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**REPORT No. 333/21**

**CASE 12.871**

REPORT ON THE MERITS (PUBLICATION)

VIRILIO MALDONADO RODRIGUEZ  
UNITED STATES OF AMERICA

Approved electronically by the Commission on November 22, 2021.

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## I. INTRODUCTION

1. On December 9, 2011, the Inter-American Commission on Human Rights (the “Inter-American Commission” or “IACHR”) received a petition submitted by Sandra L. Babcock from the Northwestern University School of Law (the “petitioners”), alleging the international responsibility of the United States of America (the “State” or “the United States”) for the violation of the rights of Virgilio Maldonado Rodriguez (“Mr. Maldonado”), a Mexican national who was at the time on death row in Texas.

2. The Commission approved its admissibility report No. 63/12 on March 29, 2012.<sup>1</sup> On April 2, 2012, the IACHR notified the report to the parties and placed itself at the disposition of the parties to reach a friendly settlement. The parties were allocated the time periods provided for in the IACHR’s Rules of Procedure to present additional observations on the merits of the case. All of the information received by the IACHR was duly transmitted to the parties.

## II. POSITIONS OF THE PARTIES

### A. Petitioners

3. The petitioners initially claimed that Mr. Maldonado suffered from severe mental disabilities; that the court-appointed attorney who represented him was ineffective; that the police failed to notify him of his right to consular notification in violation of Article 36 of the Vienna Convention on Consular Relations; and that the lethal injection as it was practiced in Texas created an unacceptable risk of causing excruciating pain and suffering to the inmate.

4. On September 5, 2013, the petitioners informed the IACHR that on December 13, 2012, the 338<sup>th</sup> District Court of Harris County, Texas, found that Mr. Maldonado is “mentally retarded” and is therefore ineligible for execution. That decision was confirmed by the Texas Court of Criminal Appeals on May 22, 2013, and Mr. Maldonado’s death sentence was commuted to a sentence of life imprisonment. Mr. Maldonado was subsequently transferred from death row, and he is now serving a prison sentence in a separate facility. In light of these developments, the petitioners withdraw their claims pertaining to Mr. Maldonado’s mental disability and the risk of cruel, inhuman or degrading treatment or punishment if he was subjected to lethal injection. Therefore, the IACHR will analyze in this report the claim of ineffective assistance of counsel, considering Mr. Maldonado’s disability, and the alleged violation of his right to consular notification.

5. The petitioners state that on April 11, 1996, Mr. Maldonado, a Mexican national, was arrested in Houston, Texas, for a bank robbery unrelated to the murder of Augustin Saucedo, for which he was ultimately convicted. They state that Mr. Maldonado was appointed a lawyer to represent him on the robbery charge, who advised him not to talk to the police. After the alleged victim refused to talk to a police officer, the police supposedly re-initiated contact with him. According to the petitioners, “only then did Mr. Maldonado “confess” in response to the police interrogation”. They argue that the resulting confession was not only invalid and illegally obtained; it was the only factual basis for Mr. Maldonado’s conviction. Mr. Maldonado was convicted of capital murder and sentenced to death on October 6, 1997. The conviction and sentence was confirmed by the higher courts.

6. The petitioners note that the Consular Notification Compliance Act (CNCA) was introduced on June 14, 2011. According to the petitioners, it would grant Mr. Maldonado a right to the judicial process required by the Avena Case decided by the International Court of Justice.<sup>2</sup> However, they argue that the likelihood that the United States will provide him with the review and reconsideration to which he is entitled under Avena remains slim.

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\* Commissioner Joel Hernandez Garcia, a Mexican national, considered that, based on Article 17(3) of the Rules of Procedure of the IACHR, he should abstain from participating in the deliberation and decision of this matter.

<sup>1</sup> IACHR. Report No 63/12. Petition 1762-11. Admissibility. Virgilio Maldonado Rodriguez. United States. March 29, 2012.

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

7. According to the petitioners, at his 1997 trial, Mr. Maldonado was represented by a court-appointed attorney who failed to meaningfully investigate, develop, and present substantial mitigating evidence that could have swayed the jury to spare his life. They note that Mr. Maldonado was sentenced to death by a jury who did not know of his “mental retardation,” horrific childhood, and the extreme poverty he endured in Mexico. The petitioners allege that trial counsel’s entire penalty phase defense rested on a single character witness who was absent from Mr. Maldonado’s childhood and adolescence. In addition, petitioners point out that in his appeal to the Texas Court of Criminal Appeals, the alleged victim’s court-appointed appellate counsel failed to raise the violation of Article 36 of the Vienna Convention. They state that the appeal was rejected and that subsequent appeals based on ineffective assistance of counsel and violations of the Vienna Convention have failed based on the court’s findings that such claims were foreclosed by procedural default.

8. With regard to Mr. Maldonado’s consular rights, petitioners point out that, although the police was aware that he was a Mexican national, they failed to notify him of his right to consular notification in violation of Article 36 of the Vienna Convention. They further state that Mr. Maldonado was born and raised in Mexico until the age of twenty-one; that he spoke no English at the time of his arrest; and that he told the police that he went to school in Mexico. The petitioners also contend that the Mexican Consulate did not learn of Mr. Maldonado’s detention until one month before the start of the trial, and after *voir dire* had begun. They conclude that, had the Consulate been notified sooner, the office would have offered Mr. Maldonado flexible and far-reaching assistance to avoid the imposition of the death penalty.

## **B. State**

9. According to the State, the petitioners’ claim regarding compliance with the Vienna Convention is not a matter within the Commission’s competence and the allegation of ineffective assistance of counsel fails to state facts that establish a violation of the American Declaration. According to the United States, Mr. Maldonado was afforded extensive due process protections in criminal proceedings.

10. With regard to the Vienna Convention claim, the State reiterates its position that the IACHR lacks competence to review claims under the Vienna Convention and that consular notification claims do not raise a violation of the American Declaration. It argues that consular notification is not a human right and that the “Vienna Convention’s consular notification protections are based on principles of reciprocity, nationality, and function, and persons do not enjoy these protections by mere virtue of their human existence.” The State notes that it is up to representatives of the detained individual’s state of nationality to determine whether to provide assistance, and the Vienna Convention does not provide the detained individual any right or authority to demand it. According to the State, to accept the argument that a “consular notification claim amounts to a human rights violation under the American Declaration would require the untenable conclusion that any foreign national who does not receive consular assistance, because of an absence of consular relations or because his government did not provide assistance, cannot receive a fair trial or due process.”

11. The United States points out that its criminal justice system gives full effect to the fair trial protections and procedural guarantees contained in the American Declaration and has done so in Mr. Maldonado’s case. According to the State, the claim of ineffective assistance of the state-appointed trial counsel received multiple layers of judicial review in U.S. courts. Specifically, the State argues that the jury heard about his difficult childhood, and that his father testified and admitted that he was an absent parent and that Mr. Maldonado was forced to drink alcohol as a child. The United States indicates that, despite this evidence of his background, the jury concluded that the mitigating circumstances did not warrant a life sentence.

12. According to the State, evidence of severe mental impairment and mitigating factors were presented at a seven-day hearing, and a number of lay witnesses, some from Mexico, testified about Mr. Maldonado’s social history, background and character but the court concluded that he had not met his burden of establishing severe mental impairment. The State emphasizes that that finding was adopted by the Texas Court of Criminal Appeals, and two federal courts agreed on collateral review that this conclusion was not unreasonable. Moreover, the State indicates that Mr. Maldonado was given ample opportunity to raise trial counsel’s alleged ineffectiveness in his state and federal habeas proceedings, and the courts determined he was not entitled to a new trial or other relief on this basis.

13. The State also argues that decisions by counsel at trial and sentencing, including decisions not to develop certain lines of argument, “may in retrospect seem like bad ones, but may nonetheless have been valid, strategic decisions at the time.” It states in this regard that an attorney’s “decision not to present evidence of severe mental impairment to the jury could be one such decision; as the Supreme Court has acknowledged, evidence of severe mental impairment can also suggest an inability to learn from mistakes, and lead a jury to aggravate rather than mitigate a sentence.”

14. Finally, the United States notes its longstanding position that the American Declaration is a non-binding instrument and does not create legal rights or impose legal obligations on States.

### III. FINDINGS OF FACT

15. 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 to the analysis and decision of the instant case.

#### A. Mr. Maldonado’s conviction and death sentence

16. On October 6, 1997, a jury convicted Mr. Maldonado of capital murder and the 338th District Court of Harris County, Texas, sentenced him to death.<sup>3</sup> In one of the pretrial hearings conducted before the District Court on September 18, 1997, the police officer who arrested Mr. Maldonado testified the following:<sup>4</sup>

Q [...] So, at the time you interviewed [Mr. Maldonado], you didn’t know whether he had a lawyer in the bank robbery case at all?

A No, sir.

[...]

Q You knew at that time, Mr. Escalante, that Mr. Maldonado had been appointed a lawyer by the name of Dominique Gerard, didn’t you, sir?

A No, sir, I didn’t.

Q Well, didn’t you ask Mr. Maldonado if he had a lawyer?

A Yes, sir, I did.

Q Is that on your tape-recorded conversation?

A No, sir.

Q Did you make a report about that?

A No, sir.

Q You didn’t write it in the report, sir?

A No, sir.

Q You were there to interview him on a capital murder case and you don’t ask him whether or not he has a lawyer?

A Yes, sir, I did.

Q But you don’t write that in your report though?

A No, I didn’t.

[...]

Q Did you make a report about the interview, sir?

A Yes, sir, I did.

Q But you didn’t include the fact he talked to you about an attorney?

A No, sir.

Q Did you make an effort to contact [...] the prosecutor [...] to ask: Hey who’s this guy’s lawyer? [...]

A No, sir.

Q Did you check the records? You have access to find out who represented a certain defendant, do you not, sir?

A Yes, sir, I get somebody to do that, that’s correct.

Q Did you do that in this case?

A No, sir.

<sup>3</sup> *Ex parte* Maldonado, No WR-51,612-01 (Tex. Crim. App. April 25, 2012). Exhibit A submitted with petitioners’ additional observations on the merits on July 2, 2012.

<sup>4</sup> Reporter’s record. Volume 18, pages, 14-17 and 34-37. Exhibit 9 submitted with petitioners’ original petition on December 9, 2011.

17. In a hearing conducted on September 30, 1997, the same police officer testified the following:<sup>5</sup>

Q When you went to talk to him on the 24<sup>th</sup>, did you tell him that he had a right to contact the Mexican Consulate's office for advice? Or that he had a right to contact it regarding his detainment and imprisonment or incarceration? Did you tell him that?

A No, sir, I never brought up the Mexican Consulate.

[...]

18. At the penalty phase, trial counsel offered Mr. Maldonado's father, Jose Maldonado, as a character witness, who in a hearing held on October 6, 1997, testified the following:<sup>6</sup>

THE COURT: All right. You have any witnesses in the courtroom, sir?

MR. CERVANTES [trial counsel]: Yes, I do. They're outside, Judge.

THE COURT: Would you ask them to step in so I can ask them to come in at the same time.

MR. CERVANTES: Your Honor, we have one.

THE COURT: Just one, right now?

MR. CERVANTES: That's it. His name is Jose Maldonado.

[...]

Q [by Mr. Cervantes] When was the last time you saw [...] Virgilio's mother?

A It's been many years. He was still not yet born when I separated from her.

[...]

Q So when was the first time you saw Virgilio Maldonado?

A I don't remember exactly the year. But when we saw each other he was 21 years old.

Q Was there a time that you saw him, at least for an hour or 30 minutes or 15 minutes, in Mexico as a child?

A Yes. I went one time. I went to go visit my parents in the town [...] and he happened to be in there. And his mom told him to come by, to come see me.

Q And was that the first time you had seen Virgilio?

A Yes.

[...]

Q So between the age of the time he was born until the age of 21 you saw your son for maybe 30 minutes to an hour?

A You could say it was even less than that. Maybe half an hour he came to see me and then he ran back to his mother.

Q And I believe you said at the time he was how old?

A About two years old.

19. At his closing argument at the punishment phase, trial counsel said:<sup>7</sup>

[...] Mr. Maldonado, he never had a life. Mother was a prostitute. Grew up on his own, however he could. Mom took him to bars, gave him beers, get him drunk so he stays at the dance. That's something to take into account.

20. On June 30, 1999, the Texas Court of Criminal Appeals denied Mr. Maldonado's direct appeal and rehearing was denied on September 15, 1999. In his direct appeal, Mr. Maldonado's counsel raised eleven points. With regard to point five about the lack of consular notification, the Court established the following:<sup>8</sup>

In point of error five, appellant again contends the trial court failed to give a jury instruction in violation of Article 38.23(a). He argues he was entitled to an instruction ordering the jury to ignore appellant's audio-taped in-custody statement and the transcription of the tape if it found appellant had not been advised of his right to contact the Mexican Consulate before making a statement to the police. Appellant cites Article 36 of the Vienna Convention on Consular Relations. [...] Appellant asserts he is a Mexican

<sup>5</sup> Reporter's record. Volume 18, page 81. Exhibit 9 submitted with petitioners' original petition on December 9, 2011.

<sup>6</sup> Reporter's record. Volume 28, pages 7-10. Exhibit 9 submitted with petitioners' original petition on December 9, 2011.

<sup>7</sup> Reporter's record. Volume 28, page 38. Exhibit 9 submitted with petitioners' original petition on December 9, 2011.

<sup>8</sup> Maldonado v. State, 998 S.W. 2d 239 (Tex. Crim. App. 1999). Available at: <https://www.leagle.com/decision/19991237998sw2d23911233#>

citizen and emphasizes that Officer Escalante admitted he never mentioned the Mexican Consulate to him.

The Vienna Convention on Consular Relations grants a foreign national who has been arrested, imprisoned or taken into custody a right to contact his consulate and requires the arresting government authorities to inform the individual of this right "without delay." [...] Article 38.23(a) provides that evidence obtained in violation of a federal or state law or constitutional provision shall not be admitted against the accused and mandates that the jury be instructed to disregard evidence obtained in violation of the law if the issue is raised by the evidence. Under the Supremacy Clause of the United States Constitution, states must adhere to United States treaties and give them the same force and effect as any other federal law. [...] Thus, a violation of this treaty would arguably fall under the language in Article 38.23(a) if the issue is raised by the evidence. [...]

Only if appellant is a foreign national did authorities have an obligation to notify him of his right to consular access. Testimony at trial showed that appellant lived in Mexico when he was a child and that is where he knew the victim's son, Augustin Saucedo. This evidence does not preclude the possibility that appellant became a United States citizen after coming to this country. Other evidence showed appellant had lived in the United States for many years, spoke some English, had a Texas driver's license, and had purchased a car in the United States. No one testified that applicant was not a United States citizen. In sum, trial evidence did not show appellant was a Mexican citizen. Therefore, appellant was not entitled to an instruction under Article 38.23. *See id.* Appellant's fifth point of error is overruled.

## B. State and federal post-conviction proceedings

21. Mr. Maldonado filed his initial writ application in the trial court in February 1999, and the Texas Court of Criminal Appeals denied relief on March 6, 2002.<sup>9</sup> On June 7, 2001, the court appointed counsel to represent Mr. Maldonado in his federal habeas proceedings.<sup>10</sup> On June 20, 2002, the United States Supreme Court in *Atkins* held that individuals with "mental retardation" are constitutionally ineligible for the death penalty under the Eighth Amendment.<sup>11</sup> Therefore, Mr. Maldonado's counsel raised an unexhausted "Atkins claim" in his federal petition, and then returned to the state courts to exhaust that claim, filing a second petition for a writ of habeas corpus on June 17, 2003.<sup>12</sup> The Texas Court of Criminal Appeals remanded the claim to the trial court for consideration on July 2, 2003.<sup>13</sup> Following an evidentiary hearing conducted in 2006, the trial court concluded that Mr. Maldonado's Eighth Amendment claims should be denied. The record was subsequently sent to the Texas Court of Criminal Appeals, and relief was denied on September 12, 2007.<sup>14</sup>

22. According to the allegations of the parties, on March 26, 2005, Mr. Maldonado filed a third petition for a writ of habeas corpus, asserting that his rights under Article 36 of the Vienna Convention on Consular Relations had been violated. The Texas Court of Criminal Appeals dismissed the claim on September 12, 2007. A petition asserting violations of the Fifth, Sixth, and Eighth Amendments and the Vienna Convention was also denied on September 24, 2009. On August 10, 2010, the Fifth Circuit held that Mr. Maldonado was entitled to a certificate of appealability on the issue of whether he was "mentally retarded" and thus ineligible for execution. The habeas relief was denied as well as a rehearing. Mr. Maldonado's petition for a writ of certiorari was denied by the United States Supreme Court on October 3, 2011.

23. Based on available information, the IACHR understands that, while on Texas' death row, Mr. Maldonado was detained at Polunsky Unit. According to a report published by the Human Rights Clinic of the University of Texas School of Law, detainees on death row at Polunsky Unit are subject to mandatory solitary confinement, which "involves total segregation of individuals who are confined to their cells for twenty-two to

<sup>9</sup> *Ex parte Maldonado*, No WR-51,612-01 (Tex. Crim. App. April 25, 2012) (citing *Ex parte Maldonado*, No. WR-51,612-01 (Tex. Crim. App. March 6, 2002)). Exhibit A submitted with petitioners' additional observations on the merits on July 2, 2012.

<sup>10</sup> Order of the 338th District Court of Harris County, Texas, signed on December 12, 2012, p. 2. Exhibit submitted with petitioners' supplemental observations on December 28, 2012.

<sup>11</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>12</sup> Order of the 338th District Court of Harris County, Texas, signed on December 12, 2012, p. 2. Exhibit submitted with petitioners' supplemental observations on December 28, 2012.

<sup>13</sup> *Ex parte Maldonado*, No WR-51,612-01 (Tex. Crim. App. April 25, 2012) (citing *Ex parte Maldonado*, No. WR-51,612-01 (Tex. Crim. App. July 2, 2003)). Exhibit A submitted with petitioners' additional observations on the merits on July 2, 2012.

<sup>14</sup> *Ex parte Maldonado*, No WR-51,612-01 (Tex. Crim. App. April 25, 2012) (citing *Ex parte Maldonado*, No. WR-51,612-01 (Tex. Crim. App. September 12, 2007)). Exhibit A submitted with petitioners' additional observations on the merits on July 2, 2012.

twenty-four hours per day, with a complete prohibition on recreating or eating with other inmates.”<sup>15</sup> The report also found that this prolonged solitary confinement “has overwhelmingly negative effects on inmates’ mental health, exacerbating existing mental health conditions and causing many prisoners to develop mental illness for the first time.”<sup>16</sup>

### C. Sentence of life imprisonment

24. In April 2011, Dr. George Denkowski, who was the sole expert witness to testify at the 2006 hearing conducted by the trial court, entered into a Settlement Agreement with the Texas State Board of Examiners of Psychologists, in which his license was reprimanded for his unethical conduct in Mr. Maldonado’s case, among others.<sup>17</sup> Pursuant to this settlement, Mr. Maldonado’s counsel submitted a request that the Texas Court of Criminal Appeals reconsidered its previous denial of his “mental retardation claim.” In light of the settlement agreement, on April 25, 2012, the Court exercised its authority to reconsider the case on its own initiative and remanded it to the trial court to reconsider and re-evaluate its previous findings.<sup>18</sup>

25. A reconsideration hearing took place before the 338th District Court of Harris County, Texas, on October 25 and 26, 2012. On December 13, 2012, the trial court found that Mr. Maldonado is “mentally retarded” and is therefore ineligible for execution, and modified his death sentence to a sentence of life imprisonment.<sup>19</sup>

### D. Investigations by post-conviction counsel

26. According to post-conviction counsel’s investigations into Mr. Maldonado’s background, “[t]here is a great possibility that he suffers from Fetal Alcohol Syndrome (FAS), [...] one of the leading known causes of mental retardation and birth defects.”<sup>20</sup> Also, according to the same study, Mr. Maldonado was regularly and severely physically abused by his alcoholic prostitute mother who drank heavily during the majority of the pregnancy. The study found that he suffered from malnutrition and that he started drinking alcohol as a young child.<sup>21</sup> Mr. Maldonado started working at the age of 13 in the fields, carrying a tank on his back filled with chemicals agents that often leaked into his skin and that are known to cause damage to the central nervous system.<sup>22</sup> He was unable to pass from first grade and dropped out of school.<sup>23</sup>

### E. Consular notification

27. According to an affidavit submitted by Mr. Manuel Perez Cardenas, Consul General of Mexico in Houston, Texas, from August 1995 to July 1998:

6. Over the last several decades, Mexico has established an extensive and sophisticated program of consular assistance to Mexican nationals residing in the United States. [...]

[...]

14. Mexican consular offices have spent considerable time, energy, and resources on capital cases over the years. In these cases, Mexico’s overriding concern is to ensure each national receives an adequate

<sup>15</sup> The University of Texas School of Law, Human Rights Clinic. “Designed to break you. Human rights violations on Texas’ death row.” April 2017, p. 5. Available at: <https://law.utexas.edu/wp-content/uploads/sites/11/2017/04/2017-HRC-DesignedToBreakYou-Report.pdf>

<sup>16</sup> The University of Texas School of Law, Human Rights Clinic. “Designed to break you. Human rights violations on Texas’ death row.” April 2017, p. 5.

<sup>17</sup> *Ex parte Maldonado*, No WR-51,612-01 (Tex. Crim. App. April 25, 2012). Exhibit A submitted with petitioners’ additional observations on the merits on July 2, 2012.

<sup>18</sup> *Ex parte Maldonado*, No WR-51,612-01 (Tex. Crim. App. April 25, 2012). Exhibit A submitted with petitioners’ additional observations on the merits on July 2, 2012.

<sup>19</sup> Order of the 338th District Court of Harris County, Texas, signed on December 12, 2012, p. 5. Exhibit submitted with petitioners’ supplemental observations on December 28, 2012.

<sup>20</sup> Declaration of Ricardo Weinstein, Ph.D. Exhibit 5 submitted with petitioners’ original petition on December 9, 2011, para. 23.

<sup>21</sup> Declaration of Ricardo Weinstein, Ph.D. Exhibit 5 submitted with petitioners’ original petition on December 9, 2011, para. 25.

<sup>22</sup> Declaration of Ricardo Weinstein, Ph.D. Exhibit 5 submitted with petitioners’ original petition on December 9, 2011, paras. 24-27.

<sup>23</sup> Declaration of Ricardo Weinstein, Ph.D. Exhibit 5 submitted with petitioners’ original petition on December 9, 2011, para. 28.

legal defense from competent and vigorous defense counsel. The quality of attorneys representing indigent defendants is uneven, at best. For this reason, consular officers are instructed to monitor and support defense counsel's efforts, confer regularly with the defendant and his family, and attend court proceedings. In many cases, consulates provide funds for expert and investigative assistance, and assist in gathering evidence in preparation for the guilt and penalty phases of capital trials. In others, consular officers support defendants' attempts to obtain more qualified counsel, sometimes providing funds so that experienced counsel may be retained.

15. Mexico's goal is not to interfere with the judicial process, but rather to ensure its nationals receive the protection to which they are entitled under domestic and international law. Pursuant to this mandate, Mexican consular officers have assisted attorneys in innumerable capital cases. Attached to this affidavit as Exhibit A are examples of three capital cases in which the involvement of Mexican consular officers was instrumental in avoiding the imposition of the death penalty. These cases, all of which were prosecuted in the late 1980s and early 1990s, demonstrate Mexico's longstanding policy of providing meaningful consular assistance in capital cases. While they are not the only cases in which Mexico has provided substantial assistance, they provide a representative sampling of the efforts made by Mexico's consular officers to provide assistance to Mexican nationals involved in capital cases.

16. Under article 36(1) of the Vienna Convention on Consular Relations, law enforcement officers are required to notify detained foreign nationals of their right to communicate with their consulate "without delay." Prompt notification is a crucial component of this article. In Mexico's experience, early intervention by consular officers can often prevent the imposition of a death sentence.

17. I first learned that Mr. Maldonado was a Mexican national facing a capital murder trial in August 1997, almost a year and a half after his initial detention in April 1996. This information came to me as a result of the media. If we had known that Mr. Maldonado was a Mexican national at the time of his initial detention, consular officials would have offered flexible and far-reaching assistance to avoid the imposition of the death penalty. Our consular assistance spans a wide variety of services, and we would have made all of them available to Mr. Maldonado.

18. First, exercising our rights under the Vienna Convention, we would have visited him in the jail as soon as possible and explained the nature of the American adversarial system, a system that is largely foreign to most Mexican nationals. Most particularly, we would have advised him in no uncertain terms that he should not speak to any law enforcement officer without first speaking with an American attorney. We would have explained that such an attorney would represent him without cost. And we would have explained that this attorney had a right to be present any time he was questioned by the police.

19. Consular representatives would have continued to visit Mr. Maldonado on a regular basis throughout his detention. We would have maintained contact with his family, as well, to ensure they understood the nature of the proceedings.

20. One of the duties of a consular officer is to monitor legal counsel's activities on behalf of a detained national. In a capital case, I take that responsibility very seriously. In the case of Mr. Maldonado if I saw that his lawyer was mishandling the case, or lacked the necessary experience to properly defend him, I would have requested that the court appoint more experienced counsel. At the time of Mr. Maldonado's detention, the consulate also had some funds that could have been used for the purpose of retaining a lawyer to advise appointed counsel. If the court refused to appoint substitute counsel, I would have sought leave from the Mexican Foreign Ministry to retain additional legal counsel to assist Mr. Maldonado. Since the Mexican Government places such a high priority on capital cases, I feel certain the Ministry would have authorized the expenditure of these funds.

21. The consulate would also have provided funds for a Spanish-speaking psychologist or psychiatrist to examine Mr. Maldonado for evidence of mental retardation, organic brain damage, fetal alcohol syndrome, or other mental and physical problems that could have been used as mitigating evidence at this trial. The consulate would also have provided funds for an investigator or mitigation specialist. Moreover, we would have been willing to assist Mr. Maldonado's appointed counsel in gathering records from Mexico, arranging the transport of Mexican witnesses to the trial, and facilitating contact with Spanish-speaking witnesses. By the time we learned of his detention, however, it was too late to provide the comprehensive assistance that could have affected the outcome of the trial.

22. In 1996, the Houston consulate had a close working relationship with local attorneys who were available to advise us in complex criminal cases involving Mexican nationals. Also during this time, there were members of the Mexican foreign service who had been trained in U.S. law schools. If the consulate had been promptly notified of Mr. Maldonado's arrest and detention, I would have unquestionably sought the advice of these experts to assist consular officials during his pre-trial detention. Specifically, I would have requested expert assistance from the Foreign Ministry or from local attorneys during the critical months of Mr. Maldonado's pre-trial detention, in order to assess the kinds of consular services that would have the greatest chance of affecting the outcome of his trial. These experts could also have assisted us at plea negotiations with the prosecutions.

23. To summarize, the Houston consulate would have played as active a role as necessary to help ensure Mr. Maldonado avoided the death penalty. Though our role varied from case to case, I can safely say we would have undertaken the following consular interventions:

- a. Arranging for and assisting with visits from Mr. Maldonado's family;
- b. Arranging for and assisting counsel with investigations and record-gathering in Mexico;
- c. Assisting in raising legal issues surrounding the Vienna Convention, if such issues arose;
- d. Assisting counsel with funding, if he was not able to secure the funds from American courts;
- e. Assisting counsel in locating expert and lay witnesses regarding issues of importance to Mr. Maldonado, whether at the guilt or punishment phases;
- f. Providing affidavits and documentary evidence from Mexico;
- g. Assisting as needed at all court proceedings, including offering testimony about consular practices or the Vienna Convention;
- h. Assisting in plea negotiations

28. According to the declaration of Mr. Adrian Franco, Mexican criminal defense attorney, before the International Court of Justice in *Avena*<sup>24</sup> submitted by the petitioners:<sup>25</sup>

Even if a Mexican national were familiar with Mexican rules of criminal procedure and the corresponding rules of evidence, this knowledge would be of no use to anyone seeking to understand his or her rights in the United States' criminal justice system. Mexico's criminal justice system differs from that of the United States in several fundamental aspects.

*First*, in cases involving serious felony charges such as homicide, Mexican law does not allow for reduced penalties pursuant to deals brokered through negotiations between the prosecutor (the "Ministerio Público") and defendant, as in the so-called "plea bargaining" process in the United States. [...] Any such negotiated agreement between the prosecutor and defendant would violate Mexican constitutional law and public policy mandates, and would be considered void.

*Second*, the role of confessions as evidence against the accused differs markedly between the two jurisdictions. Under Article 20 of the Mexican Constitution, a confession obtained from a criminal defendant is not admissible against that defendant unless the confession was taken in front of the Ministerio Público or judge and in the presence of counsel or "person of confidence" to the defendant. Moreover, pursuant to Article 287 of the Federal Code of Criminal Procedure and Article 249 of the Mexico City Code of Criminal Procedure, confessions given only to the judicial police have no evidentiary value; that is, they are inadmissible at trial, whether or not they are deemed voluntary. In the United States, by contrast, confessions given to the police are admissible at trial, provided that two basic conditions are met: (1) the confession is voluntary; and (2) the police advised the defendant of his constitutional rights, pursuant to *Miranda v. Arizona*, before any custodial interrogation.

[...]

*Third*, the judicial procedures followed in the Mexican criminal justice system differ substantially from those of the United States. [...]

<sup>24</sup>Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U. S.), 2004 I.C.J. 12 (Judgment of March 31, 2004).

<sup>25</sup>Declaration of Adrian Franco. Exhibit 10 submitted with petitioners' original petition on December 9, 2011.

## IV. ANALYSIS OF LAW

### A. Preliminary considerations

29. Before embarking on its analysis of the merits in the case of Virgilio Maldonado Rodriguez, the Inter-American Commission believes it should reiterate its previous rulings 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 *sine qua non* for the enjoyment of all other rights.

30. That gives rise to the particular importance of the IACHR's obligation to ensure that any denial 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. That heightened scrutiny is consistent with the restrictive approach adopted by other international human rights bodies in cases involving the imposition of the death penalty,<sup>26</sup> and it has been set out and applied by the Inter-American Commission in previous capital cases brought before it.<sup>27</sup> 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.<sup>28</sup> In the words of the Commission:

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.<sup>29</sup>

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

32. The Commission recalls that its review does not consist of determining that the death penalty in 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.

33. Finally, given the allegation of the State regarding the non-binding nature of the American Declaration, the IACHR would like to briefly refer to the legal status of the Declaration. The American Declaration is, for the Member States not parties to the American Convention on Human Rights, the source of international obligation 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 the rights referred to in the Charter are those enunciated and defined in the American Declaration.<sup>30</sup> 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 obligation for the member states of the OAS.<sup>31</sup> In this

<sup>26</sup> 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; United Nations Human Rights Committee, *Baboheram-Adhin et al. v. Suriname*, Communications Nos. 148-154/1983, adopted on April 4, 1985, para. 14.3; *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), para. 378.

<sup>27</sup> IACHR, Report No. 57/96, Andrews, United States, IACHR Annual Report 1997, para. 170-171; Report No. 38/00 Baptiste, Grenada, IACHR Annual Report 1999, paras. 64-66; Report No. 41/00, McKenzie *et al.*, Jamaica, IACHR Annual Report 1999, paras. 169-171.

<sup>28</sup> 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.

<sup>29</sup> IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, para. 34.

<sup>30</sup> See Article 1 of the Commission's Statute approved by Resolution No. 447, adopted by the General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October 1979.

<sup>31</sup> See in this regard, Resolution 314 (VII-0/77) of June 22, 1977, charging the Inter-American Commission with the preparation of a study to "set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man;" Resolution 371 (VIII-0/78) of July 1, 1978, in which the General Assembly reaffirmed "its commitment to promote the observance of the

[continues ...]

respect, the Inter-American Court of Human Rights noted that “by means of an authoritative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter.”<sup>32</sup>

## **B. Right to a fair trial<sup>33</sup> and to due process of law<sup>34</sup>**

### **1. General considerations regarding ineffective assistance of court-appointed counsel**

34. Adequate legal representation is a fundamental component of the right to a fair trial. The IACHR has found that “[t]he right to due process and to a fair trial includes the right to adequate means for the preparation of a defense, assisted by adequate legal counsel.”<sup>35</sup> According to the Commission, “[t]he 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.”<sup>36</sup>

35. The appointment of an attorney by the state does not, in and of itself, ensure effective assistance of counsel. At the same time, while the state is responsible for ensuring that such assistance is effective, it is not responsible for what may be understood as decisions of strategy or for every possible shortcoming. Rather, the Commission must evaluate whether the assistance of counsel was effective in the overall context of the process and taking into account the specific interests at stake. In the present case, the interests at stake included the potential application of the death penalty, and the assistance of counsel must be evaluated in that context.<sup>37</sup>

36. 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 of his or her case.”<sup>38</sup> The Commission has also indicated that due process protections, under the 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.<sup>39</sup>

37. It may be noted that the fundamental nature of this guarantee has been reflected in practice guidelines for lawyers. The American Bar Association has prepared and adopted guidelines and related commentaries

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American Declaration of the Rights and Duties of Man;” and Resolution 370 (VIII-0/78) of July 1, 1978, referring to the “international commitments” of a member state of the Organization to respect the rights of man “recognized in the American Declaration of the Rights and Duties of Man.”

<sup>32</sup> I/A Court H.R., 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. 10, para. 43.

<sup>33</sup> Article XVIII of the American Declaration provides: “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.”

<sup>34</sup> Article XXVI of the American Declaration provides: “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.”

<sup>35</sup> 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, p. 123.

<sup>36</sup> 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, p. 123.

<sup>37</sup> IACHR, Report No. 79/15, Case 12.994. Merits (Publication). Bernardo Aban Tercero. United States. October 28, 2015, para. 111.

<sup>38</sup> IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, para. 134.

<sup>39</sup> IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, para. 134.

that emphasize the importance of investigating and presenting mitigating evidence in death penalty cases.<sup>40</sup> According to these guidelines, the duty of counsel in the United States to investigate and present mitigating evidence is now well-established and “[b]ecause the sentencer in a capital case must consider in mitigation, anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant,” penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.<sup>41</sup> The Guidelines also emphasize that the “mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.”<sup>42</sup>

38. Finally, the Commission notes that the international responsibility of the State is activated not only when court-appointed counsel is inefficient but also when the manifest negligence of the defense should have been evident to the judicial authorities and the necessary and sufficient actions were not taken to prevent and/or remedy the violation of the right to defense.<sup>43</sup>

## 2. Analysis of the case

39. Based on the available information, the Commission will analyze whether the assistance of counsel was effective in the overall context of Mr. Maldonado’s case and taking into account the specific interests at stake.

40. The petitioners claim that, at his trial, Mr. Maldonado was represented by a court-appointed attorney who failed to meaningfully investigate, develop, and present substantial mitigating evidence. The State argues that, despite the evidence about Mr. Maldonado’s difficult childhood presented by the defense, the jury concluded that the mitigating circumstances did not warrant a life sentence.

41. According to the facts established in this report, Mr. Maldonado suffered malnutrition as well as early and severe physical and emotional abuse during his childhood in Mexico, his mother drank heavily during the pregnancy, and he started drinking alcohol as a young child. It is also a fact that Mr. Maldonado dropped out of school after failing to pass first grade, and that he started working in the fields at the age of 13 carrying chemical agents that are known to cause damage to the central nervous system. All these constitute relevant and critical pieces of evidence that a diligent defense would have presented as mitigating circumstances.

42. Despite all the available information, court-appointed trial counsel decided to call only one character witness at the penalty phase, Mr. Maldonado’s father, who abandoned his family before Mr. Maldonado was even born and who only saw him one day, for a total of 30 minutes, up until the time he was 21 years old. The Commission considers that the sole testimony of Mr. Maldonado’s father, who merely gave general and third-hand information regarding his son’s difficult childhood, fell short of effectively demonstrating the violence and deprivations experienced by Mr. Maldonado, as well as his mental and intellectual disability. Further, according to the information available, trial counsel did not conduct a thorough investigation into Mr. Maldonado’s background to gather information which could have been presented at the penalty phase of his trial. He made no effort to contact other relatives closer to Mr. Maldonado, schoolteachers in Mexico or former employers to testify at trial. Further, trial counsel did not seek to test Mr. Maldonado for fetal alcohol syndrome or organic brain damage, which could have been used as mitigating evidence.

43. Also, the Commission notes that this deficiency was made evident by the judge’s reaction when he noted that the defense would present only one character witness:

<sup>40</sup> American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003), Guideline 10.7 – Investigation. Available at: <http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>.

<sup>41</sup> American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003), Guideline 10.7 – Investigation, at 82.

<sup>42</sup> American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003), Guideline 10.7 – Investigation, at 83.

<sup>43</sup> See *mutatis mutandi*, I/A Court. Case of Ruano Torres et al. vs. El Salvador. Merits, Reparations and Costs. Judgment of October 5, 2015. Serie C. No. 303, para. 172 (available only in Spanish).

THE COURT: Would you ask them to step in so I can ask them to come in at the same time.

MR. CERVANTES: Your Honor, we have one.

THE COURT: Just one, right now?

44. Therefore, the IACHR also concludes that judicial authorities failed to take the necessary actions to prevent Mr. Maldonado's violation of the right to effective legal representation according to the above-mentioned standard.

45. As a consequence of these failures on the part of court-appointed counsel, and the corresponding failure on the part of the State to ensure that Mr. Maldonado received effective assistance according to the standards applicable in a capital case, the Inter-American Commission concludes that the United States violated Mr. Maldonado's right to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration.

### 3. General considerations regarding the right to consular notification

46. The Commission has determined in previous cases that it is necessary and appropriate to consider the extent to which a state party has given effect to the requirements of Article 36 of the Vienna Convention on Consular Relations for the purpose of evaluating that state's compliance with a foreign national's due process rights under Articles XVIII and XXVI of the American Declaration. Therefore, it does consider compliance with Article 36 of the Vienna Convention when interpreting and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to trial or to custody pending trial, or is detained in any other manner by that state.<sup>44</sup>

47. In this regard, the Commission has noted that "non-compliance with obligations under Article 36 of the Vienna Convention on Consular Relations is a factor that must be evaluated together with all of the other circumstances of each case in order to determine whether a defendant received a fair trial."<sup>45</sup>

48. In addition, the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas" adopted by the Commission in 2008 establish that:<sup>46</sup>

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

49. The significance of consular notification is also reflected in practice guidelines such as those adopted by the American Bar Association, a national organization for the legal profession in the United States, concerning the due process rights of foreign nationals in capital proceedings. The ABA has indicated in its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases that:<sup>47</sup>

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

<sup>44</sup> IACHR, Report No. 11/15, Case 12.833. Merits (Publication). Felix Rocha Diaz. United States. March 23, 2015, para. 63.

<sup>45</sup> IACHR, Report No. 79/15, Case 12.994. Merits (Publication). Bernardo Aban Tercero. United States. October 28, 2015, para. 126.

<sup>46</sup> Principle V (Due Process) of the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas" approved by the Commission during its 131<sup>st</sup> regular period of sessions, held from March 3-14, 2008, <http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>

<sup>47</sup> American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition)(February 2003), Guideline 10.6B "Additional Obligations of Counsel Representing a Foreign National."

#### 4. Analysis of the case

50. The petitioners allege that, although the police were aware that Mr. Maldonado was a Mexican national, they failed to notify him of his right to consular notification. The State argues that consular notification is not a human right and therefore it does not raise a violation of the American Declaration. It alleges that, to accept the argument that a “consular notification claim amounts to a human rights violation under the American Declaration would require the untenable conclusion that any foreign national who does not receive consular assistance, because of an absence of consular relations or because his government did not provide assistance, cannot receive a fair trial or due process.”

51. The IACHR will first refer to the scope of the right to consular notification in order to address the State’s allegation and then it will examine whether the State complied with its international human rights obligations.

52. Under the Vienna Convention on Consular Relations, when a foreign national has been arrested, committed to trial or to custody pending trial, or is detained in any other manner, the competent authorities shall, without delay, notify him or her of the right to communicate with consular officers. If the person so requests, they shall, without delay, inform the consular officers about the detention and ensure free and private access and communication between the foreign national and the consular authorities. This notification and free access and communication, are the factors analyzed by the IACHR in order to evaluate the state’s compliance with a foreign national’s due process rights.

53. Therefore, the IACHR has considered consular notification as one factor, among others, that it must examine when assessing whether due process guarantees have been respected in the case of foreign nationals. The Commission has not established, however, that, if the person does not receive consular assistance, for whatever reason, his or her right to due process is automatically infringed.

54. Consular notification is not a mere theoretical issue. It allows consular authorities the possibility to assist their nationals, which has shown to have important practical implications, particularly in capital cases of Mexican nationals detained in the United States. As it has been established in this report, Mexico has an extensive and sophisticated program of consular assistance to Mexican nationals residing in the United States, as well as a longstanding policy of providing meaningful consular assistance in capital cases, which was already in place at the time of Mr. Maldonado’s detention.

55. According to the facts established in this report, the police officer who arrested Mr. Maldonado and interviewed him on April 24, 1996, failed to notify Mr. Maldonado of his right to communicate with the Mexican Consulate. This was admitted by the police officer during his testimony at a hearing conducted on September 30, 1997. The Consul General of Mexico in Houston, Texas, first learned, through the media, that Mr. Maldonado was facing a capital murder trial in August 1997, almost a year and a half after his initial detention.

56. In Mr. Maldonado’s case, consular assistance at the pre-trial stage would have been instrumental in avoiding the deficiencies in the defense that have already been established by the IACHR. Prompt notification is a crucial component of Article 36.1 of the Vienna Convention. As the Consul General of Mexico in Houston, Texas, at the time of Mr. Maldonado’s detention declared, “[i]n Mexico’s experience, early intervention by consular officers can often prevent the imposition of a death sentence.” By the time they learned of his detention, however, it was too late to provide the comprehensive assistance that could have affected the outcome of the trial.

57. Consular officials would have advised Mr. Maldonado not to speak to any law enforcement officer without first speaking with an attorney, could have provided funds for expert and investigative assistance, and assisted in gathering evidence in preparation for the guilt and penalty phases. They could have requested that the court appoint more experienced counsel or retain additional legal counsel. The consulate would also have provided funds for a Spanish-speaking psychologist, psychiatrist or other medical expert to examine Mr. Maldonado for evidence of mental disability, organic brain damage, fetal alcohol syndrome, or other mental and physical problems that could have been used as mitigating evidence at this trial. Early intervention by consular officers could have spared him 15 years on death row.

58. Given the comprehensive assistance provided by the Mexican Government to its citizens in death penalty cases in the United States, the IACHR believes that there is a reasonable probability that, had Mr. Maldonado received consular assistance at the time of his arrest, this would have had a positive impact in the development of his criminal case. More specifically, it may well have had a positive impact on his right to an adequate defense.

59. Based upon the foregoing, the IACHR concludes that the State's obligation under Article 36.1 of the Vienna Convention to inform Mr. Maldonado of his right to consular notification constituted a fundamental component of the due process standards to which he was entitled under the American Declaration. Therefore, the State's failure to respect and ensure this obligation deprived Mr. Maldonado of a criminal process that satisfied the minimum standards of due process and a fair trial required under Articles XVIII and XXVI of the Declaration.

### **C. The deprivation of liberty on death row and the right of protection against cruel, infamous or unusual punishment<sup>48</sup>**

60. 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 (Articles XXV and XXVI).<sup>49</sup> Based on those standards, in the case of Russell Bucklew the IACHR found that "the very fact of spending 20 years on death row is, by any account, excessive and inhuman."<sup>50</sup>

61. 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.<sup>51</sup>

62. 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.<sup>52</sup>

63. As established in this report, Mr. Maldonado spent 15 years on death row in complete isolation, until he was found ineligible for execution given his mental disability. The Commission notes that the very fact of spending 15 years on death row is, by any account, excessive and inhuman, and is aggravated by Mr. Maldonado's mental health condition as well as by the prolonged expectation that the death sentence could be executed. The IACHR notes in this regard that Mr. Maldonado spent approximately 23 hours a day in complete isolation and with no exposure to natural light for 15 years. Consequently, the United States is responsible for violating, to the detriment of Mr. Maldonado, the right to humane treatment, and not to receive cruel, infamous or unusual punishment established in the American Declaration.

<sup>48</sup> Article XXV of the American Declaration provides: "[...] Every individual who has been deprived of his liberty has the right [...] to humane treatment during the time he is in custody."

Article XXVI of the American Declaration provides: "[...] Every person accused of an offense has the right [...] not to receive cruel, infamous or unusual punishment."

<sup>49</sup> IACHR, Report No. 71/18, Case 12.958. Merits. Russell Bucklew. United States, May 10, 2018, paras. 86-90. In this report the Commission has cited a number of developments in the inter-American and other protections systems, including the regional and United Nations systems.

<sup>50</sup> IACHR, Report No. 71/18, Case 12.958. Merits. Russell Bucklew. United States, May 10, 2018, para. 83.

<sup>51</sup> IACHR, Report No. 24/17, Case 12.254. Merits. Victor Saldaño. United States. March 18, 2017, para. 246, citing IACHR, Report No. 58/02. Merits. Case 12.275. Denton Aitken. Jamaica. October 21, 2002, paras. 133 and 134.

<sup>52</sup> United Nations. Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment. 9 August 2012. A/67/279. para 48.

**V. ACTIONS SUBSEQUENT TO REPORT No. 93/19**

64. On June 14, 2019, the Commission approved Report No. 93/19 on the merits of the instant case, which encompasses paragraphs 1 to 63 *supra*, and issued the following recommendations to the State:

1. Grant Mr. Virgilio Maldonado Rodriguez effective relief, including the review of his trial and sentence in accordance with the guarantees of fair trial and due process set forth in Articles XVIII, XXV and XXVI of the American Declaration, and the payment of pecuniary compensation.
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 XVIII, XXV and XXVI thereof, and, in particular, that no one with a mental or intellectual disability at the time of the commission of the crime or execution of the death sentence receives the death penalty or is executed.
3. Ensure that the legal counsel provided by the State in death penalty cases is effective, trained to serve in death penalty cases, and able to thoroughly and diligently investigate all mitigating evidence.
4. Ensure that conditions on death row at Texas' Polunsky Unit are compatible with international human rights standards and that solitary confinement is only used in exceptional circumstances, for the shortest period possible.
5. Ensure that every foreign national deprived of his or her liberty is informed, without delay and prior to his or her first statement, of his or her right to consular notification and to request that the diplomatic authorities be immediately notified of his or her arrest or detention.
6. Push for urgent passage of the bill for the "Consular Notification Compliance Act" ("CNCA"), which has been pending with the United States Congress since 2011.
7. 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.<sup>53</sup>

65. On August 6, 2019, the Commission transmitted the report to the State with a time period of two months to inform the Inter-American Commission on the measures taken to comply with its recommendations. On that same date the IACHR notified the petitioners about the adoption of the report. To date, the IACHR has not received any response from the United States regarding Report No. 93/19.

**VI. ACTIONS SUBSEQUENT TO REPORT No. 32/20**

66. On April 13, 2020, the Commission approved Final Merits Report No. 32/20, which encompasses paragraphs 1 to 65 *supra*, and issued its final conclusions and recommendations to the State. On April 28, 2020, the Commission transmitted the report to the State and the petitioners with a time period of two months to inform the Inter-American Commission on the measures taken to comply with its recommendations. To date, the IACHR has not received any response from the United States or the petitioners regarding Report No. 32/20.

<sup>53</sup> 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.

## VII. FINAL CONCLUSIONS AND RECOMMENDATIONS

67. On the basis of determinations of fact and law, the Inter-American Commission concludes that the State is responsible for the violation of Articles XVIII (fair trial), XXV (protection from arbitrary detention) and XXVI (due process) of the American Declaration.

### THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THAT THE UNITED STATES OF AMERICA,

1. Grant Mr. Virgilio Maldonado Rodriguez effective relief, including the review of his trial and sentence in accordance with the guarantees of fair trial and due process set forth in Articles XVIII, XXV and XXVI of the American Declaration, and the payment of pecuniary compensation.
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 XVIII, XXV and XXVI thereof, and, in particular, that no one with a mental or intellectual disability at the time of the commission of the crime or execution of the death sentence receives the death penalty or is executed.
3. Ensure that the legal counsel provided by the State in death penalty cases is effective, trained to serve in death penalty cases, and able to thoroughly and diligently investigate all mitigating evidence.
4. Ensure that conditions on death row at Texas' Polunsky Unit are compatible with international human rights standards and that solitary confinement is only used in exceptional circumstances, for the shortest period possible.
5. Ensure that every foreign national deprived of his or her liberty is informed, without delay and prior to his or her first statement, of his or her right to consular notification and to request that the diplomatic authorities be immediately notified of his or her arrest or detention.
6. Push for urgent passage of the bill for the "Consular Notification Compliance Act" ("CNCA"), which has been pending with the United States Congress since 2011.
7. 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.<sup>54</sup>

## VIII. PUBLICATION

68. 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.

Approved by the Inter-American Commission on Human Rights on the 22nd day of November 2021. (Signed): Antonia Urrejola Noguera, President; Julissa Mantilla Falcón, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño and Edgar Stuardo Ralón Orellana, Commissioners.

<sup>54</sup> 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.