, Peru, para. 21.

83. Based on the foregoing, the IACHR concludes that Mr. Saldaño's defense has exhausted all mechanisms available to him and that the State has had ample opportunity to resolve the situation submitted to the IACHR. Taking into account the time elapsed, the Commission considers that it is not necessary to continue awaiting the resolution of this latest appeal or filing of additional appeals in order for the petition to be admissible.

84. Therefore, the Commission considers that the requirement that domestic remedies be exhausted has been satisfied according to Article 31.1 of its Rules of Procedure.

2. Deadline for presentation of the petition

85. Article 32.1 of the Rules of Procedure of the Inter-American Commission establishes that for a petition to be accepted, it must be lodged within six months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies.

86. In this case, the IACHR received the petition on June 23, 1998, and February 21, 2000. As explained in the previous section, the domestic proceedings evolved over time and the exhaustion of domestic remedies has taken place while the case has been under study by the Commission. Under such circumstances, it has been the constant criterion of the Commission that compliance with the filing period is intrinsically linked with the exhaustion of domestic remedies, and the Commission considers the requirement to have been met in this case.⁸

87. The Inter-American Commission therefore concludes that this petition satisfies the requirement of Article 32.1 of its Rules of Procedure.

3. Duplication of proceedings and international *res judicata*

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

89. The case file does not indicate that the subject of the petition is pending in another international proceeding for settlement or that it is substantially the same as one previously studied by the Commission or by another international organization. Therefore, the requirements of Article 33 of the IACHR's Rules of Procedure have been met.

4. Colorable claim

90. According to Article 34.a of its Rules of Procedure, the Commission shall declare any petition or case inadmissible when it fails to state facts that tend to establish a violation of the rights referred to in Article 27 thereof, in which case the petition shall be rejected as "manifestly groundless" or "out of order" as stipulated in Article 34.b. The criteria used to analyze the admissibility of a petition differ from those used to analyze the merits of the case, because at the admissibility stage the Inter-American Commission only makes a *prima facie* evaluation as to whether the petition describes facts that could potentially constitute violations of rights guaranteed in the American Declaration. It is a preliminary analysis, without prejudging the merits of the case.

91. The Rules of Procedure of the Commission do not require that the petitioners indicate the specific rights that were allegedly violated by the State in the matter presented, although the petitioners may do so. It is for the IACHR, based on the jurisprudence of the inter-American system, to specify in its

⁸ See for example, IACHR, Report 8/10. Case 12.374. Admissibility. Jorge Enrique Patiño Palacios et al. Paraguay. March 16, 2010. para. 31; and IACHR, Report 20/05. Petition 716/00. Admissibility. Rafael Correa Díaz. Peru. February 25, 2005. para. 34.

admissibility report which provisions of the relevant inter-American instruments are applicable and could have been violated if the alleged facts are sufficiently proved.

92. The IACHR finds that, if proved, the facts alleged by the petitioner could tend to characterize violations of Articles I (the right to life, liberty, and the security of the person), II (the right to equal treatment before the law), XVIII (the right to a fair trial), XXV (right to protection from arbitrary arrest) and XXVI (the right to due process of law) of the American Declaration of the Rights and Duties of Man. The IACHR reiterates that it has a special obligation to guarantee that any deprivation of life from application of the death penalty occurs in strict compliance with the applicable inter-American human rights instruments, among them the American Declaration,⁹ an obligation that will be taken into account in the analysis of the merits in subsequent stages.

93. In conclusion, the IACHR decides that the petition is not manifestly groundless or out of order, and declares that the petitioners have prima facie satisfied the requirements established in Article 34 of the Commission's Rules of Procedure.

V. ESTABLISHED FACTS

94. In application of Article 43(1) of its Rules of Procedure, the IACHR will examine the arguments and evidence provided by the petitioners and the State. Likewise, the Commission will take into account publicly available information that may be relevant for the analysis and decision of the instant case.

A. Background, the first trial and death sentence

95. Víctor Hugo Saldaño¹⁰ was born on October 22, 1971, in the city of Córdoba, Argentina. His mother is Lidia Guerrero and his sister is Sandra Beatriz Saldaño¹¹.

96. The information available indicates that when he was 24 years old, Víctor Saldaño was in the United States and that, following the kidnapping and murder of Mr. Paul King in November, 1995, in Plano, Texas, Víctor Saldaño was arrested along with one other person and subjected to judicial proceedings for those offenses.

97. On November 25, 1995, Víctor Saldaño provided a statement in Spanish before Detective Jay Domínguez, in the presence of two witnesses. In that procedure, he renounced his right to have a lawyer present and confessed to having participated in the killing of a person.¹²

98. On November 25, 1995, the Grand Jury in Collin County, Texas accused Víctor Saldaño of homicide with a firearm.¹³ There is a record in the file with the IACHR that on December 5, 1995 and on February 20, 1996, the 199th District Court of the Judicial District of Collin County, Texas (hereinafter "the 199th District Court") assigned a state-appointed public defender to represent Mr. Saldaño, given that he had stated that he could not afford an attorney of his own.¹⁴ On December 21, 1995, the aforementioned court appointed an interpreter to assist the accused during his trial.¹⁵

⁹ IACHR, Report N.º 11/15, Case 12,833, Merits, Félix Rocha Díaz, United States, March 23, 2015, para. 53.

¹⁰ In the file with the IACHR, there are various judicial decisions in which Víctor Saldaño is also referred to as Víctor Rodríguez. The Commission will use the name Víctor Saldaño, which is the one shown in his birth certificate.

¹¹ Birth certificate of Víctor Hugo Saldaño, issued by the Municipal Birth Registry in the City of Córdoba on February 16, 1979. Attached to the communication of June 23, 1998.

¹² Testimony of Victor Saldaño to Detective Jay Domínguez on November 25, 1995.

¹³ Transcript No. 199-80049-96.

¹⁴ Transcript No. 199-80049-96, pp.6 and 27.

¹⁵ Transcript No. 199-80049-96, pp.6 and 27.

99. The trial of Mr. Saldaño before the 199th District Court of the Judicial District of Collin County, Texas began on July 8, 1996.¹⁶

100. On July 11, 1996, the jury found Víctor Saldaño guilty of murder.¹⁷

101. The stage for deciding on the sentence to be imposed was then initiated. The Commission observes that, in accordance with criminal procedure in the state of Texas,¹⁸ at that stage the jury had to respond to two questions in order to determine the punishment of the alleged victim: i) “do you find beyond a reasonable doubt that there is a probability that the defendant, VICTOR SALDANO, would commit criminal acts of violence that would constitute a continuing threat to society?” and ii) “whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than death sentence be imposed.”¹⁹

102. According to information in the file, to make that decision the jury took into account, among other evidence, the testimony of a clinical psychologist, Dr. Walter Quijano, presented by the Prosecutor’s Office to establish the “future dangerousness” of the accused. Specifically, it was on July 12, 1996, that this psychologist testified and made reference to three general categories and 24 factors that should be taken into account to determine the “future dangerousness” of the defendant. The three general categories consisted of environmental factors²⁰, clinical judgment factors,²¹ and statistical factors.

103. In particular, the statistical factors category included the following sub-criteria: i) past crimes, ii) age, iii) sex of the person, iv) race, v) employment stability, vi) socioeconomic status of the person and vii) substance abuse, whether alcohol or other illicit drugs.²²

104. During questioning by the prosecution, referring to race, the witness indicated the following:

A. The fourth category is race.

Q. Well, let’s talk about that.

In this age of political correctness, that somehow it is an item that we tend to gloss over. But, empirically, there is a statistical analysis of it. Is that correct?

A. Yes. This is one of those unfortunate realities also that blacks and Hispanics are over-represented in the criminal justice system.

Q. And there may be social problems for that; we don’t know. But that doesn’t alter the fact that, statistically, that’s a reality of life.

A. The race itself may not explain the over-representation, so there are other subrealities that may have to be considered. But, statistically speaking, 40 percent of inmates in the prison system are black, about 20 percent are—about 30 percent are white, and about 20 percent are Hispanics. So there’s much over-representation.

Q. Okay.

¹⁶ Case No 199-80049-96, Statement of Facts, Volume 14.

¹⁷ See, inter alia: Decision of the Court of Criminal Appeals of Texas. No. 72.556. Attached to the petitioners’ communication of April 11, 2000.

¹⁸ Article 37.071 of the Code of Criminal Procedure of Texas in force at the time.

¹⁹ Transcript No. 199-80049-96, p.126.

²⁰ This category included the following sub-criteria: i) family environment, ii) peer environment, iii) job environment, iv) availability of victims, v) availability of weapons, and vi) availability of drugs. Cause No 199-80049-96, Statement of Facts, Volume 20, p. 84.

²¹ That category included the following sub-criteria: i) mental illness, ii) personal variables, iii) antisocial personality disorder, iv) situation-specific variables, v) deliberateness, vi) behaviorally expressed remorse at the time of the conduct charged; vii) post conduct-charged behaviors: continuing crime, viii) post conduct charged behaviors: covering up the crime, ix and x) post conduct charged behaviors: surrender, x), xi) how the person does in the prison environment. Cause No 199-80049-96, Statement of Facts, Volume 20, p. 86.

²² Cause No 199-80049-96, Statement of Facts, Volume 22, p. 86.

In the category—categorization of races, how is an Argentinean fitted?

A. That—he would be considered a Hispanic.²³

105. He also stated, regarding the weighting of his statistical criteria and sub-criteria, that although these are objective factors, there is no scientific evidence for determining the weighting or value of each criterion. It was up to the jury to determine the weight they attached to each criterion.²⁴

106. The Commission takes note that Mr. Saldaño's court-appointed defense counsel raised no objection during the trial to the inclusion of the racial criteria as a factor for determining the future dangerousness of the defendant. In this regard, the defense counsel stated:

During Dr. Quijano's testimony, I did my best to be as attentive as possible. I knew in advance how effective he could be expected to be with the jury and I would need to exploit every possible opportunity on cross examination to discredit his theory of the case about future dangerousness of Mr. Saldaño and to suggest alternate ways of looking at his interpretations of the data in the case (...).

Thus, when Dr. Quijano began to testify about the factor of race or ethnicity of the defendant in determining future dangerousness, my main concern was to keep very accurate notes of exactly what he was saying on this point for cross examination (...)

To the extent that I considered making (but failed to make) any objection to Quijano's testimony about this point, I would say first that I would never have imagined that anyone (least of all Dr. Quijano, a native of the Philippines and an immigrant) would testify that because a person was of Hispanic origin he would be more likely to be dangerous in the future and therefore should receive the death penalty. To be fair to Dr. Quijano, I would say that it was my impression during the trial that he was saying that there was a statistical correlation between a person's ethnic background and his (or her) chance of being dangerous in the future. In other words, I understood the doctor to say a higher percentage of Hispanic persons commit violent offenses than the general population, therefore if a person is a Hispanic, there is a greater likelihood that that person will be dangerous in the future than someone who is not Hispanic.

It was only after reading the passage of the trial transcript ("out of the heat of legal combat" and on the cold printed page) that it became clear to me there was no real difference between the two formulations stated above, and that I should have objected to that line of testimony. I must say on this point that I believe any objection at that point would have been futile. I have appeared many other times before the trial court in the Saldaño case, several other times in capital cases, and on the basis of that previous experience I believe the Judge would certainly have overruled any objection stated.²⁵

107. At this stage for the determination of the punishment, according to the information available, the 199th District Court appointed an expert to conduct a psychiatric examination of the defendant.²⁶ On July 12, 1996, that person testified, saying that he had examined Mr. Saldaño and had found, among other things, that he had an intelligence quotient of 76, so that he was a "borderline" case. The expert added that, after

²³ Cause No 199-80049-96, Statement of Facts Volume 20, p.76.

²⁴ Cause No 199-80049-96, Statement of Facts, Volume 22, p. 86.

²⁵ Application for writ of *habeas corpus* presented by the alleged victim to the United States District Court for the Eastern District of Texas on Thursday, April 11, 2002, p. 12.

²⁶ Transcript No. 199-80049-96, p.63.

interviewing the defendant, he considered the likelihood of his committing crimes in the future was low, if he were to be in a structured environment.²⁷

108. After listening to this testimony, along with other elements, the jury responded to the first question as to the risk of future dangerousness, saying that it found beyond a reasonable doubt that there was a likelihood of the defendant committing criminal acts of violence that would constitute a continuing threat to society.²⁸ Regarding the second question, concerning whether there were sufficient mitigating circumstances to warrant the alternative sentence of life in prison, the jury answered in the negative.²⁹

109. On July 22, 1996, Mr. Saldaño's defense counsel filed a "motion for a new trial" because the defense considered that the verdict reached had been contrary to law given that the 199th District Court had admitted the testimony of Martín Alvarado,³⁰ an employee of the prison in the city of Plano, who gave a statement regarding a confession that the alleged victim had made to him regarding the facts, but which, according to the defense, had been elicited without the defendant having been advised of his rights under the United States Constitution and the Constitution of the state of Texas.³¹ On July 25, 1996, the 199th District Court summarily dismissed the motion as unfounded without granting a hearing.³²

110. On August 15, 1996, the 199th District Court of the Judicial District of Collin County, Texas found Víctor Saldaño guilty of the crime of murder committed on November 20, 1995 and that the application of the death penalty against him would proceed.³³ Pursuant to procedural law in Texas, the Court also granted automatic appeal to the Criminal Court of Appeals of the state of Texas.³⁴

111. Víctor Saldaño's defense counsel filed an appeal arguing "seven points of error" against the conviction decision.³⁵ One of the arguments of the defense was that the trial court had unlawfully admitted the testimony of Dr. Walter Quijano regarding the alleged "future dangerousness" of Víctor Saldaño. The defense recalled that during the "sentencing phase" of the trial, the prosecution had presented Dr. Walter Quijano, a clinical psychologist, so that he could give his opinion regarding the likelihood of the defendant committing further acts of violence that would constitute a continuing threat to society, pursuant to Article 37.071.2(b)(1) of the Criminal Code of the state of Texas. It was pointed out in the appeal that Dr. Quijano had expressed his view that it was highly likely that Mr. Saldaño would continue to be "dangerous." The defense argued that Dr. Quijano had neither interviewed nor examined Mr. Saldaño, and had rather based his opinion on documents about the investigation provided to him by the prosecution. It added that there was no evidence as to which facts exactly had formed the basis of Dr. Quijano's opinion, so that, according to the Criminal Code of Texas, his opinion should be declared inadmissible.³⁶

²⁷ Cause No 199-80049-96, Statement of Facts, Volume 22, p. 191.

²⁸ Transcript No. 199-80049-96, p.131.

²⁹ Transcript No. 199-80049-96, p.126.

³⁰ Martín Alvarado Rocha, a prison guard in the city of Plano, testified at the trial on July 10, 1996. He said that he had contact with the defendant in November 1995 and that while the defendant was detained he had spoken with him, and that the defendant had voluntarily confessed that they had shot a person several times in the chest and that once that person was on the ground the defendant had shot him in the head to make sure he was dead. Mr. Alvarado Rocha added that at the time he had not been interrogating the defendant. Rather, the defendant had mentioned it to him spontaneously, and so he had made a record of it. Cause No 199-80049-96, Statement of Facts, Volume 17, p. 684.

³¹ Transcript No. 199-80049-96, p.135.

³² Transcript No. 199-80049-96, p.137.

³³ Decision of the Judge of the 199th District Court of Collin County, Texas, on August 15, 1996.

³⁴ Decision of the Judge of the 199th District Court of Collin County, Texas, on August 15, 1996.

³⁵ Appeal filed before the 199th District Court of Collin County, Texas. Cause No. 199-80049-96.

³⁶ Appeal filed before the 199th District Court of Collin County, Texas. Cause No. 199-80049-96.

112. On this aspect, the defense also argued that it should be considered that Víctor Saldaño was 24 years old at the time of the events of the case, with an I.Q. of 76 considered "borderline intelligence," and that, in general, no evidence had been produced to show that Víctor Saldaño could be perceived as being of "bad character or reputation," so that it could be established beyond a reasonable doubt that Mr. Saldaño would commit another crime or acts of violence that would make him a continuing threat to society.³⁷

113. Another defense claim had to do with the presentation by the prosecution of Martin Alvarado, from the city of Plano, to testify regarding the conversation he had with Víctor Saldaño, when the latter had been detained there, during which he had confessed to being guilty of the facts. Here, the defense argued that that evidence had been unlawfully admitted because the conversation ought to have been considered an interrogation, so that, to be presented as such, certain guarantees would have had to have been met, which was not the case.³⁸

114. As a subsidiary claim, the defense argued that, regardless of whether the conversation should or should not be considered an interrogation, the statement made by Víctor Saldaño to that prison official should be considered "involuntary." Specifically, the defense maintained that it had to be taken into account that Víctor Saldaño spoke very little English, had an I.Q. of 76, and that his admission of the facts to the official had been made after he had been confined to an individual cell for three days. There was no evidence of him having had any contact during that time with anyone other than that official, with whom he was able to converse in his native language and to ask about his situation. Accordingly, the defense argued that Víctor Saldaño had been confused at the time and the guard, in addition to having assisted him previously as a translator, had initiated a conversation with him and had persuaded him to go on talking; so that, under those circumstances and bearing in mind his "mental state," his will had been influenced by the guard and the statement could therefore not be considered voluntary. Regarding that testimony, it was also argued that, under Texas rules and the United States Constitution, its admission violated due process because the conviction had been based, in whole or in part, on an involuntary confession, irrespective of the truth or falsehood of said confession.³⁹

115. It was also argued in the appeal that there had been a violation of the principle of equality established in both the laws of the state of Texas and the United States Constitution, because consideration had been given to testimony -- that of Dr. Quijano -- asserting the alleged future dangerousness of Víctor Saldaño based on race. Here the defense argued that the Texas Constitution and that of the United States prohibited unequal treatment based on race and that, during the trial, the prosecution had asked the jury to consider, *inter alia*, the defendant's race in deciding whether he constituted a threat to society. This, in turn had the impact of making the difference between whether he should be given the death penalty or sentenced to life in prison. The defense maintained that, although no objection had been raised about this during the trial, the fact that the defendant's race was considered at the trial to decide his sentence was a constitutional issue so grave that it ought to be reviewed by the Court of Appeals.⁴⁰

116. The defense maintained that in view of the alleged errors, the conviction should be overturned and a new trial held, or, if that request were rejected, it requested that in the alternative, consideration be given to commuting the sentence to life imprisonment.⁴¹

117. On August 17, 1998, the state of Texas presented its response to the appeal, requesting that the judgment of the 199th District Court be upheld since no error had been committed.⁴² The state argued,

³⁷ Appeal filed before the 199th District Court of Collin County, Texas. Cause No. 199-80049-96.

³⁸ Appeal filed before the 199th District Court of Collin County, Texas. Cause No. 199-80049-96.

³⁹ Appeal filed before the 199th District Court of Collin County, Texas. Cause No. 199-80049-96.

⁴⁰ Appeal filed before the 199th District Court of Collin County, Texas. Cause No. 199-80049-96.

⁴¹ Appeal filed before the 199th District Court of Collin County, Texas. Cause No. 199-80049-96.

⁴² Response of the state of Texas in connection with the appeal, August 17, 1998, p.7.

inter alia, that the District Court had correctly admitted the testimony of Dr. Walter Quijano regarding the future dangerousness of Mr. Saldaño and that the defense had not objected either to the professional qualifications of the declarant or to his opinion on the defendant's future dangerousness, so that the defense did not preserve this issue for appeal. Specifically regarding race, the state added that Dr. Quijano had restricted himself to presenting a statistical summary of racial representation in prisons and it was not true that the only inference that could be drawn from that was that Hispanics are more likely to commit crime just because they are Hispanic. It indicated that if that constituted an error it would be "harmless" under the "Rules of Procedure for Appeals" of Texas because the "overwhelming evidence" produced at the trial justified the jury's verdict.⁴³

118. On September 15, 1999, the Court of Criminal Appeals of Texas confirmed the conviction.⁴⁴ Among other things, the Court of Appeals found that the defense had not objected in a timely manner to Dr. Quijano's testimony and that, under federal law, only matters relating to "fundamental errors" could be raised for the first time upon appeal, which was not the case in this instance.⁴⁵ Specifically, the decision stated that the appellant did not raise any objection to the testimony of Doctor Quijano during the trial and did not allege in the appeal that the admission of that testimony was a fundamental error. In this regard, the Court of Appeals cited the Rules of Criminal Evidence 103 (a) and (d) and indicated that the appellant did not preserve the right to allege error. It added that "we cannot say that this admission of Dr. Quijano's testimony of which the appellant complains was fundamental error."⁴⁶

119. On January 18, 2000, the 199th District Court of Collin County, Texas issued the warrant with the execution date for Víctor Saldaño. The date set was for April 18, 2000, for execution by lethal injection.⁴⁷

B. *Writ of certiorari* before the United States Supreme Court of Justice

120. On February 4, 2000, Víctor Saldaño's defense counsel presented a *writ of certiorari*, together with a request for suspension of the execution, to the United States Supreme Court.⁴⁸ In that request, the defense asked that execution be suspended until the *writ of certiorari* had been reviewed.⁴⁹ The *writ of certiorari* argued that it had been a "fundamental error" to use "race or ethnic stereotypes to establish imposition of the death penalty."⁵⁰

121. In the *writ of certiorari* proceeding, the Attorney General of Texas presented his reply, admitting that "the use of race in [Víctor] Saldaño's sentencing seriously undermined the fairness, integrity, and public reputation of the judicial process," and that the state of Texas acknowledged that it had committed an error and agreed that Víctor Saldaño should be submitted to a new sentencing phase. Therefore, the

⁴³ Response of the state of Texas in connection with the appeal, August 17, 1998, p.14.

⁴⁴ Decision of the Court of Criminal Appeals of Texas. No. 72.556. Attached to the petitioners' communication of April 11, 2000.

⁴⁵ Decision of the Court of Criminal Appeals of Texas. No. 72.556. Attached to the petitioners' communication of April 11, 2000.

⁴⁶ Decision of the Court of Criminal Appeals of Texas. No. 72.556. Attached to the petitioners' communication of April 11, 2000. Judge Mansfield concurred with the decision and added the following note to it: "I am convinced that, in this case, the reference by Walter Quijano to the fact that Hispanics and African-Americans are incarcerated at a rate greater than their percentages of the general population of this country did not harm appellant. The danger that such testimony could be interpreted by a jury in a particular case as evidence that minorities are more violent than non-minorities is real, however, and this Court should not sanction the use of such testimony."

⁴⁷ 199th Judicial District of Collin County, Texas. No. 199-80049-96. Execution warrant. January 18, 2000. Attached to the petitioners' communication of April 11, 2000.

⁴⁸ Request for suspension of execution. Attached to the petitioners' communication of April 11, 2000; and Petition for *writ of certiorari* to the Texas Court of Criminal Appeals. Cause No. 72,556. Attached to the petitioners' communication of April 11, 2000.

⁴⁹ Request for suspension of execution. Attached to the petitioners' communication of April 11, 2000.

⁵⁰ Petition for *writ of certiorari* to the Texas Court of Criminal Appeals. Cause No. 72,556. Attached to the petitioners' communication of April 11, 2000.

Attorney General asked the Supreme Court to grant the *writ of certiorari* and to order that Víctor Saldaño be submitted to a new sentencing phase in which race would not be a consideration.⁵¹

122. The Commission notes that, according to publicly available information, on May 9, 2000, the Attorney General of Texas John Cornyn stated the following:

It has been eight weeks since I first identified problems associated with the testimony of Dr. Walter Quijano, an expert witness in the capital murder trial of Victor Hugo Saldano. As I explained in a filing before the United States Supreme Court on May 3, it is inappropriate to allow race to be considered as a factor in our criminal justice system. On June 5, the United States Supreme Court agreed. The people of Texas want and deserve a system that affords the same fairness to everyone (...)

After a thorough audit of cases in our office, we have identified eight more cases in which testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in making its determination about the sentence in a capital murder trial. Six of these eight cases are similar to that of Victor Hugo Saldano.⁵²

123. On June 5, 2000, the United States Supreme Court granted the *writ of certiorari*, vacated the imposition of the death penalty, and sent the case file back to the Court of Criminal Appeals of Texas for "further consideration" in view of the admission by the Attorney General of Texas that an error had been committed.⁵³

124. The Commission notes the entry into force on September 1, 2001 of Law 77 (R) SB 133 related with the admissibility in criminal trials of race or ethnicity criteria for assessing future criminal conduct. That law amended the Texas Code of Criminal Procedure. That law states that "notwithstanding Subdivision (1), "the State shall not present evidence to establish that the race or ethnicity of a defendant makes him more likely to commit future criminal conduct." As the text of the law itself points out, the change it introduces applies to any sentencing procedure that begins on or after the date of entry into force of this law, regardless of when the crime of which the accused was convicted took place.⁵⁴

C. Decision of the Court of Criminal Appeals of Texas and subsequent appeals

125. On March 14, 2002, the Court of Criminal Appeals of Texas confirmed the decision to sentence Víctor Saldaño to death.⁵⁵ The Court of Appeals considered that the admission by the Attorney General of Texas that an error had been committed did not have an effect and that the presentation of such factors as race did not constitute a "fundamental error," so that that issue could not be submitted for review as the defense had not objected to it at the appropriate time.⁵⁶

⁵¹ Reply by the state of Texas, represented by its Attorney General, in the Víctor Saldaño *writ of certiorari* petition proceedings before the Supreme Court. No. 99-8119. Attached to the petitioners' communication of May 11, 2000.

⁵² See: <https://texasattorneygeneral.gov/newspubs/newsarchive/2000/20000609death.htm>.

⁵³ Saldaño v. Texas, See 530 U.S. 1212, 1212 (2000). See, inter alia: Appeal from the United States District Court for the Eastern District of Texas. Filed on March 23, 2004; and Application for writ of *habeas corpus* before the United States District Court for the Eastern District of Texas, Sherman Division, against the Texas Department of Criminal Justice.

⁵⁴ Amendments of the Code of Criminal Procedure of Texas. Available at: <http://www.legis.state.tx.us/tlodocs/77R/billtext/html/SB00133F.htm>

⁵⁵ Decision of the Court of Criminal Appeals of Texas of March 14, 2002.

⁵⁶ Decision of the Court of Criminal Appeals of Texas of March 14, 2002. There were two dissenting opinions regarding that decision. Judge Price considered that admitting Dr. Quijano's testimony during the sentencing phase in the trial constituted a "fundamental error" that ought to be reviewed even if no objection was raised during the trial. For her part, Judge Johnson maintained that allowing the testimony "violates one of the most fundamental principles of our legal system: a citizen must be found guilty and given appropriate punishment because of what he did, not who he is. It is all the more important to steadfastly defend this principle when the potential consequence of a violation is as serious as it is in the instant case. To do less is to place the right of the State to execute this

[continues ...]

126. Concerning the admission of error by the Attorney General, the court indicated that “the State’s confession of error in the Supreme Court is contrary to our state’s procedural law for presenting a claim on appeal, as well as the Supreme Court’s enforcement of such procedural law when it is presented with equal-protection claims. If any decision of any court in this country would support another conclusion, the appellant, the Attorney General and other amici, and the dissenting opinion have not informed us of it.”⁵⁷

127. Likewise it referred to the appellant’s argument that the submission of the testimony of Walter Quijano by the prosecution violated the right to equal protection enshrined in the Constitution. It indicated that the appellant did not present an objection during the trial and that “the failure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence. This is true even though the error may concern a constitutional right of the defendant. Specifically, a defendant’s failure to object to testimony prevents his raising on appeal that the testimony was offered for the sole purpose of appealing to the potential racial prejudices of the jury.”⁵⁸

128. According to information in the case file, Víctor Saldaño's defense counsel filed a petition for *habeas corpus* against that decision with the United States District Court for the Eastern District of Texas on April 11, 2002.⁵⁹ That appeal argued that “the evidence improperly injected by the State during the penalty phase of the Petitioner’s trial allowed the jury to consider race as an aggravating factor used to determine his future dangerousness. Consideration of race in this manner constitutes a serious constitutional error that mandates the reversal of Saldaño’s death sentence.”⁶⁰

129. The application for *habeas corpus* relief also argued that in the proceedings against Víctor Saldaño, the right to an adequate defense was violated because during the trial his defense attorney failed to raise a timely objection to the introduction of race as evidence for the jury to consider.⁶¹ Consequently, the United States District Court for the Eastern District of Texas was asked to revoke the sentence of the death penalty against the alleged victim and to return the case to the court of first instance for a new hearing on the imposition of punishment.⁶²

130. On May 21, 2002, the Director of the Correctional Institutions Division of the Criminal Justice Department of Texas submitted his response in connection with the petition for *habeas corpus* relief.⁶³ In that response, he confessed to a constitutional error that consisted of injecting race as a factor for assessing “future dangerousness” in the context of Dr. Walter Quijano's testimony, which violated Víctor Saldaño's right to due process and equality.⁶⁴

[... continuation]

appellant under a cloud. I would be inclined to order a new hearing to determine the appellant's punishment.” See: Judge Price's dissenting opinion; and partially concurring and partially dissenting opinion of Judge Johnson.

⁵⁷ Decision of the Court of Criminal Appeals of Texas of March 14, 2002.

⁵⁸ Decision of the Court of Criminal Appeals of Texas of March 14, 2002.

⁵⁹ Application for writ of *habeas corpus* presented by the alleged victim to the United States District Court for the Eastern District of Texas on Thursday, April 11, 2002, p. 12.

⁶⁰ Application for writ of *habeas corpus* presented by the alleged victim to the United States District Court for the Eastern District of Texas on Thursday, April 11, 2002, p.10.

⁶¹ Application for writ of *habeas corpus* presented by the alleged victim to the United States District Court for the Eastern District of Texas on April 11, 2002. p. 20.

⁶² Application for writ of *habeas corpus* presented by the alleged victim to the United States District Court for the Eastern District of Texas on April 11, 2002. p. 20.

⁶³ Reply of May 21, 2002 by the Director of the Correctional Institutions Division of the Criminal Justice Department of Texas in the *habeas corpus* proceeding.

⁶⁴ Reply of May 21, 2002 by the Director of the Correctional Institutions Division of the Criminal Justice Department of Texas in the *habeas corpus* proceeding.

131. This response to the petition for *habeas corpus* relief also recalled that the prosecution had called upon the jury to base its findings on the 24 criteria outlined by Dr. Quijano for assessing "future dangerousness" -- criteria including race -- and that "the use of race in [V́ctor] Saldaño's sentencing seriously undermined the fairness and integrity of the judicial process." In light of that, the Director requested that the application for *habeas corpus* be granted, unless the state of Texas were to commute the sentence to life imprisonment or conduct a new hearing in accordance with the Constitution and the laws of the United States.⁶⁵

132. On June 12, 2003, the United States District Court for the Eastern District of Texas granted the petition for *habeas corpus*.⁶⁶ It pointed out that the admission of certain parts of Dr. Quijano's testimony and the reference to that testimony by the prosecution during final arguments constituted a constitutional error because it "invited" the jury to take V́ctor Saldaño's race and ethnicity into account in assessing whether he should receive the death penalty. That decision established that considerations of race and ethnicity are irrelevant for assessing future dangerousness.⁶⁷

D. Second sentencing trial of V́ctor Saldaño and subsequent appeals

133. Following the decision granting the application for *habeas corpus*, on September 16, 2004 a new proceeding was initiated to determine the punishment to be imposed on Mr. Saldaño. It was conducted before the same 199th District Court in Collin County, Texas.

134. In those proceedings, the defense filed a motion aimed at preventing the State from potentially introducing evidence relating to Victor Saldaño's behavior in detention following the sentence of death issued as a result of the first trial.⁶⁸ In particular, the defense argued that the alleged victim's negative conduct in prison was the result of his prison conditions and isolation on death row and that the state should not benefit from the consequences of the prosecutorial misconduct and the Quijano testimony that placed Mr. Saldaño on death row.⁶⁹ For these reasons the defense indicated that it would be improper and unjust to allow the prosecution to refer to such conduct as evidence of future dangerousness.

135. For its part, the prosecution argued that the mental capacity of the alleged victim could be used as a mitigating circumstance, but also as a "double-edged sword."⁷⁰

136. The District Court decided to admit the evidence relating to the alleged victim's conduct while on death row. Likewise, it found that if the defense presented expert appraisals relating to the mental capacity of the accused, the state had a right to present its own experts and cross-examine the defense's witnesses.⁷¹ The defense therefore opted not to present the report of a doctor who had examined the alleged victim in 2001 or the testimony of his mother.⁷²

⁶⁵ Reply of May 21, 2002 by the Director of the Correctional Institutions Division of the Criminal Justice Department of Texas in the *habeas corpus* proceeding.

⁶⁶ Decision of the United States District Court for the Eastern District of Texas, of June 12, 2003, consulted at: LEXSEE 2003 U.S. Dist. LEXIS 10048.

⁶⁷ Decision of the United States District Court for the Eastern District of Texas, of June 12, 2003, consulted at: LEXSEE 2003 U.S. Dist. LEXIS 10048.

⁶⁸ Proceedings, 199-80049-96, state of Texas versus Victor Saldano, Volume 23, p. 6.

⁶⁹ Proceedings, 199-80049-96, state of Texas versus Victor Saldano, Volume 23, p. 8.

⁷⁰ Proceedings, 199-80049-96, state of Texas versus Victor Saldano, Volume 23, p. 10.

⁷¹ Proceedings, 199-80049-96, state of Texas versus Victor Saldano, Volume 23, p. 52.

⁷² Proceedings, 199-80049-96, state of Texas versus Victor Saldano, Volume 31, p. 99.

137. The evidence presented in this regard by the prosecution included statements by prison personnel indicating that Mr. Saldaño had, among other things, twice thrown feces and urine at them,⁷³ started a fire in his cell,⁷⁴ insulted the guards, blocked his cell window,⁷⁵ and destroyed the television placed in his cell.⁷⁶

138. The prosecution asked the jury to assess whether Víctor Saldaño constituted a future social danger, taking into account the evidence presented during the proceedings, which included information on the alleged victim's conduct while on death row, as well as the circumstances in which he had committed the crime and the absence of mitigating circumstances.⁷⁷ The prosecution indicated that there was insufficient evidence that the alleged victim had been intoxicated at the time he committed the crime and that it had been proven beyond a reasonable doubt that the alleged victim was a future danger.⁷⁸

139. For its part, the defense asked that the death penalty not be imposed, given that Mr. Saldaño had shown repentance through his confession. It also asked that consideration be given to the fact that Mr. Saldaño had not been examined to determine whether he had been intoxicated when he committed the crime.⁷⁹ His counsel added that his emotional and cognitive deterioration was the result of the time he had spent on death row, given that he spent 24 hours a day in his cell.⁸⁰

140. The Commission observes that, according to the records of the proceeding, Víctor Saldaño was examined by psychologist Kelly Goodness, appointed by the court, on November 11, 2004, who pronounced him competent to stand trial.⁸¹ The Commission takes note that within the framework of this proceeding other similar examinations were conducted regarding Mr. Saldaño's mental health. The information available also shows that during this proceeding the defense asked to present the testimony of Dr. Peccora as evidence, so that he could make a statement as to the effects of being on death row on Víctor Saldaño's mental health. Given that request, the prosecution claimed based on an earlier judicial precedent (Lagrone) that the state should be permitted to name an expert to examine Víctor Saldaño, which the District Court accepted.

141. At the end of the proceedings, the 199th District Court indicated that it had no reason to consider that Víctor Saldaño was not competent to stand trial, because, while during the trial he had behaved in a way contrary to his own interests, the verbal exchanges the judge had had with him made it fair to say that the defendant had understood and had been able to communicate.⁸²

142. Within the framework of this new sentencing trial, on October 21, 2004, Víctor Saldaño's defense filed a request with the 199th District Court to establish that: i) Article 37.071 2(b)(1) of the Code of Criminal Procedure of Texas was "unconstitutionally vague;" and ii) in accordance with the Constitution, that Article could not be applied in light of the facts of the instant case.⁸³ The defense argued that approximately eight years had elapsed between the first trial and the new sentencing trial about to commence and that

⁷³ Proceedings, 199-80049-96, state of Texas versus Victor Saldano. Volume 28, p. 14.

⁷⁴ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño. Volume 28, p. 105.

⁷⁵ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño. Volume 28, p. 127.

⁷⁶ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño. Volume 28, p. 150.

⁷⁷ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño, Volume 31, p. 19.

⁷⁸ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño, Volume 31, p. 79.

⁷⁹ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño, Volume 31, p. 48.

⁸⁰ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño, Volume 31, p. 54.

⁸¹ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño. Volume 27, p. 2.

⁸² Proceedings, 199-80049-96, state of Texas versus Victor Saldaño. Volume 29, p. 8.

⁸³ Request presented to the 199th District Court of Collin County, Texas in cause No. 199'80049-96 on behalf of Víctor Saldaño, on October 21, 2004. Appendix III. Part A of the petitioners' communication of September 17, 2009.

during that entire time Víctor Saldaño had been on death row under conditions that caused a serious deterioration in his mental health. The defense alternatively requested that, if the article were not established as unconstitutional, the prosecution be ordered to abstain from presenting evidence on Víctor Saldaño's behavior during the time he had spent on death row.⁸⁴

143. On November 15, 2004, Víctor Saldaño's defense counsel filed another request, asking the District Court to reconsider its decision applying the judicial precedent adduced by the prosecution in favor of examining Víctor Saldaño. The defense indicated that it would accept that Víctor Saldaño be subjected to an examination on behalf of the prosecution, but on condition that the examination would not be used for any purpose other than the issue of the deterioration in his mental health and emotional stability on death row. The defense also added that, from the start of the trial in November 2004, it was evident that Víctor Saldaño was suffering from severe mental disability and emotional instability as a result of long periods of isolation on death row.

144. The records show that on that same date a hearing was held to resolve the latest request. On that occasion, the District Court denied the request by Víctor Saldaño's defense to restrict the scope of the examination. From the available information the Commission understands that this examination was not performed.

145. On November 17, 2004, the jury found that there was a likelihood beyond a reasonable doubt that Víctor Saldaño would commit criminal acts of violence that would constitute a continuing threat to society⁸⁵ and that there were insufficient mitigating circumstances to commute the death penalty sentence to a sentence of life in prison.⁸⁶

146. On November 18, 2004, after accepting the jury's decision, the 199th District Court handed down a judgment condemning Mr. Saldaño to the death penalty.⁸⁷

147. An appeal against that decision was filed and denied and, on June 6, 2007, the imposition of the death penalty was upheld by the Court of Criminal Appeals of Texas.⁸⁸ That Court considered that there was sufficient evidence to support the jury's finding that it was probable that Víctor Saldaño would commit acts of violence that would constitute an ongoing threat to society. Further, the Court established, among other points, that the defense had not presented a timely objection to the evidence presented by the prosecution concerning the conduct of the defendant on death row. Nor had the defense raised in a timely way its claim that, in the event that an expert for the prosecution were permitted to examine Mr. Saldaño as to his mental health, such evidence should not be utilized to prove his future dangerousness. The Appeals Court also determined that the testimony given by officers, to the effect that Víctor Saldaño had not expressed repentance for the crime committed and had said that he had killed three other people, did not constitute misuse of the Court's discretion or prejudice the case of the accused.⁸⁹

148. In addition, the available information shows that, while that decision on the appeal was still pending, on February 15, 2007, Víctor Saldaño's defense had filed an application for writ of *habeas corpus*, which was denied by the 199th District Court. That denial was upheld by the Court of Criminal Appeals of

⁸⁴ Request presented to the 199th District Court of Collin County, Texas in cause No. 199'80049-96 on behalf of Víctor Saldaño, on October 21, 2004. Appendix III. Part A of the petitioners' communication of September 17, 2009. This request was presented along with statements from 2004 by Dr. Orlando Peccora and Dr. Susan Perryman-Evans regarding Víctor Saldaño's mental health and the effects of being held in isolation on death row.

⁸⁵ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño, Volume 31, p. 84.

⁸⁶ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño, Volume 31, p. 85.

⁸⁷ Decision of the Judge of the 199th District Court of Collin County, Texas, on November 18, 2004.

⁸⁸ Decision of the Court of Criminal Appeals of Texas of June 6, 2007.

⁸⁹ Decision of the Court of Criminal Appeals of Texas of June 6, 2007.

Texas in a decision handed down on October 29, 2008. The records show that another application for *writ of certiorari* was filed with the Supreme Court of Justice, which rejected it in 2008.⁹⁰

149. On October 26, 2009, Víctor Saldaño's defense filed a petition for federal *habeas corpus* relief, arguing violations of constitutional rights.⁹¹ Specifically, the defense raised 15 claims relating mainly to the District Court's decision not to give assurances that if the prosecution conducted an examination of Víctor Saldaño's mental health, the findings would not be used to prove his "future dangerousness." They argued that that decision had prevented the defense from presenting Dr. Peccora's testimony. Another argument was the lack of access to an adequate defense in that proceeding. On the one hand, because there had been no timely objection to application of the judicial precedent cited by the prosecution to call for an examination of Víctor Saldaño's mental health. On the other hand, because the defense had failed to present relevant mitigating evidence to establish that Mr. Saldaño would not be a danger to society. Further on this point, it was claimed that the defense had also failed to request a hearing to establish Víctor Saldaño's competence to be subjected to this judicial proceeding. It was also argued that due process had been violated by going forward with a judicial proceeding for which Víctor Saldaño was incompetent.⁹²

150. The application for federal *habeas corpus* relief also made, inter alia, the following arguments: i) the future dangerousness criterion is "unconstitutionally vague" because it was not clear what period of time should be taken into account in assessing said future dangerousness and what circumstances should be taken into account for such an assessment; ii) that the new sentencing trial for Víctor Saldaño and his possible execution were unconstitutional due to his mental health; iii) that his right to due process was violated because the prosecution was allowed to present evidence that the defense had not had sufficient opportunity to rebut; and iv) the legal norms in force in the state of Texas regarding the death penalty are unconstitutional because they allow a jury broad discretion in determining who should live and who should die. The defense maintained that all these factors, even if they did not do so individually, as a whole constitute a violation of due process for Víctor Saldaño.⁹³

151. In this context, the Commission has a copy of a communication sent on June 2, 2010 by the Attorney General of the United States to the judge in charge of hearing this petition for *habeas corpus*. In that letter, the Attorney General referred to and attached a State Department letter dated May 10, 2010, in which the Department indicated the importance that Mr. Saldaño be allowed at this stage to have an evidentiary hearing. The letter also noted the existence of the present case before the IACHR; the follow up the Government of Argentina has given to the case; as well as the defense presented by the State in the framework of the inter-American proceedings in the sense that there were remedies still pending and that there are strong constitutional protections in the legal system of the United States.⁹⁴

152. During the processing of the above-mentioned *habeas corpus* petition, the Criminal Justice Department of the state of Texas presented its position on July 9, 2010, requesting that the appeal be denied.⁹⁵

⁹⁰ See: Reply from the Criminal Justice Department of the state of Texas. Civil Action No. 4:08-cv-193. July 9, 2010. Attached to the petitioner's communication of July 27, 2010.

⁹¹ See: Reply from the Criminal Justice Department of the state of Texas. Civil Action No. 4:08-cv-193. July 9, 2010. Attached to the petitioner's communication of July 27, 2010.

⁹² See: Reply from the Criminal Justice Department of the state of Texas. Civil Action No. 4:08-cv-193. July 9, 2010. Attached to the petitioner's communication of July 27, 2010.

⁹³ See: Reply from the Criminal Justice Department of the state of Texas. Civil Action No. 4:08-cv-193. July 9, 2010. Attached to the petitioner's communication of July 27, 2010.

⁹⁴ Letter from the Attorney General John M. Bales dated June 10, 2010, sent to the Honorable Judge Richard Schell with reference to a request from the State Department.

⁹⁵ Reply from the Criminal Justice Department of the state of Texas. Civil Action No. 4:08-cv-193. July 9, 2010. Attached to the petitioner's communication of July 27, 2010.

153. On November 27, 2010, Víctor Saldaño's defense presented its response to the arguments of the Director of the Criminal Justice Department of the state of Texas in the matter of the federal *habeas corpus* petition.⁹⁶

154. The response argued that: i) Víctor Saldaño's mental health deteriorated as from the time of his transfer to death row in the Polunsky Unit in early 2000; ii) he was not competent to stand trial at the time of the second sentencing trial, and had been depicted by the prosecution as a future danger to society based on the testimony of prison guards whose testimony concerned his bad conduct subsequent to the deterioration in his mental health on death row; iii) the Criminal Justice Department of Texas had hospitalized Víctor Saldaño in the Jester IV Psychological Unit various times, and at the time of the response he had again been hospitalized; iv) owing to "constitutional errors" in the second sentencing trial, the defense was unable to present the testimony of Dr. Peccora because presenting it would have meant that the prosecution could appoint an expert to examine him as well, with no terms established as to how the findings of such an examination could be used; and v) despite all the information on Víctor Saldaño's mental health, a hearing was never ordered regarding his competence to stand trial. In addition, the defense of Víctor Saldaño requested that an evidentiary hearing be granted in the *habeas corpus* proceeding.

155. On July 18, 2016, the United States District Court for the Eastern District of Texas denied the *habeas corpus* petition.⁹⁷ The decision indicates that the standard for a federal court to be able to review a *habeas corpus* petition is that the violation of a federal constitutional right has to be proved. It also points out that the disciplinary record for Víctor Saldaño on death row was presented at the second trial in 2004 and in that proceeding it had been established that the bad conduct included attacks and death threats against guards, that he had thrown his urine and feces at them, and had started fires. It adds that the state presented this evidence of his bad conduct to address the issue of "future dangerousness" and that, while it is true that Dr. Peccora did not testify, the defense did present his affidavit, as shown in the records of the trial. The aforementioned decision establishes that it is not subject to appeal.⁹⁸

156. On August 10, 2016, Víctor Saldaño's defense filed a request for amendment of the decision of July 18, 2016 and for reconsideration of the non-appealable nature of the decision.

157. As of the date this report was adopted, a decision on that request was still pending.

E. Conditions of detention on death row

158. According to the procedural record of the case, the alleged victim has been on death row since 1996 and remains there to the date of the present report.⁹⁹

159. The available information indicates that the death row has been located at the Polunsky Unit since 1999, but that it was previously located at Ellis Unit in Huntsville, Texas. According to a sergeant of corrections with the Texas Department of Criminal Justice, who works at the "Polunsky Unit", conditions in Ellis Unit were less severe because prisoners had, for example, the right to outdoor group recreation.¹⁰⁰

⁹⁶ First amended reply to respondent's answer. To the United States District Court for the Eastern District of Texas. Sherman Division. No. 4:08cv193. November 17, 2010. Attached to the petitioners' communication of November 28, 2010.

⁹⁷ Decision of the United States District Court for the Eastern District of Texas, Sherman Division. Civil Action No. 4:08-cv-193. July 18, 2016. Attached to the petitioners' communication of July 18, 2016.

⁹⁸ Decision of the United States District Court for the Eastern District of Texas, Sherman Division. Civil Action No. 4:08-cv-193. July 18, 2016. Attached to the petitioners' communication of July 18, 2016.

⁹⁹ Decision of the Judge of the 199th District Court of Collin County, Texas, on November 18, 2004.

¹⁰⁰ Proceedings, 199-80049-96, state of Texas versus Víctor Saldaño. Volume 28, p. 5 and ss.

160. Said sergeant described the conditions of detention for persons held on death row, indicating that the cells are individual with a size of approximately nine feet wide, six long and nine tall¹⁰¹. He added that in general the convicts remain in their cell for 23 hours and are entitled to 1 hour of recreation per day, which is individual¹⁰².

161. He added that there are three levels of detention according to the behavior of the convict.¹⁰³ In this regard, he stated that level 1 is the least severe and allows convicts to spend \$ 75 a week at the Commissary, and to buy all the items they want, such as food, personal hygiene items, writing materials, etc. They also have the right to 4 visits per month, one per week and the right to daily recreation.¹⁰⁴

162. In levels 2 and 3, the convicted persons have only two visits per month and are not entitled to purchases at the Commissary. They are entitled to recreation only on certain days in accordance with the restrictions imposed on them. They also receive writing materials, pencils, pens, one hygiene item each and two visits per month. Nevertheless, "property restrictions" may be imposed on them.¹⁰⁵

163. He indicated that during all the time he has been at the Polunsky Unit, Mr. Saldaño has remained in level 3 with "property restrictions".¹⁰⁶

164. The Commission notes that the issue of Mr. Saldaño's mental health was presented throughout all the processes against him. As previously indicated, during the first trial, at the stage of determination of punishment, an expert was appointed to conduct a psychiatric examination of the defendant.¹⁰⁷ The result was that Mr. Saldaño had an intelligence quotient of 76, a "borderline" case.¹⁰⁸ This was one of the arguments presented by the defense counsel with the appeal filed against the sentence of August 15, 1996.¹⁰⁹

165. Furthermore, the Commission notes that during the second trial to determine the punishment to be imposed to Mr. Saldaño, the prosecution argued that the mental capacity of the alleged victim could be used as a mitigating circumstance, but also as a "double-edged sword."¹¹⁰ For its part, the defense asked that the death penalty not be imposed, given that Mr. Saldaño's emotional and cognitive deterioration was the result of the 8 years he had spent on death row, from the first to the second trial, given that he spent 24 hours a day in his cell.¹¹¹

166. According to information presented by the petitioners and which has not been contested by the State, Mr. Saldaño was hospitalized in the psychiatric hospital of the Texas penitentiary system at least four times: from March 20 to August 3, 2001; from May 18 to August 17, 2006; from September 25, 2007 to January 4, 2008; and from January 8 to April 22, 2009.

¹⁰¹ Proceedings, 199-80049-96, State of Texas versus Victor Saldaño. Volume 28, pg. 5 y ss.

¹⁰² Proceedings, 199-80049-96, state of Texas versus Victor Saldaño. Volume 28, p. 5 and ss. See also: Texas Department of Criminal Justice, Death Row Facts, https://www.tdcj.state.tx.us/death_row/dr_facts.html.

¹⁰³ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño. Volume 28, p. 5 and following.

¹⁰⁴ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño. Volume 28, p. 5 and following.

¹⁰⁵ Proceedings, 199-80049-96, State of Texas versus Victor Saldaño. Volume 28, pág. 5 and ss.

¹⁰⁶ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño. Volume 28, p. 5 and ss. The available information shows that that sergeant worked at the death row for three years.

¹⁰⁷ Transcript No. 199-80049-96, p.63.

¹⁰⁸ Cause No 199-80049-96, Statement of Facts, Volume 22, p. 191.

¹⁰⁹ Appeal filed before the 199th District Court of Collin County, Texas. Cause No. 199-80049-96.

¹¹⁰ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño, Volume 23, p. 10.

¹¹¹ Proceedings, 199-80049-96, state of Texas versus Victor Saldaño, Volume 31, p. 54.

167. As indicated above, on October 26, 2009, Víctor Saldaño's defense filed a petition for federal *habeas corpus* relief, arguing violations of constitutional rights.¹¹² Specifically, relating to a violation of due process by going forward with a judicial proceeding for which Víctor Saldaño was incompetent.¹¹³

VI. ANALYSIS OF THE MERITS

168. Taking into account the arguments of the parties and the proven facts, the Commission will conduct its analysis of law in the following order: i) Preliminary considerations on the IACHR's standard of review in cases involving the death penalty; ii) Right to a fair trial, to due process of law, and equality before the law; iii) Right to protection against arbitrary arrest, to humane treatment, and not to undergo cruel, degrading, and unusual punishment; and iv) The right to life.

1. Preliminary considerations on the IACHR's standard of review in cases involving the death penalty

169. Before embarking on its analysis of the merits in the case of Víctor Saldaño, the Inter-American Commission considers it relevant to reiterate its previous decisions regarding the heightened scrutiny to be used in cases involving the death penalty. The right to life has received broad recognition as the supreme human right and as a *condition sine qua non* for the enjoyment of all other rights.

170. That gives rise to the particular importance of the IACHR's obligation to ensure that any deprivation of life that may arise from the enforcement of the death penalty strictly abides by the requirements set forth in the applicable instruments of the Inter-American human rights system, including the American Declaration.¹¹⁴ That heightened scrutiny is consistent with the restrictive approach adopted by other international human rights bodies when analyzing cases that involve the imposition of the death penalty,¹¹⁵ and it has been set out and applied by the Inter-American Commission in previous capital cases brought before it.¹¹⁶

171. As the Inter-American Commission has explained, this standard of review is the necessary consequence of the specific penalty at issue and the right to a fair trial and all attendant due process guarantees, among others.¹¹⁷ In the words of the Commission:

¹¹² See: Reply from the Criminal Justice Department of the state of Texas. Civil Action No. 4:08-cv-193. July 9, 2010. Attached to the petitioner's communication of July 27, 2010.

¹¹³ See: Reply from the Criminal Justice Department of the state of Texas. Civil Action No. 4:08-cv-193. July 9, 2010. Attached to the petitioner's communication of July 27, 2010.

¹¹⁴ See, in this respect, IACHR, The death penalty in the Inter-American System of Human Rights: From restrictions to abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011.

¹¹⁵ See, for example: I/A Court H. R., Advisory Opinion OC-16/99 (October 1, 1999), *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 136 (finding that "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 is not arbitrarily taken as a result"); United Nations Human Rights Committee, *Baboheram-Adhin et al. v. Suriname*, Communications Nos. 148-154/1983, adopted on April 4, 1985, para. 14.3 (observing that "the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State"); *Report of the United Nations Special Rapporteur on Extrajudicial Executions*, 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, UN Doc.E/CN.4/1995/61 (December 14, 1994) ("the Ndiaye Report"), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trial 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).

¹¹⁶ IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States, March 23, 2015, para. 54; Report No. 44/14, Case 12.873, Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 127; Report No. 57/96, Andrews, United States, IACHR Annual Report 1997, paras. 170-171.

¹¹⁷ IACHR, The death penalty in the Inter-American System of Human Rights: From restrictions to abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011, para. 41.

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.¹¹⁸

172. The Inter-American Commission will therefore review the petitioner's allegations in the present case with a heightened level of scrutiny, to ensure in particular that the rights to life, due process and fair trial, among others set out in the American Declaration have been respected by the State. With regard to the legal status of the American Declaration, the IACHR reiterates that:

[t]he American Declaration is, for the Member States not parties to the American Convention, the source of international obligations related to the OAS Charter. The Charter of the Organization gave the IACHR the principal function of promoting the observance and protection of human rights in the Member States. Article 106 of the OAS Charter does not, however, list or define those rights. The General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October, 1979, agreed that those rights are those enunciated and defined in the American Declaration. Therefore, the American Declaration crystallizes the fundamental principles recognized by the American States. The OAS General Assembly has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS.¹¹⁹

173. Finally, and bearing in mind the State's position, the Commission recalls that its review does not consist of determining that the death penalty and of itself violates the American Declaration. What this section addresses is the standard of review of the alleged human rights violations in the context of a trial culminating in the death penalty.

2. Right to a fair trial, due process of law and equality before law

174. Article XVIII of the American Declaration establishes the right to justice as follows:

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.

175. Article XXVI of the American Declaration establishes the right to due process as follows:

Every accused person is presumed to be innocent until proved 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.

176. Furthermore, the American Declaration contemplates the right to equality before the law in its Article II as follows:

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.

¹¹⁸ IACHR, Report No. 78/07, Case 12,265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, para. 34.

¹¹⁹ IACHR, Report No. 44/14, Case 12,873, Report on Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 214.

177. The Commission will review the sequence of judicial processes leading to imposition of the death penalty on Víctor Saldaño with the following structure: i) Future dangerousness as a criterion for imposing the death penalty; ii) The use of race and nationality to determine future dangerousness; iii) The right an adequate defense and procedural obstacles in proceedings that led to imposition of the death penalty; iv) The duration of the proceedings; and v) Conclusion.

2.1. Future dangerousness as a criterion for imposing the death penalty

178. The information available indicates that under the laws of the State of Texas applicable to the instant case, one factor taken into consideration when determining whether the death penalty should be imposed was future dangerousness.

179. The Commission cannot fail to point out that applying this criterion in order to impose the death penalty is exceptional, even among the states within the United States that do maintain the death penalty. Thus, the information available indicates that Texas is one of two states that not only allow the prosecution to argue the future dangerousness of the convicted person but also have regulations requiring the jury to reach a determination on this issue. Accordingly, in Texas, future dangerousness is not just taken into account; it plays an essential part in determining whether a person will receive the death penalty.

180. Indeed, as was established under proven facts, in Víctor Saldaño's case, after being found guilty by the jury, on July 11, 1996 the penalty phase of the proceedings began, in which the jury had to indicate whether it found, beyond a reasonable doubt, that Víctor Saldaño would commit criminal acts of violence that would constitute a continuing threat to society. At that juncture in the proceedings, the jury heard statements by mental health experts, who issued their opinions regarding that likelihood.

181. The Commission deems it important to take into consideration the observations of the Human Rights Committee of the International Covenant on Civil and Political Rights (hereinafter "the Human Rights Committee"), to which the United States is party. That Committee has referred in general terms to the deprivation of the liberty of a person based on his or her supposed future dangerousness. Specifically, it has pointed out that:

The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science (...) on the one hand; [this] requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behavior of a past offender which may or may not materialize.¹²⁰

182. The Commission also notes that in other countries use of the future dangerousness criterion to impose the death penalty has been considered unconstitutional. Recently, on February 11, 2016, the Constitutional Court of Guatemala ruled that:

(...) the term dangerousness contained in the contested phrase as a decisive factor for imposing the death penalty undermines the principle of no crime or punishment without prior law (*principio de la legalidad*), because the only acts punishable are those characterized as a punishable crime or offense by law prior to their perpetration. Given that dangerousness constitutes an endogenous characteristic, the inherently potential nature of which makes it impossible to specify exactly the protected juridical right that could be

¹²⁰ Human Rights Committee of the ICCPR. Robert John Fardon v. Australia, Communication No. 1629/2007, U.N. Doc. CCPR/C/98/D/1629/2007 (2010). Para. 7.4.

impaired, any punishment imposed would be linked to hypothetical behavior, which under the aforementioned constitutional provision, would not be punishable.¹²¹

183. The Commission takes note of studies that point to the lack of reliability of predictions of future dangerousness in these types of cases.¹²² Similarly and with respect to the concrete use of a psychiatric evidence to make these determinations, the American Psychiatric Association has indicated that the unreliability of psychiatric predictions of long-term future dangerousness is by now “an established fact” within the profession. Furthermore, it indicates that psychiatric predictions of long-term dangerousness have little or no probative value and yet exact an incalculable cost in the application of prejudice to a capital defendant.¹²³

184. The Commission considers that the element of future dangerousness accords the jury a high degree of discretionary authority to impose the harshest possible penalty and may prove problematic, given the likelihood that a future act will occur, exceeding the scope of the crime actually committed by the person in question. Accordingly, the Commission considers that, given that this is a matter of a criterion that depends on a subjective and speculative decision by the jury, the mere fact that it is required under internal law of the State of Texas constitutes a permanent risk that human rights violations could be committed against the person convicted and in consequence, that the death penalty could be imposed arbitrarily. This may include the undue consideration of such factors as race or mental health, as will be analyzed in subsequent sections of this report regarding the two times Víctor Saldaño was sentenced to the death penalty.

2.2. The use of race and nationality to determine future dangerousness

185. The Commission has indicated that, in general and regardless of the legal and procedural system in force in countries, “structural inequalities, stereotypes, and prejudices are reflected in the criminal system.”¹²⁴ The Commission has also noted “the impact of racism in the criminal justice system in the region” and has reiterated that “the use of race and skin color as grounds to set and adjust a criminal sentence are banned by the Inter-American system of human rights protection.”¹²⁵

186. The Commission has indicated that allegations relating to the right to equality in the context of a criminal process imply an analysis of the fair trial requirements which include the requirement that the tribunal concerned is impartial and affords a party equal protection of the law, without discrimination of any kind.¹²⁶ In systems that employ a jury system, these requirements apply both to judges and to juries. In this regard, the Commission has recognized that the international standard on the issue of “judge and juror impartiality” employs an objective test based on “reasonableness and appearance of impartiality.”¹²⁷ According to this standard, “it must be determined whether there is a real danger of bias affecting the mind of the relevant juror or jurors.”¹²⁸

¹²¹ Decision of the Constitutional Court of Guatemala, February 11, 2016, available at: <http://181.174.117.21/cc/wp-content/uploads/2016/11/1097-2015.pdf>.

¹²² Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness 34 (2004) http://texasdefender.org/wp-content/uploads/TDS_Deadly-Speculation.pdf; Thomas J. Reidy, Jon R. Sorenson & Mark D. Cunningham, Probability of Criminal Acts of Violence: A Test of Jury Predictive Accuracy, 31 Behav. Sci. L. 286, 289 (2013).

¹²³ American Psychiatric Association BRIEF AMICUS CURIAE. No. 82-6080. In The Supreme Court of the United States October Term, 1982. THOMAS A. BAREFOOT, Petitioner, v. W. J. Estelle, Jr., Director Texas Department of Corrections, Respondent. Available at: <https://www.psychiatry.org/.../Psychiatrists/.../amicus-briefs/amicus-1982-barefoot.pdf>

¹²⁴ IACHR, The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62, December 5, 2011, para. 184.

¹²⁵ IACHR, The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62, December 5, 2011, para. 189.

¹²⁶ IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, para 66.

¹²⁷ IACHR, Annual Report of 1997, Report No. 57/96, Case 11.139, William Andrews, United States, para. 159.

¹²⁸ IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, para 66.

187. The IACHR has indicated that where this bias may relate to a prohibited ground of discrimination, such as race, language, religion, or national or social origin, it may also implicate a violation of the principle of equality and non-discrimination, which the Inter-American Court recently declared to have attained the status of a *jus cogens* norm.¹²⁹

188. Based on those standards, on previous occasions, the Commission has stated that equality before the law was violated when a prosecutor included the question of the accused's nationality in his arguments and no control over the reference was exercised or objection raised by the internal authorities, including the judge in the case.¹³⁰

189. In the instant case, there is no disputing the fact that, during the first trial in relation to the punishment to be imposed on Víctor Saldaño, the prosecution presented the testimony of Dr. Walter Quijano, which was heard by the jury on July 12, 1996. In his statement, Dr. Walter Quijano referred to "statistical factors" in order to determine a person's future dangerousness. He included "race" as one such factor and reached the conclusion that Hispanics are more likely to commit crimes. As recorded in the proven facts, the prosecution asked explicit questions about Víctor Saldaño's race and national origin and referred to both the fact that he is Hispanic and an Argentine national. No objection to Dr. Walter Quijano's testimony was raised by Mr. Saldaño's court-appointed defense, nor was it excluded de officio by the 199th District Court. Consequently, Víctor Saldaño's race and national origin were presented to the jury, which decided to sentence him to death by responding affirmatively to the question regarding future dangerousness.

190. It is necessary to note that both the Attorney General of Texas (in connection with the *writ of certiorari* before the Supreme Court) and the Director of the Criminal Justice Department of Texas (in connection with the writ of federal *habeas corpus*) acknowledged that an error of constitutional magnitude had been committed race having been considered a determinant factor of future dangerousness.

191. From this brief recapitulation of the facts, the Commission regards it as indisputable that both race and nationality played a part in the determination of the penalty to be imposed on Mr. Saldaño.

192. The Commission notes that the various state entities involved included and/or permitted the racial and national criteria to be presented. Thus the Attorney General's Office did so explicitly through the prosecution's presentation of the testimony of Dr. Walter Quijano and the questions it asked about Mr. Saldaño's race and national origin. When that happened, the court-appointed defense counsel refrained from objecting to the inclusion of the evidence, a matter that will be reviewed in greater detail in another section of this report. For its part, the 199th District Court, which was supposed to oversee the trial, did nothing to prevent Mr. Saldaño's race and national origin from playing a part in the choice of penalty to be imposed. As will be analyzed below, despite the acknowledgment of error by the Attorney General of Texas and the order handed down by the Supreme Court in connection with the *writ of certiorari*, the judicial authorities of the State of Texas abstained from correcting the existing discrimination, relying instead on arguments on procedural grounds.

193. It was only in September 2004, following a federal *habeas corpus* and much delay, that the death penalty was set aside and a new proceeding began to determine the sentence. By that time, the death sentence based on his race and national origin had weighed on Víctor Saldaño for more than eight years, all of which he had spent on death row.

194. In light of the foregoing considerations, the Commission concludes that in the instant case there was a violation of the right to equality before the law as part of the right to a fair trial, because Víctor Saldaño's race and national origin played a central part in the imposition of the death penalty in the first trial, a situation that was resolved with delay and after severe harm had been done to Victor Saldaño.

¹²⁹ IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, para 66, citing I/A Court H.R., Advisory Opinion OC-18/03 of September 17, 2003, Juridical Condition of Rights of Undocumented Migrants, Ser. A Nº 18.

¹³⁰ IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, paras. 68 and 69.

2.3. The right to an adequate defense and procedural obstacles in the proceedings that led to imposition of the death penalty

2.3.1. General considerations

195. As the Commission has already pointed out in this report, in death penalty cases the protections derived from the right to a fair trial and due process are strengthened and subject to heightened scrutiny.

196. Bearing in mind that the vast majority of the violations of due process alleged in the instant case have to do with the sentencing proceedings, the Commission recalls that:

(...) these protections apply to all aspects of a defendant's criminal trial, regardless of the manner in which a state may choose to organize its criminal proceedings. Consequently, where, as in the present case, the State has chosen to establish separate proceedings for the guilt/innocence and punishment stages of a criminal prosecution, the Commission considers that due process protections apply throughout.¹³¹

197. The Commission has established the existence of a link between the right to an adequate defense and procedural rules during the review stage that may restrict or impede access to review, especially in cases in which the defense was ineffective in the initial stages. According to the IACHR "it must take into account the necessary link between the claims concerning ineffective assistance of counsel and the way that the procedural requirements would limit subsequent opportunities for review of claims not raised or not fully or properly raised at the first procedural opportunity."¹³²

198. The IACHR will now briefly recall some of the standards that are relevant both to the right to an adequate defense and to the existence of procedural barriers to the possibilities for review of a sentence.

199. The Inter-American Commission has stated that:

The right to due process and to a fair trial include the right to adequate means for the preparation of a defense, assisted by adequate legal counsel. Adequate legal representation is a fundamental component of the right to a fair trial.

[...]

The State cannot be held responsible for all deficiencies in the conduct of State-funded defense counsel. National authorities are, however, required [...] to intervene if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention. Rigorous compliance with the defendant's right to competent counsel is compelled by the possibility of the application of the death penalty.¹³³

200. The Commission has established that "the fundamental due process requirements for capital trials include the obligation to afford a defendant a full and fair opportunity to present mitigating evidence for consideration in determining whether the death penalty is the appropriate punishment in the circumstances

¹³¹ IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, para. 47.

¹³² IACHR, Report No. 79/15, Case 12.994. Merits (Publication), Bernardo Aban Tecero, United States, October 28, 2015, para. 139.

¹³³ IACHR, The death penalty in the Inter-American System of Human Rights: From restrictions to abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011, page 123.

of his or her case.”¹³⁴ In this sense, it has also indicated that due process protections, under the American Declaration:

guarantee an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of the defendant’s case, in light of such considerations as the offender’s character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.¹³⁵

201. The Commission takes note of the American Bar Association’s “Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,” with respect to the importance of objecting to certain evidence so as to preserve the possibility of the question being reviewed at subsequent stages. Here, the Commission draws attention to Guideline 11.7.3, which reads as follows:

Objection to Error and Preservation of Issues for Post Judgement Review

Counsel should consider, when deciding whether to object to legal error and whether to assert on the record a position regarding any procedure or ruling, that post judgment review in the event of conviction and sentence is likely, and counsel should take steps where appropriate to preserve, on all applicable state and Federal grounds, any given question for review¹³⁶.

202. Indeed, with respect to possible State responsibility as a result of the performance of the court-appointed defense counsel for a person in a trial in which the death penalty may be imposed, the Commission has considered that the defense was inadequate for having failed to opportunely present particular arguments in favor of the defendant, thereby rendering it impossible to review them later in the trial.¹³⁷

203. At the same time, the Commission has also made reference on the existence of procedural restrictions regarding the scope of post-conviction review.

204. The right to appeal a sentence is a fundamental guarantee of due process for avoiding the consolidation of an injustice. In that regard, the IACHR has stated that “due process guarantees should also be interpreted to include a right of effective review or appeal from a determination that the death penalty is an appropriate sentence in a given case.”¹³⁸ The purpose of the right to review is to protect the right of defense by establishing a remedy to prevent a defective ruling containing errors detrimental to a person’s interests

¹³⁴ IACHR, Report N.º 90/09, Case 12.644, Admissibility and merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, para. 134. Also IACHR, Report N.º 38/00 (Baptiste), Grenada, Annual Report of 1999, paras. 91 and 92; IACHR, Report N.º 41/00, McKenzie et al., Jamaica, Annual Report of 1999, paras. 204 and 205; IACHR, Case N.º 12.067, Michael Edwards et al., Bahamas, Annual Report of 2000, paras. 151-153.

¹³⁵ IACHR, Report N.º 90/09, Case 12.644, Admissibility and merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, párr. 134. Also IACHR, Report N.º 38/00 (Baptiste), Grenada, Annual Report of 1999, paras 91 and 92; IACHR, Report N.º 41/00, McKenzie et al., Jamaica, Annual Report of 1999, paras. 204 and 205; IACHR, Case N.º 12.067, Michael Edwards et al., Bahamas, Annual Report of 2000, paras. 151-153.

¹³⁶ Available at: http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/DOIStandards.auth_checkdam.pdf

¹³⁷ IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, para. 55.

¹³⁸ IACHR, Report N.º 48/01, Case N.º 12.067, Michael Edwards et al., Bahamas, April 4, 2001, para. 149.

from becoming final. Due process would be ineffective without the right to defense during the trial and the opportunity to defend oneself from a judgment by means of an appropriate review.¹³⁹

205. According to the standards developed by the Inter-American human rights system, a remedy must be effective, i.e., it must provide results or responses consistent with the objectives that it was intended to serve, which is to avoid the consolidation of an unjust situation. It must also be accessible, without requiring the kind of complex formalities that would render this right illusory.¹⁴⁰

206. The efficacy of a remedy is closely linked to the scope of the review. Judicial error is not confined to the application of the law, but may occur in other aspects of the process such as the determination of the facts or the weighing of evidence.¹⁴¹ Hence, the remedy of appeal will be effective in accomplishing the purpose for which it was conceived if it makes a review of such issues possible without *a priori* limiting that review to certain aspects of the court proceedings.¹⁴²

207. In this respect, the IACHR has considered that:

to guarantee the full right of defense, this remedy should include a material review of the interpretation of procedural rules that may have influenced the decision in the case when there has been an incurable nullity or where the right to defense was rendered ineffective, and also with respect to the interpretation of the rules on the weighing of evidence, whenever they have led to an erroneous application or non-application of those rules.¹⁴³

208. With respect to the accessibility of the remedy, the Commission has considered that, in principle, the regulation of some minimum requirements for the presentation of the appeal is not incompatible with the right to appeal. Some of these requirements are, for example, the presentation of the appeal itself or the regulation of a reasonable period within which it must be filed.¹⁴⁴ However, in some circumstances, rejection of appeals based on failure to comply with formal requirements established by statute or defined in judicial practice may be a violation of the right to appeal a judgment.¹⁴⁵

209. Finally, the Commission must underscore that States have an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty is in strict compliance with the right to a timely, effective and accessible remedy.¹⁴⁶

2.3.2. Analysis of the right to defense and procedural obstacles in the first trial

210. The Commission already determined in this report that Mr. Víctor Saldaño was a victim of discrimination, because in the first sentencing trial, consideration was given to his race and national origin.

¹³⁹ See *mutatis mutandis*, IACHR, Report N.º 55/97, Case 11.137, Merits, Juan Carlos Abella (Argentina), November 18, 1997, para. 252; IACHR Court. *Case Herrera Ulloa vs. Costa Rica*. Sentence of July 2, 2004. Serie C N.º 107, para. 158.

¹⁴⁰ IACHR, Report No. 79/15, Case 12.994. Fondo (Publication), Bernardo Aban Tercero, United States, October 28, 2015, para. 134.

¹⁴¹ IACHR, Report 53/13, Case 12.864, Merits (Publication), Iván Teleguz, United States, July 15, 2013, para. 103.

¹⁴² IACHR, Report 53/13, Case 12.864, Merits (Publication), Iván Teleguz, United States, July 15, 2013, para. 103, citing IACHR, Letter of submission to the Court and Merits Report, Case 11.618, Oscar Alberto Mohammed, April 13, 2011, paras. 75 and 76.

¹⁴³ IACHR, Report N.º 55/97, Case 11.137, Merits, Juan Carlos Abella, Argentina, November 18, 1997, para. 261.

¹⁴⁴ IACHR, Report 53/13, Case 12.864, Merits (Publication), Iván Teleguz, United States, July 15, 2013, para. 105.

¹⁴⁵ IACHR, Report 53/13, Case 12.864, Merits (Publication), Iván Teleguz, United States, July 15, 2013, para. 103, citing IACHR, Letter of submission to the Court and Merits Report, Case 11.618, Oscar Alberto Mohammed, April 13, 2011, para. 83.

¹⁴⁶ IACHR, Report 53/13, Case 12.864, Merits (Publication), Iván Teleguz, United States, July 15, 2013, para. 106.

211. The Commission observes that in the first sentencing trial, the Court of Criminal Appeals of Texas refrained on two occasions from making a pronouncement on this fundamental issue, arguing procedural restrictions.

212. Thus, on September 15, 1999, when ruling on the appeal, the Court of Criminal Appeals of Texas confirmed the sentence imposed at first instance because Mr. Saldaño's defense counsel had not objected at the appropriate time to the testimony of Dr. Walter Quijano, which included arguments relating to race and national origin.

213. In a similar vein, following the Supreme Court's decision in connection with the *writ of certiorari* that the matter should be given "further consideration" in light of the admission of error by the Attorney General of Texas, on March 14, 2002 the aforementioned Court of Criminal Appeals practically ignored the Supreme Court's mandate and confirmed the sentence without pronouncing on the question of discrimination. On that occasion, the Court of Criminal Appeals upheld the procedural argument regarding the failure to present the objection in a timely manner and it added another procedural argument questioning the authority of the Attorney General of Texas to admit error before the Supreme Court.

214. Thus, it is clear to the IACHR that the court-appointed defense counsel for Mr. Saldaño committed a serious omission by not having objected to Dr. Quijano's testimony prior to the death penalty sentence so as to preserve, in accordance with the procedural rules governing evidence, the possibility of contesting the issue in an eventual appeal. The Commission considers that the arguments adduced by the defense counsel regarding the futility of any objection before the 199th District Court, far from justifying the omission, demonstrate that it was all the more necessary to preserve the issue for appeal.

215. On this point, and without prejudice to the State's responsibility due to the omission of the public defender, the Commission considers that in extremely serious cases in which the violation of fundamental rights is evident, the court's invocation of merely procedural arguments to refuse to consider such violations constitutes a denial of justice and of due process.

216. Accordingly, in the instant case, the fact that the court-appointed defense counsel for Mr. Saldaño failed to object to Dr. Quijano's testimony, added to the strict application of procedural limitations even though the issue at stake, namely racism, was of such gravity, meant in practice that the discrimination based on race and national origin could not be remedied in a timely manner. Indeed, it was only on June 12, 2003, eight years after sentencing and after eight years spent on death row, that a *habeas corpus* appeal established the existence of a constitutional error in having given consideration to Mr. Saldaño's ethnicity. The IACHR considers that this situation amounted to a violation of the right to a fair trial and due process of law.

2.3.3. Analysis of the right to defense and procedural obstacles in the second sentencing trial

217. As established in the proven facts, following the *habeas corpus* decision a new sentencing trial began. The Commission notes that throughout the second trial the central topics of debate was Víctor Saldaño's behavior and his mental health status in two interrelated senses. On the one hand, it was an issue raised by the prosecution to justify Víctor Saldaño's future dangerousness. On the other, precisely because of that stance by the prosecution, the defense asked for certain guarantees in order to be able to elicit evidence relating to the defendant's mental health that could favor him.

218. As to the former, the Commission stresses that the prosecution did indeed use testimony regarding the defendant's aggressive behavior on death row as a strategy to demonstrate Víctor Saldaño's supposed future dangerousness. The 199th District Court ruled that the evidence submitted by the prosecution in this regard was admissible.

219. Regarding this point, the Commission reiterates its concern regarding the criterion of "future dangerousness" for imposing the death penalty, in the terms already set out in this report.

220. On this matter, moreover, the Commission considers that the use of Víctor Saldaño's mental health situation in order to determine his future dangerousness violated his human rights.

221. First, given that this is a case of a person deprived of his liberty with the symptoms of a mental health problem, it is incumbent upon the State in its capacity as guarantor of those rights to take all necessary steps to provide the treatment required by the person in question, rather than using the existence of mental health-related symptoms as a justification for proving future risk in order to obtain the imposition of the harshest possible penalty. Second, there are sufficient grounds for affirming that the deterioration in Víctor Saldaño's mental health was the result of the more than eight years that he had, at that time, already spent on death row in the conditions described in the proven facts section of this report. It is necessary to recall that Víctor Saldaño's presence on death row was the result of a trial in which racist criteria played a part.

222. Under this circumstances, the IACHR deems that considering the conduct of a person deprived of his liberty as a consequence of his mental health condition when assessing his future dangerousness and the consequent imposition of the death penalty, is a violation of the right to due process and a fair trial and may even constitute a form of inhumane treatment and cruel and unusual punishment. These latter aspects will be reviewed in greater detail further on in this report.

223. Regarding the second aspect, the Commission notes that the fact that the arguments and respective evidence regarding Víctor Saldaño's conduct on death row were validated as a determinant of future dangerousness had an impact on the possibilities open to the defense. The Commission notes that, from the start, Mr. Saldaño's defense counsel filed a motion to prevent the defendant's conduct on death row from being used for the assessment of future dangerousness. Despite that motion, as mentioned earlier, the 199th District Court decided to allow that evidence. In doing so, that Court validated the possibility of considering the impact of his time on death row on Víctor Saldaño's mental health as grounds for imposing the death penalty.

224. It is not the role of the Commission to establish the mental health situation of Víctor Saldaño at the time the crime was committed or at the time he faced the second trial for resentencing. Within its role of reviewing due process in the proceedings, the Commission observes that, in accordance with the sequence set forth in the foregoing paragraph, Víctor Saldaño's defense attempted to safeguard his rights from the beginning of the second trial, while the prosecution insisted on invoking the behavior of Víctor Saldaño while on death row, linked to his mental health, as a factor demonstrating his future dangerousness, which was in turn accepted by the District Court. In this sense, the Commission observes that the defense encountered serious limitations in its possibilities to present evidence on two key issues. The first issue was whether Víctor Saldaño was competent to stand trial at that moment, taking into account the severe deterioration in his mental health as a consequence of the prolonged time on death row. The second issue was whether his mental health should be considered as a mitigating factor to influence the sentence to be imposed. Given the approach of the judge to the preliminary motions and at trial, the defense was unable to present evidence it considered highly probative on these two issues.

225. The Commission observes that the second sentence to the death penalty was appealed by Mr. Saldaño's defense counsel, using precisely those arguments. In response, in June 2007, the Court of Appeals confirmed the sentence without pronouncing substantively on the use of Mr. Saldaño's conduct on death row as an indicator of future dangerousness. On this occasion the Court of Appeals again resorted to procedural arguments relating to the lack of timely objection by Mr. Saldaño's defense counsel. Thus, once again, the Court of Appeals prioritized formal issues over the possibility of pronouncing on matters involving the violation of Mr. Saldaño's human rights. Along the same lines, and in the context of the *habeas corpus* application filed in October 2009, the Commission observes that it was rejected in July 2016 on the grounds that it had not been shown that a federal constitutional right had been violated. The Commission notes that neither in connection with the trial nor in connection with the *habeas corpus* appeal was a hearing held in which evidence could have been presented on Víctor Saldaño's mental health situation.

226. In summary, the IACHR considers that, during the second sentencing trial, consideration was improperly given to Mr. Saldaño's conduct as a consequence of the time he had spent on death row, a situation that placed severe restrictions on the exercise of his defense due to fear that evidence relating to mental health would result in imposition of the death penalty. Despite the foregoing, both the Court of Criminal Appeals and the United States District Court for the Eastern District of Texas abstained from pronouncing substantively on this situation, invoking, respectively, procedural reasons and failure to satisfy the standard of violation of a federal constitutional right. All of the above constituted a violation of the right to a fair trial and due process, to the detriment of Mr. Víctor Saldaño.

2.4. The duration of the proceedings

227. On this point, the IACHR will analyze the duration of internal proceedings as an essential component of due process and effective access to justice.

228. The Commission observes that more than 21 years have elapsed since the start of criminal proceedings against Víctor Saldaño and that, to this day, the domestic authorities have not managed to issue a definitive ruling properly resolving the human rights violations he was subjected to in both trials, in the terms established by the Commission in this report. This lack of response is all the more grave considering the very serious nature of the violations, such as the presence of racism and the undue use of the mental health situation of a person in the exercise of the State's punitive powers.

229. It is important to underscore the fact that the lack of a timely and effective response to these violations thus far has not been due to undue appeals filed by the defense. While it is true that at various moments in the proceedings the defense did file a number of appeals, the Commission notes that they were not and have not been resolved with the promptness required by the grave nature of the complaints filed. The Commission observes delays in decisions on appeals and there have been long periods in which nothing was done to move them forward.

230. For example, more than three years elapsed between the first sentencing in August 1996 and the decision on the appeal taken in September 1999. Similarly, almost three more years elapsed between the second sentencing in November 2004 and the decision on the appeal taken in June 2007. Likewise, between the filing of the federal *habeas corpus* filed in October 2009 and the resolution on that writ in July 2016, almost seven years elapsed. Currently a resolution of the request for reconsideration is pending. The State has provided no justification for these extensive delays.

231. In light of the above considerations, the IACHR concludes that, in addition to the violations described earlier in this report, unwarranted delay throughout the proceedings constituted an additional violation to the rights to a fair trial and due process. The Commission stresses that these delays have meant, in practice, that Víctor Saldaño has spent more than 20 years on death row, with all the consequences for the exercise of his rights that derive from that. Those implications will be reviewed in the following section of this report.

2.5. Conclusion

232. Based on the foregoing considerations, the Commission concludes that Víctor Saldaño was not treated in accordance with the principle of equality before the law, because his race and national origin were taken into consideration in the first sentencing trial. The Commission also concludes that Víctor Saldaño did not have an adequate court-appointed defense and there were multiple procedural obstacles that prevented his claims from being duly and promptly heard and resolved, including the complaints regarding discriminatory imposition of the death penalty during the first trial and the improper consideration of his mental health during the second trial. Finally, the Commission concludes that there has been unwarranted delay in the totality of the internal proceedings. Throughout the period in which these violations occurred, Víctor Saldaño has remained on death row, which has severely impacted his human rights, as will be analyzed later in this report.

233. By virtue of these conclusions, the Commission finds that the United States is responsible for the violation of the rights to a fair trial, due process, and equality before the law established in Articles XVIII, XVI, and II of the American Declaration of the Rights and Duties of Man, to the detriment of Víctor Saldaño.

3. Right of protection against arbitrary arrest, to humane treatment, and not to undergo cruel, infamous, or unusual punishment, with respect to the deprivation of liberty on death row

234. Article XXV of the American Declaration establishes the right of protection against arbitrary arrest as follows:

No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

No person may be deprived of liberty for non-fulfillment of obligations of a purely civil nature.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

235. For its part, Article XXVI of the American Declaration establishes, within the right to due process of law, the right of every person accused of an offense:

(...) not to receive cruel, infamous, or unusual punishment.

236. In this section, the Commission will analyze the established facts in the following order: i) Deprivation of liberty on death row based on discriminatory and unlawful criteria; and ii) The time that Víctor Saldaño has been on death row, in solitary confinement, for more than 20 years.

3.1. Deprivation of liberty on death row based on discriminatory and illegitimate criteria

237. In prior sections of this report, the Commission determined that in both the first and the second trial, the death penalty was imposed on Víctor Saldaño in a manner that violated his human rights.

238. Thus, the IACHR established that in the first trial the imposition of the death penalty was discriminatory in that it took Víctor Saldaño's race and national origin into account, an error that was not corrected in a timely manner. Further, the Commission considered that, in the second trial, the imposition of the death penalty improperly took into consideration the deterioration in Víctor Saldaño's mental health. The IACHR also concluded that there were various violations of the right to a fair trial and to due process in both proceedings.

239. The Commission notes that the deprivation of Mr. Saldaño's liberty on death row from 1996 until today as the result of the imposition of the death penalty based on the discriminatory and illegitimate criteria referred to in the foregoing paragraph constitutes arbitrary detention pursuant to Article XXV of the American Declaration. Further, the Commission deems that the consideration given in the second trial to Víctor Saldaño's mental health condition and its manifestations in his conduct invoked by the prosecution as an indication of future dangerousness, despite the fact that they were triggered by his time on death row under a sentence that considered his race and national origin, was a form of inhumane treatment and unusual punishment pursuant to Articles XXV and XXVI of the American Declaration.

3.2. The detention of Víctor Saldaño on death row, in solitary confinement, for more than 20 years

3.2.1. Pertinent standards

240. In both international human rights law and comparative law, the issue of long term deprivation of liberty on death row, known as the *death row phenomenon*, has been developed for decades, in light of the prohibition of cruel, inhuman, or degrading punishment in constitutions and in multiple international treaties, including the American Declaration of the Rights and Duties of Man (Articles XXV and XXVI). Bearing in mind the equivalent nature of the protections envisaged in this regard in the American Declaration and other international instruments, the Commission considers it relevant to cite a number of developments that have taken place in Inter-American and other protection systems, including the regional and United Nations systems.

241. To start with, the Commission takes note of the concept of the *death row phenomenon* that the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has taken into consideration:

(...) it consists of a combination of circumstances that produce severe mental trauma and physical deterioration in prisoners under sentence of death.¹⁴⁷ Those circumstances include the lengthy and anxiety-ridden wait for uncertain outcomes, isolation, drastically reduced human contact and even the physical conditions in which some inmates are held. Death row conditions are often worse than those for the rest of the prison population, and prisoners on death row are denied many basic human necessities.¹⁴⁸

242. In the case of *Soering vs. The United Kingdom*, the European Court of Human Rights, in its interpretation of the norm banning cruel, inhuman, and unusual punishment and in reference to the death penalty, pointed out that:

The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3.¹⁴⁹

243. The European Court was referring to an average of six to eight years on death row from imposition of the penalty to execution and it mentioned how proceedings and appeals subsequent to the imposition of the death penalty themselves have a bearing on the aforementioned wait time on death row. Despite that, the European Court stated that:

(...) just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of

¹⁴⁷ United Nations. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment. 9 August 2012. A/67/279, para 42. Citing: Patrick Hudson, "Does the death row phenomenon violate a prisoner's rights under international law?", *European Journal of International Law*, vol. 11, No. 4 (2000), pp. 834-837.

¹⁴⁸ United Nations. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment. 9 August 2012. A/67/279, para 42.

¹⁴⁹ ECtHR. Case of *Soering v. The United Kingdom*. Report No. 14038/88. Judgment, July 7, 1989. para. 104.

living in the ever-present shadow of death.¹⁵⁰

(...)

For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable.

(...)

However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.¹⁵¹

244. Furthermore, in a comparative law context, the Commission notes that the Privy Council of the British House of Lords considered in 1993 on the issue of the *death row phenomenon* in the *Pratt and Morgan v. Jamaica* case, that:

In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.

(...)

The total period of delay is shocking and now amounts to almost fourteen years. It is double the time that the European Court of Human Rights considered would be an infringement of Article 3 of the European Convention and their Lordships can have no doubt that an execution would now be an infringement of section 17(1) of the Jamaican Constitution.

To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of section 17(1).

(...)

These considerations lead their Lordships to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment".¹⁵²

¹⁵⁰ ECtHR. Case of Soering v. The United Kingdom. Report No. 14038/88. Judgment, July 7, 1989. para. 106.

¹⁵¹ ECtHR. Case of Soering v. The United Kingdom. Report No. 14038/88. Judgment, July 7, 1989. para. 111.

¹⁵² *Pratt and Morgan v. The Attorney General for Jamaica and another (Jamaica)* [1993] UKPC 1 (2nd November, 1993), paragraphs 73, 74, 75, and 84.

245. In the same vein, the Supreme Court of Uganda considered in 2009 that "to execute a person after a delay of three years in conditions that were not acceptable by Ugandan standards would amount to cruel, inhuman punishment."¹⁵³ For its part, the Supreme Court of Zimbabwe has pointed out since 1993 that "having regard to judicial and academic consensus concerning the death row phenomenon, the prolonged delays and the harsh conditions of incarceration, a sufficient degree of seriousness had been attained to entitle the applicant to invoke the protection concerning the prohibition of torture and inhuman or degrading punishment.". That Supreme Court maintained that "52 and 72 months, respectively, on death row constituted a violation of the prohibition of torture and would render an actual execution unconstitutional."¹⁵⁴

246. Specifically regarding the matter of prolonged solitary confinement on death row, the Inter-American Commission has determined that deprivation of liberty under certain conditions on death row, including solitary confinement for four years, constituted inhuman treatment.¹⁵⁵

247. The UN Special Rapporteur on Torture has found that:

Individuals held in solitary confinement suffer extreme forms of sensory deprivation, anxiety and exclusion, clearly surpassing lawful conditions of deprivation of liberty. Solitary confinement, in combination with the foreknowledge of death and the uncertainty of whether or when an execution is to take place, contributes to the risk of serious and irreparable mental and physical harm and suffering to the inmate. Solitary confinement used on death row is by definition prolonged and indefinite and thus constitutes cruel, inhuman or degrading treatment or punishment or even torture.¹⁵⁶

3.2.2. Review of Víctor Saldaño's situation

248. As established under proven facts, Víctor Saldaño has been deprived of his liberty on death row from 1996 through to the date on which this report was approved, i.e., for more than 20 years.

249. According to the information available until 1999, the death row was located in the Ellis Unit and since then it has been located in the Polunsky Unit. At one point, Víctor Saldaño was notified that his execution date was April 18, 2000 and that he would die by lethal injection. Subsequent to that date, Víctor Saldaño has been deprived of his liberty in the Polunsky Unit for approximately 16 years. In that unit, solitary confinement conditions are severe: 23 hours a day locked up in a cell and one hour a day of individual recreation with absolutely no group contact. As pointed out under proven facts, in addition to those general conditions, there are three degrees of custody that entail additional restrictions, one of which relates to visits. Although it does not have the precise dates, the Commission understands that, for at least several periods, Víctor Saldaño has been held under Level 3, the one with the most stringent restrictions.

250. The Commission notes that the time spent by Víctor Saldaño on death row greatly exceeds the length of time that other international and domestic courts have characterized as cruel, inhuman, and degrading treatment, in the terms described earlier.

251. In summary, in the instant case, Víctor Saldaño has been held on death row as a result of discriminatory proceedings, in which the deterioration in his mental health was improperly taken into account, and in which the most fundamental guarantees for the rights to a fair trial and due process were

¹⁵³ Supreme Court of Uganda in *Attorney General v. Susan Kigula and 417 others* (Constitutional Appeal No. 3 of 2006), 2009.

¹⁵⁴ Judgment of the Supreme Court of Zimbabwe of 24 June 1993 in *Catholic Commissioner for Justice and Peace in Zimbabwe v. Attorney General* (4) SA 239 (ZS).

¹⁵⁵ CIDH. Report No. 58/02. Merits. Case 12.275. Denton Aitken. Jamaica October 21, 2000, paragraphs 133 and 134.

¹⁵⁶ United Nations. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment. 9 August 2012. A/67/279. para 48.

violated. The Commission emphasizes the severe solitary confinement conditions to which he has been subjected, at least since 2000, in the Polunsky Unit in which, irrespective of the level of custody, no group recreation is allowed. Moreover, the very fact of spending 20 years on death row, with judicial proceedings still not finalized, is, by any account, excessive and inhuman. All these factors, taken together, demonstrate the extreme severity of the consequences suffered by Mr. Saldaño on death row to the present, which, in addition to being inhuman, cruel, unusual, and infamous, constitute a form of torture.

3.3. Conclusion

252. Based on the foregoing considerations, the Commission concludes that the deprivation of liberty on death row as a consequence of discriminatory proceedings that violated the rights to a fair trial and to due process of law is, in itself, arbitrary. In addition, the Commission considers that holding Víctor Saldaño on death row for more than 20 years in solitary confinement has constituted a form of torture, with severe and irreparable detriment to his personal integrity and, especially, his mental health. Consequently, the United States is responsible for violating, to the detriment of Víctor Saldaño, the rights of protection against arbitrary detention, to humane treatment, and not to receive cruel, infamous, or unusual punishment established in Articles XXV and XXVI of the American Declaration.

4. The right to life with respect to the eventual execution of Víctor Saldaño

253. Article I of the American Declaration sets forth the right to life, liberty and personal security, as follows:

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

254. The Commission reiterates that it is not competent to review judgments handed down by domestic courts acting within their spheres of competence and with due judicial guarantees. In principle that is because the IACHR does not have the authority to superimpose its own interpretations on the assessment of facts made by national courts. The fourth instance formula, however, does not preclude the Commission from considering a case in which the petitioner's allegations entail a possible violation of any of the rights set forth in the Declaration.¹⁵⁷ This authority is heightened in cases involving imposition of the death penalty, given its irreversibility.

255. As indicated above, the Inter-American Commission considers that it is incumbent upon the national courts, not the Commission, to interpret and apply national laws and, in the instant case, to determine whether Mr. Saldaño is innocent or guilty. Nevertheless, the IACHR must ensure that any deprivation of life resulting from imposition of the death penalty is imposed in accordance with the stipulations of the American Declaration.¹⁵⁸

256. Throughout this report, the Commission established that lead to the imposition of the death penalty to Victor Saldaño, the domestic judicial authorities violated the right to a fair trial, due process, and equality before the law. It also established that Víctor Saldaño's court-appointed defense counsel was inadequate in key phases of the proceedings. The Commission also concluded that depriving Víctor Saldaño of his liberty on death row as a consequence of death penalties imposed in violation of his human rights, for an excessive period of 20 years and in extreme conditions of isolation, was arbitrary and constituted cruel, unusual and inhuman punishment of such severity that it constituted torture.

257. Under these circumstances, the IACHR has maintained that executing a person sentenced to death in violation of his rights, in particular the rights to due process, a fair trial, and equality before the law, would be extremely grave and constitute a deliberate violation of the right to life established in Article I of the

¹⁵⁷ See, *mutatis mutandis*, IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996.

¹⁵⁸ IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Iván Teleguz, United States, July 15, 2013, para. 129.

American Declaration.¹⁵⁹ This consideration is reinforced by the conclusion reached by the Commission that Mr. Víctor Saldaño has been a victim of torture and cruel and inhuman treatment during his time on the death row.

258. In light of the foregoing and taking into account the determinations made throughout this report, the IACHR concludes that the execution of Víctor Saldaño would constitute a serious violation of his right to life, recognized in Article I of the American Declaration.

VII. REPORT No. 76/16

259. On December 10, 2016, during its 160 period of sessions, the Commission approved Report No. 76/16 on the merits of this matter, with the following recommendations to the State:

1. Grant Víctor Saldaño effective relief, including the review of his trial and sentence in accordance with the right to equality before the law and the guarantees of fair trial and due process set forth in Articles II, XVIII and XXVI of the American Declaration. Taking into account the conclusions of the IACHR on the time Víctor Saldaño has been held on death row, the Commission recommends that his sentence be commuted, that he be transferred out of death row, that the State ensure that his conditions of detention are compatible with his human dignity and that due attention be given to his mental health.

2. Review its laws, procedures, and practices to ensure that persons accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, II, XVIII, XV and XXVI thereof;

3. Ensure that the legal counsel provided by the State in death penalty cases is effective and adequately trained to serve in death penalty cases;

4. Given the violations of the American Declaration the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death.¹⁶⁰

VIII. ACTIONS SUBSEQUENT TO REPORT No. 76/16

260. On December 12, 2016, the IACHR transmitted the report to the State, with a time period of one month to present information on the measures taken to comply with the recommendations set forth in the report.

261. On December 20, 2016, the petitioners requested that the Commission expand its report and specify the obligations of the State with respect to the reparations required in relation to the moral, psychological and material harm caused to Víctor Saldaño and his family.

262. On December 29, 2016, the petitioners informed the Commission of an appellate brief filed with the Fifth Circuit Court of Appeals and of an Amicus Curiae brief presented by the State of Argentina before the same judicial body in support of the appeal. The Commission has no further information on the current state of the procedure.

263. On January 12, 2017, the State presented a note in response to Report 76/16, indicating that it had taken under advisement the “nonbinding recommendations” set forth in the report and acknowledged that Mr. Saldaño remains subject to a “nonbinding” request for precautionary measures. The State informed

¹⁵⁹ IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Félix Rocha Díaz, United States, March 23, 2015, para. 106.

¹⁶⁰ See in this regard, IACHR, The death penalty in the Inter-American Human Rights System: From restrictions to abolition, OEA/Ser.L/V/II.Doc 68, December 31, 2011.

the IACHR that on January 6, 2017 it had forwarded the report to the Governor of Texas and the Attorney-General for their consideration.

IX. REPORT No. 5/17

264. On January 27, 2017, the Commission approved its Report No. 5/17 containing the final conclusions and recommendations. As set forth in Article 47.2 of its Rules of Procedure, on February 16, 2017, the Commission transmitted the report to the parties with a time period of a month to present information on the measures taken to comply with the final recommendations.

X. ACTIONS SUBSEQUENT TO REPORT No. 5/17

265. On February 27, 2017, one of the petitioners sent the Commission a copy of the Opposition filed by the State of Texas on the same day regarding the appeal that was pending at the time of the approval of the merits report, which states that “Saldaño does not show that reasonable jurists would dispute the resolution of the issues by the court below and does not show that any of his issues deserve additional consideration. Accordingly, Saldaño’s request for COA should be denied.” The petitioner also sent the Commission a copy of a request filed by Saldaño’s defense to be permitted to file a reply brief before the United States Court of Appeals, Fifth Circuit, requesting three weeks to do so.

266. On March 17, 2017, the Commission held a working meeting with both parties, during its 161 period of sessions. The petitioners reported on the status of the judicial proceedings still pending and requested that the State take specific steps to comply with the Commission’s recommendations. The State also reported on the pending proceedings, indicating that Mr. Saldaño had not exhausted his domestic remedies and still had access to remedies to protect his rights. The State did not report any measures taken to comply with the Commission’s recommendations.

XI. FINAL CONCLUSIONS AND RECOMMENDATIONS:

267. From the available information to the date of the approval of this report, the Commission notes that the United States has not complied with the recommendations set forth in the merits report. Regarding the request of the petitioners, the Commission considers it relevant to recall that at this stage the Commission assesses the status of compliance with the recommendations and cannot extend it to aspects not addressed in its merits report 76/16.

268. Based on the legal and factual considerations set forth in this report, the Inter-American Commission concludes that the United States is responsible for violating Articles I (right to life, liberty, to personal security and integrity), II (right to equality before the law), XVIII (right to a fair trial), XXV (right of protection from arbitrary arrest), and XXVI (right to due process of law) of the American Declaration to the detriment of Víctor Saldaño. If Víctor Saldaño were to be executed, the State would also be responsible for a serious and irreparable violation of the fundamental right to life, protected by Article I of the American Declaration.

269. Víctor Saldaño is the beneficiary of precautionary measures adopted by the Inter-American Commission under Article 25 of its Rules of Procedure. The Inter-American Commission must remind the State that carrying out a death sentence in such circumstances would not only cause irreparable harm to the person but would also deny his right to petition the Inter-American human rights system and to obtain an effective result, and that such a measure is contrary to the fundamental human rights obligations of an OAS member state pursuant to the Charter of the Organization and the instruments deriving from it.¹⁶¹

¹⁶¹ See: IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, para. 66; Report No. 52/01, Case No. 12.243, Juan Raúl Garza, United States, Annual Report of the IACHR 2000, para. 117; IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Doc.OEA/Ser.L/V/II.11doc.21rev. (April 6, 2001) paras. 71 and 72. See also: International Court of Justice, *Case re. the Vienna Convention on Consular Relations (Germany v. United States of America)*, Request for the Indication of

Accordingly,

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

1. Grant Víctor Saldaño effective relief, including the review of his trial and sentence in accordance with the right to equality before the law and the guarantees of fair trial and due process set forth in Articles II, XVIII and XXVI of the American Declaration. Taking into account the conclusions of the IACHR on the time Víctor Saldaño has been held on death row, the Commission recommends that his sentence be commuted, that he be transferred out of death row, that the State ensure that his conditions of detention are compatible with his human dignity and that due attention be given to his mental health.

2. Review its laws, procedures, and practices to ensure that persons accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, II, XVIII, XV and XXVI thereof;

3. Ensure that the legal counsel provided by the State in death penalty cases is effective and adequately trained to serve in death penalty cases;

4. Given the violations of the American Declaration the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death.¹⁶²

XII. PUBLICATION

270. In light of the above and in accordance with Article 47.3 of its Rules of Procedure, the IACHR decides to make this report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Inter-American Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until it determines there has been full compliance.

Done and signed in Washington, D.C. on the 18th day of the month of March, 2017. (Signed): Francisco José Eguiguren, First Vice President; Margarete May Macaulay, First Vice President; Paulo Vannuchi, and Esmeralda E. Arosemena Bernal de Troitiño, Commissioners.

[... continuation]

Provisional Measures, Order of March 3, 1999, General List, No. 104, paras. 22-28; United Nations Human Rights Committee, *Dante Piandiong et al. v. Philippines*, Communication No. 869/1999, UN Doc. CCPR/C/70/D/869.

¹⁶² See in this regard, IACHR, *The death penalty in the Inter-American Human Rights System: From restrictions to abolition*, OEA/Ser.L/V/II.Doc 68, December 31, 2011.