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**REPORT No. 456/21**

**CASE 13.829**

REPORT ON ADMISSIBILITY AND MERITS (PUBLICATION)

RAMIRO IBARRA RUBI  
UNITED STATES OF AMERICA

Approved electronically by the Commission on December 31, 2021

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## I. INTRODUCTION

1. On February 2, 2018, the Inter-American Commission on Human Rights (the “Inter-American Commission”, “Commission” or “IACHR”) received a petition submitted by Kuykendall and Associates on behalf of Ramiro Ibarra Rubí (“Mr. Ibarra” or “the alleged victim”) alleging the international responsibility of the United States of America (the “State” or “the United States”) for the violation of Mr. Ibarra’s rights, a Mexican national who is on death row in the state of Texas and is scheduled to be executed on March 4, 2021.<sup>1</sup>

2. On October 16, 2019, the Commission notified the parties of the application of Article 36 (3) of its Rules of Procedure, since the petition falls within the criteria established in its Resolution 1/16, and placed itself at the disposition of the parties to reach a friendly settlement. The parties enjoyed the time periods provided for in the IACHR’s Rules to present additional observations on the merits. All the information received by the Commission was duly transmitted to the parties.

## II. POSITIONS OF THE PARTIES

### A. Petitioners

3. The petitioners claim that the State has violated the rights of Mr. Ibarra entrenched within Articles I, II, XVIII, XXV and XXVI of the American Declaration.

4. The petitioners claim in particular that Mr. Ibarra was deprived of a fair, unbiased and scientifically valid review of his intellectual disability claim, as well as his claim to having chronic and severe psychosocial disability by the domestic courts. It is submitted that the state court denied Mr. Ibarra adequate time and funding to prepare for his intellectual disability hearing. The petitioners explain that with respect to Mr. Ibarra’s habeas corpus application on June 19, 2003, neither the Texas Court of Criminal Appeals, nor the trial court, to which the review of the claim was remanded to, appointed counsel to represent Mr. Ibarra. This subsequent state habeas application was filed by his federal habeas counsel in a pro bono capacity, however, the counsel was ineligible for appointment in—and any compensation for—the state habeas proceedings. It is submitted that Mr. Ibarra, who was indigent, remained unrepresented in state court until volunteer counsel entered an appearance on 18 July 2006, two months before the scheduled ‘Atkins’ hearing on 18 September 2006.<sup>2</sup>

5. The petitioners provide that volunteer counsel filed multiple requests to continue the hearing and for adequate funding to investigate and uncover evidence in both the United States and Mexico of Mr. Ibarra’s intellectual disability. The trial court refused to continue the hearing despite the affidavit of a defense investigator attesting that she had yet to locate and interview fifteen additional witnesses residing in Mexico who could provide critical information regarding Mr. Ibarra’s Atkins claim. It is submitted that the trial court authorized only \$7,500 for investigation expenses and denied all further funding requests. Further, on September 15, 2006, just three days before the Atkins hearing, the court denied funding to secure the presence and testimony of the expert psychologist who had evaluated Mr. Ibarra and unequivocally determined he was a person with intellectual disability. Additionally, on the day of the hearing, the trial court admitted into evidence the affidavit of the defense investigator discussing the life history information uncovered up to that point, but refused on procedural grounds to consider the psychologist’s affidavit which concluded on Mr. Ibarra’s intellectual disability, in lieu of in-person testimony.

6. The petitioners claim secondly that the trial court made an unreasonable and unscientific assessment of the record. It is submitted that the court adopted verbatim the prosecutor’s proposed findings of fact, relying almost exclusively on the prosecutor’s recollection of the trial proceedings and inexplicably ignoring the information contained in the defense investigator’s affidavit. The petitioners provide that the trial court based

<sup>1</sup> On October 1, 2018, the IACHR granted precautionary measures on behalf of Mr. Ibarra pursuant to Article 25(1) of its Rules of Procedure and requested the United States to take the measures necessary to preserve the life and physical integrity of the alleged victim so as not to hinder the processing of his case before the Inter-American system.

<sup>2</sup> *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002). In *Atkins* the United States Supreme Court ruled that executing people with intellectual disabilities violates the Eighth Amendment’s ban on cruel and unusual punishment.

its decision largely on the facts and circumstances of the underlying offense, and not on information relevant to a clinical determination of intellectual disability. It is asserted that the court also relied on the affidavit of a psychiatrist who evaluated Mr. Ibarra during his trial and before the Atkins case was decided, and who never administered any scientifically-validated tests for intellectual disability. Moreover, it is provided that this doctor offhandedly commented on his view that Mr. Ibarra does not have 'mental retardation' even though he did not formally evaluate him for any such disability. Further, the petitioners provide that the federal court arbitrarily refused to consider the additional evidence, which included affidavits from several family members and Mr. Ibarra's former school teacher, as well as the affidavit of the expert psychologist Carol M. Romey, Ph.D., of Mr. Ibarra's intellectual disability that was presented during his federal habeas proceedings. This, the petitioners explain, was because the evidence was not accepted into the evidentiary record in the state court, even though, as claimed by the petitioners, that it was the state court that thwarted Mr. Ibarra's efforts to develop his claim by denying him the time and funding necessary to prepare for and present evidence at his Atkins hearing.

7. This, the petitioners claim, is in violation of Mr. Ibarra's fair trial and due process rights as someone subject to the penalty of death and that the State is obligated to address a claim of mental or intellectual disability on the merits, at any time of the proceedings where there is an indication of such claim by an accused or convicted person. It is submitted that the State has two main obligations, based on the jurisprudence of the Commission; the first being to survey all records and information in its possession concerning the mental health of a person accused of a capital offense; and the second, to provide any indigent person with the means necessary to have an independent mental health evaluation done in a timely manner.

8. It is asserted that the State did not seriously attempt to dispute the overwhelming evidence of Mr. Ibarra's intellectual disability, and relied on the affidavit of Dr. Stephen Mark, who evaluated Mr. Ibarra before the Atkins decision and who did not administer any tests for intellectual disability, yet who casually opined, five years later, that Mr. Ibarra was not intellectually disabled. The petitioners allege that, by failing to give full and appropriate consideration to the evidence that Mr. Ibarra suffers from Post Traumatic Stress Disorder (PTSD), the United States has violated not only its substantive obligation to refrain from executing persons with psychosocial disabilities, but also its obligation to provide adequate procedures to those who may qualify for protection and to address the claim on the merits at any time of the proceedings.

9. The petitioners emphasize that Mr. Ibarra remains under a sentence of death despite unequivocal evidence that he satisfies the clinical criteria for an intellectual disability diagnosis. The petitioners claim that Mr. Ibarra's execution would violate the prohibition against executing persons with psychosocial disabilities, contemplated under the American Declaration and under principles of customary international law. It is submitted that ultimately, executing him would thus constitute a denial of his right to life, to an impartial hearing and to protection from cruel, infamous and unusual punishment, in violation of Articles I, XVIII and XXVI of the American Declaration.

10. The petitioners claim that the trial and post-conviction attorneys appointed by the state of Texas to represent Mr. Ibarra were inexcusably negligent in failing to conduct an adequate investigation of Mr. Ibarra's life and to present mitigating evidence, such as that on mental health, giving rise to violations of Articles XVIII and XXVI of the American Declaration. Trial counsel for Mr. Ibarra never hired a mitigation investigator, never sought the assistance of the Mexican consulate in preparing a mitigation investigation into his childhood, or his medical, educational, work, or family histories in Mexico.

11. Specifically, it is alleged that, at the penalty phase of the trial, the defense counsel presented virtually none of the readily available mitigating evidence that supported a life sentence. Trial counsel did not seek specific funds for a penalty phase investigation until August 27, 1997, eleven days before trial, which was when counsel requested and obtained funding for a mental health evaluation. The appointed counsel retained a mental health expert, Dr. Mark, who met with Mr. Ibarra for just over an hour. It is submitted that counsel pursued no further investigations even after Dr. Mark reported that Mr. Ibarra had a difficult time learning as a child, that he had an impoverished youth in the country in Mexico, and that he had prior alcohol problems.

12. It is presented that the lawyer who represented him in his state habeas corpus petition, filed a five-page petition that raised only one legal argument, which was an issue that had already been raised and rejected on direct appeal, and was not even cognizable in state habeas corpus proceedings. It is claimed that the lawyer appointed never visited him, and never responded to Mr. Ibarra's letters. Further, that while Mr. Ibarra's sister and wife testified on his behalf, defense counsel failed to elicit any testimony regarding his life in Mexico, where he lived until he was 18 years old. Affidavits from Mr. Ibarra's family members indicate that they were never contacted by any member of the defense team, either to give testimony or to provide the defense with evidence. The defense counsel called only two siblings and Mr. Ibarra's wife to testify at trial. One of those siblings was only asked to testify at the penalty phase, and never spoke with counsel before testifying. According to the petitioners, neither of these witnesses was familiar with Mr. Ibarra before he turned eighteen. They allege that the prejudice here was particularly acute because the void of information presented about his history, character and mental status.

13. The petitioners also submit that Mr. Ibarra, who spoke virtually no English and had a third-grade education, was detained for over one year awaiting his capital murder trial without being informed of his rights to consular notification and access. On September 22, 1997, when Mr. Ibarra was sentenced to death, a Mexican reporter contacted the consulate of Mexico in Austin, Texas, and consular officials immediately contacted defense counsel, as well as Mr. Ibarra's family members, to confirm his nationality. The petitioners claim that by failing to notify Mr. Ibarra of his rights to consular access and notification at the time of his arrest, the State violated its binding obligations under Article 36(1)(b) of the Vienna Convention on Consular Relations (VCCR). They allege that, as a consequence of that violation, Mr. Ibarra was deprived of a fundamental component of due process. Furthermore, they submit the state and federal courts have consistently failed to provide any remedy for the admitted violation of Mr. Ibarra's consular rights, in breach of Article 36(2) of the VCCR.

14. The petitioners also claim that on November 10, 2004, the Texas Court of Criminal Appeals remanded the case to the trial court to address the merits of Mr. Ibarra's Atkins claim, but neither court appointed counsel to represent Mr. Ibarra during this process. They state that no further action was taken until June 28, 2006, when the Court of Criminal Appeals abruptly ordered the trial court to resolve the case within ninety days. Mr. Ibarra, who is indigent, remained unrepresented in state court until volunteer counsel entered an appearance on July 18, 2006, a mere two months before the scheduled Atkins hearing on September 18, 2006.

15. The petition asserts that the post-conviction review of Mr. Ibarra's case was impermissibly tainted by racial, ethnic and national origin bias, in the form of public remarks made by one of the senior federal judges assigned to review his case. It outlines that on February 20, 2013, while Mr. Ibarra's petition for rehearing *en banc* was pending before the U.S. Fifth Circuit Court of Appeals, Fifth Circuit Court judge Edith Jones gave a lecture on the death penalty at the University of Pennsylvania School of Law. It is alleged that Judge Jones discussed several individual cases during her lecture, including Mr. Ibarra's case, over which she was presiding at the time. In particular, that during the lecture, Judge Jones reportedly made several statements creating the appearance of bias and partiality against Mr. Ibarra, including statements suggesting racial, ethnic and national origin bias, while denigrating the intellectual disability and consular rights claims raised by Mr. Ibarra.

16. The petitioners provided references to alleged statements made by Judge Jones in support of this claim, as follows:

"[R]acial groups like African Americans and Hispanics are predisposed to crime," are "'prone' to commit acts of violence," and get involved in more violent and "heinous" crimes than people of other races, ethnicities, and nationalities; Mexico does not provide the legal protections within its criminal justice system that a Mexican national facing a death sentence in the United States would receive; Mexican nationals on death row, such as Mr. Ibarra, would prefer to be on death row in the United States than in prison in Mexico;"

17. The Judicial Council of the United States received a complaint in respect of those comments made at the lecture by several legal aid and civil liberty groups, and the Special Committee began an investigation. However, on July 7, 2014, the Special Committee issued a report detailing its findings and recommended that the Judicial Council dismiss the complaint. The petitioners claim that a biased and self-protecting review of the judicial misconduct claim was done by a panel of senior judges. Notably, that complainants were denied access to the materials that the Special Committee relied on as more credible than the many sworn affidavits supporting

their complaint. It is submitted that the alleged flawed process was plainly insufficient to afford “adequate and effective remedies” for the alleged violations of Mr. Ibarra’s rights. Moreover, that the procedure for reviewing the judicial misconduct complaint violated Mr. Ibarra’s right to a fair review and effective remedies.

18. On August 12, 2014, the Judicial Council adopted the Special Committee’s report and recommendation. On October 14, 2014, the complainants filed an appeal with the Committee on Judicial Conduct and Disability, seeking reversal of the Judicial Council’s decision dismissing the complaint. On February 19, 2015, the Committee on Judicial Conduct and Disability dismissed the appeal and affirmed the Judicial Council’s decision.

19. The petitioners allege that the complainants were denied access to the materials that the Special Committee relied on as more credible than the many sworn affidavits supporting their complaint. They were not allowed to testify at or even attend the hearing into their complaint, nor could they question the judge, nor were they provided with the investigative report and supplemental reports prepared by Special Counsel for the Committee. They assert that when the complainants appealed the dismissal on the grounds that the proceedings were egregiously onesided and fundamentally unfair, their appeal was rejected on the ground that the procedures followed by the Special Committee were consistent with the governing rules established by the Committee on Judicial Conduct and Disability, without inquiry into the propriety or sufficiency of those rules. Petitioners assert that the secretive and selective adjudication of the misconduct allegations never addressed the weight of the complainants’ sworn evidence or explained why it should be discounted. The only remedial mechanism available under domestic law, according to the petitioners, was thus both ineffectual and left the strong impression of partiality and this deeply flawed process was plainly insufficient to afford “adequate and effective remedies.”

20. According to the petitioners, Judge Jones’s denial of Mr. Ibarra’s motion to disqualify her from hearing his appeal based on her reported public remarks about the merits of his case violated yet another core aspect of judicial impartiality. These circumstances, it is submitted, constitute a violation of Mr. Ibarra’s rights to equality before the law without distinction as to race or nationality, to freedom from discrimination and to a fair remedy.

21. The petitioners assert that Mr. Ibarra has suffered 20 years of death row incarceration under grossly inhumane and unnecessarily harsh conditions of confinement, and that prolonged confinement on death row under such conditions violates the right to humane treatment in custody guaranteed under Article XXV and the prohibition of cruel punishment under Article XXVI of the American Declaration. It is provided that the cells on death row are approximately eight by twelve feet, with a sink, a toilet, and a thirty-inch-wide bunk, and with only one small window prisoners can only see out by standing on their bunks.

22. Moreover, death row prisoners are permitted to exercise only in limited increments and only in small “cages.” Inmates do not have access to television or to any educational programming, they are segregated from other prisoners in every aspect of their lives, including eating, showering, and worship. They can communicate with one another only by yelling between cells and are allowed no physical contact with family members, friends, or attorneys. Even the union representing Texas death row guards has called for better treatment of the inmates, noting that they “go crazy, become clinically mentally ill, in solitary conditions there.” Mr. Ibarra was sentenced to death in Texas on September 22, 1997. The petitioners claim that it is incumbent on states that undertake to impose capital punishment to set up an effective and expeditious system of review to ensure the reliability of its sentences.

23. The petitioners claim lastly, that Mr. Ibarra faces execution by lethal injection at a time when the Texas execution protocol is shrouded in secrecy, in violation of Mr. Ibarra’s right to challenge the manner of execution. They also allege that the use of drugs of uncertain efficacy creates an unacceptable risk of causing excruciating pain, in violation of Articles XXV and XXVI of the American Declaration.

24. The petitioners assert that given the current difficulty in procuring pentobarbital, a drug previously used in the lethal injection protocol, a new protocol would amount to pure experimentation. It is submitted that the state would be choosing drugs based on availability, and not on capacity to minimize the risk of suffering. Additionally, it is alleged that Texas, like many other states, refuses to provide inmates facing imminent execution with detailed information about the drugs it plans to use, including their source, how they were

stored, when they were manufactured, and how and by whom they were tested. The federal courts have allowed this refusal to stand. It is submitted that the information about the protocol that Texas has provided is vague about the composition and training of the execution team, requiring only that there be a “medically trained individual” on the team, without specifying their background, level of training, or licensing.

## **B. State**

25. The State claims that the petition was inadmissible when submitted as domestic remedies had not been exhausted, and that the petition thereby failed to meet the requirements for consideration by the Commission under its rules of procedure within Article 31 and 34.

26. It is alleged that the petition is inadmissible under Article 31, as the petitioners continued to pursue domestic remedies after their petition was submitted, and had failed to exhaust domestic remedies. Moreover, the State claims that the Commission held the petition in abeyance pending the exhaustion of domestic remedies. With respect to the Commission’s stated basis for a deferral of a decision on admissibility, which concerned the subject matter of a petition on the death penalty, the State claims this rationale to be inconsistent with Article 36(3).

27. The State asserts that the petition fails to establish acts that could support a claim of violation of the American Declaration, under Article 34, also making it inadmissible and manifestly groundless. With respect to the petitioner’s claim that state appointed counsel was inadequate, the State refers to the judgment of the Federal District Court which reviewed the evidence and concluded that there was nothing to support Mr. Ibarra’s claim that counsel failed to investigate and present evidence in mitigation during the punishment phase, or that Ibarra’s first habeas counsel was ineffective for failing to raise the ineffective assistance of counsel issue as it related to mitigation.

28. The State highlights that the District Court noted that Mr. Ibarra’s trial attorneys filed multiple motions including for investigative assistance and psychological evaluation. Additionally, Mr. Ibarra was evaluated twice by Dr. Mark, a psychiatrist, who found no evidence of intellectual disability; discussed Mr. Ibarra’s childhood, education, work history and alcohol abuse with him; and suspected him of “malingering.” Further, the court found that much of the mitigating evidence that Mr. Ibarra proffered was in fact presented to the jury through the testimony of Mr. Ibarra’s wife and sister.

29. With respect to the allegations of racial and ethnic bias, the State submits that the petitioner fails to explain how the remarks allegedly made by Judge Jones subjected him to judicial misconduct or otherwise impacted his right to equality before the law. The State highlights that the Special Committee panel on the matter concluded that the judge “did not commit misconduct in discussing the specific cases cited by the complainants”. The State highlights, in support, the explanation within the Report of the Special Committee to the Judicial Council of the District of Columbia Circuit which provided that:

[T]he matter involving Mr. Ibarra that was pending at the time of the lecture was Mr. Ibarra’s petition for reconsideration en banc of the panel’s rejection of his challenges to the district court’s denial of habeas relief. The sole issues raised by that petition was a challenge to the panel’s determination that Mr. Ibarra’s ineffective assistance claim had been procedurally defaulted, and that previous jurisprudence did not permit Mr. Ibarra to avoid the default. No one contends that Judge Jones’ comments about Ibarra addressed that issue, whether with respect to the merits or otherwise.

30. The State claims that the petitioner’s consular notification claim is not cognizable under the American Declaration, and maintains its firm position that the Commission does not, in fact, have competence to review claims arising under the Vienna Convention. It provides that this lack of jurisdiction is not avoided by characterizing a claim as one arising under the American Declaration, and that claims concerning consular notification do not give rise to a violation of a human right enshrined in any international instrument to which the United States is a party or has endorsed.

31. It is submitted that the consular notification protections are based on principles of reciprocity, nationality, and function, and any rights arising from those protections attach to consular officers for the purpose of facilitating a foreign state's information about, and access to, its nationals. The State emphasizes that consular notification is not a necessary component of the right to a fair trial or the right to due process in criminal proceedings. Moreover, that availability of consular notification and access is premised on the existence of consular relations between governments, and is thus undeniably a right exercised by the detained individual's State of nationality, through its consular officers, to facilitate that State's access to its national. While the State of nationality may diplomatically protest any failure to observe the terms of the Vienna Convention on Consular Relations (VCCR) and attempt to negotiate a solution, the individual does not have a judicially enforceable right to compel compliance. Additionally, the State submits that the federal district court provided an alternative prejudice review for the petitioner on the basis of his consular notification complaint, finding that the petitioner was not prejudiced by the timing of notification to the Mexican consulate.

32. The State highlights that neither the American Declaration nor U.S. law prohibit capital punishment for individuals who are seriously mentally ill but whose mental condition does not rise to the level of insanity or intellectual disability. Moreover, that no internationally agreed upon definition of "seriously mentally ill" individuals has been established and shows a lack of international consensus. The State also submits that the petitioner did not show, at any point in time during his trial and appellate proceedings, that he had not understood that he will be executed for the crimes of which he was convicted.

33. The State further submits that Dr. Stephen Mark evaluated Mr. Ibarra on two occasions, finding that he was competent to stand trial and that he was not "mentally retarded." The State claims that the expert opinion provided by the petitioner, which was completed in 2003 after the Atkins decision, is wanting, as it was completed at a time when the petitioner had an incentive to appear as intellectually compromised as possible. Further, the State asserts that the petitioner failed to establish that he is mentally incompetent or that his mental condition has deteriorated to the point of insanity that would render application of the death penalty impermissible. It is asserted that Mr. Ibarra's mental capacity was investigated and reviewed on multiple occasions where it was found not to meet the constitutionally required standard. Lastly, the State highlights that the U.S. Supreme Court has held that mentally ill individuals may be executed as long as they understand the reason for their execution.

34. With respect to the claim of Mr. Ibarra suffering from death row phenomenon, the State asserts that the domestic appellate process affords those convicted of capital offenses the highest level of internationally recognized protection, and provides avenues for both state and federal court review of every criminal conviction. In addition, federal habeas corpus procedures enable federal courts to review the substantive and procedural merits of every death penalty sentence imposed by state courts. It is an individual's right to take full advantage of mandatory and discretionary appeals at the state and federal level, and it is not uncommon that many years pass before this extensive appeals process is completed.

35. The State rejects the contention that the American Declaration requires States to revise the conditions of detention, which may be mandated by the security risks posed by convicted prisoners on death row, so that they may avoid the hardship potentially associated with a prolonged detention. Long periods of detention on death row are often the result of a constitutionally-mandated, exhaustive appeal process like what has taken place in this case where Petitioner has had numerous federal and states court reviews of his case.

36. It is submitted that the conditions of detention during what may be an extended delay between sentencing and execution, follow as a consequence of lawfully-imposed capital punishment. The State adds that under the Fourteenth Amendment's Due Process Clause, prisoners have a protected liberty interest in avoiding certain types of solitary confinement, and cannot be subjected to solitary confinement absent an administrative hearing and other procedures protective of their right to due process. The State asserts that a finding that conditions of detention of prisoners subject to the death sentence violate the Declaration would undermine the State's authority to take appropriate safety and security measures to protect other persons during this review period.



37. It is lastly submitted that the fourth instance doctrine precludes the commission from reviewing the petitioners' claims. It is submitted that the alleged victim has availed himself of the domestic legal framework to challenge his conviction and his sentence in multiple proceedings over a number of years. In each of these proceedings, the courts carefully reviewed the evidence and rejected the alleged victim's arguments as meritless. The State claims that in reviewing the claims, the Commission would be second-guessing the legal and factual determinations of both state and federal courts at multiple levels, which were conducted in conformity with due process protections under U.S. law and fully consistent with U.S. commitments under the American Declaration.

### III. ADMISSIBILITY

#### A. Competence, duplication of procedures and international *res judicata*

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Declaration of the Rights and Duties of Man (ratification of the OAS Charter on June 19, 1951)
<b>Duplication of procedures and international <i>res judicata</i>:</b>	No

38. The IACHR notes the State's position that the Commission does not have competence to review claims arising under the Vienna Convention. As it will be addressed below, while the Commission has no jurisdiction to find a violation of such provisions, it may consider them for the purpose of evaluating the State's compliance with a foreign national's due process rights under the American Declaration.

#### B. Exhaustion of domestic remedies and timeliness of the petition

39. According to the court record,<sup>3</sup> Mr. Ibarra's judgment and sentence culminated on September 22, 1997, with his motion for new trial overruled by the State District Court on December 9, 1997. His conviction and sentence were affirmed on Direct Appeal on October 9, 1999, with a rehearing denied on December 8, 1999,<sup>4</sup> and his petition for Writ of Certiorari denied on October 2, 2000.<sup>5</sup> The Court of Criminal Appeals denied his initial habeas corpus on April 4, 2001,<sup>6</sup> the Court thereafter dismissed the second and third habeas corpus petition on September 26, 2007,<sup>7</sup> and on May 19, 2008, his petition for Writ of Certiorari was denied.<sup>8</sup> The fourth habeas corpus petition for relief was dismissed by the Court of Criminal Appeals on October 1, 2008,<sup>9</sup> and the United States District Court denied federal habeas corpus on March 31, 2011;<sup>10</sup> with exceptions sustained in part and dismissed in part.<sup>11</sup> The United States Court of Appeal for the 5<sup>th</sup> Circuit affirmed the District Court's denial of federal habeas relief on August 26, 2019,<sup>12</sup> and his petition for writ of certiorari was denied on June 8, 2020.<sup>13</sup> On August 6, 2020, by virtue of the State District Court order, the execution of Mr. Ibarra was scheduled for March 4, 2021.<sup>14</sup>

40. The State alleges that the petition is inadmissible, as domestic remedies had not been exhausted at the time the petition was submitted. First, the IACHR notes in this regard that the requirement set forth in Article 31 of the Rules of Procedure is analyzed in light of the situation in force at the time the admissibility of the petition

<sup>3</sup> State of Texas v Ramiro Ibarra Rubí, Case Number 1996-634-C, Order Setting Date for Execution.

<sup>4</sup> Ibarra v State, 11 S.W.3D 189 (Tex. Crim. App. 1999).

<sup>5</sup> Ibarra v Texas, 531 U.S. 828 (2000).

<sup>6</sup> Ex parte Ibarra, No. WR-48, 832-01 (Tex. Crim. App. April 4, 2001).

<sup>7</sup> Ex parte Ibarra, WR-48, 832-02, WR-48, 832-03, 2007 WL 2790587 (Tex. Crim. App. September 26, 2007).

<sup>8</sup> Ibarra v Texas, 553 U.S. 1055 (2008).

<sup>9</sup> Ex parte Ibarra, WR-48, 832-04, 2008 WL 4417283 (Tex. Crim. App. October 1, 2008).

<sup>10</sup> Ibarra v Thaler, W-02-CA-052, 2011 WL 13177743 (W.D. Tex. March 31, 2011).

<sup>11</sup> Ibarra v Stephens, 723 F. 3d 599 (5<sup>th</sup> Cir. 2013).

<sup>12</sup> Ibarra v Davis 786 Fed. Appx. 420 (5<sup>th</sup> Cir. 2019).

<sup>13</sup> Ibarra v Davis 19-8103, S. Ct. 2020 WL 3038333. (US June 8, 2020).

<sup>14</sup> State of Texas v Ramiro Ibarra Rubí, Case Number 1996-634-C, Order Setting Date for Execution

is decided.<sup>15</sup> As indicated above, all ordinary and extraordinary remedies have been exhausted. Second, the purpose of the rule requiring the prior exhaustion of domestic remedies is to give the State the opportunity to remedy the matter within its jurisdiction before it reaches an international body.<sup>16</sup> In the instant case, even at the time the petition was submitted, Mr. Ibarra had exhausted a direct appeal, a petition for writ of certiorari, and four habeas corpus petitions. Therefore, even before the petition was filed before the IACHR, Mr. Ibarra had raised the issue at the domestic level, so the purpose of the international rule has been served.

41. Based on the above factors, the Inter-American Commission concludes that the alleged victim properly exhausted domestic remedies available within the domestic legal system and, therefore, that the claims before the Commission are not barred from consideration by the requirement of exhaustion of domestic remedies under Article 31(1) of its Rules of Procedure.

42. The petition before the IACHR was presented on February 2, 2018. It is noted that the United States Court of Appeal had not provided a decision on the District Court's denial of Mr. Ibarra's petition for federal habeas corpus by this date but that the alleged violations claimed subsisted beyond that date and continued to be the subject of petitions for relief until his petition for writ of certiorari was denied on June 8, 2020. The Commission therefore concludes that the requirement specified in Article 32(1) of its Rules of Procedure has been met.

### **C. Colorable claim**

43. The Commission considers that, if proven, the facts alleged would tend to establish violations of the rights set forth in Articles I, II, XVIII, XXV and XXVI of the American Declaration, to the detriment of Mr. Ibarra.

## **IV. FINDINGS OF FACT**

### **A. Facts of the case**

44. According to the facts as accounted by the courts,<sup>17</sup> Ramiro Ibarra was convicted of capital murder for the rape and strangulation of a 16-year-old. The facts as established from the trial reflect that 16-year-old Maria De La Paz Zuniga was raped, sodomized, and murdered on the morning of March 6, 1987. The police obtained a search warrant on March 10, 1987, to obtain blood and hair samples from Mr. Ibarra to compare to the hair and bodily fluids found at the crime scene. An indictment for murder was issued against Mr. Ibarra on May 27, 1987. Subsequently, Mr. Ibarra filed a motion to suppress, which was granted because the search warrant was not issued by the appropriate court. At that time, Texas law precluded the police from obtaining a second search warrant. Because it believed there was insufficient evidence without the blood and hair comparisons, the State dismissed the indictment on July 19, 1998, and Mr. Ibarra was released from custody.

45. According to the facts as accounted by the courts,<sup>18</sup> Texas law changed in 1995, allowing police to obtain the issuance of more than one evidentiary search warrant in a case. The police obtained a second warrant for hair and blood samples from Mr. Ibarra on July 2, 1996, and were able to secure such evidence. Examination of the evidence revealed that the facial and pubic hairs found on and around Maria De La Paz Zuniga were similar to those of Mr. Ibarra, and his DNA matched the semen recovered from her body and underwear, as well as the material under her fingernails. Mr. Ibarra was then reindicted for her murder on September 18, 1996.

### **B. Trial and death sentence**

46. On September 17, 1997, Mr. Ibarra was convicted of murder. On September 22, 1997, he was sentenced to death<sup>19</sup>. The petitioners provide<sup>20</sup> that with the assistance of the Mexican consular officials, Mr. Ibarra's defense attorney filed a motion for a new trial based on the failure to comply with the Vienna Convention on

<sup>15</sup> IACHR, Report No. 219/19, Petition 459-08. Admissibility. Anant Kumar Tripathi. United States of America. October 24, 2019 para. 13.

<sup>16</sup> IACHR, Report No. 54/14, Petition 684-14. Admissibility. Russel Bucklew and Charles Warner. United States. July 21, 2014, para. 28.

<sup>17</sup> Ibarra v. Thaler, No. W-02-CA-052, 2011 WL 13177743 (W.D. Tex. Mar. 31, 2011).

<sup>18</sup> Ibarra v. Thaler, No. W-02-CA-052, 2011 WL 13177743 (W.D. Tex. Mar. 31, 2011).

<sup>19</sup> Petition and request for precautionary measures on behalf of Ramiro Ibarra Rubí to the Commission dated February 2, 2018

<sup>20</sup> Ibarra v. Quarterman, Amended Petition for Writ of Habeas Corpus ("Amended Habeas Petition") (W.D. Tex., 5 Jan. 2009), at 132 & n. 35.

Consular Relations (“VCCR”). The police freely admitted that they knew Mr. Ibarra was a Mexican national, but were not aware that he had the right to consult with the Mexican consulate. His motion for new trial was overruled by the State District Court on December 9, 1997.<sup>21</sup>

### C. Post-conviction relief and other remedies

47. According to the court record,<sup>22</sup> the alleged victim’s sentence and conviction were affirmed on direct appeal on October 9, 1999, with a rehearing denied on December 8, 1999.<sup>23</sup> The petition for a writ of certiorari was denied on October 2, 2000,<sup>24</sup> and the first state habeas corpus petition was denied on April 4, 2001.<sup>25</sup>

48. Following the U.S. Supreme Court’s decision in *Atkins* (2002),<sup>26</sup> Mr. Ibarra subsequently filed an application for a writ of habeas corpus which was stayed while he exhausted additional state court claims pursuant to the decision in *Atkins* (2002). His petition was stayed further while he pursued state court claims following President Bush’s announcement that the United States would have state courts give effect to the ruling in the ‘Avena case’, an International Court of Justice (ICJ) opinion declaring that Mexican nationals were entitled to review and reconsideration of their convictions due to the States’ failure to comply with the VCCR, requiring them to advise these defendants of their right to contact the Mexican consulate.<sup>27</sup>

49. As outlined by the court,<sup>28</sup> the Texas Court of Criminal Appeals remanded the alleged victim’s *Atkins* claim to the trial court for an evidentiary hearing that was scheduled for September 2006. The defense presented an affidavit signed by Dr. Carol M. Romney, a licensed clinical psychologist, which concluded that Mr. Ibarra “has mental retardation” after two psychological examinations were done on June 9 and 10, 2003. A measure of intellectual functioning revealed a full scale IQ score of 65, that Mr. Ibarra exhibited a “uniform and diffuse level of cognitive deficits”, his problem solving skills were “confused” and he showed an “impaired ability for sequencing”.<sup>29</sup>

50. The affidavit was declared inadmissible because it was not sworn before a notary. Dr. Romney made the following annotation at the bottom of the affidavit:<sup>30</sup>

“This document is not notarized because counsel for Mr. Ibarra requested that I provide an affidavit on Friday, September 15, 2006. I was unable to reach a notary public during the weekend. A signed and sworn affidavit will be substituted for this declaration at the first available opportunity.”

51. The trial court determined that Mr. Ibarra did not have a mental disability based, *inter alia*, on the opinion of Dr. Stephen Mark, who had found no evidence of mental handicap after two examinations of Mr. Ibarra. This holding was adopted on appeal by the Texas Court of Criminal Appeals. In the same order, the Texas Court of Criminal Appeals dismissed his separate petition for relief under the Avena claim, on procedural grounds, finding that the ICJ ruling did not constitute a basis for a successive habeas corpus petition under state law. The Court of Criminal Appeals thereafter dismissed the second and third habeas corpus petitions on September 26, 2007.<sup>31</sup> Mr. Ibarra’s application for certiorari on his Avena claim was thereafter denied on May 19, 2008.

<sup>21</sup> State of Texas v Ramiro Ibarra Rubí, Case Number 1996-634-C, Order Setting Date for Execution

<sup>22</sup> Ibarra v Davis, Director, No. 17-70014 (U.S. Court of Appeal for the 5<sup>th</sup> Circuit, filed August 26, 2019).

<sup>23</sup> Ibarra v State, 11 S.W.3D 189 (Tex. Crim. App. 1999).

<sup>24</sup> Ibarra v Texas, 531 U.S. 828 (2000).

<sup>25</sup> Ex parte Ibarra, No. WR-48, 832-01 (Tex. Crim. App. April 4, 2001).

<sup>26</sup> *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002).

<sup>27</sup> *Avena and Other Mexican Nationals (Mex. v. U.S.) (“Avena”)*, 2004 I.C.J. 12 (Judgment of Mar. 31). *Medellin v. Texas*, 552 U.S. 491, 128 S. Ct. 1346, 170 L.Ed.2d 190 (2008).

<sup>28</sup> Ibarra v. Thaler, No. W-02-CA-052, 2011 WL 13177743 (W.D. Tex. Mar. 31, 2011).

<sup>29</sup> Carol M. Romney, Ph. D., sworn affidavit dated September 18, 2006.

<sup>30</sup> Initial petition filed by the petitioners before the IACHR on February 2, 2018. Exhibit 5: Dr. Romey Affidavit, Ex. 19 to Amended Petition for Writ of Habeas Corpus, Ibarra v. Quarterman (W.D. Tex., Jan. 5, 2009).

<sup>31</sup> Ex parte Ibarra, WR-48, 832-02, WR-48, 832-03, 2007 WL 2790587 (Tex. Crim. App. September 26, 2007).

52. According to the procedural history as outlined by the court,<sup>32</sup> a fourth state habeas petition, raising a claim that his trial counsel was ineffective, relying upon the opinion in *Wiggins v. Smith*<sup>33</sup>, was also dismissed by the Texas Court of Criminal Appeals on October 1, 2008, as an abuse of the writ. According to the court record,<sup>34</sup> Mr. Ibarra contended that “his trial counsel was ineffective in his investigation, development, and presentation of mitigation evidence, as well as the development of rebuttal evidence for the state’s aggravating factors at sentencing” in violation of the Sixth Amendment and the decision of *Wiggins*.

53. The United States District Court thereafter denied the federal habeas corpus on March 31, 2011,<sup>35</sup> rejecting the claim for two independent reasons. The first reason was that the claim was subject to procedural default under governing precedent, and secondly, that alternatively, his claim was meritless, because Mr. Ibarra could not demonstrate prejudice.

54. The federal habeas corpus was denied by the U.S. Court of Appeal, which held that reasonable jurists “could not disagree with the district court’s conclusion that Petitioner’s *Wiggins* claim was procedurally defaulted” and denied a certificate of appealability.

55. As to the *Atkins* claim, the U.S. Court of Appeal<sup>36</sup> denied a certificate of appealability on alternative grounds of procedural bar, non-exhaustion, and meritlessness. The Court noted that the evidence Mr. Ibarra offered in state court included an unsworn, inadmissible expert witness statement concerning Mr. Ibarra’s IQ; an investigative report about his alleged adaptive deficits; and the opinion of Dr. Stephen Mark, who had found no evidence of mental handicap after two examinations of Mr. Ibarra. Further, the court noted that to establish that he falls under *Atkins*, petitioner must demonstrate that he possesses significantly subaverage intellectual functioning and impaired adaptive functioning, both of which manifested before the age of 18. The Texas Court of Criminal Appeals had rejected this claim on the merits and Mr. Ibarra consequently offered material new evidence in federal court, which rendered his claim unexhausted and procedurally barred.

56. Lastly, the court considered his claim based on the *Avena* case barred due to being procedurally defaulted, recognizing that the claim in his direct appeal was dismissed due to lack of contemporaneous objection. Moreover, the court provided that even if the claim was not procedurally defaulted, to be successful, Mr. Ibarra would need to show he was prejudiced by the state’s failure to inform of his right to notify the consulate of his arrest and conviction.

57. Reviewing the state court record, the U.S. Court of Appeal found it not debatable that the state courts’ rejection of Mr. Ibarra’s *Atkins* claim on the merits was without violation. The court affirmed the District Court’s denial of federal habeas relief on August 26, 2019.<sup>37</sup> Mr. Ibarra’s petition for writ of certiorari was denied on June 8, 2020.<sup>38</sup> On August 6, 2020, by virtue of the State District Court order, the execution of Mr. Ibarra was scheduled for March 4, 2021.<sup>39</sup>

#### **D. Motion to disqualify and judicial misconduct complaint<sup>40</sup>**

58. On June 5, 2013, Mr. Ibarra filed a motion to disqualify Judge Jones from any further participation in his case and to vacate the Fifth Circuit’s opinion denying his application for a certificate of appealability, which had been authored by Judge Jones. On 10 June 2013, Judge Jones issued an order denying Mr. Ibarra’s motion. The order, signed by reads as follows:<sup>41</sup>

<sup>32</sup> *Ibarra v. Thaler*, No. W-02-CA-052, 2011 WL 13177743 (W.D. Tex. Mar. 31, 2011).

<sup>33</sup> *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003).

<sup>34</sup> *Ibarra v Davis, Director*, No. 17-70014 (U.S. Court of Appeal for the 5<sup>th</sup> Circuit, filed August 26, 2019).

<sup>35</sup> *Ibarra v Thaler*, W-02-CA-052, 2011 WL 13177743 (W.D. Tex. March 31, 2011).

<sup>36</sup> *Ibarra v Davis, Director*, No. 17-70014 (U.S. Court of Appeal for the 5<sup>th</sup> Circuit, filed August 26, 2019).

<sup>37</sup> *Ibarra v Davis* 786 Fed. Appx. 420 (5<sup>th</sup> Cir. 2019)

<sup>38</sup> *Ibarra v Davis* 19-8103, S. Ct. 2020 WL 3038333. (US June 8, 2020)

<sup>39</sup> *State of Texas v Ramiro Ibarra Rubí*, Case Number 1996-634-C, Order Setting Date for Execution

<sup>40</sup> In re: Complaint of Judicial Misconduct, Report of the Special Committee to the Judicial Council of the District of Columbia Circuit, Judicial Complaint No. DC-13-90021, at 64 (August 12, 2014).

<sup>41</sup> Initial petition filed by the petitioners before the IACHR on February 2, 2018. Exhibit 10: Order Denying Motion to Disqualify.

“ORDER

IT IS ORDERED that appellant’s motion to disqualify Judge Edith H. Jones is denied.”

59. According to the report of the Special Committee to the Judicial Council of the District of Columbia Circuit, hereinafter ‘the Committee’, issued in 2014, thirteen legal aid and civil liberty groups later filed a complaint of judicial misconduct against Judge Edith Jones of the United States Court of Appeals for the Fifth Circuit. The complaint alleged misconduct arising from remarks the Judge made at a lecture on the death penalty at the University of Pennsylvania Law School on February 20, 2013.

60. The Committee upon review of various pieces of evidence first established in the report that in the absence of a recording of the lecture, it was unable to determine the nature of Judge Jones’ tone or demeanor and so were unable to make a finding based on a preponderance of the evidence. The Committee’s findings were based on the submission of the judge’s notes, affidavits of attendees of the lecture and other witness statements.

61. It was noted that at some point during the lecture, Judge Jones said that certain kinds of challenges to capital punishment are “red herrings” such as claims on intellectual disability and the right to consular notification.

62. With respect to a claim that words spoken communicated racial bias, Judge Jones acknowledged that in her lecture she said that “sadly, African-Americans seem to be disproportionately on death row,” and that she “may have said” that “sadly some groups seem to commit more heinous crimes,” but insists that she “was talking about statistical facts... [and] not talking about propensities.” The Committee found that, based on witnesses’ recollections, it was unable to find that Judge Jones made those comments in her initial remarks; and that whatever she said initially, was clarified within the question-and- answer period that she did not adhere to such views. Additionally, it was recognized that, without an explanation or qualification, saying that certain groups are “more involved in” or “commit more of” certain crimes can sound like saying those groups are “prone to commit” such crimes, but the Committee reasoned that, whether or not her statistical statements were accurate, or accurate only with caveats, they did not by themselves indicate racial bias or an inability to be impartial.

63. In response to a complaint of statements made by the judge of intellectual disability not being a defense, the Committee concluded that no affidavit or witness reported any statements made by Judge Jones which would have supported this claim. It was noted by the Committee, that Judge Jones explained that by referring to the type of claim as a “red herring”, she was describing a claim that in her experience rarely succeeds; to which the Committee found no indication of bias or impartiality.

64. With respect to a complaint that Judge Jones “denigrated the system of justice in the nation of . . . Mexico, Mexican Nationals, and the use of international standards in capital cases” the Committee considered that the statements made by the Judge as evidenced by the affidavits, witnesses and her notes, expressed the recollection of views of a majority of the Supreme Court on similar matters. It was reasoned that Judge Jones’ contention that a defense based on a defendant’s inability to consult with consular officials has been unlikely to succeed, would not be considered misconduct. Further, the Committee asserted that a judge was not barred from stating what she perceives to be the advantages of her own country’s legal system over that of others.

65. The Committee concluded that although it found a number of matters involving individuals whose cases were pending or impending were addressed within the Judge’s lecture, and that some of the judge’s comments may have been on the merits of those matters, the comments did not violate the code on judicial conduct because the scholarly presentations exception applied. Moreover, it found that the comments did not denigrate public confidence in the judiciary’s integrity or impartiality, and thus did not violate the code on judicial conduct or constitute misconduct. The scholarly presentations exception refers to a provision within the code which makes an exception for offering such comments in the context of “scholarly presentations made for purposes of legal education.”

## V. ANALYSIS OF LAW

### A. Preliminary considerations

66. Before embarking on its analysis of the merits in the case of Ramiro Ibarra Ibarra, the Inter-American Commission reiterates 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.

67. 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>42</sup> and it has been set out and applied by the Inter-American Commission in previous capital cases brought before it.<sup>43</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>44</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>45</sup>

68. 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, not to receive cruel, infamous or unusual punishment, to due process, and to a fair trial as prescribed under the American Declaration, have been respected by the State. With regard to the legal status of the American Declaration, the IACHR reiterates that:<sup>46</sup>

[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.

69. Finally, 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 criminal proceedings in a case involving the application of the death penalty.

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<sup>42</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>43</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>44</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>45</sup> IACHR, Report No. 78/07, Case 12.265, *Merits (Publication)*, Chad Roger Goodman, *The Bahamas*, October 15, 2007, para. 34.

<sup>46</sup> IACHR, Report No. 44/14, Case 12,873, *Report on Merits (Publication)*, Edgar Tamayo Arias, *United States*, July 17, 2014, para. 214.

## B. Right to a fair trial<sup>47</sup> and right to due process of law<sup>48</sup>

### 1. Right to information on consular assistance

70. 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 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>49</sup>

71. The Commission observes that according to Article 36 of the Vienna Convention, "the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State." This Article has been "interpreted as requiring the authorities of the host State to inform any detained foreign national of the rights accorded to him in that article "at the time of the arrest, and in any case before the accused makes any statement or confession to the police or judicial authorities."<sup>50</sup>

72. In its Advisory Opinion OC-16/99, the Inter-American Court established that sub-paragraphs (b) and (c) of Article 36(1) of the Vienna Convention "recognize, *inter alia*, a detained foreign national's right to be advised, without delay, that he has:

- a) the right to request and obtain from the competent authorities of the host State that they inform the appropriate consular post that he has been arrested, committed to prison, placed in preventive custody or otherwise detained, and
- b) the right to address a communication to the appropriate consular post, which is to be forwarded "without delay."<sup>51</sup>

73. The significance of the right to information on consular assistance 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>52</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 [...]

74. In the present case, the Commission notes that Mr. Ibarra is a national of Mexico. It is asserted that he was not informed of his right to information on consular assistance when arrested or subsequent thereto in preparation for his trial. Moreover, the police freely admitted that they knew Mr. Ibarra was a Mexican national

<sup>47</sup> Article XVIII of the American Declaration establishes: 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>48</sup> Article XXVI of the American Declaration establishes: 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>49</sup> IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, paras 124-132. See also, IACHR, Report No. 91/05 (Javier Suarez Medina), United States, Annual Report of the IACHR 2005; Report No. 1/05 (Roberto Moreno Ramos), United States, Annual Report of the IACHR 2005; and Report 52/02, Case 11.753 (Ramón Martínez Villarreal), United States, Annual Report of the IACHR 2002.

<sup>50</sup> I/A Court H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No.16, para. 102.

<sup>51</sup> I/A Court H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No.16, para. 81.

<sup>52</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."

but were not aware that he had the right to consult with the Mexican consulate. Additionally, the Commission notes that the state appointed counsel failed to inform Mr. Ibarra, during trial, of his right to information on consular assistance. Also, according to the facts established in this report, this claim was brought by Mr. Ibarra in a post-conviction motion, but the court considered that he failed to show that the lack of information on consular assistance affected his conviction and sentence.

75. The State has not disputed the petitioners' contentions in this regard save for the allegation that claims concerning information on consular assistance do not raise a violation of a human right. Accordingly, based upon the information and arguments presented, the Commission concludes that the alleged victim was not notified of his right to information on consular assistance at or subsequent to the time of his respective arrests.

76. Based upon the foregoing, the Commission concludes that the State's obligation under Article 36 of the Vienna Convention to inform Mr. Ibarra at the time of his arrest or during his trial, constituted a fundamental component of the due process standards to which they are entitled under Article XVIII and XXVI of the Declaration, and that the State's failure to respect and ensure this obligation deprived the alleged victim of a criminal process that satisfied the minimum standards of due process and a fair trial required under Articles XVIII and XXVI of the Declaration.

## 2. Ineffective assistance of court-appointed counsel

77. 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>53</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>54</sup>

78. 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.<sup>55</sup>

79. 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>56</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>57</sup>

80. 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 that

<sup>53</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>54</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>55</sup> IACHR, Report No. 79/15, Case 12.994, Merits (Publication), Bernardo Aban Tercero, United States, October 28, 2015, para. 111.

<sup>56</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>57</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.



emphasize the importance of investigating and presenting mitigating evidence in death penalty cases.<sup>58</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>59</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>60</sup>

81. According to the information provided, trial counsel called several witnesses to attest to Mr. Ibarra’s character. In particular, the court considered that motions for investigative funding and assistance, including evaluations by Dr. Stephen Mark, a psychiatrist, were completed. Moreover, that many of the facts identified by Mr. Ibarra were in fact presented to the jury through the testimony of his sister and his wife, who testified that he came to the United States to find work to help support his family, that their family was poor, and that they lived in “humble” circumstances, working on the land, and provided details on the circumstances of his family situation in the United States.

82. The Commission considers that the information provided does not sufficiently substantiate the claim that counsel was ineffective in orchestrating investigations and presenting mitigation evidence. It is submitted, however, that a failure by state-appointed counsel to inform Mr. Ibarra of his right to consular notification is a breach of his right to due process and a fair trial. This had an impact on Mr. Ibarra’s post-conviction motion as the claim was procedurally barred. Moreover, it is indeterminable the extent of assistance the consulate could have provided and the impact of further testimony to Mr. Ibarra’s character, however, given the heightened scrutiny for capital trials, counsel should have explored all avenues to obtain available mitigating evidence.

83. The Commission considers that the fundamental due process and fair trial requirements for capital trials include the obligation to afford adequate legal representation, inclusive of the submission of all available mitigating evidence, and that the failure to inform a client of his rights to various forms of assistance, specifically, to consular assistance when the client is a foreign national, would constitute inadequate representation. Based on the aforementioned considerations and on the information on record, the Commission concludes that the actions by the state appointed counsel constitute inadequate representation; and that the United States has violated Mr. Ibarra’s right to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration.

### **3. Right to adequate time and to be assisted by legal counsel**

84. The petitioners allege that the state court denied Mr. Rubí adequate time and funding to prepare for his intellectual disability hearing. They say that neither the Texas Court of Criminal Appeals, nor the trial court, appointed counsel to represent him. He allegedly remained unrepresented in state court until volunteer counsel entered an appearance.

85. Given the available information on the matter before the Commission, there is no evidence to substantiate this allegation and the Commission is unable to conclude on whether there exists a violation against Mr. Ibarra’s right to adequate time and to be assisted by legal counsel, which equally violates his right to adequate means for the preparation of his defense which would be in violation of Article XVIII of the Declaration.

<sup>58</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>59</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>60</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.

#### 4. Right to an effective remedy, to be tried by an impartial judge, and to equality before the law and non-discrimination<sup>61</sup>

86. The right to be tried by an impartial judge or court is a fundamental guarantee of due process. In other words, the person on trial must have the guarantee that the judge or court presiding over his case brings to it the utmost objectivity. This way, courts inspire the necessary trust and confidence in the parties to the case and in the citizens of a democratic society.

87. In the Case of Herrera Ulloa v. Costa Rica,<sup>62</sup> citing the European Court, the Inter-American Court stated that impartiality has both subjective and objective aspects. In terms of subjectivity, the court must lack personal bias (the judge or tribunal must have the utmost objectivity to face the trial), and in terms of the objective point of view, the courts must inspire the "necessary confidence in the parties to the case, as well as in the citizens in a democratic society." The Court specified that the "impartiality of the tribunal implies that its members do not have a direct interest, a position taken, or a preference for any of the parties and that they are not involved in the controversy". Specifically, it was noted that the European Court held in this regard that:

"First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to proceedings."<sup>63</sup>

88. In the case of Apitz Barbera *et al.* ("First Court of Administrative Disputes") vs. Venezuela, the Court reiterated that "impartiality requires that the judge who intervenes in a particular dispute approach the facts of the case subjectively free of any prejudice and, likewise, offer sufficient guarantees of an objective nature to dispel any doubt that the defendant or the community may harbor regarding the absence of impartiality [...] The so-called objective test consists of determining whether the judge in question provided convincing elements to eliminate legitimate fears or well-founded suspicions of partiality."<sup>64</sup>

89. The IACHR recalls that the State has a general obligation to provide effective judicial remedies to persons who allege that they are victims of human rights violations, which must be substantiated in accordance with the rules of due process of law. For a remedy to be effective, it is not enough that it be legally provided for; it must be truly adequate to establish whether a human rights violation has occurred and to provide the necessary remedy. In assessing the effectiveness of the remedies, it must be examined whether the decisions in the judicial proceedings have effectively contributed to putting an end to a situation that violates rights, to ensuring the non-repetition of the harmful acts, and to guaranteeing the free and full exercise of the rights protected by the Convention.<sup>65</sup>

90. The principles of equality before the law, equal protection, and non-discrimination are among the most basic human rights, and are in fact recognized as *jus cogens* norms, "because the whole legal structure of

<sup>61</sup> Article XVIII of the 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.

Article XXVI of the 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.

Article II of the Declaration provides: 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.

<sup>62</sup> Case of Herrera Ulloa v Costa Rica, Herrera Ulloa v Costa Rica, Preliminary Objections, Merits, Reparations and Costs. Series C No 107, 2nd July 2004, paras. 170 and 171. Case of Palamara Iribarne v. Chile. Merits, Reparations y Costs. Judgment of November 22, 2005. Series C No. 135.

<sup>63</sup> Cf. Eur. Court. H. R., Case of Pabla KY v. Finland, Judgment of June 26, 2004, para. 27; and Eur.Court. H. R., Case of Morris v. the United Kingdom, Judgment of February 26, 2002, para. 58.

<sup>64</sup> I/A Court H.R., Case of Apitz Barbera *et al.* ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 56.

<sup>65</sup> IACHR, Report No. 109/18, Case 12.840. Merits. Yenina Esther Martinez Esquivia. Colombia. October 5, 2018, para. 72.

national and international public order rests on it.”<sup>66</sup> In line with the Human Rights Committee, the Commission has further understood “discrimination” to mean “any distinction, exclusion, restriction, or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>67</sup> The Commission has also pointed out that discrimination can manifest itself either directly (intentional or “targeted”) or indirectly (involuntary or “by outcome”), and the latter can be de facto, when it manifests itself in practice, or de iure, when it emanates from a law or provision.<sup>68</sup>

91. The petitioners allege that the post-conviction review of Mr. Ibarra’s case was impermissibly tainted by racial, ethnic and national origin bias, in the form of public remarks made by Judge Edith Jones, one of the senior federal judges assigned to review his case, at a lecture on the death penalty at the University of Pennsylvania Law School on February 20, 2013.

92. According to the available information, on June 5, 2013, Mr. Ibarra filed a motion to disqualify her from any further participation in his case and to vacate the Fifth Circuit’s opinion denying his application for a certificate of appealability, which had been authored by Judge Jones. On 10 June 2013, the Court issued a one-sentence order, signed by Judge Jones, denying the motion.

93. Following a complaint of judicial misconduct against Judge Jones arising from her public remarks filed by legal aid and civil liberty groups, the Special Committee to the Judicial Council of the District of Columbia Circuit issued a report in 2014. The Committee asserted that, in the absence of a recording of the lecture, it was unable to make a finding based on a preponderance of the evidence, and therefore its findings were based on the submission of the judge’s notes, affidavits of attendees of the lecture and other witness statements.

94. It was noted that at some point during the lecture, Judge Jones said that certain kinds of challenges to capital punishment are “red herrings” such as claims on intellectual disability and the right to consular notification. With respect to a claim that words spoken communicated racial bias, Judge Jones acknowledged that in her lecture she said that “sadly, African-Americans seem to be disproportionately on death row,” and that she “may have said” that “sadly some groups seem to commit more heinous crimes,” but said that she “was talking about statistical facts... [and] not talking about propensities.” The Committee reasoned that, whether or not her statistical statements were accurate, or accurate only with caveats, they did not by themselves indicate racial bias or an inability to be impartial.

95. The Committee concluded that although it found a number of matters involving individuals whose cases were pending or impending were addressed within the Judge’s lecture, and that some of the judge’s comments may have been on the merits of those matters, the comments did not violate the code on judicial conduct because the scholarly presentations exception applied. Moreover, it found that the comments did not denigrate public confidence in the judiciary’s integrity or impartiality, and thus did not violate the code on judicial conduct or constitute misconduct.

96. As stated above, the right to be tried by an impartial judge or court is a fundamental guarantee of due process. In order to guarantee this right, States have the obligation to provide an effective remedy in case of doubts or complaints regarding the lack of impartiality of the judge. In the present case, the Commission notes that a senior federal judge who was hearing Mr. Ibarra’s case issued public comments that could compromise her impartiality in the specific case. The judge not only referred to issues involved in the pending petition, such as allegations on disability and consular notification, but also further referred specifically to Mr. Ibarra’s case and generally to issues related to his ethnicity. Such comments could be considered problematic from the perspective of the right to a fair trial and specifically the right to be tried by an impartial judge.

<sup>66</sup> See I/A Ct. H.R. Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03 of Sept. 17, 2003, para. 101. See also IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States, Nov. 30, 2016, para. 72.

<sup>67</sup> IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States, Nov. 30, 2016, para. 75.

<sup>68</sup> IACHR, Report No. 5/14, Case 12,841. Merits. Angel Alberto Duque. Colombia. April 2, 2014, para. 67.

97. In view of the judge's public remarks considered by Mr. Ibarra's defense team impermissibly tainted by ethnic and national origin bias, a motion to disqualify her from any further participation in the case and to vacate the opinion denying the application for a certificate of appealability was filed. The Commission notes that the response from the federal court was a one-sentence order denying the request. It also notes that the order was signed by Judge Jones herself. Based on the inter-American standards referred to above, such judicial response cannot be considered effective, since it lacks a minimum motivation.

98. Following the motion's denial, a complaint of judicial misconduct against Judge Jones was filed by legal aid and civil liberty groups. The complaint referred to Mr. Ibarra's case, among others. The Special Committee to the Judicial Council of the District of Columbia Circuit was unable to make a finding based on a preponderance of the evidence. However, after reviewing the available evidence, it concluded that, whether or not Judge Jones' statistical statements were accurate, they did not by themselves indicate racial bias or an inability to be impartial. It also found that the comments did not constitute judicial misconduct.

99. The Commission notes the petitioners' allegations that the complainants were denied access to the materials that the Special Committee relied on as more credible than the many sworn affidavits supporting their complaint; that they were not allowed to testify at or even attend the hearing into their complaint, nor could they question the judge, nor were they provided with the investigative report and supplemental reports prepared by Special Counsel for the Committee. The Commission also notes that the State does not refute these allegations.

100. Based on these considerations, the IACHR asserts that neither of the two avenues attempted by Mr. Ibarra's defense to challenge Judge Jones' alleged lack of impartiality were effective. As established above, impartiality requires that sufficient objective guarantees be provided to remove any doubts that the defendant or the community may have as to the absence of impartiality. Further, the State has a reinforced duty to investigate allegations of discrimination based on prohibited categories such as race or ethnicity, or national origin. The Commission notes that, given the existence of reasonable doubts regarding the lack of objective impartiality, Mr. Ibarra did not have an adequate and effective remedy.

101. The Commission therefore concludes that the failure to provide an adequate remedy regarding allegations of lack of impartiality and discrimination, violated Mr. Ibarra's right to a fair trial and to due process of law, in connection with his right to an impartial hearing and right to equality before the law and non-discrimination as required by Articles XXVI and II of the American Declaration.

### **C. Right of every person with mental or intellectual disabilities not to be subjected to the death penalty**

102. The IACHR has established that, while the American Declaration does not expressly prohibit the imposition of the death penalty in the case of persons with mental and intellectual disabilities, such a practice is in violation of the rights and basic principles recognized in Articles I and XXVI of the American Declaration.<sup>69</sup> The IACHR has also ruled that:

States have a special duty to protect persons with mental and intellectual disabilities, a duty that is reinforced in the case of persons under State custody. Moreover, it is a principle of international law that persons with mental and intellectual disabilities, either at the time of the commission of the crime or during trial, cannot be sentenced to the death penalty. Likewise, international law also prohibits the execution of a person sentenced to death if that person has a mental or intellectual disability at the time of the execution.<sup>70</sup>

103. States have a special duty to protect persons with mental and intellectual disabilities, a duty that is reinforced in the case of persons under State custody. Moreover, it is a principle of international law that persons with mental and intellectual disabilities, either at the time of the commission of the crime or during

<sup>69</sup> IACHR, Report No. 44/14, Case 12,873. Merits (Publication). Edgar Tamayo Arias. United States, July 17, 2014, para. 152.

<sup>70</sup> IACHR, Report No. 44/14, Case 12,873. Merits (Publication). Edgar Tamayo Arias. United States, July 17, 2014, para. 159.

trial, cannot be sentenced to the death penalty. Likewise, international law also prohibits the execution of a person sentenced to death if that person has a mental or intellectual disability at the time of the execution.<sup>71</sup>

104. Given its special duty to protect persons with mental and intellectual disabilities, in death penalty cases the State has the obligation to have procedures in place to identify those accused or convicted persons who have a mental or intellectual disability. In this regard, the State has two main obligations. First, it has the duty to survey all records and information in its possession concerning the mental health of a person accused of a capital offense. Second, the State must provide any indigent person with the means necessary to have an independent mental health evaluation done in a timely manner.<sup>72</sup> Moreover, when there is an indication that an accused or convicted person in a death penalty case might have a mental or intellectual disability, the State has the obligation, at any time of the proceedings, to address the claim on the merits.

105. In a case involving Trinidad and Tobago, the Human Rights Committee held that the reading of a death warrant to a person with a mental disability, even if that person had been competent at the time of his or her conviction, is a violation of the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>73</sup> The United Nations “Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty” provide that a death sentence shall not be carried out on [...] “persons who have become insane.”<sup>74</sup> The United Nations Commission on Human Rights called upon all States that still have the death penalty “[n]ot to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person.”<sup>75</sup>

106. Also, the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment indicated that international law considers the imposition and enforcement of the death penalty in the case of persons with mental disabilities as particularly cruel, inhuman and degrading, and in violation of Article 7 of the International Covenant on Civil and Political Rights and Articles 1 and 16 of the Convention against Torture.<sup>76</sup> Likewise, the U.N. Special Rapporteur on arbitrary executions stated that “[i]t is a violation of death penalty safeguards to impose capital punishment on individuals suffering from psychosocial disabilities.”<sup>77</sup>

107. In *Atkins v. Virginia*,<sup>78</sup> the United States Supreme Court held that “executions of mentally retarded criminals are cruel and unusual punishments prohibited by the Eighth Amendment” of the U.S. Constitution. In its ruling, the Supreme Court traced the history of the concept of “excessive” sanctions and underscored the fact that the consensus today unquestionably reflects widespread judgment about the relative culpability of “mentally retarded offenders.”<sup>79</sup>

108. According to the available information, after the Supreme Court of Justice issued its decision on Atkins, Mr. Ibarra filed an application for a writ of habeas corpus. The Texas Court of Criminal Appeals remanded the Atkins claim to the trial court for an evidentiary hearing that was scheduled for September 2006. The trial court determined that Mr. Ibarra did not have a mental disability, and this holding was adopted on appeal.

<sup>71</sup> See in this respect, IACHR Report No. 52/13, Cases 11.575, 12.333. and 12.341, Merits (Publication), Clarence Allen Lackey et al, Miguel Angel Flores, and James Wilson Chambers, United States, July 15, 2013, para 206.

<sup>72</sup> See in this respect, IACHR Report No. 52/13, Cases 11.575, 12.333. and 12.341, Merits (Publication), Clarence Allen Lackey et al, Miguel Angel Flores, and James Wilson Chambers, United States, July 15, 2013, para 206.

<sup>73</sup> Human Rights Committee, *Sahadath v. Trinidad and Tobago*, Communication No. 684/1996, April 2, 2002, CCPR/C/74/D/684/1996, para. 7.2.

<sup>74</sup> Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984).

<sup>75</sup> United Nations Commission on Human Rights, Promotion and Protection of Human Rights, The question of the death penalty, E/CN4/2005/L.77, April 14, 2005, paragraph 7(c).

<sup>76</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/67/279, August 9, 2012, para. 58.

<sup>77</sup> Office of the High Commissioner for Human Rights, “Death row: U.N. expert urges U.S. authorities to stop execution of two persons with psychosocial disabilities”, July 17, 2012.

<sup>78</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>79</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002) at 311-317.

109. The Commission notes the State's claim that Dr. Stephen Mark evaluated Mr. Ibarra on two occasions, finding that he was competent to stand trial and that he was not "mentally retarded" and that the expert opinion was completed after the Atkins decision. The Commission also notes, however, that according to the information provided by the petitioners, not controverted by the State, although the opinion was completed in 2003, it relied on evaluations done before Atkins.

110. The Commission notes the opinion of Dr. Carol M. Romney, a licensed clinical psychologist, which concluded that Mr. Ibarra "has mental retardation" after two psychological examinations were done on June 9 and 10, 2003. A measure of intellectual functioning revealed a full scale IQ score of 65, that Mr. Ibarra exhibited a "uniform and diffuse level of cognitive deficits", his problem solving skills were "confused" and he showed an "impaired ability for sequencing".<sup>80</sup> According to the available information, however, the affidavit was declared inadmissible because it was not sworn before a notary. In this regard, the Commission notes that Dr. Romney expressly stated that the affidavit was not notarized because counsel for Mr. Ibarra requested it on a Friday and she was unable to reach a notary public during the weekend. However, she indicated that a sworn affidavit would be submitted at the first available opportunity.

111. Mr. Ibarra later filed a federal habeas petition and the U.S. Court of Appeal denied in 2019 a certificate of appealability regarding the Atkins claim on alternative grounds of procedural bar, non-exhaustion, and meritlessness. The Court found that the Texas Court of Criminal Appeals had rejected this claim on the merits and Mr. Ibarra now offered material new evidence, which rendered his claim unexhausted and procedurally barred. It further noted that to establish that he falls under Atkins, petitioner must demonstrate that he possesses significantly subaverage intellectual functioning and impaired adaptive functioning, both of which manifested before the age of 18.

112. Therefore, the Commission finds that the State did not offer Mr. Ibarra an opportunity to present new evidence regarding his intellectual disability, since the only analysis on the merits was made based on evaluations that did not provide a complete diagnosis of his mental health. Based on the above-mentioned international and inter-American standards, when there is an indication that an accused or convicted person in a death penalty case might have a mental or intellectual disability, the State has the obligation, at any time of the proceedings, to address the claim on the merits.

113. Based on the above considerations, and given the heightened degree of scrutiny that it has applied in death penalty cases,<sup>81</sup> the Inter-American Commission concludes that the United States violated Articles I and XXVI of the American Declaration to the detriment of Mr. Ibarra by denying any opportunity to present evidence regarding his mental and intellectual disability and be heard on the merits of that evidence according to the Atkins decision.

## **D. The deprivation of liberty on death row and the right of protection against cruel, infamous or unusual punishment**

### **1. Death row phenomenon<sup>82</sup>**

114. The long-term deprivation of liberty on death row is referred to within both international human rights and comparative law as the "death row phenomenon", and infringes on a person's freedom from cruel, inhuman or degrading punishment. Such treatment violates the prohibition of cruel, inhuman or degrading punishment

<sup>80</sup> Carol M. Romney, Ph. D., sworn affidavit dated September 18, 2006.

<sup>81</sup> See IACHR Report No. 77/09, Petition 1349-07, Admissibility, Orlando Cordia Hall, United States, August 5, 2009, para 47; Report No.61/03, Petition 4446-02, Admissibility, Roberto Moreno Ramos, United States, paragraph 66; Report No. 41/00, Case 12.023, Merits, McKenzie *et al.*, Jamaica, paragraphs 169 -171.

<sup>82</sup> Article XI of the American Declaration provides: "The right to the preservation of health and well-being – every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources."

in Constitutions and in multiple international treaties, including the American Declaration (Articles XXV and XXVI).<sup>83</sup>

115. The Commission takes note of the concept of the death row phenomenon of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment that:

(...) it consists of a combination of circumstances that produce severe mental trauma and physical deterioration in prisoners under sentence of death.<sup>84</sup> 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.<sup>85</sup>

116. 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.<sup>86</sup>

117. The European Court found that the death row phenomenon: is a cruel, inhuman and degrading treatment, and is characterized by a prolonged period of detention while awaiting execution, during which prisoners sentenced to death suffer severe mental anxiety, extreme psychological tension and trauma.<sup>87</sup>

118. 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. The court referenced the lapse of time between sentence and execution is inevitable however, 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 living in the ever-present shadow of death.<sup>88</sup>

119. The court further recognized that 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 and considered elements like, 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, which brought the delay into the realm of exposed real risk of treatment going beyond the threshold set by Article 3.<sup>89</sup>

120. Furthermore, in a comparative law context, the Commission notes that in the *Pratt and Morgan v. Jamaica* case cited above the Privy Council considered the issue of the death row phenomenon, and held 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

<sup>83</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>84</sup> 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.

<sup>85</sup> 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.

<sup>86</sup> ECtHR. Case of *Soering v. The United Kingdom*. Report No. 14038/88. Judgment, July 7, 1989. para. 104.

<sup>87</sup> European Court of Human Rights, *Soering v. United Kingdom*. Judgment of July 7, 1989. Series A, Vol. 161. Likewise, the Supreme Court of the United States of America recognised in *Furman v. Georgia* that the time spent awaiting the execution of a death sentence destroys the human spirit and constitutes psychological torture that often leads to insanity. Cf. *Furman v. Georgia*, 408 U.S. 238, 287-288 (197).

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

<sup>89</sup> ECtHR. Case of *Soering v. The United Kingdom*. Report No. 14038/88. Judgment, July 7, 1989. para. 111.

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.

(...)

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."<sup>90</sup>

121. 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."<sup>91</sup> 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."<sup>92</sup>

122. As established in this report, Mr. Ibarra has been deprived of liberty on death row since September 22, 1997, for 23 years. The Commission notes that the very fact of spending 23 years on death row is, by any account, excessive and inhuman, and is aggravated by the prolonged expectation that the death sentence could be executed; and further exacerbated by the conditions under which Mr. Ibarra is detained. Mr. Ibarra is detained at the Polunsky Unit in Texas, under the same conditions, as previous petitioners whose subjection to solitary confinement and lack of social interaction has been condemned by the Commission. Consequently, the United States is responsible for violating, to the detriment of the alleged victim, the right to humane treatment, and not to receive cruel, infamous or unusual punishment established in Articles XXV and XXVI of the American Declaration.

## 2. Method of Execution

123. The Commission notes that even though the American Declaration does not prohibit the death penalty, various organs have considered that an execution method is incompatible with the right to humane treatment and the prohibition of torture when it is not designed to inflict the least possible suffering.<sup>93</sup>

124. United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty establish that "when the death penalty may be carried out it must be done in a way to keep to a minimum the suffering of prisoners."<sup>94</sup> The Special Rapporteur on Torture, referring to the Safeguards, has indicated that there is no categorical evidence to show that any of the execution methods currently used to implement the death penalty comply with the prohibition of torture and cruel, inhumane and degrading treatment and added even if the safeguards were observed, all currently used methods of execution can inflict pain and excessive suffering.<sup>95</sup>

125. The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has indicated with respect to the methods for the execution of the death penalty that "the extraordinary power conferred on the State to

<sup>90</sup> Pratt and Morgan v. The Attorney General for Jamaica and another (Jamaica) [1993] UKPC 1 (2nd November 1993), paras. 73-75 and 84.

<sup>91</sup> Supreme Court of Uganda in *Attorney General v. Susan Kigula and 417 others* (Constitutional Appeal No. 3 of 2006), 2009.

<sup>92</sup> 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).

<sup>93</sup> In that respect, guideline xiv) of the "EU Guidelines on Death Penalty" establishes that "Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering. It may not be carried out in public or in any other degrading manner EU Guidelines on the Death Penalty: revised and updated version.

<sup>94</sup> Economic and Social Council, Safeguards guaranteeing protection of the rights of those facing the death penalty.

<sup>95</sup> A/HRC/30/18, Human Rights Council, Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, para.32; also see: Office of the High Commissioner for Human Rights "Despite progress in abolishing the death penalty, thousands remain on death row. Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DeathPenalty.aspx>



end a person's life through a firing squad, hanging, lethal injection or other means to kill, poses a dangerous risk of abuse. This power can be kept under control only through the public supervision of the public punishment. It is a commonplace that due process serves to protect the accused. However, due process is also a mechanism through which society ensures that the punishments inflicted on their behalf are fair."<sup>96</sup>

126. States have a reinforced special duty to ensure that the method of execution does not constitute cruel, infamous or unusual punishment. In this regard, the drugs and doses to be used in case of executions by lethal injection, as well as the composition of the execution team and the training of its members should be subjected to the highest quality control standards. In particular, the drugs used should be subject to government approval and regulation, the execution team should have appropriate medical training and lethal injection protocols should be available to the public to guarantee public scrutiny.<sup>97</sup>

127. The Inter-American Commission notes in this regard that the due process requirement is not limited to the conviction and post-conviction proceedings.<sup>98</sup> Therefore, the State has the duty to inform the person sentenced to death, in a timely manner, about the drug and method of execution that will be used, so he or she is not precluded from litigating the right to be executed in a manner devoid of cruel and unusual suffering. Moreover that conducting executions without first providing prisoners access to information related to the precise procedures to be followed, the drugs and doses to be used in case of executions by lethal injection, and the composition of the execution team as well as the training of its members deprives a victim of his right to challenge the manner in which he is planned to be executed, in violation of his rights to petition authorities and to due process under Articles XXIV and XXVI of the American Declaration.<sup>99</sup>

128. The IACHR also notes that the United Nations Committee Against Torture received substantiated information indicating that executions in the United States can be accompanied by severe pain and suffering and requested the State to "carefully review its execution methods, in particular lethal injection, in order to prevent severe pain and suffering."<sup>100</sup>

129. The petitioners argue that the Texas Supreme Court explicitly approved the Texas Department of Criminal Justice's policy to keep the source of its drugs a secret, even from the people on whom the drugs will be used.<sup>101</sup>

130. Given the State's reinforced special duty to ensure that the method of execution does not constitute cruel, infamous or unusual punishment, and in particular, to subject the drugs used to government approval and regulation, the IACHR finds that in Mr. Ibarra's case it violated Article XXVI of the American Declaration.

#### **E. Right to life<sup>102</sup> and to protection against cruel, infamous or unusual punishment with respect to the eventual execution of Ramiro Ibarra Rubí**

131. As indicated above, the Inter-American Commission considers that it is incumbent upon the national courts, not the Commission, to interpret and apply national law. Nevertheless, the IACHR must ensure that any deprivation of life resulting from imposition of the death penalty complies with the requirements of the American Declaration.<sup>103</sup>

132. Under these circumstances, the IACHR has maintained that executing a person, after proceedings that were conducted in violation of his rights, would be extremely grave and constitute a deliberate violation of the

<sup>96</sup> A/HRC/30/18, Human Rights Council, Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, para. 50.

<sup>97</sup> IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States, March 23, 2015, para. 84

<sup>98</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Iván Teleguz, United States, July 15, 2013, para. 123.

<sup>99</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Iván Teleguz, United States (July 15, 2013), at paras. 121, 124

<sup>100</sup> Committee Against Torture, Considerations of Reports submitted by State Parties under Article 19 of the Convention, United States, CAT/C/USA/CO/2, July 25, 2006, para 31

<sup>101</sup> Texas Department of Criminal Justice v. Levin, 572 S.W.3d 671 (Tex. 2019)

<sup>102</sup> Article I of the American Declaration establishes: Every human being has the right to life, liberty and the security of his person.

<sup>103</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Iván Teleguz, United States, July 15, 2013, para. 129.

right to life established in Article I of the American Declaration.<sup>104</sup> Further, based on the conclusions regarding the deprivation of liberty on death row, the eventual execution of the alleged victims would constitute, by any account, a violation of the right to protection against cruel, infamous or unusual punishment. In light of the foregoing and taking into account the determinations made throughout this report, the IACHR concludes that the execution of Ramiro Ibarra Rubí would constitute a serious violation of his right to life established in Articles I of the American Declaration.

## VI. REPORT No. 9/21 AND INFORMATION ABOUT COMPLIANCE

133. On February 25, 2021, the Commission approved Report No. 9/21 on the merits of the instant case, which encompasses paragraphs 1 to 132 supra, and issued the following recommendations to the State:

1. Grant Ramiro Ibarra Rubi effective relief, including the review of her trial and sentences in accordance with the guarantees of fair trial and due process set forth in Articles XVIII, and XXVI of the American Declaration, and the payment of pecuniary compensation. Taking into account the conclusion of the IACHR on the time the alleged victim has been held on death row, the Commission recommends that her sentence be commuted.
2. Review its laws, procedures, and practices at the state and federal level 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, XXV and XXVI thereof, and, in particular:
  - a. Ensure that every foreign national deprived of his or her liberty is informed, without delay and prior to his or her first instance of questioning by State authorities, of the right to request that consular authorities be immediately notified of his or her arrest or detention;
  - b. To grant the opportunity to present evidence regarding mental and intellectual disability and be heard on the merits of that evidence, where such disability is alleged and to conduct a re-sentencing hearing to determine the appropriate sentence suitable where such disability exists; and
  - c. Ensure that the method of execution does not constitute cruel, infamous or unusual punishment, and in particular, to make available to a person subject to pending execution, the details regarding the source, substance and/or administrative procedure in the execution method.
3. 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 abolishes the death penalty.<sup>105</sup>

134. On February 26, 2021 the IACHR transmitted the report to the State in order for it to report to the Commission until March 1, 2021 on the measures it has adopted to comply with the Commission's recommendations and resolve the situation.

135. On February 26, 2021 petitioners informed the Commission that the Texas Court of Criminal Appeals stayed Mr. Ibarra's scheduled execution to allow consideration of two of the claims raised in his subsequent petition for writ of habeas corpus he filed in the Texas courts on February 11, 2021. They informed that the Court agreed to consider Mr. Ibarra's claim that he has intellectual disability and his claim that his conviction was tainted by unreliable DNA evidence. They informed that the Court has not declared Mr. Ibarra ineligible for execution; and should it ultimately reject these claims, Texas will be able once again to seek his execution. This information was transmitted to the State on March 6, 2021.

136. To date, the Commission has not received any response from the United States regarding report No. 9/21.

<sup>104</sup> IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Félix Rocha Díaz, United States, March 23, 2015, para. 106.

<sup>105</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. ACTIONS SUBSEQUENT TO REPORT No. 325/21

137. On November 19, 2021, the Commission approved Final Merits Report No. 325/21, which encompasses paragraphs 1 to 136 *supra*, and issued its final conclusions and recommendations to the State. On November 23, 2021, the Commission transmitted the report to the State and the petitioners with a time period of three weeks 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. 325/21.

## VIII. FINAL CONCLUSIONS AND RECOMMENDATIONS

138. On the basis of determinations of fact and law, the Inter-American Commission concludes that the State is responsible for the violation of Articles I (life, liberty, and security), XVIII (fair trial), XXV (protection from arbitrary arrest) and XXVI (due process) of the American Declaration, in connection with Article II of the Declaration.

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

1. Grant Ramiro Ibarra Rubi effective relief, including the review of her trial and sentences in accordance with the guarantees of fair trial and due process set forth in Articles XVIII, and XXVI of the American Declaration, and the payment of pecuniary compensation. Taking into account the conclusion of the IACHR on the time the alleged victim has been held on death row, the Commission recommends that her sentence be commuted.
2. Review its laws, procedures, and practices at the state and federal level 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, XXV and XXVI thereof, and, in particular:
  - b. Ensure that every foreign national deprived of his or her liberty is informed, without delay and prior to his or her first instance of questioning by State authorities, of the right to request that consular authorities be immediately notified of his or her arrest or detention;
  - c. To grant the opportunity to present evidence regarding mental and intellectual disability and be heard on the merits of that evidence, where such disability is alleged and to conduct a re-sentencing hearing to determine the appropriate sentence suitable where such disability exists; and
  - d. Ensure that the method of execution does not constitute cruel, infamous or unusual punishment, and in particular, to make available to a person subject to pending execution, the details regarding the source, substance and/or administrative procedure in the execution method.
3. 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 abolishes the death penalty.<sup>106</sup>

## IX. PUBLICATION

139. 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.

<sup>106</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.

Approved by the Inter-American Commission on Human Rights on the 31st day of December 2021. (Signed):  
Antonia Urrejola Noguera, President; Julissa Mantilla Falcón, First Vice President; Flávia Piovesan, Second Vice  
President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Joel Hernández García and  
Edgar Stuardo Ralón Orellana, Commissioners.