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**REPORT No. 11/15**  
**CASE 12.833**  
MERITS (PUBLICATION)

FELIX ROCHA DIAZ  
UNITED STATES

Approved by the Commission at its session No. 2021 held on March 23, 2015  
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\* Commissioner James Cavallaro, a U.S. national, did not participate in discussing or deciding this case, in accordance with Article 17.2.a of the IACHR's Rules of Procedure. Commissioner José de Jesús Orozco Henríquez, a Mexican national, considered that, based on Article 17(3) of the Rules of Procedure of the IACHR, he should abstain from participating in the deliberation and decision on this matter, noting that the alleged victim in this case is one of the persons included in the *Case concerning Avena and Other Mexican Nationals (Mexico v. the United States of America)*, which Mexico filed with the International Court of Justice. The Inter-American Commission accepted his decision to excuse himself, with the result that Commissioner Orozco Henríquez did not participate in the deliberation or vote on this case.

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**I. SUMMARY**

1. On March 2, 2011, the Inter-American Commission on Human Rights (“the Inter-American Commission” or “the IACHR”) received a petition and request for precautionary measures filed by Sandra L. Babcock of the Center for International Human Rights at Northwestern University School of Law and Kathryn M. Kase of the Texas Defender Service (“the petitioners”) against the United States of America (“the State” or “the United States”). The petition was lodged on behalf of Felix Rocha Diaz (“the alleged victim” or “Mr. Rocha”) a Mexican national deprived of his liberty on death row in the state of Texas.

2. The petitioners contend that Mr. Rocha’s death sentence violates the American Declaration for four reasons. First, they submit that the arresting authorities failed to notify Mr. Rocha of his right to consular assistance in violation of Article 36 of the Vienna Convention on Consular Relations (“VCCR”). They argue in this regard that, if the Mexican government had been notified, it would have provided active and far reaching assistance to the alleged victim in the judicial process against him. Second, petitioners claim that Mr. Rocha’s court-appointed counsel were inexcusably ineffective and failed to meaningfully investigate, develop and present substantial mitigating evidence. Third, they state that lethal injection as currently practiced in Texas creates an unacceptable risk of causing excruciating pain and suffering. Finally, petitioners submit that Mr. Rocha has spent the last sixteen years on Texas’ death row under inhuman conditions. In particular, they argue that death row prisoners are subjected to solitary confinement, being therefore segregated from other prisoners in every aspect of their lives. The petitioners hold that those facts constitute violations of Articles I, XVIII, XXV and XXVI of the American Declaration of the Rights and Duties of Man (“the American Declaration”). As of the date of approval of this report, the State has not submitted its observations on this case.

3. On October 19, 2011, during its 143<sup>th</sup> regular sessions, the IACHR examined the contentions of the petitioners on the question of admissibility, and without prejudging the merits of the matter, decided to admit the claims in the present petition pertaining to Articles I, XVIII, XXV and XXVI of the American Declaration; and to continue with the analysis of the merits of the case. It also resolved to publish Admissibility Report N° 133/11 and to include it in its Annual Report to the General Assembly of the Organization of American States. The matter was recorded as Case No. 12,833.

4. In the instant report, after analyzing the position of the petitioners, the Inter-American Commission concludes that the United States is responsible for violating Articles I (Right to life, liberty and personal security), XVIII (Right to a fair trial), XXV (Right of protection from arbitrary arrest) and XXVI (Right to due process of law) of the American Declaration with respect to Felix Rocha Diaz. Consequently, should the State carry out the execution of Mr. Rocha, it would also be committing a serious and irreparable violation of the basic right to life recognized by Article I of the American Declaration.

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## **II. PROCEEDINGS SUBSEQUENT TO REPORT N° 133/11**

5. On November 17, 2011, the IACHR forwarded Admissibility Report N° 133/11 to the State and to the petitioners. In accordance with the Rules of Procedure in force at the time, the Inter-American Commission set a deadline of three months for the petitioners to submit additional observations on the merits and, at the same time, made itself available to the parties with a view to initiating a possible friendly settlement of the matter.

6. On January 18, 2012, the petitioners submitted additional observations on the merits. On May 16, 2012, the IACHR forwarded those observations to the State, and set a time period until June 29, 2012 to submit its observations, pursuant to Article 37(3) of the Rules of Procedure.

7. On August 8, 2012, the petitioners submitted two exhibits. On August 22, 2012, the IACHR forwarded those to the State, reiterated its request for additional information regarding the merits, and set a deadline of two weeks for the State to submit its observations. On December 28, 2012, the petitioners submitted additional information, which was forwarded to the State on February 11, 2013. No response was received from the State.

### **Precautionary Measures**

8. On March 10, 2011, the Commission notified the State that precautionary measures had been granted on behalf of the alleged victim, and requested a stay of execution until such time as the IACHR would be able to pronounce on the merits of the petition.

## **III. POSITIONS OF THE PARTIES**

### **A. Position of the petitioners**

9. The petitioners indicate that, in April 1996, Mr. Rocha was shot six times during his arrest for a crime unrelated to his death sentence. While under heavy sedation in the hospital he was purportedly interrogated by police officers regarding his alleged participation in a robbery and murder that occurred on November 26, 1994. Based on incriminating statements made in response to that interrogation, he was finally convicted of capital murder and sentenced to death in 1998 in the 338<sup>th</sup> Judicial District Court of Harris County, Texas.

10. The petitioners argue that Mr. Rocha's sentence violates the American Declaration for four reasons. First, they claim that, by failing to notify the alleged victim of his right to consular notification and access at the time of his arrest, the United States violated Article 36 of the Vienna Convention on Consular Relations and therefore Mr. Rocha's execution would violate Articles I, XVIII and XXVI of the American Declaration. Second, the petitioners submit that the attorneys appointed by the State to represent the alleged victim were inexcusably ineffective, giving rise to violations of Articles XVIII and XXVI of the American Declaration. Third, they claim that lethal injection as currently practiced in Texas creates an unacceptable risk of causing excruciating pain and suffering, in violation of Article XXVI of the American Declaration. Finally, petitioners argue that the conditions on Texas' death row violate Mr. Rocha's rights to humane treatment while he is in custody, pursuant to Articles XXV and XXVI of the American Declaration. Petitioners point out that on October 11, 2011, the United States Supreme Court denied Mr. Rocha's petition for writ of certiorari and that therefore all of his appeals have been exhausted.

#### **1. Right to consular notification**

11. According to the petitioners, when Mr. Rocha was interrogated on April 24, 1996, in Houston, Texas, in connection with a robbery and murder that occurred on November 26, 1994, police failed to notify him of his right to consular assistance in violation of Article 36 of the Vienna Convention on Consular Relations ("VCCR"). They submit that the alleged victim, who spoke almost no English at the time of his detention, failed to comprehend that he had the right to a lawyer and to remain silent. Therefore, confused

and alone, Mr. Rocha allegedly made incriminating statements that were eventually used against him during his capital murder prosecution.

12. The petitioners contend that the State of Texas deprived Mr. Rocha of even the most basic consular assistance after his detention and that, if the Mexican government had been notified, it would have provided active and far-reaching assistance to the alleged victim in the judicial process against him. They mention in this regard that the Mexican government has a program to ensure such assistance.

13. After being shot six times during his arrest for a crime unrelated to his death sentence, investigators allegedly sought to interrogate Mr. Rocha in his hospital bed. A Houston Police Officer purportedly claimed the alleged victim made an uncounseled waiver of his *Miranda* rights after his invasive surgery and while under heavy sedation and on pain-killing drugs, consenting to interrogation. The petitioners argue that Mr. Rocha was in no position to waive his rights and that it is undisputed that neither the police officer nor anyone else informed Mr. Rocha of his consular rights.

14. According to the petitioners, after the alleged victim repeatedly denied any knowledge of the murder, the police officer played a tape-recording of Mr. Rocha's co-defendant, who allegedly had an IQ of 61, claiming to implicate Mr. Rocha in the murder. They indicate that, only after hearing this tape, did Mr. Rocha tell the officer he would talk. However, the alleged victim purportedly did not understand the *Miranda* warning that the police read to him. In this respect, Mr. Rocha later reported that "[he] said yes. But [he] thought he was saying if [he] heard him. Because [he] was in a lot of pain."<sup>1</sup> Therefore, it was after this allegedly uninformed waiver that Mr. Rocha made damaging admissions that he participated in two capital murders to which no forensic or eyewitness evidence directly connected him.

15. Given that Mr. Rocha did not speak English, he allegedly used an interpreter throughout trial. Petitioners claim that, in addition to language barriers, there were cultural barriers that impeded the alleged victim from understanding his legal rights in the interrogation context. This, because in Mexico plea-bargaining is illegal and there are no jury trials. For these reasons, Mr. Rocha allegedly did not grasp the meaning of the *Miranda* warning sufficiently to waive the rights it safeguards.

16. Petitioners contend that, had Mr. Rocha known the importance of having a lawyer present during any conversation with the police, he would not have made incriminating statements in response to interrogation, and the state would not have charged him with capital murder and sentenced him to death. They believe that a consular official would have explained the concept of a waiver of legal rights and would have advised him that he was not required to give any statements to the police.

17. The failure of the arresting authorities to inform Mr. Rocha of his right to consular notification, communication and assistance is, according to the petitioners, an undisputable violation of the Vienna Convention, as well as a breach of domestic law. In this regard, they state that the VCCR entered into force for the United States on December 24, 1969, and has therefore been part of the "supreme Law of the Land" under the provisions of Article VI of the United States Constitution.

18. The petitioners indicate that Mr. Rocha was included in the judgment issued by the International Court of Justice ("ICJ") on March 31, 2004, in the Avena Case.<sup>2</sup> They point out that the ICJ held that, as a remedy for the violations of Article 36(1), the United States must provide "review and reconsideration" of the convictions and sentences of Mr. Rocha and the other Mexican nationals in whose cases it found violations.

19. After the ICJ's judgment, Mr. Rocha allegedly filed a subsequent habeas petition in the Texas Court of Criminal Appeals, arguing that he was entitled to review and reconsideration of his Vienna

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<sup>1</sup> Original petition received on March 2, 2011, pages 33-34.

<sup>2</sup> International Court of Justice, *Case concerning Avena and other Mexican nationals (Mexico v. United States of America)*, Judgment of 31 March 2004. Available at: <http://www.icj-cij.org/docket/files/128/8188.pdf>.

Convention claim. The petitioners indicate that the Court refused to consider the claim and that the U.S. Supreme Court denied review of Mr. Rocha's petition for writ of certiorari on March 31, 2008.

20. The petitioners state that the United States unconditionally agrees with the position of the ICJ and that the current Administration has openly recognized the ongoing international legal obligation to provide review and reconsideration to the Mexican nationals identified in Avena. In this regard, they affirm that, despite the good intentions of the executive branch, Congress has failed to pass the legislation necessary to implement the Avena judgment.

## **2. Incompetent defense counsel**

21. The petitioners contend that Mr. Rocha was forced to accept representation by a court-appointed attorney who failed to meaningfully investigate, develop and present substantial mitigating evidence that could have swayed the jury to spare his life. They conclude that counsel's lack of preparation and effort was both deficient and prejudicial. In the absence of any meaningful defense, Mr. Rocha was sentenced to death by a jury who did not allegedly know of his horrific childhood, his developmental problems and the extreme poverty he suffered.

22. According to the petitioners, defense counsel did not take the time to investigate or present any mitigating evidence regarding his life in the United States or in Mexico, where he grew up in the hands of an abusive father and an absentee mother, endured deplorable living conditions, and developed learning disabilities.

23. The petitioners indicate that the prosecution twice declared that there was no mitigation. According to the exhibits presented by the petitioners, the prosecutor stated that Mr. Rocha's case "is one of those rare cases that comes along where there is no mitigation. There is no mental retardation. There is no child abuse."<sup>3</sup>

24. Mr. Rocha was allegedly shaped by a horrific childhood in Michoacán, Mexico, marked by extreme poverty and deprivation. Petitioners state that his mother, during her pregnancy with Mr. Rocha, often went without food and was beaten by his father. Mr. Rocha allegedly lived in a shack-like dwelling with only two walls, no running water, no electricity, and a dirt floor. Further, he was allegedly beaten by his father and grandfather on a regular basis, and was forced to leave school as a child to help support his family.

25. Petitioners claim that, although there were at least six mitigation witnesses that would have been willing to provide testimony about Mr. Rocha and his life in the United States and in Mexico, defense counsel's penalty phase preparation was allegedly limited to interviewing four witnesses collectively for thirty minutes, whose testimonies covered only 52 pages of the trial transcript.

26. By compiling the social and family history that Mr. Rocha's defense counsel never obtained, mitigator Norma V. Solis, a master social worker licensed by the State of Texas, determined that several recurrent themes pervaded the families of Mr. Rocha's mother and father, and of the family they sought to forge: alcoholism and alcohol abuse; domestic violence; verbal and emotional abuse; learning disabilities; and mental abandonment.

27. In addition, the petitioners state that Mr. Rocha's father beat his mother until she finally abandoned their marriage. To support her four children she had to work two jobs, leaving Mr. Rocha, who was then three years old, in the care of relatives and/or his sister who was only two years older. When the alleged victim was 9 or 10, his mother left her children in Michoacán to find work in the United States, leaving Mr. Rocha in charge of his grandfather, who abandoned him and his siblings, leaving them effectively without any parents whatsoever.

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<sup>3</sup> S.F. Vol. XXVIII: 40. Exhibits Appendix 2 of 2. Communication from the petitioners received on August 8, 2012.

28. They argue that, without mitigating evidence, there was no basis for the jury to choose life over death. In this respect, petitioners point out that more than one juror in Mr. Rocha's case observed that the jury sentenced him to death because it learned little about him as a human being. Petitioners quote the statements of some jurors who indicated, *inter alia*, the following: "as for mitigation, I don't remember any";<sup>4</sup> "the defense never explained why he became the way he did";<sup>5</sup> "if the defense had made Rocha more human, if they managed to show that he came from a bad childhood, then that would have stuck in my mind and possibly made a difference in the decision of how to punish him."<sup>6</sup>

29. Petitioners argue that the picture that the jury saw was defined almost wholly by the prosecution. Defense counsel could allegedly have told a different story of Mr. Rocha's life with the assistance of mitigation witnesses, but they failed to uncover the facts that would have enabled them to humanize Mr. Rocha. They contend that this failure ultimately led the jury to recommend a sentence of death.

30. Therefore, according to the petitioners, the jury was not given a complete picture of Mr. Rocha or of the circumstances surrounding his actions. They state that defense counsel's complete abdication of their responsibility to defend Mr. Rocha's life at the penalty phase cannot be justified as a trial strategy and that international law requires that procedural guarantees of fairness and due process be strictly observed when a State seeks to impose the death penalty. Petitioners conclude that, but for defense counsel's errors and lack of effort, a reasonable probability exists that Mr. Rocha would not have been sentenced to death.

31. Based on all these facts, petitioners conclude that the United States violated Articles XVIII and XXVI of the American Declaration by providing incompetent defense counsel in a capital case, materially prejudicing Mr. Rocha.

### **3. Method of execution**

32. Mr. Rocha awaits execution by lethal injection. According to the petitioners, there is substantial evidence that lethal injection as currently practiced in Texas fails to comport with the requirement that a method of execution cause "the least possible physical and mental suffering." The petitioners refer to several defects in Texas' lethal injection protocol and in the procedures applied, which allegedly create an unnecessary risk of suffering.

33. With regard to the defects in the lethal injection drugs used at the time of the filing of the petition before the IACHR, petitioners stated that Texas, as most U.S. states, injected a combination of three chemical substances: sodium thiopental or sodium pentothal (an ultra short-acting barbiturate); pancuronium bromide or pavulon (a paralytic agent); and potassium chloride (the toxic agent which induces cardiac arrest).

34. According to the petitioners, the first substance was supposed to induce unconsciousness in the inmate while the other drugs were administered. If it did not function as intended, the inmate would be awake during the administration of the paralytic and toxic agents. Further, petitioners stated that only one pharmaceutical company in the world, with a plant in Italy, had been authorized by the FDA to produce and distribute sodium thiopental in the United States. They indicate that, after pressure from Italian and European authorities, in January 2011 the company announced that it was ceasing production of sodium thiopental, leading to a US-wide shortage of this substance.

35. The petitioners argue that, as a consequence of this shortage, some states have delayed executions and others have sought to obtain sodium thiopental from sources that are not approved by the

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<sup>4</sup> Affidavit of Ruby Horace Reynolds, p. 1. Exhibits Appendix 1 of 2. Communication from the petitioners received on August 8, 2012.

<sup>5</sup> Affidavit of Willie Lindsey, p. 1. Exhibits Appendix 1 of 2. Communication from the petitioners received on August 8, 2012.

<sup>6</sup> Affidavit of Terrence Lee Chamblee, p. 1. Exhibits Appendix 1 of 2. Communication from the petitioners received on August 8, 2012.

Food and Drug Administration (FDA). Without an anesthetic agent that induces unconsciousness, there would be, according to the petitioners, serious risk of suffocation and excruciating pain resulting from the injection of the two subsequent drugs. They conclude in this respect that it is imperative that the purity and efficacy of sodium thiopental is effectively monitored, and that the drug is administered by a trained anesthesiologist.

36. In supplemental observations dated December 28, 2012, the petitioners indicate that, as a result of nationwide shortages in some of the drugs that were used in lethal injections, in mid-2012 Texas began to execute individuals using a single, massive dose of pentobarbital. They argue that, although the use of a single-drug protocol alleviates many of the risks inherent in the three-drug protocol that was previously used in Texas, individuals subject to lethal injection in that state continue to suffer cruel, inhuman or degrading treatment or punishment. In this regard, petitioners refer to the comments of the Special Rapporteur on Torture in his 2012 report implying that all methods of capital punishment should now be deemed cruel and inhuman in light of contemporary human rights jurisprudence regarding corporal punishment.<sup>7</sup>

37. With regard to the alleged procedural defects in the lethal injection protocol, petitioners point out that researchers have discovered that in Texas lethal injections are administered by individuals with no training in anesthesia. They state that unknown executioners remotely administer the lethal chemicals from behind a wall or curtain without making any attempt to assess the depth of anesthesia of the executed inmate. Given that medical organizations prohibit the participation of medical professionals in executions, there is allegedly more regulation under Texas law for the training of those involved in animal euthanasia than for those involved in the executions of human beings. Further, petitioners allege that the FDA justified its failure to monitor the safety and efficacy of pharmaceuticals used in executions by claiming that such oversight would be inconsistent with its public health mandate.<sup>8</sup>

38. These defects, in combination with a lack of regulatory oversight by the FDA, make lethal injection, according to the petitioners, a cruel, infamous and unusual punishment, in violation of Article XXVI of the American Declaration.

#### **4. Conditions on death row in Texas**

39. According to the petitioners, Mr. Rocha has spent the last sixteen years on Texas' death row, where the conditions of confinement are harsher than any other death row in the United States. They state that death row prisoners are housed in small cells of approximately sixty square feet, with a sink, a toilet, and a thirty-inch-wide bunk. In addition to being single-celled, death row prisoners are allegedly segregated from other prisoners in every aspect of their lives, and communication on death row, accomplished by yelling between cells, is extremely difficult.

40. With regard to solitary confinement, petitioners add that prisoners are allowed no physical contact with family members, friends, or even their attorneys. Even in the days and hours before execution, the prisoner is allegedly not permitted to touch any family member or loved one. In addition, the only person they can reportedly receive phone calls from is their attorney – family and friends being limited to mailing letters. Petitioners also indicate that Texas has passed legislation banning the education of prisoners in administrative segregation.

41. Further, prisoners are allegedly given only limited time for exercise in small “cages,” which are not much different from being in a cell. Those with the best disciplinary records are usually given access

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<sup>7</sup> Petitioners cite the Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/67/279, 9 August 2012, par. 41.

<sup>8</sup> Press Release, Food and Drug Administration, Statement from the FDA Regarding Oversight of Lethal Injection Drugs and Release of Shipments to States (Jan. 4, 2011), available at <http://www.deathpenaltyinfo.org/statement-fda-concerning-importation-lethal-injection-drugs>. Original petition received on March 2, 2011, page 45.

to these indoor or outdoor “cages” for two hours per day and are not permitted to engage in group recreation or other communal activities. Prisoners considered to have disciplinary problems are allegedly allowed outside of their cells only three to four hours per week. In addition, petitioners allege that those prisoners are sometimes put in solitary confinement naked for days at a time, and are not allowed to have recreation (including depriving them of radios) or receive conventional food. According to reports from inmates, disciplinary action is often handed out at random or for infractions such as possession of an extra bar of soap.

42. Petitioners state that medical care and nutrition are a major concern for inmates given that breakfast is served at 3.00am, so inmates must choose between sleeping through the night or skipping the meal, and many feel hungry after lunch, having to buy additional food at a store in the prison facility. They also indicate that necessities like soap, shampoo, and deodorant are not provided by the prison and must also be purchased at the prison store.

43. Finally, petitioners allege that the sheer length of time that Mr. Rocha has awaited his execution on death row is cruel, infamous and unusual punishment and that the acute psychological damage caused by the “death row phenomenon” is internationally recognized. In this regard, referring to decisions issued by the European Court of Human Rights and by the Privy Council, they assert that Mr. Rocha’s sixteen years on death row far surpass the length of time considered to be cruel and inhuman.<sup>9</sup>

44. Petitioners conclude that the conditions under which Mr. Rocha has been confined and the length of confinement under such circumstances constitute a grave violation of the United States’ obligation to treat him humanely in violation of Articles XXV and XXVI of the American Declaration.

#### **B. Position of the State**

45. The IACHR has not received any information or observations from the State regarding Mr. Rocha’s allegations.

#### **IV. ESTABLISHED FACTS**

46. As it has in other cases, the Commission will offer a preliminary observation to the effect that an international proceeding concerning human rights violations has greater flexibility in assessing the evidence than domestic legal systems have.

47. Concerning the standard for assessing evidence in human rights cases, given the objectives of international human rights law, the Commission recalls that in the Inter-American procedure the assessment of evidence has greater flexibility than in the national legal systems. This is because the object of the analysis is not the determination of the criminal liability of those responsible for the violations of human rights, but the international responsibility of the State for the actions and omissions of its authorities. Precisely because of the nature of certain human rights violations, the Commission evaluates the sum of the evidence at its disposal, taking into consideration rules on the burden of proof according to the circumstances of the case. This leads on many occasions to logical inferences, presumptions and to the determination of facts from the body of evidence and with reference to more general contexts.

48. Therefore, in application of Article 43(1) of its Rules of Procedure, the Inter-American Commission will examine the facts alleged by the petitioners and the evidence provided during the processing of this case. It will also take into account decisions mentioned by the petitioners in their submissions to the Inter-American Commission. Concerning those decisions, the IACHR notes that while copies of those decisions are not in the case file, they were not contested by the State and an examination of the body of evidence revealed nothing to call into question the veracity of that information.

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<sup>9</sup> Petitioners cite *Soering v. The United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989); *Al-Saadoon and Mufdhi v. The United Kingdom*, 2010 Eur. Ct. H.R. 282; and *Pratt and Morgan v. The Attorney General of Jamaica*, 3 SLR 995, 2 AC 1, 4 All ER 769 (Privy Council 1993).

49. The IACHR will focus on the procedural history of the case, analyzing the most specific aspects in the respective sections that follow. With regard to the state and federal proceedings in Mr. Rocha's case, after a comprehensive review of the arguments and evidence presented by the petitioners, the Commission concludes that the following facts have been proven:

**A. State proceedings**

- Felix Rocha Diaz was convicted of capital murder and sentenced to death in November 1998 in the 338<sup>th</sup> Judicial District Court of Harris County, Texas. The Texas Court of Criminal Appeal affirmed the conviction and sentence.<sup>10</sup>
- Mr. Rocha's appointed state post-conviction counsel filed a document entitled "Incomplete Application for Habeas Corpus Relief" on July 11, 2000, and a "Superseding Application for Habeas Corpus Relief" on November 28, 2000. The Texas Court of Criminal Appeal denied the application.
- After filing federal petitions, Mr. Rocha returned to state court and sought review in the Texas Court of Criminal Appeals. On December 17, 2008, the Court dismissed Mr. Rocha's subsequent application.

**B. Federal proceedings**

- On September 10, 2003, Mr. Rocha filed a habeas petition in the United States District Court for the Southern District of Texas. After the ICJ issued its judgment in the Avena Case, Mr. Rocha filed a subsequent application in the Texas Court of Criminal Appeals, which refused to consider the claim. On March 31, 2008, the U.S. Supreme Court denied review of Mr. Rocha's petition for writ of certiorari.<sup>11</sup>
- Following the dismissal of his subsequent application on December 17, 2008, Mr. Rocha filed a 60(b) motion in the district court. The motion and certificate of appealability were denied.
- Mr. Rocha filed a notice of appeal. On September 9, 2010, the Fifth Circuit Court of Appeals upheld the district court's judgment,<sup>12</sup> denied rehearing on November 17, 2010,<sup>13</sup> and denied rehearing en banc on December 17, 2010.<sup>14</sup>
- On October 11, 2011, the United States Supreme Court denied Mr. Rocha's petition for writ of certiorari.

50. With regard to Mr. Rocha's childhood and social background, in an affidavit presented before the IACHR by Norma V. Solis, mitigator in capital cases, who performed a mitigation investigation in Mr. Rocha's case and journeyed to the places the alleged victim lived from birth and until the time that he left Mexico for the United States, it is stated, *inter alia*, that:<sup>15</sup>

Clara Diaz [Mr. Rocha's mother] suffered beatings at the hands of her husband, Guadalupe Rocha Rodriguez, throughout her marriage and throughout her pregnancy with Felix. [...]

<sup>10</sup> Rocha v. Texas, 16 S.W.3d 1 (Tex. Crim. App. 2000).

<sup>11</sup> Rocha v. Texas, 552 U.S. 1295 (2008).

<sup>12</sup> Rocha v. Thaler, 619 F.3d 387 (5<sup>th</sup> Cir. 2010).

<sup>13</sup> Rocha v. Thaler, 619 F.3d 815 (5<sup>th</sup> Cir. 2010).

<sup>14</sup> Rocha v. Thaler, 619 F.3d 218 (5<sup>th</sup> Cir. 2010).

<sup>15</sup> Affidavit of Norma V. Solis, September 5, 2003. Appendix D. Communication from the petitioners received on August 8, 2012.

Despite her pregnancy, Clara Diaz would go hungry in order to feed her children. It was learned that, when she became pregnant with Felix, she did not want another child [...] It was also stated that Guadalupe Rocha Rodriguez's beatings and "fury" seemed to escalate after Clara announced she was pregnant with Felix.

Clara Diaz was working and, in fact, was performing heavy manual labor, when she started having contractions. [...] Clara Diaz's labor lasted for two days. She was under a great deal of stress and it was feared the child would not live.

The room that Clara Diaz and Guadalupe Rocha Diaz and their [four] children lived in [was 24 by 8 feet, had only two walls] and the floor was made of dirt.

[Mr. Rocha's neighbors reported] that Felix was different than the other children. He would prefer to be naked and they had a very hard time keeping him clothed. He often was unaware of others' reactions to his nudity. [...] Felix did not have good verbal skills, but the neighbors could not tell if it was due to his shyness or inability to learn words.

It was reported that Felix's siblings were very impatient with him. They would become frustrated at the fact that he did not understand, that he would not follow their commands, and that he would go outside undressed.

51. According to Mr. Rocha's mother, her family was extremely poor and the alleged victim's father was very abusive. Mr. Rocha's mother reports that he "would go to the market, buy a piece of meat [...] tell her to put it on a plate [and] make [her and the children] sit around the table and watch him eat, without giving any of the meat to anyone else." Ms. Diaz also states that when she left Mexico Mr. Rocha was about 9 or 10 years old. In the years before she left, she noticed that he "was not like [her] other children. He wasn't as smart as the others, and he had many problems with learning how to do things, [...] Felix [...] could [not] initiate conversations with other children. [...] If Felix was given a task to do, he could not grasp what he was being told to do or how to do it."<sup>16</sup>

52. Further, the Inter-American Commission notes that most of the witnesses who submitted their affidavits before the IACHR on Mr. Rocha's family and social background, certified that they were never asked during the trial phase if they were willing to testify in Mr. Rocha's case.<sup>17</sup>

## **V. LEGAL ANALYSIS**

### **A. Preliminary matters**

53. Before embarking on its analysis of the merits in the case of Felix Rocha Diaz, the Inter-American Commission believes it should reiterate its previous rulings regarding the heightened scrutiny to be used in cases involving the death penalty. The right to life has received broad recognition as the supreme human right and as a *sine qua non* for the enjoyment of all other rights.

54. 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

<sup>16</sup> Affidavit of Clara Diaz, August 17, 2004, paragraphs 3, 4, 6, 23 and 26. Appendix D. Communication from the petitioners received on August 8, 2012.

<sup>17</sup> Affidavit of Margarito Diaz Pineda, August 15, 2003, paragraph 11; Maria Ines Rocha Rodriguez, August 15, 2003, paragraph 11; Laura Maldonado Granados, August 13, 2003, paragraph 7; Miguel Galvan Rios, August 13, 2003, paragraph 6; Narcisa Hernandez Gonzalez, August 13, 2003, paragraph 10; and Juan Vasquez, August 13, 2003, paragraph 11. Appendix D. Communication from the petitioners received on August 8, 2012.

international human rights bodies in cases involving the imposition of the death penalty,<sup>18</sup> and it has been set out and applied by the Inter-American Commission in previous capital cases brought before it.<sup>19</sup>

55. 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:<sup>20</sup>

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>21</sup>

56. The IACHR has further affirmed that it has competence to apply the heightened scrutiny test and is not precluded by the “fourth instance formula” which establishes that, in principle, it will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees. In this respect, the IACHR points out that the fourth instance formula does not preclude it from considering a case where the petitioner’s allegations entail a possible violation of any of the rights set forth in the American Declaration.<sup>22</sup>

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

58. Finally, the IACHR would like to briefly refer to the legal status of the American Declaration. The American Declaration is, for the Member States not parties to the American Convention on Human Rights, the source of international obligation related to the OAS Charter. The Charter of the Organization gave the IACHR the principal function of promoting the observance and protection of human rights in the Member States. Article 106 of the OAS Charter does not, however, list or define those rights. The General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October, 1979, agreed that the rights referred to in the Charter are those enunciated and defined in the American Declaration.<sup>23</sup> Therefore, the American Declaration crystallizes the fundamental principles recognized by the American States. The OAS General Assembly has also repeatedly recognized that the American Declaration is a source of international

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<sup>18</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 (finding that “because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life is not arbitrarily taken as a result”); United Nations Human Rights Committee, *Baboheram-Adhin et al. v. Suriname*, Communications Nos. 148-154/1983, adopted on April 4, 1985, para. 14.3 (observing that “the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State”); *Report of the United Nations Special Rapporteur on Extrajudicial Executions*, Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, UN Doc.E/CN.4/1995/61 (December 14, 1994) (“the Ndiaye Report”), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trial to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life).

<sup>19</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>20</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>21</sup> IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, para. 34.

<sup>22</sup> See, *mutatis mutandi*, IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996, para. 170.

<sup>23</sup> See Article 1 of the Commission’s Statute approved by Resolution No. 447, adopted by the General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October, 1979.

obligation for the member states of the OAS.<sup>24</sup> In this respect, the Inter-American Court of Human Rights noted that “by means of an authoritative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter.”<sup>25</sup>

**B. Right to a fair trial and right to due process of law (Articles XVIII and XXVI of the American Declaration)**

59. The American Declaration guarantees the right of all persons to a fair trial and to due process of law, respectively, in the following terms:

Article XVIII – Right to a fair trial

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

Article XXVI – Right to due process of law

Every accused person is presumed to be innocent until 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.

**1. Right to consular notification and assistance**

60. The petitioners allege that the arresting authorities failed to notify Mr. Rocha of his right to consular assistance in violation of Article 36 of the Vienna Convention on Consular Relations (“VCCR”). They believe that, if the Mexican government had been notified, it would have provided active and far reaching assistance to the alleged victim, who wouldn’t have given an incriminating statement to the police. The petitioners argue that Mr. Rocha’s execution would therefore violate Articles I, XVIII and XXVI of the American Declaration.

61. On March 31, 2004, the International Court of Justice found in the *Case concerning Avena and Other Mexican Nationals (Mexico v. the United States of America)* that the United States of America had breached its obligations under the Vienna Convention with respect to Mr. Avena and 50 other Mexican nationals arrested and imprisoned for crimes in the United States by failing to inform them, without delay upon their detention, of their rights under Article 36 paragraph 1 (b) of the Vienna Convention.<sup>26</sup> The Court found that those individuals were entitled to review and reconsideration of their convictions and sentences regardless of their failure to comply with generally applicable state rules governing challenges to criminal convictions. Mr. Rocha was one of the 51 Mexican nationals named in the ICJ judgment.<sup>27</sup>

<sup>24</sup> See in this regard, Resolution 314 (VII-0/77) of June 22, 1977, charging the Inter-American Commission with the preparation of a study to “set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man;” Resolution 371 (VIII-0/78) of July 1, 1978, in which the General Assembly reaffirmed “its commitment to promote the observance of the American Declaration of the Rights and Duties of Man;” and Resolution 370 (VIII-0/78) of July 1, 1978, referring to the “international commitments” of a member state of the Organization to respect the rights of man “recognized in the American Declaration of the Rights and Duties of Man.”

<sup>25</sup> I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 43.

<sup>26</sup> International Court of Justice, *Case concerning Avena and Other Mexican Nationals (Mexico v. the United States of America)*, Judgment of 31 March, 2004. Available at: <http://www.icj-cij.org/docket/files/128/8188.pdf>

<sup>27</sup> ICJ, *Case concerning Avena and Other Mexican Nationals (Mexico v. the United States of America)*, Judgment of 31 March, 2004, p. 17.

62. On March 25, 2008, the United States Supreme Court held, in *Medellín v. Texas*, that in the absence of congressional legislation, the ICJ judgment in *Avena* was not directly enforceable as domestic law in state courts because the Optional Protocol to the Vienna Convention was not “self-executing.”<sup>28</sup> However, the opinions agreed that compliance with *Avena* is an international legal obligation of the United States and that Congress has the authority to implement that obligation.

63. 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>29</sup>

64. In this regard, the Commission has noted that “non-compliance with obligations under Article 36 of the Vienna Convention is a factor that must be evaluated together with all of the other circumstances of each case in order to determine whether a defendant received a fair trial.”<sup>30</sup>

65. In addition, the “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas” adopted by the Commission in 2008 establish that:

Persons deprived of liberty in a Member State of the Organization of American States of which they are not nationals, shall be informed, without delay, and in any case before they make any statement to the competent authorities, of their right to consular or diplomatic assistance, and to request that consular or diplomatic authorities be notified of their deprivation of liberty immediately. Furthermore, they shall have the right to communicate with their diplomatic and consular authorities freely and in private.<sup>31</sup>

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

[u]nless predecessor counsel has already done so, counsel representing a foreign national should: 1. immediately advise the client of his or her right to communicate with the relevant consular office; and 2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client’s consular office and inform it of the client’s detention or arrest [...]<sup>32</sup>

<sup>28</sup> *Medellín v. Texas*, 552 U.S. 491 (2008). Available at: <http://www.supremecourt.gov/opinions/07pdf/06-984.pdf>

<sup>29</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>30</sup> IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), *Medellín, Ramírez Cardenas and Leal García*, United States, August 7, 2009, para. 127.

<sup>31</sup> Principle V (Due Process) of the “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas” approved by the Commission during its 131<sup>st</sup> regular period of sessions, held from March 3-14, 2008, <http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>

<sup>32</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.”

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

68. The Inter-American Commission values the efforts made by the federal authorities and the U.S. Congress to adopt legislation to implement the *Avena* judgment. However, as of the date of the issuance of this report, this legislation has not yet been adopted and Mr. Rocha has not been granted the right to judicial review and reconsideration of his conviction and sentence to determine whether he was prejudiced by the violation of his consular rights.

69. Based upon the foregoing, the IACHR concludes that the State's obligation under Article 36.1 of the Vienna Convention to inform Mr. Rocha of his right to consular notification and assistance constituted a fundamental component of the due process standards to which he was entitled under the American Declaration. Therefore, the State's failure to respect and ensure this obligation deprived 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**

70. According to the petitioners, Mr. Rocha's court-appointed counsel failed to meaningfully investigate, develop and present substantial mitigating evidence. Defense counsel reportedly did not take the time to investigate or present any mitigating evidence regarding Mr. Rocha's life in Mexico or the United States. Therefore, the petitioners conclude that he was allegedly sentenced to death by a jury whose members had no information on Mr. Rocha's deplorable living conditions, abuse and extreme poverty that surrounded his childhood. Petitioners allege that these facts constitute a violation of Articles XVIII and XXVI of the American Declaration.

71. According to the facts established in this report, six witnesses, who had relevant information regarding Mr. Rocha's childhood and adolescence, were never asked by the defense counsel if they were willing to testify in Mr. Rocha's case.<sup>33</sup>

72. The Inter-American Commission has indicated that:

The 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. Adequate legal representation is a fundamental component of the right to a fair trial.

[...]

The State cannot be held responsible for all deficiencies in the conduct of State-funded defense counsel. National authorities are, however, required [...] to intervene if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention. Rigorous compliance with the defendant's right to competent counsel is compelled by the possibility of the application of the death penalty.<sup>34</sup>

<sup>33</sup> Affidavit of Margarito Diaz Pineda, August 15, 2003, paragraph 11; Maria Ines Rocha Rodriguez, August 15, 2003, paragraph 11; Laura Maldonado Granados, August 13, 2003, paragraph 7; Miguel Galvan Rios, August 13, 2003, paragraph 6; Narcisa Hernandez Gonzalez, August 13, 2003, paragraph 10; and Juan Vasquez, August 13, 2003, paragraph 11. Appendix D. Communication from the petitioners received on August 8, 2012.

<sup>34</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.

73. The IACHR 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>35</sup> In this respect, it has also stated that the due process guarantees under the American Declaration:

[...] guarantee an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of the defendant’s case, in light of such considerations as the offender’s character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.<sup>36</sup>

74. 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 emphasize the importance of investigating and presenting mitigating evidence in death penalty cases.<sup>37</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>38</sup>

75. 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>39</sup>

76. With regard to the laws of the United States, the Commission has recognized that they: offer extensive due process protections to individuals who are the subject of criminal proceedings, including the right to effective legal representation supplied at public expense if an individual cannot afford an attorney. While it is fundamental for these protections to be

<sup>35</sup> IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 134. See also IACHR, Report N° 38/00 (Baptiste), Grenada, Annual Report of the IACHR 1999, paras. 91, 92; Report N° 41/00 (McKenzie et al.) Jamaica, Annual Report of the IACHR 1999, paras. 204, 205; Case N° 12.067 (Michael Edwards et al.), The Bahamas, Annual Report of the IACHR 2000, paras. 151-153.

<sup>36</sup> IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 134. See also IACHR, Report N° 38/00 (Baptiste), Grenada, Annual Report of the IACHR 1999, paras. 91, 92; Report N° 41/00 (McKenzie et al.) Jamaica, Annual Report of the IACHR 1999, paras. 204, 205; Case N° 12.067 (Michael Edwards et al.), The Bahamas, Annual Report of the IACHR 2000, paras. 151-153.

<sup>37</sup> American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003) (<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>), Guideline 10.7 – Investigation.

<sup>38</sup> American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003) (<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>), Guideline 10.7 – Investigation, at 82.

<sup>39</sup> American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003) (<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>), Guideline 10.7 – Investigation, at 83.

prescribed under domestic law, it is also necessary for States to ensure that these protections are provided in practice in the circumstances of each individual defendant.<sup>40</sup>

77. However, as highlighted by a recent report of The Constitution Project's Death Penalty Committee, it should also be noted that an attorney's errors, "not only adversely affect the client at trial and sentencing, but also vastly reduce the scope of appellate review, decreasing the possibility that errors will be corrected later."<sup>41</sup> In this regard, the report states that "courts have found that the vast majority of this attorney incompetence does not fall below the standard for ineffective counsel under *Strickland v. Washington*, which requires the defendant to show both that counsel's performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence." Therefore, "the client continues to pay for the attorney's errors, sometimes with his or her life."<sup>42</sup>

78. Considering that the fundamental due process and fair trial requirements for capital trials include the obligation to afford adequate legal representation, and that the failure to develop and present potentially mitigating evidence in a capital case would constitute inadequate representation, the Commission has analyzed the information presented as to trial preparation, and specifically the failure to seek, develop or present elements that were in fact available in mitigation of the gravity of the crime. As a consequence of this failure on the part of state appointed counsel in a crucial phase of the process, the Inter-American Commission concludes that the United States violated Mr. Rocha's right to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration.

**C. Right to humane treatment during custody and not to receive cruel, infamous or unusual punishment (Articles XXV and XXVI of the American Declaration)**

79. The third paragraph of Article XXV and second paragraph of Article XXVI of the American Declaration provide that:

Article XXV – Right of protection from arbitrary arrest

[...] Every individual who has been deprived of his liberty [...] has the right to humane treatment during the time he is in custody.

Article XXVI – Right to due process of law

Every person accused of an offense has the right [...] not to receive cruel, infamous or unusual punishment.

**1. Method of execution**

80. The petitioners originally argued that the three-drug protocol used in lethal injections in Texas at the time of the filing of the petition failed to comport with the requirement that a method of execution cause "the least possible physical and mental suffering." They also highlighted some alleged procedural defects in the lethal injection protocol. According to the petitioners, these facts make lethal injection a cruel, infamous and unusual punishment in violation of Article XXVI of the American Declaration.

81. As indicated in paragraph 36 *supra*, on December 28, 2012, the petitioners presented supplemental observations indicating that in mid-2012, as a result of nationwide shortages in some of the

<sup>40</sup> IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 137.

<sup>41</sup> Irreversible Error: Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment, A Report of The Constitution Project's Death Penalty Committee, 2014, p. 86.

<sup>42</sup> Irreversible Error: Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment, A Report of The Constitution Project's Death Penalty Committee, 2014, p. 89.

drugs that were used in lethal injections, Texas began to execute individuals using a single, massive dose of pentobarbital. They concede that the use of a single-drug protocol “alleviates many of the risks inherent in the three-drug protocol that was previously used in Texas.”<sup>43</sup> However, petitioners allege that individuals subject to lethal injection in Texas “continue to suffer cruel, inhuman or degrading treatment or punishment.”<sup>44</sup>

82. With regard to the drugs currently used in lethal injections in Texas, this Commission notes that the petitioners do not explain how this single-drug protocol creates an unnecessary risk of suffering. In particular, they do not allege any particular deficiency in the composition of the drug the state of Texas intends to use in Mr. Rocha’s execution or in other executions in Texas. Likewise, there’s no allegation in the file concerning any failure of the state’s authorities to inform Mr. Rocha or other death row inmates the source of the drug used in this new single-drug protocol. Therefore, the IACHR lacks sufficient information for a detailed analysis in the specific case of whether the current single-drug protocol violates Article XXVI of the American Declaration.

83. In addition, the petitioners allege a lack of meaningful training of the execution team as well as a lack of federal oversight regarding the drugs used in lethal injections. Regarding the former, petitioners argue that medical professionals are prohibited from participating in executions and therefore lethal injections in Texas are administered by individuals with no training in anesthesia. With regard to the latter, the Commission notes that, according to a public statement issued by the Food and Drug Administration on January 4, 2011, “in keeping with established practice, FDA does not review or approve products for the purpose of lethal injection.”<sup>45</sup>

84. 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.

85. The Inter-American Commission notes in this regard that the due process requirement is not limited to the conviction and post-conviction proceedings.<sup>46</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.

86. 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>47</sup>

87. Based on the above considerations, the IACHR concludes that the State is exposing Mr. Rocha to unjustified anguish and fear that amount to a violation of his right to humane treatment and not to receive cruel, infamous or unusual punishment set forth in Articles XXV and XXVI of the Declaration.

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<sup>43</sup> Communication from the petitioners dated December 28, 2012, p. 1.

<sup>44</sup> Communication from the petitioners dated December 28, 2012, p. 1.

<sup>45</sup> Press Release, Food and Drug Administration, Statement from the FDA Regarding Oversight of Lethal Injection Drugs and Release of Shipments to States (Jan. 4, 2011), available at <http://www.deathpenaltyinfo.org/statement-fda-concerning-importation-lethal-injection-drugs>. Original petition received on March 2, 2011, page 45.

<sup>46</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 123.

<sup>47</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, parr. 31.

## 2. Death row confinement conditions

88. The petitioners allege that Mr. Rocha has spent the last sixteen years on Texas' death row under inhuman conditions. In particular, they argue that death row prisoners are housed in small cells of approximately sixty square feet and subjected to solitary confinement, being therefore segregated from other prisoners in every aspect of their lives. In this respect, they indicate that prisoners are allowed no physical contact with family members, friends, or even their attorneys. In addition prisoners are reportedly given only limited time for exercise in small "cages." The petitioners further claim that prisoners in solitary confinement are not allowed to receive conventional food and that Texas' legislation bans the education of prisoners in administrative segregation.

89. According to international human rights standards, persons deprived of liberty on death row should not be subjected to solitary confinement as a regular condition of imprisonment, but only in exceptional circumstances and solely as a disciplinary punishment in those instances and under the same conditions in which these measures apply to the rest of the inmates.<sup>48</sup>

90. The IACHR has written that solitary confinement should only be used on an exceptional basis, for the shortest amount of time possible and only as a measure of last resort.<sup>49</sup> The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas underscore the exceptional nature of the practice of solitary confinement:

Solitary confinement shall only be permitted as a disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the institution's internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel.<sup>50</sup>

91. In assessing whether solitary confinement falls within the ambit of Article 3 (Prohibition of torture) in a particular case, the European Court of Human Rights will consider "the stringency of the measure, its duration, the objective pursued and its effects on the person concerned."<sup>51</sup> At the same time, it has found that "where conditions of detention comply with the Convention and the detainee has contact with the outside world, through visits and contact with prison staff, the prohibition of contact with other prisoners will not breach Article 3 provided that the regime is proportional to the aim to be achieved, and the period of solitary detention is not excessive."<sup>52</sup>

92. Similarly, the United Nations Human Rights Committee has concluded that solitary confinement is justifiable only in case of urgent need, in exceptional circumstances and for limited periods of time.<sup>53</sup>

93. On October 18, 2011, the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment called for the prohibition of indefinite solitary confinement and

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<sup>48</sup> IACHR, Report on the human rights of persons deprived of liberty in the Americas, OEA/Ser.L/V/II.Doc.64., December 31, 2011, paragraph 517.

<sup>49</sup> IACHR, Report on the human rights of persons deprived of liberty in the Americas, OEA/Ser.L/V/II.Doc.64., December 31, 2011, paragraph 411.

<sup>50</sup> IACHR, Resolution 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XXII (3).

<sup>51</sup> European Commission of Human Rights, *Dhoest v Belgium*, Application No. 10448/83, May 14, 1987, parr. 118.

<sup>52</sup> *Torture in International Law: a guide to jurisprudence*, APT and CEJIL, 2008, p. 81.

<sup>53</sup> Human Rights Committee, Concluding Observations on Denmark, UN Doc. CCPR/CO/70/DNK, 2000, parr. 12.

prolonged solitary confinement, which he defined as for any period in excess of 15 days.<sup>54</sup> The Special Rapporteur concluded that 15 days “is the limit between ‘solitary confinement’ and ‘prolonged solitary confinement’ because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible.” The U.N. Rapporteur also observed that “even a few days of solitary confinement will shift an individual’s brain activity towards an abnormal pattern characteristic of stupor and delirium.”<sup>55</sup>

94. More recently, the U.N. Special Rapporteur stated that, in order to be consistent with human rights standards, “no prisoner, including those serving life sentence and prisoners on death row, shall be held in solitary confinement merely because of the gravity of the crime.”<sup>56</sup>

95. With regard to the cell size, the U.N. Special Rapporteur indicates that, while there is no universal instrument that specifies a minimum acceptable size, domestic and regional jurisdictions have sometimes ruled on the matter. According to the European Court of Human Rights in *Ramírez Sanchez v. France*, a cell measuring 6.84 square meters (73.6 square feet) is “large enough” for single occupancy. However, the Special Rapporteur disagrees, “especially if the single cell should also contain, at a minimum, toilet and washing facilities, bedding and a desk.”<sup>57</sup>

96. Solitary confinement can have serious psychological effects, ranging from depression to paranoia and psychosis, as well as physiological effects such as cardiovascular problems and profound fatigue.<sup>58</sup> The European Court has held that protracted sensory isolation, coupled with social isolation, can destroy the personality and constitutes a form of inhuman treatment.<sup>59</sup>

97. The United Nations Human Rights Committee has expressed its concern over the practice in some maximum security prisons in the United States “to hold detainees in prolonged cellular confinement, and to allow them out-of-cell recreation for only five hours per week, in general conditions of strict regimentation in a depersonalized environment.”<sup>60</sup>

98. For its part, in an application filed with the Inter-American Court in connection with a death penalty case in which the victims were held in solitary confinement for protracted periods, the Inter-American Commission established that the State had failed to ensure respect for the inherent dignity of the human person, regardless of the circumstance, and the right not to be subjected to cruel, inhuman or degrading treatment or punishment.<sup>61</sup>

<sup>54</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, January 18, 2010, A/HRC/19/61, para. 18.

<sup>55</sup> United Nations, General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, August 5, 2011, A/66/268, paragraphs 26 and 55.

<sup>56</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, August 9, 2013, A/68/295, para. 61.

<sup>57</sup> United Nations, General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, August 5, 2011, A/66/268, para. 49.

<sup>58</sup> Shalev, Sharon, *A sourcebook on solitary confinement*, Mannheim Centre for Criminology, LSE, 2008, pp. 15 and 16. Available at: [http://solitaryconfinement.org/uploads/sourcebook\\_web.pdf](http://solitaryconfinement.org/uploads/sourcebook_web.pdf), cited in IACHR, Report on the human rights of persons deprived of liberty in the Americas, OEA/Ser.L/V/II.Doc.64., December 31, 2011, para. 492.

<sup>59</sup> *European Court of Human Rights, Case of Ramírez Sánchez v. France, (Application no. 59450/00), Judgment of July 4, 2006, Grand Chamber*, paragraphs 120-123, cited in IACHR, Report on the human rights of persons deprived of liberty in the Americas, OEA/Ser.L/V/II.Doc.64., December 31, 2011, para. 416.

<sup>60</sup> United Nations, Human Rights Committee, CCPR/C/USA/CO/3, September 15, 2006, paragraph 32. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement>

<sup>61</sup> I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of June 21, 2002. Series C No. 94, paragraphs 154-156.

99. The Inter-American Commission reaffirms that all persons deprived of liberty must receive humane treatment, commensurate with respect for their inherent dignity. This means that the conditions of imprisonment of persons sentenced to death must meet the same international norms and standards that apply in general to persons deprived of liberty. In this regard, the duties of the State to respect and ensure the right to humane treatment of all persons under its jurisdiction apply regardless of the nature of the conduct for which the person in question has been deprived of his liberty.<sup>62</sup>

100. Therefore, based on the information available, the IACHR considers that Mr. Felix Rocha Diaz has been held under prolonged solitary confinement for almost two decades solely on the basis of the fact that he had been sentenced to death. Measures of general application such as prohibiting any form of physical contact with family members and attorneys, and with other inmates, are in such a circumstance disproportionate, illegitimate and unnecessary.

101. Based on international human rights standards, the Inter-American Commission concludes that by keeping Mr. Rocha in prolonged solitary confinement, the United States is subjecting him to inhumane treatment during his incarceration and imposing cruel, infamous and unusual punishment, in violation of Articles XXV and XXVI of the American Declaration.

#### **D. Right to life (Article I of the American Declaration)**

102. Article I of the American Declaration provides that:

Article I - Right to life, liberty and personal security

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

103. According to the “fourth instance formula”, in principle, the Inter-American Commission will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees. This is because, in principle, the IACHR does not have the authority to superimpose its own interpretations on evaluations of facts by domestic organs. However, the fourth instance formula does not preclude the Inter-American Commission from considering a case where the petitioner’s allegations entail a possible violation of any of the rights set forth in the American Declaration.<sup>63</sup> This authority is enhanced in cases involving the imposition of the death penalty given its irreversible nature.

104. The Inter-American Commission notes that it is the competence of domestic courts, and not of the Commission, to interpret and apply domestic law, and, in the instant case, to determine whether the alleged victim is innocent or guilty. However, as noted above, the IACHR must 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 American Declaration.<sup>64</sup>

105. In evaluating the information on the record, the Inter-American Commission concludes that the manner in which certain evidence directly pertinent to the basis for Mr. Rocha’s capital conviction was treated in the course of his criminal proceedings –specifically, the matters of mitigation and lack of consular notification-- failed to meet the rigorous standard of due process applicable in capital cases and amounted to a denial of justice contrary to the fair trial and due process standards.

106. When a convicted prisoner’s right to a fair trial has been violated in proceedings through which the death penalty was imposed, the IACHR has maintained that executing the person under such a

<sup>62</sup> IACHR, Report on the human rights of persons deprived of liberty in the Americas, OEA/Ser.L/V/II.Doc.64., December 31, 2011, para. 513.

<sup>63</sup> See, *mutatis mutandi*, IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996.

<sup>64</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 129.

sentence would be an extremely grave and deliberate violation of the right to life set forth in Article I of the American Declaration.<sup>65</sup> Therefore, the IACHR concludes that the imposition of the death penalty in such circumstances would constitute a grave violation of Mr. Rocha's right to life recognized under Article I of the American Declaration.

## VI. ACTIONS SUBSEQUENT TO REPORT No. 41/14

107. On July 17, 2014, the Inter-American Commission approved Report No. 41/14 on the merits of this matter, which comprises paragraphs 1 to 106 *supra*, with the following recommendations to the State:

1. Grant Felix Rocha Diaz effective relief, including the review of his trial in accordance with the guarantees of due process and a fair trial enshrined in Articles I, XVIII and XXVI of the American Declaration;
2. Review its laws, procedures, and practices to ensure that people accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII, XXV and XXVI thereof;
3. Ensure that every foreign national deprived of his or her liberty is informed, without delay and prior to his or her first statement, of his or her right to consular assistance and to request that the diplomatic authorities be immediately notified of his or her arrest or detention;
4. Push for urgent passage of the bill for the "Consular Notification Compliance Act" ("CNCA"), which has been pending with the United States Congress since 2011;
5. Ensure that legal counsel provided by the State in death penalty cases is effective, trained to serve in death penalty cases, and able to thoroughly and diligently investigate all mitigating evidence;
6. Ensure that the drugs used in lethal injection are subject to government approval and regulation, that the execution team has appropriate medical training and that lethal injection protocols are available to the public;
7. Ensure that persons sentenced to death have access to information, in a timely manner, related to the precise procedures to be followed in their execution, the drugs and doses to be used, and the composition of the execution team as well as the training of its members. The State must also ensure that persons sentenced to death have the opportunity to challenge every aspect of the execution procedure;
8. Review its laws, procedures and practices to ensure that solitary confinement is not used as a court-imposed sentence in the case of persons sentenced to death. Ensure that solitary confinement is reserved for only the most exceptional circumstances, in accordance with international standards;
9. Ensure that persons sentenced to death have the opportunity to have contact with family members and access to various programs and activities; and
10. Given the violations of the American Declaration that the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American

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<sup>65</sup> IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, para. 55.

Commission is recommending to the United States that it adopt a moratorium on executions of persons sentenced to death.<sup>66</sup>

108. On August 4, 2014, the report was transmitted to the State with a time period of two months to inform the Inter-American Commission on the measures taken to comply with its recommendations. On that same date, the petitioners were notified of the adoption of the report. No response was received from the State on the measures taken to comply with the recommendations set forth in Report No. 41/14.

109. On November 4, 2014, during its 153<sup>rd</sup> period of sessions, the Inter-American Commission approved Report No. 91/14 containing the final conclusions and recommendations indicated *infra*. As set forth in Article 47.2 of its Rules of Procedure, on November 13, 2014, the IACHR transmitted the report to the State with a time period of two months to present information on compliance with the final recommendations. On that same date the IACHR transmitted the report to the petitioner. No response was received within the stipulated period.

## VII. FINAL CONCLUSIONS AND RECOMMENDATIONS

110. In accordance with the legal and factual considerations set out in this report, the Inter-American Commission concludes that the United States is responsible for the violation of the right to life, liberty and personal security (Article I), right to a fair trial (Article XVIII), right of protection from arbitrary arrest (Article XXV) and right to due process of law (Article XXVI) guaranteed in the American Declaration, with respect to Felix Rocha Diaz. Consequently, should the State carry out the execution of Mr. Rocha, it would be committing a serious and irreparable violation of the basic right to life enshrined in Article I of the American Declaration.

111. Felix Rocha Diaz is the beneficiary of precautionary measures adopted by the Inter-American Commission under Article 25 of its Rules of Procedure. The Inter-American Commission must remind the State that carrying out a death sentence in such circumstances would not only cause irreparable harm to the person but would also deny his right to petition the inter-American human rights system, and that such a measure is contrary to the fundamental human rights obligations of an OAS member state pursuant to the Charter of the Organization and the instruments deriving from it.<sup>67</sup>

112. On the basis of the facts and information provided, the IACHR finds that the State has not taken measures toward compliance with the recommendations in the merits report in this case. Accordingly,

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

1. Grant Felix Rocha Diaz effective relief, including the review of his trial in accordance with the guarantees of due process and a fair trial enshrined in Articles I, XVIII and XXVI of the American Declaration;
2. Review its laws, procedures, and practices to ensure that people accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII, XXV and XXVI thereof;

<sup>66</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.

<sup>67</sup> See: IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, para. 66; Report No. 52/01, Case No. 12.243, Juan Raúl Garza, United States, Annual Report of the IACHR 2000, para. 117; IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Doc.OEA/Ser.L/V/II.11doc.21rev. (April 6, 2001) paras. 71 and 72. See also: International Court of Justice, *Case re. the Vienna Convention on Consular Relations (Germany v. United States of America)*, Request for the Indication of Provisional Measures, Order of March 3, 1999, General List, No. 104, paras. 22-28; United Nations Human Rights Committee, *Dante Pindiong et al. v. Philippines*, Communication No. 869/1999, UN Doc. CCPR/C/70/D/869.

3. Ensure that every foreign national deprived of his or her liberty is informed, without delay and prior to his or her first statement, of his or her right to consular assistance and to request that the diplomatic authorities be immediately notified of his or her arrest or detention;

4. Push for urgent passage of the bill for the “Consular Notification Compliance Act” (“CNCA”), which has been pending with the United States Congress since 2011;

5. Ensure that legal counsel provided by the State in death penalty cases is effective, trained to serve in death penalty cases, and able to thoroughly and diligently investigate all mitigating evidence;

6. Ensure that the drugs used in lethal injection are subject to government approval and regulation, that the execution team has appropriate medical training and that lethal injection protocols are available to the public;

7. Ensure that persons sentenced to death have access to information, in a timely manner, related to the precise procedures to be followed in their execution, the drugs and doses to be used, and the composition of the execution team as well as the training of its members. The State must also ensure that persons sentenced to death have the opportunity to challenge every aspect of the execution procedure;

8. Review its laws, procedures and practices to ensure that solitary confinement is not used as a court-imposed sentence in the case of persons sentenced to death. Ensure that solitary confinement is reserved for only the most exceptional circumstances, in accordance with international standards;

9. Ensure that persons sentenced to death have the opportunity to have contact with family members and access to various programs and activities; and

10. Given the violations of the American Declaration that the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission is recommending to the United States that it adopt a moratorium on executions of persons sentenced to death.<sup>68</sup>

### **VIII. PUBLICATION**

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

Done and signed in the city of Washington, D.C., on the 23<sup>rd</sup> day of the month of March, 2015. (Signed): Rose-Marie Belle Antoine, President; Felipe González, Rosa María Ortiz, Tracy Robinson, and Paulo Vannuchi, Commissioners.

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<sup>68</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.