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REPORT No. 44/14
CASE 12.873

REPORT ON MERITS (PUBLICATION)

EDGAR TAMAYO ARIAS
UNITED STATES

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TABLE OF CONTENTS

[*] 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 study and decision of 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 January 6, 2012, 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 from Northwestern University School of Law ("the petitioner") against the United States of America ("the State" or "the United States"). The petition was lodged on behalf of Edgar Tamayo Arias ("the alleged victim" or "Mr. Tamayo") who was deprived of his liberty on death row in the state of Texas. Mr. Tamayo was executed on January 22, 2014.

2. The petitioner contends that Mr. Tamayo's trial failed to meet minimum standards of fairness in violation of international law. In particular, she alleges that Mr. Tamayo was deprived of any opportunity to seek consular assistance as a result of Texas' failure to notify him of his right to contact a consular official under Article 36 of the Vienna Convention on Consular Relations. The petitioner also claims that the alleged victim's court-appointed trial counsel failed to investigate and present substantial, readily available evidence in mitigation of the death penalty. According to the petitioner, if the jury had heard such mitigating evidence, Mr. Tamayo would probably have received a life sentence. Further, the petitioner asserts that the alleged victim has been denied any opportunity to present evidence regarding his mental and intellectual disability. Finally, the petitioner holds that the conditions of confinement on death row are inhumane and that the method of execution would subject Mr. Tamayo to excessive and avoidable pain and suffering.

3. The State does not contest the fact that it violated the Vienna Convention in Mr. Tamayo's case but argues that consular notification is not a human right and that the Inter-American Commission lacks competence to review claims under the Vienna Convention. The State also affirms that Mr. Tamayo was afforded effective assistance of counsel at trial, and that assigned counsel made reasonable and strategic choices. According to the State, the petitioner has not proven sufficiently severe "mental impairment" such that Mr. Tamayo's death sentence would constitute cruel and unusual punishment in violation of the rights recognized in the American Declaration. Regarding conditions of detention on death row, the State argues that they do not constitute cruel and unusual punishment. Finally, the State asserts that petitioner has not exhausted domestic remedies with regard to the method of execution. It notes, however, that U.S. courts have carefully reviewed and rejected other claims alleging that states' lethal injection protocols constitute cruel and unusual punishment. In this respect, the State concludes that the method of legal injection currently being used by Texas is humane, and carefully administered.

4. On July 17, 2012, during its 145th regular sessions, the IACHR examined the contentions of the petitioner 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 (Right to life, liberty and personal security), XVIII (Right to a fair trial), XXV (Right to protection from arbitrary arrest) and XXVI (Right to due process of law) of the American Declaration; and to continue with the analysis of the merits of the case. It also resolved

[*] 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 study and decision of 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.

to publish Admissibility Report N° 73/12 and to include it in its Annual Report to the General Assembly of the Organization of American States. The petition was then registered as Case No. 12.873.

5. In the instant report, after analyzing the position of the petitioner and the State, and the available information, the Inter-American Commission concludes that the United States is responsible for violating Articles I, XVIII, XXV and XXVI of the American Declaration with respect to Edgar Tamayo Arias. Consequently, should the State carry out the execution of Mr. Tamayo, it would also be committing a serious and irreparable violation of the basic right to life recognized in Article I of the American Declaration.

II. PROCEEDINGS SUBSEQUENT TO REPORT No. 73/12

6. On July 24, 2012, the IACHR forwarded Admissibility Report No. 73/12 to the State and to the petitioner. In accordance with the Rules of Procedure in force at the time, the Inter-American Commission set a deadline of three months for the petitioner 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.

7. On December 28, 2012, the petitioner submitted additional observations on the merits, the pertinent parts of which were duly forwarded to the State on February 20, 2013. On October 8, 2013, the petitioner presented supplemental observations. On November 11, 2013, the IACHR forwarded the relevant parts to the State, and set a time period of one month to submit its observations.

2.

8. On December 26, 2013, the IACHR received the observations on the merits from the State, the pertinent parts of which were duly forwarded to the petitioner on January 3, 2014.

Precautionary Measures

9. On January 18, 2012, the IACHR 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 it would be able to pronounce on the merits of the petition. In light of the imminent execution of Mr. Tamayo, scheduled for January 22, 2014, the Inter-American Commission, by note dated November 26, 2013, reiterated the request to the State.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

10. According to the information available, on January 31, 1994, shortly after 3:30 a.m., Mr. Tamayo, a Mexican national, was arrested and charged with capital murder in connection with the death of Officer Guy Gaddis in Houston, Texas, earlier that same evening. The petitioner argues that at the time, Mr. Tamayo was heavily intoxicated and was high on heroin and phencyclidine (PCP). He was allegedly confused and disoriented from a night spent drinking and taking drugs. Nevertheless, the police allegedly began to interrogate him. At the end of the interrogation, Mr. Tamayo allegedly gave two incriminating statements in which he admitted that he killed Officer Gaddis. On October 31, 1994, the jury sentenced the alleged victim to death. The petitioner argues that Mr. Tamayo's trial failed to meet minimum standards of fairness in violation of international law.

11. In the supplemental observations filed on October 8, 2013, the petitioner states that on September 17, 2013, the 209th Judicial District Court of Harris County, Texas, scheduled Mr. Tamayo's execution for January 22, 2014. Mr. Tamayo allegedly informed the court of the Commission's issuance of precautionary measures and requested it to refrain from setting an execution date out of deference to the Commission's review of the human rights violations in his case. In addition, Mr. Tamayo reportedly advised the court of the pendency of legislation before the United States Congress that would implement the

International Court of Justice's *Avena* judgment.[1] Also, U.S. Secretary of State John Kerry wrote to the court and informed it of the United States Executive's ongoing effort to work with Congress to promote legislation protecting consular notification, and warned that the setting of an execution date would endanger the welfare of countless Americans abroad.

12. According to the information submitted, the Court ignored Mr. Tamayo's and the Secretary of State's requests. The petitioner states that the alleged victim will be executed on January 22, 2014, unless a court grants an extraordinary stay of execution, or the Texas Governor or Board of Pardons enters a reprieve.

1. Right to consular notification

13. The petitioner submits that Mr. Tamayo was deprived of any opportunity to seek consular assistance as a result of Texas' failure to notify him of his rights under Article 36 of the Vienna Convention on Consular Relations (the Vienna Convention), ratified by the United States on November 24, 1969. The petitioner indicates that the Vienna Convention's provisions are binding on all federal, state, and local authorities. She further notes that there is no dispute that the authorities failed to notify Mr. Tamayo of his consular rights given that he is one of the 51 Mexican nationals named in the ICJ's *Avena* judgment. The petitioner mentions that the ICJ determined that Texas authorities violated Mr. Tamayo's Vienna Convention rights and held that the United States must provide review and reconsideration of the conviction and sentence of Mr. Tamayo.

14. According to the petitioner, at the time of the arrest Mr. Tamayo told the police that he had attended school in Mexico, and could only speak some English. Although police had reason to know that he was a Mexican national, they allegedly never informed him of his right under the Vienna Convention to have the Mexican Consulate notified of his arrest. According to the petitioner, Mexican consular officials could have provided meaningful assistance to make up for defense counsel's shortcomings.

15. The petitioner claims that the violation of the Vienna Convention resulted in actual prejudice in the alleged victim's case. In this respect, she states that it was not until less than one week before his capital murder trial commenced that Mr. Tamayo was offered consular assistance. Therefore, it was allegedly too late for the consulate to assist in the investigation and preparation of witness testimony.

16. Given the active and far reaching assistance long provided by the Government of Mexico to its nationals facing the death penalty, the petitioner believes that, if Mr. Tamayo had received this assistance as from the time of his arrest, he would not have been sentenced to death. The Government of Mexico has allegedly been actively involved in Mr. Tamayo's defense since learning about his case. As an example, the petitioner indicates that they provided the funds to undertake neuropshychological testing when the courts declined to provide any, and assisted post-conviction counsel in investigating the childhood history that helped to explain the impact of the alleged victim's brain damage.

17. The petitioner argues that Mr. Tamayo would have benefitted enormously from consular assistance during his initial detention. The alleged victim had no formal education in the United States and he could not speak English. He used an interpreter throughout the trial. In addition to these linguistic barriers, cultural barriers allegedly impeded Mr. Tamayo from understanding his legal rights in the interrogation context. As an example, the petitioner mentions that in Mexico confessions given only to the judicial police have no evidentiary value and are inadmissible at trial.

18. According to the petitioner, had the Mexican consulate learned of Mr. Tamayo's detention at the time of his arrest, among other things the consulate would have: advised him about the significant differences between the U.S. and Mexican criminal justice systems; advised him to decline to answer any questions from the police without the presence of an attorney; arranged for and assisted counsel with investigations and record-gathering in Mexico; assisted counsel with funding trial preparation, if he was not

[1] Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.), 2004 I.C.J. 12 (Judgment of March 31, 2004).

able to secure the funds from American courts; and assisted counsel in locating witnesses. In particular, Mexico's involvement would have improved the quality of Mr. Tamayo's defense by assisting counsel in challenging the admission of Mr. Tamayo's statements taken in violation of the Vienna Convention and in gathering mitigating evidence related to Mr. Tamayo's childhood in Mexico and reported brain damage.

19. The petitioner submits that, in 2008, Texas assured the United States Supreme Court in the case of *Medellin v. Texas*[2] that Texas would comply with the ICJ's mandate. Specifically, Texas allegedly conceded that certain Mexican nationals subject to the *Avena* judgment may not have received review and reconsideration, and promised the Court that Texas would take certain measures to see that they did. Texas concluded "if any such individual should seek such review in a future federal habeas proceeding, the State of Texas will not only refrain from objecting, but will join the defense in asking the reviewing court to address the claim of prejudice on the merits."[3] This promise was allegedly reiterated by Governor Perry in a letter to former Secretary of State Condoleeza Rice and Attorney General Michael Mukasey on July 18, 2008.

20. According to the petitioner, Texas has conceded that Mr. Tamayo has not had any review of his Vienna Convention claim by any court, state or federal. Nevertheless, it has reneged on its promise to the Supreme Court, the Secretary of State and the Attorney General, and has refused to ask any court to review Mr. Tamayo's Vienna Convention claims.

21. The petitioner concludes that the failure of the arresting authorities to inform Mr. Tamayo of his right to consular notification, communication, and assistance prejudiced Mr. Tamayo in his capital murder trial, resulting in a violation of his fundamental due process rights set forth in Articles XVIII and XXVI of the American Declaration.

2. Ineffective assistance of counsel

22. The petitioner claims that Mr. Tamayo's court appointed trial counsel failed to investigate and present an enormous amount of substantial, readily available evidence in mitigation of the death penalty. The deficient performance allegedly began before the trial, with a failure to seek out and interview potential witnesses, and culminated in the penalty phase, where virtually no mitigating evidence was presented. According to the petitioner's allegations, Texas has long provided incompetent lawyers for defendants facing capital murder charges and, unlike other states, has no central agency responsible for providing specialized representation in death penalty cases.

23. The petitioner notes that Mr. Tamayo's defense attorneys knew little about him, as they had neglected to conduct any meaningful investigation into his life history. Neither defense counsel nor their investigator traveled to Mexico to meet with Mr. Tamayo's family and friends. The petitioner further states that trial counsel's investigator conducted only 15.3 hours of investigation prior to trial and met with Mr. Tamayo only twice. She further asserts that counsel did not seek funds for a mitigation specialist or for a psychiatric, neurological, or psychological examination of any kind. Also, Mr. Tamayo's own mother was allegedly never contacted by any person working for the defense –she purportedly heard about the trial from an acquaintance.

24. As a result, Mr. Tamayo's lawyer allegedly failed to discover the great wealth of constitutionally relevant mitigating evidence that was readily available, and which was discovered, with the assistance of the Mexican Consulate, in post-conviction proceedings. The petitioner asserts that this evidence both humanizes the alleged victim and offers an explanation for the tragic and bizarre events that occurred on the evening of the shooting.

25. Edgar Tamayo was born in Mexico and grew up in Miacatlán, Morelos. The petitioner argues that his childhood was marked by poverty and neglect, largely a result of his father's alcoholism. His

[2] *Medellin v. Texas*, 554 U.S. 759 (2008) (Medellin III)).

[3] The petitioner cites the Brief in Opposition at 17-18, *Medellin v. Texas*, 554 U.S. 759 (No 08-5573).

father would allegedly get so drunk that people would have to pick him up off the street. Moreover, because he often drunk away his income, Mr. Tamayo and his siblings often went without food and life's bare necessities. They also frequently witnessed their father abuse and humiliate their mother, calling her the daughter of a prostitute and a bitch. The petitioner asserts that both parents physically abused their children. The mother allegedly used to chain Mr. Tamayo to a brick so that he would not escape from her sight; she had a special whip just to hit him and once allegedly broke his nose by hitting him hard with a broom. The petitioner points out that the father's physical brutality was even worse.

26. As a teenager, the alleged victim often escaped his abusive home environment by leaving for extended periods of time to travel with a group of bullfighters. The petitioner indicates that at the age of seventeen a bull threw him to the ground and stomped on his head, leaving him hospitalized and comatose for several days. When Mr. Tamayo finally regained consciousness, he remained unsteady and incoherent for days, and was unable to walk or talk normally for weeks. According to a childhood friend and witness to the accident, after the accident he became more aggressive; he would use drugs and drink alcohol to get rid of his headaches.

27. The petitioner argues that, coping with his brain injury without the help of medication or psychiatric assistance, Mr. Tamayo's drug and alcohol abuse worsened, as did his explosive tendencies. According to a psychiatrist specialized in brain injuries, whose services were obtained during state habeas proceedings, Mr. Tamayo suffered from an Intermittent Explosive Disorder. To confirm his diagnosis, he recommended that Mr. Tamayo be tested by a neuropsychologist to document the presence of significant brain injury. The Court of Criminal Appeals allegedly refused to provide the necessary funds for this testing. However, with the aid of the Mexican Consulate in Houston, aid that according to the petitioner would also have been available to trial counsel, Mr. Tamayo obtained the services of a neuropsychologist.

28. The evaluation concluded that the alleged victim's head injury laid the foundation for serious and ensuing behavioral problems and noted that individuals with frontal lobe dysfunction have poor impulse control and are not able to inhibit themselves when emotionally aroused. The neuropsychologist further noted that brain injured persons typically experience great difficulty resisting the temptations of illicit drugs and alcohol because they lack judgment about the behavioral consequences of such abuse, and that the injured brain is highly susceptible and extremely sensitive to substances. The petitioner notes that on the night of the offense Mr. Tamayo was under the influence of alcohol, heroin and PCP.

29. Records obtained from Mr. Tamayo's trial counsel allegedly reveal that Mr. Tamayo informed the defense investigator of his brain injury and resultant coma. Yet, according to the petitioner, counsel did nothing to investigate the injury with a view to presenting mitigating evidence at the punishment phase, nor did they hire an expert to explore the possibility that his brain injury might have contributed to his conduct on the night of the crime.

30. Therefore, trial counsel's penalty phase defense was allegedly weak and ineffective. The petitioner states that Mr. Tamayo's entire defense at the punishment phase barely filled 49 pages of the trial transcript, which included jury instructions. Moreover, only seven witnesses allegedly testified, three of whom were deputies whose only contact with Mr. Tamayo consisted of escorting him to and from the courtroom during trial. The petitioner also contends that the attorneys failed to question Mr. Tamayo's parents about his past and upbringing.

31. The petitioner maintains that trial counsel's failure to discover or present any of this evidence was clearly not the product of a deliberate strategic or tactical decision, but the result of a negligent omission to make any meaningful inquiry into Mr. Tamayo's history or to follow up on information regarding his head injury. The petitioner also asserts that, had counsel investigated and presented the abundant mitigating evidence summarized above, there can be no doubt that at least one juror would have answered at least one of the statutory special issues in such a way that a life sentence would have been imposed.

32. Finally, the petitioner argues that the United States has an obligation to provide competent defense counsel to indigent prisoners facing capital murder trials, an obligation that is inherent in the concept

of a fair trial as set forth in Article XXVI of the American Declaration. She also submits that international law requires that procedural guarantees of fairness and due process be strictly observed when a country seeks to impose the death penalty. Accordingly, the petitioner claims that Mr. Tamayo's death sentence should be vacated, and that he should receive a new sentencing hearing in accordance with the equality, due process and fair trial protections set forth under the American Declaration.

3. Mental disability

33. According to the petitioner, Mr. Tamayo is a person with a mental disability who has been denied any opportunity to present evidence regarding this fact. The state and federal courts have allegedly refused to consider evidence of Mr. Tamayo's mental disability on the grounds that he did not present the evidence in a timely manner. The petitioner claims that the state of Texas intends to execute Mr. Tamayo without ever providing him a full and fair hearing to determine if his disability exempts him from execution under the U.S. Supreme Court's decision in *Atkins v. Virginia*. She also states that, had Mr. Tamayo received competent legal representation, the jury would have heard mitigating evidence relating to his mental disability that would likely have resulted in a life sentence.

34. The petitioner further notes that cognitive testing has revealed that Mr. Tamayo also has a significant intellectual disability that meets the criteria for "mental retardation." Moreover, he also allegedly has limitations in his adaptive functioning, notably academic difficulties and slow development in his childhood. Additionally, his head injury resulting in neurological trauma allegedly contributes to his "mental retardation" and impulse control disorder.

35. The petitioner concludes that, because Mr. Tamayo is a person with a mental disability, his death sentence constitutes a form of cruel, inhuman, or degrading treatment or punishment prohibited by Article XXVI of the American Declaration. She notes in this respect that, while the American Declaration does not expressly prohibit the imposition of the death penalty on the "mentally disabled," the practice is clearly unlawful under established norms of customary international law.

36. The petitioner also submits that the court's refusal to allow Mr. Tamayo an adequate opportunity to present evidence of his mental disability, in light of the uncontested expert opinions that he is cognitively "impaired," violates his rights under Articles I and XVIII of the American Declaration. She further maintains that Article XVIII of the Declaration guarantees the right of access to the courts to prevent acts of authority that violate any fundamental constitutional rights. In this respect, the petitioner mentions the *Atkins v. Virginia* decision in which the U.S. Supreme Court declared that "mentally disabled" individuals have a constitutional right to be protected from execution.

4. Death row confinement conditions

37. The petitioner indicates that since 1999 all male Texas death row prisoners have been incarcerated in the Polunsky Unit in Livingston, Texas. They are allegedly housed in small cells (approximately sixty square feet), with a sink, a toilet, and a thirty-inch-wide bunk. Also, prisoners are allegedly given only limited time for exercise in small indoor or outdoor "cages." Prisoners with the best disciplinary records are reportedly given access to these "cages" for one or two hours per day. Those with disciplinary problems, which usually include prisoners with mental disabilities, are allegedly allowed outside of their cells only three to four hours per week. Prisoners with disciplinary problems are reportedly deprived of their radios. The petitioner also contends that death row prisoners are not provided any opportunities to participate in "programming" (structured activities in or out of their cells) and that they receive no educational or occupational training.

38. In addition to being single-celled, death row prisoners are allegedly segregated from other prisoners in every aspect of their lives. The petitioner asserts that prisoners are allowed no physical contact with family members, friends, or even their attorneys. Generally, a death row prisoner would have physical contact with no one other than prison staff from the entry onto death row until the time of the execution.

Even in the days and hours before the execution, the prisoner is reportedly not permitted to touch any family member or loved one.

39. Additionally, the petitioner argues that the conditions on Texas's death row are harsher than those found in many of the nation's highest security prisons and segregation units. She further refers to the fact that, according to expert studies, prolonged confinement without sensory stimulation or human contact exacerbates pre-existing psychological disorders in individuals like Mr. Tamayo.[4] The petitioner also cites the U.N. Special Rapporteur on Torture's conclusion that solitary confinement, especially over an extended period of time, may constitute cruel and unusual punishment and that person with mental disabilities are especially vulnerable to the harmful effects of solitary confinement.[5]

40. Finally, the petitioner claims that the prison conditions under which Mr. Tamayo has been held are both cruel and inhumane, particularly in light of Mr. Tamayo's alleged mental disability, violating his right to humane custody under Article XXV and XXVI of the American Declaration.

5. Method of execution

41. The petitioner originally claimed that the combination of three drugs used at the time to execute prisoners in Texas failed to comply with the requirement that a method of execution cause the least possible physical and mental suffering. Later the petitioner reported that, in mid-2012, as a result of nationwide shortages in some of the drugs that were used in lethal injections, Texas began to execute individuals using a single, massive dose of pentobarbital. Petitioner submits that, although the use of a single-drug protocol alleviates many of the risks inherent in the three-drug protocol previously used, individuals subject to the lethal injection in Texas continue to suffer cruel, inhuman or degrading treatment or punishment.

42. On October 1, 2013, in response to information that Texas' supply of lethal injection drugs had expired, a group of petitioners filed suit in the United States District Court for the Southern District of Texas, arguing that Texas' failure to inform them which drugs it intended to use for their executions, as well as the source of those drugs violated their rights. Shortly thereafter, Texas allegedly disclosed that it had obtained drugs from a compounding pharmacy located in Texas. The petitioner asserts that there are serious concerns about the purity and efficacy of drugs produced in compounding pharmacies given that they are not subject to any federal regulation or oversight. Also, there is allegedly a significant chance that the active pharmaceutical ingredients could be contaminated; creating an unacceptable risk that Mr. Tamayo could be subjected to a painful and prolonged death. In this regard, the petitioner mentions an execution in South Dakota carried out in October 2012 with pentobarbital believed to have been obtained from a compounding pharmacy. According to the petitioner, the compounded drug was contaminated, which was discovered after an execution in which the prisoner began choking and then remained open-eyed as the execution proceeded.[6]

43. According to researchers, in Texas and Virginia, which together have executed almost half of all prisoners since 1976, lethal injections are administered by individuals with no training in anesthesia.[7] Petitioner further states that in Texas, unknown executioners remotely administer the lethal chemicals to the conscious inmate from behind a wall or curtain. The lack of rigorous training requirements for members of the executions team, who are not required by law to have any prior experience in the administration of

[4] The petitioner cites Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995); Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988); Stuart Grassian and N. Friedman, Effects of Sensory Deprivation in Psychiatric Exclusion and Solitary Confinement, American Journal of Law and Psychiatry 49-65 (1986); Stuart Grassian, Psychopathological Effects of Solitary Confinement, American Journal of Psychiatry 1450-54 (1983).

[5] Torture and other cruel, inhuman, or degrading treatment or punishment, United Nations General Assembly 19 (Aug. 5, 2011).

[6] Brief from the petitioner, dated October 8, 2013, p. 4. The petitioner cites: Press Release, Reprieve, South Dakota Carries Out Execution Using Contaminated Compounded Drugs, (Oct. 17, 2012).

[7] The petitioner cites L.G. Koniaris et al., Inadequate Anesthesia in Lethal Injection for Execution, 365 The Lancet 1412 (2005).

anesthesia, allegedly creates an unacceptable risk that men and women may die at the hands of an executioner who lacks the training and experience to minimize suffering or even determine if the anesthesia is working.

44. The petitioner highlights the lack of state regulation concerning lethal injection procedures. Besides the fact that there is no legal requirement that executioners be trained in anesthesiology or drug administration, or that the lethal injection protocol be subjected to expert approval or review, the Texas Code of Criminal Procedure allegedly fails even to specify the drug that shall be used to cause death. This failure is allegedly exacerbated by the failure of the Texas Department of Criminal Justice (TDCJ) to implement an adequate administrative protocol. A spokesperson for the TDCJ explained in a press conference that "[i]t's in the state statute that changes in chemical and dosages may be made at the discretion of the institutional division director."[8] The director of the Correctional Institutions Division is allegedly a former corrections officer with no training or experience in anesthesiology, pharmacology, public health or science.

45. According to the petitioner, executions are less regulated than animal euthanasia. While the procedures for lethal injection are almost completely unregulated in the Texas Code of Criminal Procedures, procedures for animal euthanasia are allegedly firmly entrenched in the legislative process through regulations in the Texas Health and Safety Code and the Texas Administrative Code, as well as federal oversight from the Food and Drug Administration (FDA).

46. The petitioner also refers to the absence of meaningful federal oversight of the execution protocols in Texas. In this regard, she highlights that the mission of the FDA is to guarantee the safety, effectiveness, and purity of human drugs by assuring that they meet manufacturing standards. However, lethal injections are allegedly conducted without any meaningful federal oversight. According to the petitioner, the FDA stated that it "does not review or approve products for the purpose of lethal injection," and that it would not review shipments of lethal injection drugs "to determine their identity, safety, effectiveness, purity, or any other characteristics."[9]

47. The petitioner further makes reference to the comments of the Special Rapporteur on Torture in his 2012 report to the effect that all methods of capital punishment should now be deemed cruel and inhuman in light of contemporary human rights jurisprudence regarding corporal punishment.[10] The petitioner also cites the European Court on Human Rights' decision in *Al Saadoon & Mufdhi* in which the Court ruled that "whatever the method of execution, the extinction of life involves some physical pain, as well as intense psychological suffering deriving from the foreknowledge of death."[11]

48. In light of the alleged numerous defects in Texas' current lethal injection protocol which allegedly create a substantial and unnecessary risk of pain and suffering, the execution of Mr. Tamayo by lethal injection would, according to the petitioner, constitute cruel, infamous and unusual punishment, in violation of Article XXVI of the American Declaration.

B. Position of the State

49. The United States submits that most of the petitioner's claims have been extensively reviewed by U.S. state and federal courts and that Mr. Tamayo has been afforded extensive due process protections with regard to his criminal case. In this respect, it states that, after trial, Mr. Tamayo appealed the verdict to the Texas Criminal Court of Appeals, and has filed four state habeas cases and one federal habeas

[8] CBS Dallas/Fort Worth, Shortage Forces Texas to Switch Execution Drug, Mar. 16, 2011. Available at: http://www.dallasnews.com/news/state/headlines/20110316-shortage-forces-texas-to-switch-execution-drug.ece?nclick_check=1

[9] Brief from the petitioner, dated January 6, 2012, p. 45.

[10] 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.

[11] Al Saadoon & Mufdhi v. U.K., E.C.H.R. No. 61498/08 (Merits), 2 Mar. 2010, par. 115.

case, all of which have been heard and decided by state and federal appeals courts, respectively. Further, the State contends that, when carried out only for the most serious crimes and in accordance with due process, capital punishment is consistent with international law, including the American Declaration. For these reasons, the United States requests that the Commission reject Mr. Tamayo's petition on the merits.

1. Right to consular notification

50. The United States does not contest the fact that it violated the Vienna Convention in Mr. Tamayo's case, as was found by the ICJ in *Avena*. However, the State reiterates its position that the Inter-American Commission lacks competence to review claims under the Vienna Convention. In this regard, it states that consular notification claims do not raise a violation of a human right enshrined in the American Declaration and therefore Article 20 of the Commission's Statute and Articles 23 and 27 of its Rules of Procedure preclude their consideration.

51. The State submits that consular notification is not a human right that constitutes part of due process in criminal proceedings, as was accepted by the ICJ in *Avena*. According to the United States:

> [...] consular access and assistance is undeniably a right exercised by the detained individual's state of nationality. Yet it is up to representatives of that state to determine whether to provide assistance, and the Vienna Convention does not provide the detained individual any right or authority to demand it. To accept Petitioner's argument that his consular notification claim amounts to a human rights violation under the American Declaration would require the untenable conclusion that any foreign national who does not receive consular assistance, because of an absence of consular relations or because his government did not provide assistance, cannot receive a fair trial or due process.[12]

52. The State argues that Mr. Tamayo has received due process of law in U.S. courts, benefiting from multiple layers of judicial review. It also indicates that, approximately one week before Mr. Tamayo's trial in 1994, authorities with the federal government in Mexico became aware of his detention and began actively assisting his defense at that time.

53. The United States further refers to its efforts to address the obligations under *Avena*. It indicates that it has worked, through a variety of means, to ensure domestic compliance with the requirements of the VCCR, including outreach, guidance, and training to law enforcement, prosecutors, and judges at the federal, state, and local levels on consular notification and access. According to the information submitted, the State Department has conducted nearly 600 outreach and training sessions on consular notification and access since 1998. The State also mentions the manual titled "Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officers to Assist Them" published by the State Department since 1997, which provides instructions for police and prison officials on compliance with the VCCR and all relevant bilateral consular agreements.

54. The State also refers to its work with the U.S. Congress to secure legislation that would ensure compliance with U.S. international legal obligations under *Avena*. According to the information provided, such legislation was included in the Department of State, Foreign Operations, and Related Programs Appropriations Act, Fiscal Year 2014 (S. 1372), which has been approved by the Senate Appropriations Committee. The State affirms that this legislation would give Mr. Tamayo and other foreign nationals under sentence of death at the time of enactment the chance to show a federal court that a Vienna Convention violation prejudiced their conviction or sentence.

55. With regard to Mr. Tamayo's case, the State indicates that over this past year the State Department has actively engaged with Texas officials on his case. More specifically, the State Department's

[12] Brief from the State, received on December 26, 2013, p. 12.

Office of the Legal Adviser has sent a number of letters to and held conference calls with Texas officials, and Secretary of State Kerry has written to the Governor of Texas, Texas Attorney General, and other Texas officials urging them to delay Mr. Tamayo's execution.

2. Ineffective assistance of counsel

56. The State argues that Mr. Tamayo was afforded effective assistance of counsel at trial, and that counsel made reasonable and strategic choices. Defense counsel reportedly adopted a penalty-phase strategy that included highlighting Mr. Tamayo's level of intoxication and rebutting the State's penalty-phase evidence with testimony from his friends and family members. The strategy reportedly included testimony from seven witnesses to mitigate against the alleged victim's blameworthiness.

57. With regard to the head injury, the State alleges that Mr. Tamayo's counsel knew of it but made a conscious decision not to pursue the head injury as mitigating evidence because it would not sufficiently mitigate against the grave facts of the offense. According to the State, the alleged victim downplayed the significance and seriousness of the injury to his counsel, medical records were not available, and evidence of the injury would have been double-edged because it would have reflected future dangerousness as well.

58. The State refers to the U.S. Supreme Court's standard for adequate representation by counsel known as the "Strickland test." Under this rule, a petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defense. Also, according to the Supreme Court, courts must make every effort to eliminate "the distorting effects of hindsight" when assessing counsel's performance after the fact.[13] In this regard, the State indicates that decisions by counsel may in retrospect seem like bad ones, but may nonetheless have been valid, strategic decisions at the time.

59. Furthermore, the State alleges that petitioner's claims have been raised and received multiple layers of judicial review in U.S. courts. It indicates that state courts found that the trial attorney reasonably decided as a matter of strategy not to pursue the head injury in mitigation because, among other things, there was no contemporaneous documentation of the injury.

60. The State concludes by affirming that the Commission should not find that Mr. Tamayo's counsel's reasonable decisions under the specific factual circumstances of the case violate the rights to a fair trial and due process of law set forth in the American Declaration.

3. Mental disability

61. According to the State, the petitioner has not proven sufficiently severe "mental impairment" such that Mr. Tamayo's death sentence would constitute cruel and unusual punishment in violation of the rights recognized in the American Declaration. The State also argues that the alleged victim received many levels of review in state and federal courts, which afforded him ample opportunities to develop evidence of and raise any "mental impairments."

62. The State argues that, to establish ineligibility for capital punishment, Mr. Tamayo needed to establish that he has significantly subaverage intellectual functioning and adaptive deficits originating prior to age 18. It indicates that in Texas this involves three requirements: a subaverage general intellectual functioning, generally defined as an IQ below 70; accompanying deficits in adaptive functioning; and onset before the age of 18.

63. The United States asserts that Mr. Tamayo cannot satisfy the test. In this regard, it states that the alleged victim has not established that he has an IQ below 70; that his attempt to prove deficits in

[13] The State cites *Strickland v. Washington*, 466 U.S. 668, 687 and 668 (1984) at 689. Brief from the State, received on December 26, 2013, p. 21.

adaptive functioning was limited to alleging poor school performance; and that he did not demonstrate an inability to deal with the world.

4. Death row confinement conditions

64. The State maintains that the conditions of confinement in death row are difficult but reasonable under the circumstances and do not constitute cruel and unusual punishment. It also emphasizes that the U.S. Constitution, along with federal and state laws, establishes standards of care to which all inmates in the United States are entitled, and which are consistent with the rights recognized in the American Declaration.

65. With regard to solitary confinement, the State indicates that U.S. courts have interpreted the Eighth and Fourteenth Amendments of the U.S. Constitution as prohibiting the use of solitary confinement under certain circumstances. According to the State, correctional facility administrators may not subject inmates to solitary confinement with deliberate indifference to the resulting serious harms, including suicides, suicide attempts, and serious self-injury.[14] Referring to prisoners on death row, the State alleges that:

> […] serious considerations of safety to others within the prison, such as guards and other prisoners, are also present because such prisoners are less likely to be deterred from committing serious crimes because of the potential punishment that may be imposed, since they have already been sentenced to death.[15]

66. The United States asserts that its appellate process affords those convicted of capital offenses the highest level of internationally recognized protection. In this regard, it states that appellate review ensures that defendants' trials are fair and impartial, that convictions are based on substantial evidence, and that sentences are proportionate to the crime. However, the State stresses that "when lengthy delays between initial sentencing and execution are caused by a capital prisoner's utilization of the many appeal avenues open to him, he should not then claim that the conditions of confinement during that delay are cruel, infamous, or unusual punishment."[16]

67. The State concludes that long periods of detention on death row are often the result of a constitutionally-mandated, exhaustive appeal process like that which has taken place in the case of Mr. Tamayo where he had numerous federal and states court reviews of his case.

5. Method of execution

68. According to the United States, the method of lethal injection for execution in Texas does not constitute cruel and unusual punishment. Referring to the rule of exhaustion of domestic remedies, the State requests the IACHR to reject the petitioner's claims because Mr. Tamayo "has taken no steps to raise them in U.S. courts, despite the fact that the petitioner's most recent supplemental observations references then-ongoing litigation in Texas involving other prisoners facing the death penalty in Texas."[17]

69. With respect to the merits of petitioner's claim, the State notes that U.S. courts have carefully reviewed and rejected other claims alleging that states' lethal injection protocols constitute cruel and unusual punishment. It also indicates that the drug used in the most recent Texas executions (pentobarbital) was challenged in the *Yarrow* case and rejected. In that case, in which issues similar to the ones raised by the petitioner were alleged, the Fifth Circuit Court of Appeals rejected the claim that the use of

[14] The State cites *Farmer v. Brennan*, 511 U.S. 825, 843 (1970). Brief from the State, received on December 26, 2013, p. 25.

[15] Brief from the State, received on December 26, 2013, p. 26.

[16] Brief from the State, received on December 26, 2013, p. 24.

[17] Brief from the State, received on December 26, 2013, p. 27.

the drug produced from a compounding pharmacy was problematic because the plaintiffs did not show a likelihood of severe pain.

70. Therefore, according to the State, the mere possibility of contamination was insufficient to meet this standard. The United States further contends that in the three executions in Texas that have occurred since September 2013 using the single-drug method and using pentobarbital, no adverse issues with respect to its use have arisen.

71. Regarding this allegation, the State concludes that the method of legal injection currently being used by Texas is humane, and carefully administered, as is shown by the most recent executions undertaken using this method, and its use for humane euthanasia elsewhere in the state of Oregon and in the Netherlands.

IV. ESTABLISHED FACTS

72. In application of Article 43(1) of its Rules of Procedure, the IACHR will examine the arguments and evidence provided by the petitioner and the State. In addition, it will take into consideration publicly available information.[18]

73. On January 31, 1994, Mr. Tamayo was arrested in connection with the death of Officer Guy Gaddis that same day.[19] Within hours of his arrest the police explained to him in Spanish that he had the right to remain silent and to an attorney. Nevertheless, the alleged victim gave two written statements.[20]

74. Mr. Tamayo was convicted by a jury of the offense of capital murder and sentenced to death on October 27, 1994.[21] On December 11, 1996, the Texas Court of Criminal Appeals affirmed the conviction on direct appeal.[22] The appellate counsel did not seek review by the U.S. Supreme Court.[23]

75. With assistance from the Mexican consulate, Mr. Tamayo filed his first state application for writ of habeas corpus on February 22, 1998.[24] The Texas Court of Criminal Appeals denied the application on the merits.[25] The alleged victim filed a second state habeas application which was dismissed for failure to satisfy the state procedural rule on successive applications.[26]

76. On September 11, 2003, Tamayo filed a federal habeas petition, which was held in abeyance by the district court pending the United States Supreme Court's decision in *Medellin v. Dretke*.[27]

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[18] Article 43(1) of the Rules of Procedure of the Inter-American Commission on Human Rights provides that: "The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge."

[19] Annex 1, *Tamayo v. Thaler*, Case 4:03-cv-03890 (S.D. Tex. 2011), pp. 1-3. Brief from the State, received on December 26, 2013.

[20] Annex 2, Brief for Respondent in Opposition to Petition for Writ of Certiorari, p. 4. Brief from the State, received on December 26, 2013.

[21] Annex 2, pp. 8-12. Brief from the State, received on December 26, 2013.

[22] *Tamayo v. State,* No. AP-72,033 (Tex. Crim. App. December 11, 1996) (not designated for publication).

[23] Brief from the State, received on December 26, 2013, p. 8.

[24] Annex 2, p. 8. Brief from the State, received on December 26, 2013.

[25] *Ex parte Tamayo,* No. WR-50,116-01 (Tex. Crim. App. Nov. 14, 2001) (not designated for publication).

[26] *Ex parte Tamayo*, No. WR-55,690-02 (Tex. Crim. App. Sept. 10, 2003) (*per curiam*) (not designated for publication).

[27] *Tamayo v. Quarterman,* No. H-03-3809, slip op. at 1 (S. Dist. Tex., Aug. 3, 2009) (not selected for publication).

77. On March 18, 2005, Mr. Tamayo filed a motion to stay and abate further proceedings, which the court granted so he could exhaust a new Vienna Convention claim premised on *Avena* in state court. The alleged victim returned to the Texas Court of Criminal Appeals in June 2008. The Court dismissed the successive application because it did not fall within the exceptions for raising an additional habeas claim under Texas law.[28]

78. Following the resolution of those issues, on December 30, 2008, Mr. Tamayo amended the federal habeas petition, adding a claim of "mental retardation." He also filed a motion seeking a stay so that he could return to the Court of Criminal Appeals of Texas to exhaust the *Atkins* claim. The federal district court granted the motion.

79. On October 2, 2009, Mr. Tamayo filed a state habeas application, which was dismissed by the Texas Court of Criminal Appeals on June 9, 2010, finding that it failed to satisfy the requirements of Texas state law on successive applications.[29] Mr. Tamayo filed a federal amended petition which was denied by the Fifth Circuit Court of Appeals on March 25, 2011.[30] The Court also denied a certificate of appealability on all issues.[31]

80. On May 14, 2012, Mr. Tamayo filed a petition for a writ of certiorari before the Supreme Court of the United States, which was denied on November 13, 2012.[32]

81. At the request of Assistant District Attorney Roe Wilson, the 209th Judicial District Court of Harris County, Texas, scheduled a hearing for September 17, 2013, to determine whether an execution date should be scheduled for Mr. Tamayo.[33] On September 13, 2013, Mr. Tamayo's counsel requested that the Court defer the scheduling of an execution date giving three reasons.

82. First, counsel argued that "[by spring 2014] Congress is poised to pass legislation that will implement the judgment of the ICJ in *Avena* and will expressly grant Mr. Tamayo the right to federal review of his Vienna Convention claim."[34] Second, it informed the Court about the petition filed by Mr. Tamayo on January 6, 2012, before the Inter-American Commission on Human Rights, as well as the precautionary measures granted by the IACHR on January 18, 2012, calling upon the United States to take all measures necessary to preserve the alleged victim's life pending the Commission's investigation of the allegations raised in the petition.[35]

83. Finally, counsel referred to the discovery of evidence of state misconduct in Mr. Tamayo's case that would support the filing of a subsequent post-conviction application. In this regard, counsel stated that:

> While at the time of undersigned counsel's involvement in the case the possibility of raising claims that had been forfeited by prior counsel was a near impossibility, the legal landscape has since changed – recently, and dramatically. Martinez v. Ryan, 132 S.Ct. 1309 (March 20, 2012) and Trevino v. Thaler, 133 S.Ct 1911 (May 28, 2013), […] [which] in combination, now make it possible for death sentenced Texas inmates to raise claims that were otherwise

[28] *Ex parte Tamayo*, No. 55,690-03 (Tex. Crim. App. July 2, 2008) (*per curiam*) (not designated for publication).

[29] *Ex parte Tamayo*, No. WR-55,690-04 (Tex. Crim. App. June 9, 2010) (*per curiam*) (not designated for publication).

[30] *Tamayo v. Thaler*, Case No, 4:03-cv-03809 (S.D. Tex. 2011).

[31] *Tamayo v. Thaler*, No. 11-70005 (5th Cir. 2011).

[32] Information available at: http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-10354.htm

[33] Exhibit A. Motion to defer scheduling of execution date (Ex parte Edgar Tamayo Arias, Cause No. 9422714, 209th Judicial District Court of Harris County, Texas), p. 1. Brief from the petitioner, dated October 8, 2013.

[34] Exhibit A, p. 5. Brief from the petitioner, dated October 8, 2013.

[35] Exhibit A, p. 6. Brief from the petitioner, dated October 8, 2013.

> defaulted due to ineffective state habeas counsel. As a result, undersigned counsel recently began to conduct a limited investigation into issues that had not – but should have – been explored by prior counsel.
>
> In the course of this work, counsel uncovered two potentially significant instances of state misconduct: (1) an undisclosed deal that was made with a state's witness; and (2) the presentation of false and misleading testimony. […] [C]ounsel […] anticipates filing a state habeas petition raising these claims.[36]

84. The request presented by Mr. Tamayo was denied and on September 17, 2013, the 209th Judicial District Court scheduled his execution date for January 22, 2014.

A. Vienna Convention claim

85. On November 24, 1996, the United States ratified the Vienna Convention on Consular Relations, which entered into force for the United States on December 24, 1996.[37] The United States made no reservation or declaration. On that same date it also ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes. On March 7, 2005, the Government of the United States notified the depository its withdrawal from this Protocol.[38]

86. Article 36 of the Vienna Convention establishes:

> Article 36
> Communication and Contact with Nationals of the Sending State
>
> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> a. consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> b. if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> c. consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

[36] Exhibit A. Motion to defer scheduling of execution date (Ex parte Edgar Tamayo Arias, Cause No. 9422714, 209th Judicial District Court of Harris County, Texas), pages 7-8. Brief from the petitioner, dated October 8, 2013.

[37] United Nations Treaty Collections. Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-6&chapter=3&lang=en#EndDec

[38] United Nations Treaty Collections. Available at: http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3&lang=en#1

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

87. According to an affidavit of the alleged victim, the police officers who arrested and interrogated Mr. Tamayo did not inform him of his right to the assistance of the Mexican Consulate in dealing with the fact of his arrest. In this respect, he indicates:

> Had I been informed of my right to contact the Mexican Consulate, I would have done so before ever giving a statement to the police. Had the Mexican Consulate advised me not to give a statement to the police until legal counsel could have been arranged for me, I would not have given any statement to Officer Escalante.[39]

88. Mexico first learned of Mr. Tamayo's incarceration in late September 1994, less than one week before his capital murder trial commenced, when Mr. Tamayo himself wrote to the consulate. In the time available before trial, Mexican consular officials were unable to provide the comprehensive consular assistance to which Mr. Tamayo was entitled. In an affidavit the Director of Foreign Litigation in the Mexican Foreign Ministry at the time stressed:

> I firmly believe that the lack of consular notification in Mr. Tamayo's case seriously compromised his legal defense. In my view, the services he would have received from consular officers would have changed the outcome of the case. My conclusion is based upon a number of factors.
>
> First, we have every reason to believe that Mr. Tamayo would have welcomed the intervention of the Mexican consulate, if he had been notified of his rights to consular notification and access in a timely manner. […]
>
> It is also clear that consular officers would have provided substantial assistance to Mr. Tamayo, if they had learned of his detention at the time of his arrest. […] Among other things, Mexico retained a mental health expert at the request of state post-conviction lawyers. […] The Mexican consulate has provided ongoing assistance to the lawyers representing Mr. Tamayo. For example, when the Texas court refused to provide funds for a neuropsychological evaluation […], the consulate allocated funds for this purpose. From that testing, the neuropsychologist concluded that the frontal lobes of Mr. Tamayo's brain are damaged. This evidence was never developed by the trial lawyers.
>
> To summarize, the Mexican consulate would have played as active a role as necessary to help ensure Mr. Tamayo received a fair trial and avoided the death penalty.[40]

89. In his second state habeas application Mr. Tamayo included a Vienna Convention Claim based on the ICJ decision in the *LaGrand Case*.[41] The application claimed prejudice from the alleged victim's statements, which it argued he would not have given had he been informed of the Vienna Convention's requirements. The Court of Criminal Appeals dismissed the application for failure to satisfy the state procedural rule on successive applications.[42]

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[39] Exhibit M. Affidavit of Edgar A. Tamayo, January 6, 1998. Brief from the petitioner, dated January 6, 2012. *See also,* Annex 2, p. 4. Brief from the State, received on December 26, 2013.

[40] Exhibit E. Affidavit of Víctor Manuel Uribe, Director of Foreign Litigation in the Mexican Foreign Ministry, March 15, 2015. Brief from the petitioner, dated January 6, 2012.

[41] International Court of Justice, *LaGrand Case* (Germany v. United States), Judgment of June 27, 2001. Available at: http://www.icj-cij.org/docket/files/104/7736.pdf

[42] Annex 2, pp. 9-10. Brief from the State, received on December 26, 2013.

90. Mr. Tamayo later filed a federal amended petition raising, *inter alia*, a Vienna Convention claim. The Fifth Circuit Court of Appeals denied the petition on March 25, 2011, based on its precedent holding that the VCCR does not create individually enforceable rights.[43] The alleged victim later sought a certificate of appealability on the Vienna Convention claim, among other issues. On December 27, 2011, the Court concluded that Mr. Tamayo failed to make a substantial showing of the denial of a constitutional right with respect to his claims.[44]

91. According to the information submitted, Mexican Consular officers are trained to provide comprehensive assistance to Mexican nationals facing the death penalty. Their consistent practice, when they learn of a Mexican national's detention, is to contact him as soon as possible to explain his legal rights. They also advise detained nationals to consult with an attorney before speaking to law enforcement officers and provide funds for expert and investigative assistance. In the past, Mexico has provided funds for investigators, psychologists, mitigation specialists, psychiatrists, and travel expenses for witnesses and attorneys. Mexico has provided such funding to public defenders, private attorneys, and court-appointed lawyers. Between October 2000 and March 2005, Mexican consular officers and the Foreign Ministry have been involved in at least 66 cases in which prosecutors have agreed not to seek the death penalty.[45]

92. On September 6, 2013, the acting Legal Adviser of the U.S. Department of State wrote to Belinda Hill, First Assistant District Attorney, indicating that "[t]he execution of Mr. Tamayo at this time would be premature and extremely prejudicial to the interests of the United States, the State of Texas, and U.S. citizens." The acting Legal Adviser asked the State of Texas "to take all steps necessary to avoid jeopardizing the United States' relationship with key allies and its ability to provide consular assistance to U.S. citizens abroad while Congress gives full consideration to [the] legislation."[46]

93. On September 16, 2013, U.S. Secretary of State John F. Kerry, wrote to Attorney General of the State of Texas Greg Abbott, indicating *inter alia* that "seeking an execution date [for Mr. Tamayo] would be particularly egregious, in light of the fact that no court has yet addressed Mr. Tamayo's claim [regarding the Vienna Convention violation] on the merits, which the state of Texas pledged it would do in a July 18, 2008, letter to my predecessor."[47] On that same date the Secretary of State wrote a letter to Texas Governor Rick Perry with the same request.[48]

94. In this communication, Secretary of State Kerry refers to a letter dated July 18, 2008, addressed to U.S. Secretary of State Condoleezza Rice and Attorney General Michael B. Mukasey, in which Texas' Governor Rick Perry pledged that "if any individual under Texas custody and subject to *Avena* has not previously received a judicial determination of his claim of prejudice under the Vienna Convention and seeks such review in a future federal habeas proceeding, the State of Texas will ask the reviewing court to address the claim of prejudice on the merits."[49]

95. According to Katherine A. Huffman, attorney and principal at The Raben Group LLC in Washington DC, a public policy advocacy firm with extensive experience lobbying Congress and the Executive

[43] *Tamayo v. Thaler*, Case No, 4:03-cv-03809 (S.D. Tex. 2011).

[44] *Tamayo v. Thaler*, No. 11-70005 (5th Cir. 2011).

[45] Exhibit E. Brief from the petitioner, dated January 6, 2012.

[46] Appendix A to Exhibit A. Letter from the Office of the Legal Adviser, United States Department of State, to First Assistant District Attorney, Texas, September 6, 2013. Brief from the petitioner, dated October 8, 2013.

[47] Exhibit B. Letter from U.S. Secretary of State John F. Kerry to Attorney General of the State of Texas Greg Abbott, September 16, 2013. Brief from the petitioner, dated October 8, 2013.

[48] Exhibit C. Letter from U.S. Secretary of State John F. Kerry to Texas' Governor Rick Perry, September 16, 2013. Brief from the petitioner, dated October 8, 2013.

[49] Appendix D to Appendix C of Exhibit A. Letter from Texas' Governor Rick Perry to U.S. Secretary of State Condoleezza Rice and Attorney General Michael B. Mukasey. Brief from the petitioner, dated October 8, 2013.

branch, there is a significant likelihood that the "Consular Notification Compliance Act" introduced on June 14, 2011, will be further considered and passed by the full Congress by March or April of 2014. Ms. Huffman asserts that "[t]his legislation would specifically grant Mr. Tamayo a right to judicial review and reconsideration of his conviction and sentence to determine whether he was prejudiced by the violation of his consular rights." [50]

1. Court-appointed defense counsel

96. Judge Michael McSpadden appointed Ricardo Rodriguez to represent Mr. Tamayo in the trial for capital murder in the 209th District Court. Counsel Al Thomas served as co-counsel.[51]

97. In April of 1994 Mr. Tamayo's trial attorney requested the services of the investigative agency J. J. Gradoni & Associates, to help him to prepare for the capital murder trial. The agency conducted 3.30 hours of investigation.[52] After an investigator interviewed the alleged victim, a report was submitted to the defense counsel. The report contained a reference to the fact that Mr. Tamayo was stepped on by a bull in the back of his head as a teenager resulting in five days in a coma, as well as a list of recommended follow-up investigative tasks. The investigative agency was never asked to follow up on this information.[53]

98. From September 30 to October 31, 1994, the agency "Central Park Investigations" conducted a total of 12 hours of investigation in Mr. Tamayo's case.[54]

99. On December 30, 2008, Mr. Tamayo's mother, brother and sister as well as two childhood friends from Mexico, filed a declaration before the U.S. District Court, Southern District of Texas, Houston Division. Isabel Arias, Mr. Tamayo's mother, indicated the following:

> Nobody representing Edgar ever came to Mexico to talk with me and I don't think that Edgar's attorneys even told me about the trial or that even that Edgar had been arrested. I think I heard about it from a friend relative of Hector's. Right before Edgar's trial, a group of us from Mexico who came for Edgar's trial met with the defense attorney in his office as a group. This was the only meeting I ever had with Edgar's attorneys. […] At no time did he prepare me for my testimony or explain what would happen in court.[55]

100. The other family members and friends declared that the trial attorney never asked them to testify and if they had been asked, they would have testified on Edgar's behalf.[56] In this respect, Omar Tamayo, Mr. Tamayo's brother, declared:

> I attended Edgar's trial, but his attorney never approached me about testifying. In fact, I remember that I looked for the people from our town who were with Edgar before he was

[50] Appendix C to Exhibit A. Affidavit of Katharine A. Hauffman, September 12, 2013. Brief from the petitioner, dated October 8, 2013.

[51] Exhibit C. Affidavit of trial attorney Ricardo Rodriguez filed before the 209th District Court on February 28, 2002. Brief from the petitioner, dated January 6, 2012.

[52] Exhibit B. Bill from J. J. Gradoni & Associates, Inc., Private Investigators, to Ricardo Rodriguez, May, 9, 1994. Brief from the petitioner, dated January 6, 2012.

[53] Exhibit A. Affidavit of J. J. Gradoni, State of Texas, County of Harris, February 10, 1997. Brief from the petitioner, dated January 6, 2012.

[54] Exhibit B. Bill from Central Park Investigations, to Roberto Rodriguez, Attorney at Law, November 1, 1994. Brief from the petitioner, dated January 6, 2012.

[55] Exhibit I. Declaration of Isabel Arias, November 30, 2008, p. 4. Brief from the petitioner, dated January 6, 2012.

[56] Exhibit G. Declaration of Omar Tamayo, November 30, 2008, p. 6; Exhibit H. Declaration of Lupe Herrera, December 1, 2008, p. 2; Exhibit L. Affidavit of Nancy Tellez, December 28, 2007; Exhibit S. Declaration of Isabel Roman, p. 3; Exhibit K. Declaration of Guillermo Quintero Moran, p. 2; and Exhibit J. Affidavit of Hector Tamayo, October 24, 1997. Brief from the petitioner, dated January 6, 2012.

> arrested so that they could testify on Edgar's behalf. Edgar's lawyer told me not to because it would anger the prosecutor. […] If I had been asked, I would have testified on Edgar's behalf at the sentencing phase of his trial.[57]

101. In their declarations, Mr. Tamayo's relatives and friends referred to the alleged victim's childhood as well as family and social history. They indicate that there was a lot of violence in Mr. Tamayo's home. His father would hit his wife and children for what seemed to be no reason.[58] He would double up a stiff lasso and wet it before he would hit him in order to make the blows more forceful. The blows would cause Mr. Tamayo to bleed. The alleged victim, to avoid being hit so often, tried to stay away from the house when he could.[59] Mr. Tamayo's mother would also hit her children. She used to chain Mr. Tamayo to a brick so that he would not escape from her sight; she broke his nose once by hitting him hard with a broom when he was young.[60]

102. Regarding their childhood, Mr. Tamayo's brother declared that they lived in a very old house with two rooms and a kitchen; the house was infested with rats and there were holes in the walls and the roof. All the children slept on one bed and the parents slept on another bed, all in the same room. He and his siblings suffered from hunger. Mr. Tamayo's father would drink 5-7 days in a row without stopping and could get drunk up to three times a day.

103. With the assistance of the Mexican Consulate, on February 22, 1998, Mr. Tamayo filed his first state habeas application raising a claim for ineffective assistance of counsel based on the failure to investigate and present evidence in the penalty phase about his head injury. The Texas Court of Criminal Appeals denied the application on the merits, adopting the state district court's findings and conclusions.

104. The Court found the conclusions of the psychiatrist presented by the petitioner "unpersuasive," "speculative," and "inaccurate." It also noted "counsel's more than adequate investigation shown by the defense strategy at guilt-innocence, the character evidence presented at punishment, and the credible assertions of counsel concerning investigation of the case." The Court also noted the double-edged nature of the head-injury evidence and concluded that Mr. Tamayo failed "to show deficient performance, much less harm, in counsel not pursuing the" injury in mitigation. [61]

105. On September 11, 2003, Mr. Tamayo filed an initial federal habeas petition raising, among other things, a penalty-phase ineffective assistance of counsel claim premised on his head injury. On February 25, 2005, the district court held the petition in abeyance pending the U.S. Supreme Court's decision in *Medellin v. Dretke*.

106. Mr. Tamayo later filed a federal amended petition raising, *inter alia*, four claims of ineffective assistance of trial counsel contending that counsel failed to investigate, develop, and present mitigating evidence during the penalty phase of his trial. On March 25, 2011, the Fifth Circuit Court of Appeals concluded that Mr. Tamayo was not entitled to relief. The Court determined that the "state habeas court's conclusion that counsel made an informed strategic decision not to pursue this evidence was itself a reasonable conclusion, considering both the lack of objective evidence supporting the claim and double-edged nature of the evidence." [62] Referring to the *Strickland* test, the Court noted that the alleged victim "fail[ed] to carry the heavy burden of proving that the state court's conclusion was unreasonable."

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[57] Exhibit G, p. 6. Brief from the petitioner, dated January 6, 2012.

[58] Exhibit L, p. 1. Brief from the petitioner, dated January 6, 2012.

[59] Exhibit G, pages 4 – 6. Brief from the petitioner, dated January 6, 2012.

[60] Exhibit H, p. 1. Brief from the petitioner, dated January 6, 2012.

[61] *Ex parte Tamayo*, No. WR-55,690-01 (Tex. Crim. App. June 11, 2003) (*per curiam*) (not designated for publication).

[62] *Tamayo v. Thaler*, Case No, 4:03-cv-03809 (S.D. Tex. 2011).

2. Mental disability

107. After Mr. Tamayo was convicted and sentenced, on October 6, 1997, psychiatrist Allen Childs, M.D., Clinical Assistant Professor of Psychiatry and Pharmacy, University of Texas, and staff psychiatrist at the Vernon State Hospital, Texas, evaluated Mr. Tamayo at the Ellis I dispensary at the request of post-conviction defense counsel. Following the evaluation, and after having reviewed all the available medical records for Mr. Tamayo, reports of interviews with his family and ex-wife and investigative memoranda regarding the case, the psychiatrist issued a report on December 31, 1997, indicating, *inter alia*, the following:

> Mr. Tamayo […] began abusing glue as early as age 10 […]. About the same time he began using alcohol. […] a brain injury in mid adolescence resulted in Tamayo becoming explosive, with unpredictable rages grossly out of proportion to external stimuli. The brain injury occurred in a bull riding competition when Tamayo was struck first by the blunted horn of the bull knocking him off the animal and a second more serious blow from the hooves of the animal striking the back of Tamayo's head rendering him unconscious. Hospitalized in coma for 5 or 6 days […]. The length of unconsciousness is one indication of the severity of the brain injury […]
>
> […] [S]mall doses of alcohol and other intoxicants cause brain injured patients, especially those with frontal lobe damage, to become rageful and aggressive. Tamayo had many such episodes. Moreover, brain injured persons typically experience great difficulty resisting the temptation of illicit drugs and alcohol because they lack judgment about the behavioral consequences of such abuse. […] These catastrophic reactions […] continued into Tamayo's adult life […] until prison physicians correctly diagnosed Tamayo's Intermittent Explosive Disorder and prescribed the anticonvulsant medication Tegretol. […] [T]his medication effectively ended Tamayo's explosive rages. […] [H]e no longer experiences the […] visions of him and others killing people nor others coming to kill him.[63]

108. With regard to the day of the killing of Officer Gaddis, the evaluation states that:

> Unusually prolonged drinking, beginning in mid morning and continuing until the clubs stopped serving alcohol at 2:00 a.m. the next day, marked the day and evening of the crime. Adding to this was Tamayo's smoking P.C.P. a few hours before the crime […] and sh[ooting] up 15 to 20 c.c.s of heroin mixture […] [T]he three substances […] taken together […] would certainly undermine his thinking, emotions and behavioral control. Moreover, like most brain-damaged individuals, the ability to anticipate the consequences of his actions would be lost beneath the avalanche of toxic chemicals […] [W]hy would have Tamayo hung around the club where he had just committed a robbery? […] Why did he take no actions to evade arrest after the robbery? It seems obvious that being heavily intoxicated, he wasn't able to think clearly at all.[64]

109. In the report the psychiatrist concludes that Mr. Tamayo exhibits convincing evidence for the condition of Personality Change Due to Head Trauma and Intermittent Explosive Disorder. He further notes that "with Tamayo's history of brain injury, easily discoverable at the time of trial, his Intermittent Explosive Disorder would have been readily apparent to an examining psychiatrist."[65]

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[63] Exhibit D. Affidavit of Dr. Allen Childs, M.D., F.A.P.A, Diplomate, American Board of Psychiatry and Neurology, December 31, 1997. Brief from the petitioner, dated January 6, 2012.

[64] Exhibit D. Brief from the petitioner, dated January 6, 2012.

[65] Exhibit D. Brief from the petitioner, dated January 6, 2012.

110. On February 6, 1998, neuropsychologist Diana L. Davis, Ph. D., evaluated Mr. Tamayo at the request of post-conviction defense counsel in order to determine his neuropsychological status. The funds to undertake the testing were provided by the Mexican Government.[66] According to the report, as a child Mr. Tamayo occasionally fell out of trees and may have been knocked unconscious; he also reportedly fell off a bridge, hitting his head on some rocks. After the accident sustained while bull riding, Mr. Tamayo experienced another injury to the head in 1987, when he was involved in a car accident. His head hit the windshield hard enough to crack it. In another accident he was hit on the back of the head with a baseball bat.[67]

111. According to the report, "Mr. Tamayo has a long history of polysubstance abuse since the age of nine when he began sniffing glue and smoking marijuana. Other drugs that he has regularly used are PCP, heroin, LSD, and Crack. He began abusing alcohol around the age of nine."[68]

112. The results of the report indicate that:

> […] Mr. Tamayo is experiencing cognitive and behavioral problems secondary to a brain injury sustained at the age of 17 years, when he was kicked in the head by a bull. […] Findings indicate frontal lobe pathology, which is associated with impulsivity, limited ability to inhibit outbursts, poor frustration tolerance, labile moods, episodic dyscontrol, explosiveness, poor judgment, and poor problem solving abilities. Individuals with this type of injury typically act without thinking.
>
> […]
>
> Prior to his injury, there was no criminal activity. […][69]

113. On December 18, 2008, Dr. Gilbert Martinez, Ph.D., licensed psychologist and clinical neuropsychologist conducted an intellectual assessment of Mr. Tamayo at the request of state post-conviction counsel. He was administered 14 subtests from which his IQ and Index scores were derived. According to the results, "Mr. Tamayo's general cognitive ability is in Extremely Low range of intellectual functioning".[70] The assessment concluded that "Mr. Tamayo's scores on a comprehensive measure of intelligence meet the DSM-IV diagnostic criteria for Mild Mental Retardation. Individuals with similar test score profiles tend to suffer from lifelong deficits in adaptive functioning and intellectual ability."[71]

114. On December 30, 2008, Mr. Tamayo filed an amended federal habeas petition, raising for the first time a claim of "mental retardation." He also filed a motion seeking a stay so that he could return to the Court of Criminal Appeals of Texas to exhaust the *Atkins* claim. The federal district court granted the motion. On October 2, 2009, Mr. Tamayo filed the state habeas application, which was dismissed by the Texas Court of Criminal Appeals on June 9, 2010, finding that it failed to satisfy the requirements of Texas state law on successive applications.[72] The Court concluded the following:

> We have reviewed this third subsequent application and find that the application does not contain sufficient specific facts establishing that the factual basis of this claim was not

[66] Exhibit E. Brief from the petitioner, dated January 6, 2012.

[67] Exhibit F. Report of Neuropsychologist Diana L. Davis, February 6, 1998, p. 3. Brief from the petitioner, dated January 6, 2012.

[68] Exhibit F, p. 5. Brief from the petitioner, dated January 6, 2012.

[69] Exhibit F, pages 5 and 6. Brief from the petitioner, dated January 6, 2012.

[70] Exhibit O. Report of Dr. Gilbert Martinez, December 18, 2008, p. 2. Brief from the petitioner, dated January 6, 2012.

[71] Exhibit O, p. 6. Brief from the petitioner, dated January 6, 2012.

[72] *Ex parte Tamayo*, No. WR-55,690-04 (Tex. Crim. App. June 9, 2010) (*per curiam*) (not designated for publication).

> ascertainable through the exercise of reasonable diligence on or before the filing date of the previous application, or that but for a violation of the United States Constitution, no rational juror would have answered the special issues in the State's favor. Applicant has failed to make a threshold presentation of evidence that, if true, is sufficient to show that no rational factfinder would fail to find that he is mentally retarded. *See Ex parte Blue,* 230 S.W.3d 151 (Tex. Crim. App. 2007). The application fails to meet the dictates of Article 11.071, § 5(a). Accordingly, the application is dismissed. Art. 11.071, § 5(c). [73]

115. On March 15, 2010, Mr. Tamayo filed an amended federal habeas petition in the Court of Criminal Appeals of Texas, raising the claim that he is "mentally retarded" and that the Eighth Amendment therefore bars his execution following the Supreme Court's decision in *Atkins*. Mr. Tamayo's counsel acknowledged that the legal basis of the claim was previously available, but he asserted that the factual basis was not ascertainable through the exercise of reasonable diligence on or before the filing date of his previous applications. He argued that the limitations period should be deemed to have begun on the date that he obtained an IQ test score in the "mentally retarded range." Alternatively, he asserted that, but for a violation of the United States Constitution, no rational juror would have answered the special issues in the State's favor. On March 25, 2011, the Fifth Circuit Court of Appeals concluded that the claim was time-barred. [74]

3. Death row confinement conditions

116. Article 43.17 of the Texas Code of Criminal Procedure establishes:

> Art. 43.17. VISITORS. Upon the receipt of such condemned person by the Director of the Department of Corrections, the condemned person shall be confined therein until the time for his or her execution arrives, and while so confined, all persons outside of said prison shall be denied access to him or her, except his or her physician, lawyer, and clergyperson, who shall be admitted to see him or her when necessary for his or her health or for the transaction of business, and the relatives and friends of the condemned person, who shall be admitted to see and converse with him or her at all proper times, under such reasonable rules and regulations as may be made by the Board of Directors of the Department of Corrections.

117. Death row prisoners in Texas are held in solitary confinement in small cells.[75] The Istanbul Statement on the Use and Effects of Solitary Confinement defines solitary confinement as follows:

> Solitary confinement is the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic.[76]

118. Anthony Graves, who spent eighteen years in solitary confinement on Texas' death row before being proven innocent in 2010, testified about the experience at a U.S. Senate subcommittee hearing on solitary confinement on June 19, 2012. Regarding death row conditions in Texas, he testified the following:

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[73] *Ex parte Tamayo,* No. WR-55,690-04 (Tex. Crim. App. Jun. 9, 2010) (not designated for publication). Available at: http://www.cca.courts.state.tx.us/OPINIONS/HTMLOPINIONINFO.ASP?OPINIONID=19745

[74] *Tamayo v. Thaler*, No. 11-70005 (5th Cir. 2011).

[75] ACLU, A Death before Dying: Solitary Confinement on Death Row, July 2013. Available at: https://www.aclu.org/files/assets/deathbeforedying-report.pdf

[76] Istanbul Statement on the Use and Effects of Solitary Confinement, adopted on December 9, 2007, at the International Psychological Trauma Symposium.

> On November 1, 1994, I heard the gavel fall and the judge announce, "Anthony Graves, I hereby sentence you to death by lethal injection." […]
>
> What I didn't know then was that this wrongful death sentence was only part of the torture I would experience for the next 18-and-a-half years. I didn't know that I would be forced to live in an 8x12 cage. I didn't know I would have to use a steel toilet, connected to my steel sink, in plain view of the male and female corrections officers would walk the runs in front of my cell. I didn't know that for years on end I would have no physical contact with a single human being.
>
> I didn't know that guards would feed me like a dog, through a slot in my door. Instead of providing basic nutrients, the food sometimes contained rat feces, broken glass, or the sweat of the inmate who cooked it. This diet caused me health problems that continue today. The prison gave me no phone to call my loved ones, no television to keep up with the world and local events, and no real medical care. I lived behind a steel door, with filthy mesh-covered windows looking out to the run; my only window to the outside world was a tiny one on the top of the back wall of my cell. With its peeling, old, and dull paint, my cage was the image of an abandoned one-room project apartment.[77]

4. Method of execution

119. Article 43.14 and 43.18 of the Texas Code of Criminal Procedure establishes:

> Art. 43.14. EXECUTION OF CONVICT. Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time after the hour of 6 p.m. on the day set for the execution, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the director of the correctional institutions division of the Texas Department of Criminal Justice.
>
> […]
>
> Art. 43.18. EXECUTIONER. The director of the Texas Department of Criminal Justice shall designate an executioner to carry out the death penalty provided by law.

120. The petitioner submitted an affidavit presented by Dr. David B. Waisel, MD, at the request of the attorneys representing Roy Blankenship, executed by lethal injection on June 23, 2011, in the state of Georgia. Dr. Waisel, practicing anesthesiologist at Children's Hospital Boston and Associate Professor of Anesthesia at Harvard Medical School, gave his expert medical and scientific opinion regarding the execution of Mr. Blankenship. Dr. Waisel was not present at the execution; the information about the execution came from a comprehensive interview of an eyewitness.

121. Dr. Waisal indicates that Mr. Blankenship was inadequately anesthetized and was conscious for approximately the first three minutes of the execution and that he suffered greatly. According to the expert, he should not have been conscious or exhibiting movements, nor should his eyes have been open, after the injection of pentobarbital. He concludes that condemned inmates in Georgia executed by lethal injection are significantly likely to face extreme, torturous and needless pain and suffering.[78]

[77] ACLU, An Innocent's Man Tortured Days on Texas' Death Row, June 20, 2012. Available at: https://www.aclu.org/blog/prisoners-rights-capital-punishment/innocent-mans-tortured-days-texass-death-row

[78] Exhibit R. Expert report of Dr. David B. Waisel, pages 1 and 3. Brief from the petitioner, dated January 6, 2012.

122. Regarding the reliability of pentobarbital as used to induce anesthetic coma in human beings, Dr. Waisel states that "only when a drug has been tested systematically on thousands of subjects, with their consent, can one begin to reliably assess how an untested use of a drug will affect human subject" and further asserts that there is no "relevant data in similar populations for pentobarbital."[79]

123. On October 1, 2013, three inmates on death row in Texas, one of whom was scheduled to be executed on October 9, 2013, brought an action before the U.S. District Court for the Southern District of Texas, Houston Division, against the Texas Department of Criminal Justice (TDCJ) concerning the method of execution. The inmates alleged violations and threatened violations of the right to be free from cruel and unusual punishment and right of access to the courts and right to due process of law.[80]

124. The complaint asserts that, at the end of September 2013, the TDCJ's existing supply of pentobarbital (brand name Nembutal), the drug required by the current execution protocol, expired. Plaintiffs maintain that the TDCJ is doing everything in its power to shield the new protocols, which include untried drugs and non-FDA-approved drugs, from meaningful disclosure or scrutiny. They also allege that, without timely information, they are left with no means for determining whether the drugs are safe and are thus effectively precluded from litigating their right to be executed in a manner devoid of cruel and unusual pain. Plaintiffs requested that the Court enjoin the state from executing them until such time as defendants can demonstrate the integrity and legality of any and all controlled substances they intend to use for execution.

125. According to publicly available information, Mr. Michael Yowell, one of the plaintiffs, was executed on October 9, 2013, as scheduled.[81]

V. LEGAL ANALYSIS

A. Preliminary matters

126. Before embarking on its analysis of the merits in the case of Edgar Tamayo Arias, the Inter-American Commission considers it relevant to 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.

127. 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.[82] 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,[83] and it has been set out and applied by the Inter-American Commission in previous capital cases brought before it. [84]

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[79] Exhibit R, pages 3-4. Brief from the petitioner, dated January 6, 2012.

[80] Exhibit D. Thomas Whitaker, Perry Williams, and Michael Yowell vs. Brad Livingston, William Stephens, James Jones, and unknown executioners, complaint submitted to the United States District Court for the Southern District of Texas, Houston Division, on October 1, 2013. Brief from the petitioner, dated October 8, 2013.

[81] The Huffington Post. Michael Yowell Executed For Killing Parents In Texas, October 9, 2013. Available at: http://www.huffingtonpost.com/2013/10/10/michael-yowell-executed_n_4076853.html

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

[83] 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, [continues ...]

128. 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: [85]

> 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.[86]

129. 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.[87] The Inter-American Commission will therefore review the petitioner's allegations in the present case with a heightened level of scrutiny, to ensure in particular that the rights to life, due process, and to a fair trial as prescribed under the American Declaration have been respected by the State.

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

130. 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.

[… continuation]
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).

[84] 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.

[85] 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.

[86] IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, para. 34.

[87] See, *mutatis mutandi*, IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996, para. 170.

1. Right to consular notification and assistance

131. According to the petitioner, Mr. Tamayo was deprived of any opportunity to seek consular assistance as a result of Texas' failure to notify him of his rights under Article 36 of the Vienna Convention on Consular Relations. She indicates that, at the time of the arrest, the police never informed him of his right under the Vienna Convention to have the Mexican Consulate notified of his arrest, although they had reason to know that he was a Mexican national. The petitioner further claims that this violation resulted in actual prejudice in the alleged victim's case. In this regard, she states that if Mr. Tamayo had received consular assistance as from the time of his arrest, he would not have been sentenced to death.

132. The State, for its part, does not contest the fact that it violated the Vienna Convention in Mr. Tamayo's case but argues that consular notification is not a human right and that the Inter-American Commission lacks competence to review claims under the Vienna Convention.

133. 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.[88] 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. Tamayo was one of the 51 Mexican nationals named in the ICJ judgment.[89]

134. 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."[90] 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.

135. According to the information submitted to the Commission, since the U.S. Supreme Court decided the *Medellín* case, *Avena*-implementing legislation has been the subject of a hearing in the U.S. Senate, during which both Republicans and Democrats voiced concerns about the need to comply with the *Avena* judgment. In January 2013, President Obama included implementing language in his budget proposal. The full Senate Appropriations Committee has adopted the implementing language in Section 7083 of the State, Foreign Operations, and Related Programs Appropriations bill for fiscal year 2014.[91] The U.S. State Department, Justice Department, and Department of Defense also support the proposed implementing language.[92]

136. 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

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

[89] ICJ, *Case concerning Avena and Other Mexican Nationals (Mexico v. the United States of America), Judgment of 31 Marc, 2004*, p. 17.

[90] Medellin v. Texas, 552 U.S. 491 (2008). Available at: http://www.supremecourt.gov/opinions/07pdf/06-984.pdf

[91] Appendix C to Exhibit A. Brief from the petitioner, dated October 8, 2013.

[92] Appendix C to Appendix C of Exhibit A. Letter from Attorney General Eric H. Holder, Jr., and U.S. Secretary of State Hillary Rodham Clinton to Patrick J. Leahy, Chairman of the Committee on the Judiciary, U.S. Senate, June 28, 2011; and letter from Secretary of Defense to Patrick J. Leahy, Chairman of the Committee on the Judiciary, U.S. Senate, August 31, 2011. Brief from the petitioner, dated October 8, 2013.

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.[93]

137. 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." [94]

138. 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.[95]

139. 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 […][96]

140. 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. Tamayo 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.

141. 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. Tamayo 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.

142. Based upon the foregoing, the IACHR concludes that the State's obligation under Article 36.1 of the Vienna Convention to inform Mr. Tamayo of his right to consular notification and assistance constituted

[93] 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 Martinez Villarreal), United States, Annual Report of the IACHR 2002.

[94] 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.

[95] 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 131st regular period of sessions, held from March 3-14, 2008, http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm

[96] 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."

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

143. The petitioner contends that Mr. Tamayo's court-appointed trial counsel failed to investigate and present readily available evidence in mitigation of the death penalty. She claims that trial counsel's failure to discover or present any of this evidence was the result of a negligent omission to make any meaningful inquiry into the alleged victim's history or to follow up on information regarding his head injury. In this respect, the petitioner argues that counsel did nothing to investigate the injury with a view to presenting mitigating evidence at the punishment phase, nor did they hire an expert to explore the possibility that his brain injury might have contributed to his conduct on the night of the crime. Finally, the petitioner asserts that, had counsel investigated and presented all the mitigating evidence, at least one juror would have answered at least one of the statutory special issues in such a way that a life sentence would have been imposed.

144. The State affirms that Mr. Tamayo was afforded effective assistance of counsel at trial, and that his counsel made reasonable and strategic choices. According to the State, counsel made a conscious decision not to pursue the head injury as a mitigating evidence because it would not have sufficiently mitigated against the grave facts of the offense. In particular, it indicates that state courts found that the trial attorney reasonably decided as a matter of strategy not to pursue the head injury in mitigation because, among other things, there was no contemporaneous documentation of the injury.

145. According to the facts established in this report, Mr. Tamayo's trial attorney, in preparation for the capital murder trial, requested the services of two investigative agencies that conducted a total of 15.5 hours of investigation. One of the agencies submitted a report recommending follow-up investigative tasks. According to the available information, the agency was never asked to follow-up. Also, family members and childhood friends who were willing to testify and would have provided important information about Mr. Tamayo's upbringing and social history were not contacted by the trial attorney. Moreover, according to the psychiatrist hired during post-conviction proceedings, Mr. Tamayo's history of brain injury and his Intermittent Explosive Disorder were easily discoverable at the time of the trial.

146. 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. [97]

147. 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

[97] 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.

of his or her case."[98] 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.[99]

148. 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.[100] 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."[101]

149. 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."[102]

150. 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 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.[103]

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[98] 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 Nº 38/00 (Baptiste), Grenada, Annual Report of the IACHR 1999, paras. 91, 92; Report Nº 41/00 (McKenzie et al.) Jamaica, Annual Report of the IACHR 1999, paras. 204, 205; Case Nº 12.067 (Michael Edwards *et al.*), The Bahamas, Annual Report of the IACHR 2000, paras. 151-153.

[99] 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 Nº 38/00 (Baptiste), Grenada, Annual Report of the IACHR 1999, paras. 91, 92; Report Nº 41/00 (McKenzie et al.) Jamaica, Annual Report of the IACHR 1999, paras. 204, 205; Case Nº 12.067 (Michael Edwards *et al.*), The Bahamas, Annual Report of the IACHR 2000, paras. 151-153.

[100] 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.

[101] 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.

[102] 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.

[103] 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.

151. 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 by both parties 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 the state appointed counsel in a crucial phase of the process, the Inter-American Commission concludes that the United States violated Mr. Tamayo's right to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration.

C. Right of every person with mental or intellectual disabilities not to be subjected to the death penalty (Articles I and XXVI of the American Declaration)

152. 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.[104]

153. Article I of the American Declaration reads as follows:

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

154. The final part of Article XXVI of the American Declaration provides that:

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

155. The petitioner alleges that Mr. Tamayo is a person with a mental disability and that his death sentence therefore constitutes a form of cruel, inhuman, or degrading treatment or punishment prohibited by Article XXVI of the American Declaration. The State argues that the petitioner has not proven sufficiently severe "mental impairment" such that Mr. Tamayo's death sentence would constitute cruel and unusual punishment in violation of the rights recognized in the American Declaration.

156. According to reports issued by a psychiatrist and a neuropsychologist, the alleged victim experiences cognitive and behavioral problems secondary to a brain injury sustained at the age of 17. Findings indicate "frontal lobe pathology, which is associated with impulsivity, limited ability to inhibit outbursts, poor frustration tolerance, labile moods, episodic dyscontrol, explosiveness, poor judgment, and poor problem solving abilities."[105] Three years after his conviction, Mr. Tamayo was diagnosed with personality change due to head trauma and Intermittent Explosive Disorder.[106]

157. Also, according to a post-conviction intellectual assessment conducted by a psychologist and clinical neuropsychologist, "Mr. Tamayo's general cognitive ability is in Extremely Low range of intellectual functioning," meeting the criteria for "Mild Mental Retardation."[107] Therefore, for the purpose of this analysis, the IACHR will refer to Mr. Tamayo's alleged mental and intellectual disability.

158. The Inter-American Commission has stated that:

> [...] in interpreting and applying the Declaration, it is necessary to consider its provisions in the context of the international and Inter-American human rights systems more broadly, in

[104] 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.

[105] Exhibit F, pages 5 and 6. Brief from the petitioner, dated January 6, 2012.

[106] Exhibit H, p. 1. Brief from the petitioner, dated January 6, 2012.

[107] Exhibit O, p. 6. Brief from the petitioner, dated January 6, 2012.

> the light of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to Member States against which complaints of violations of the Declaration are properly lodged.[108]

159. 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.[109]

160. 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.[110] 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."[111] 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."[112]

161. More recently, 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.[113] 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."[114]

162. In *Atkins v. Virginia*,[115] 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."[116] The Supreme Court also made reference to studies

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[108] IACHR, Report No. 48/01, Case No. 12.067 and others, Michael Edwards *et al.*, The Bahamas, April 4, 2001, paragraph 107.

[109] See in this respect, 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, paras. 211 and 213.

[110] Human Rights Committee, Sahadath v. Trinidad and Tobago, Communication No. 684/1996, April 2, 2002, CCPR/C/74/D/684/1996, paragraph 7.2.

[111] 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).

[112] 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). Available at: http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G05/124/37/PDF/G0512437.pdf?OpenElement.

[113] 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. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/458/12/PDF/N1245812.pdf?OpenElement

[114] 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. Available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12364&LangID=E

[115] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[116] *Atkins v. Virginia*, 536 U.S. 304 (2002), p. 311-317.

indicating that an IQ between 70 and 75 or lower "is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition."[117]

163. The petitioner contends that state and federal courts have refused to consider evidence of the alleged victim's disability on the grounds that he did not present the evidence in a timely manner. In this regard, the petitioner argues that the state of Texas intends to execute Mr. Tamayo without ever providing him a full and fair hearing to determine if his disability exempts him from execution under *Atkins*.

164. According to the available information, on June 9, 2010, the Court of Criminal Appeals of Texas dismissed an amended federal habeas petition adding a claim of mental disability. The Court found that the application did not contain "sufficient specific facts establishing that the factual basis of this claim was not ascertainable through the exercise of reasonable diligence on or before the filing date of the previous application, or that but for a violation of the United States Constitution, no rational juror would have answered the special issues in the State's favor."[118]

165. 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.[119] 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.

166. In the instant case, according to the allegations of the petitioner and the information available, the courts refused to allow Mr. Tamayo an adequate opportunity to present evidence of his mental and intellectual disability. Furthermore, the state courts refused to provide funds for a neurophsychological evaluation. During post-conviction proceedings, the Mexican consulate allocated funds for this purpose. The testing concluded that Mr. Tamayo has a mental disability caused by an injury in his brain's frontal lobe. However, the Court of Criminal Appeals of Texas dismissed Mr. Tamayo's claim of mental disability presented in an amended habeas petition, on the grounds that he did not present the evidence in a timely manner.

167. Based on the above considerations, and given the heightened degree of scrutiny that it has applied in death penalty cases,[120] the Inter-American Commission concludes that the United States violated Articles I and XXVI of the American Declaration to the detriment of Mr. Tamayo by refusing to provide funds for an independent expert evaluation and by denying any opportunity to present evidence regarding his mental and intellectual disability and be heard on the merits of that evidence.

[117] *Atkins v. Virginia*, 536 U.S. 304 (2002), p. 309.

[118] *Ex parte Tamayo,* No. WR-55,690-04 (Tex. Crim. App. Jun. 9, 2010) (not designated for publication). Available at: http://www.cca.courts.state.tx.us/OPINIONS/HTMLOPINIONINFO.ASP?OPINIONID=19745

[119] See in this respect, 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. 219.

[120] See IACHR, Report No. 77/09, Petition 1349-07, Admissibility, Orlando Cordia Hall, United States, August 5, 2009, paragraph 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.

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

168. 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. Death row confinement conditions

169. The petitioner argues that the prison conditions under which Mr. Tamayo has been held are cruel and inhuman violating his right to humane custody under Article XXV and XXVI of the American Declaration. She claims that Texas death row prisoners are housed in small cells of sixty square feet, are given only limited time for exercise in small "cages," and are not provided any opportunities to participate in constructive activities. The petitioner also states that, in addition to being single-celled, prisoners would generally have physical contact with no one other than prison staff from the entry onto death row until the time of the execution.

170. The State affirms that the conditions of detention in death row in Texas do not constitute cruel and unusual punishment and that standards of care in the United States are consistent with the rights recognized in the American Declaration.

171. 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.[121]

172. 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.[122] 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.[123]

[121] 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.

[122] 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.

[123] IACHR, Resolution 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XXII (3).

173. 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."[124] 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."[125]

174. 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.[126]

175. 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 prolonged solitary confinement, which he defined as for any period in excess of 15 days.[127] 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."[128]

176. More recently, the U.N. Special Rapporteur stated that, 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."[129]

177. 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."[130]

178. 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

[124] European Commission of Human Rights, Dhoest v Belgium, Application No. 10448/83, May 14, 1987, parr. 118.

[125] Torture in International Law: a guide to jurisprudence, APT and CEJIL, 2008, p. 81.

[126] Human Rights Committee, Concluding Observations on Denmark, UN Doc. CCPR/CO/70/DNK, 2000, parr. 12.

[127] 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. 26.

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

[129] 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.

[130] United Nations, General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, August 5, 2011, A/66/268, para. 49.

fatigue.[131] The European Court has held that protracted sensory isolation, coupled with social isolation, can destroy the personality and constitutes a form of inhuman treatment.[132]

179. 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."[133]

180. 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 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.[134]

181. 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.[135]

182. Therefore, based on the information available, the IACHR considers that Mr. Tamayo 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.

183. Based on international human rights standards, the Inter-American Commission concludes that by keeping the alleged victim 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.

2. Method of execution

184. According to the petitioner, there is a lack of state and federal regulation concerning lethal injection procedures in Texas. Lethal injections are allegedly conducted without any meaningful oversight of the FDA and are administered by individuals with no training in anesthesia. Further, numerous defects in Texas' current lethal injection protocol create, according to the petitioner, an unnecessary risk of pain and suffering.

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[131] 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, 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.

[132] *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.

[133] 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.

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

[135] 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.

185. The State for its part claims lack of exhaustion of domestic remedies with regard to this allegation. With respect to the merits, it notes that U.S. courts have carefully reviewed and rejected other claims alleging that states' lethal injection protocols constitute cruel and unusual punishment. In this respect, the State concludes that the method of legal injection currently being used by Texas is humane, and carefully administered.

186. The Inter-American Commission notes that the rule of exhaustion of domestic remedies should be invoked in a timely manner during the admissibility stage. It further notes that the Commission did not receive any information or observations from the State regarding Mr. Tamayo's allegations during the admissibility stage. For this reason, the State is precluded from alleging lack of exhaustion of domestic remedies at the present merits stage.

187. The IACHR notes that Article 43.14 of the Texas Code of Criminal Procedure establishes that "[t]he sentence shall be executed [...] by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the director of the correctional institutions division of the Texas Department of Criminal Justice." According to the facts established in this report, the execution procedures in Texas are not public. The type of drug used as well as its source and the execution protocols are not in the public domain.

188. The petitioner argues that Texas intends to use drugs from a compounding pharmacy for their executions, and further states that there are serious concerns about the purity and efficacy of drugs produced in compounding pharmacies given that they are not subject to any federal regulation or oversight.

189. In capital cases the State has an enhanced obligation to ensure that the person sentenced to death has access to all the relevant information regarding the manner in which he or she is going to die. In particular, the convicted person must have 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.[136]

190. Any person subjected to the death penalty must have the opportunity to challenge every aspect of the execution procedure and such information is necessary to file a challenge. The IACHR notes in this regard that the due process requirement is not limited to the conviction and post-conviction proceedings.[137] 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.

191. Finally, the IACHR highlights the reinforced special duty of the State to ensure that the method of execution does not constitute cruel, infamous or unusual punishment. In this regard, the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated that "[t]he fact that a number of execution methods have been deemed to constitute torture or CIDT, together with a growing trend to review all methods of execution for their potential to cause severe pain and suffering, highlights the increasing difficulty with which a state may impose the death penalty without violating international law."[138]

[136] IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 123.

[137] IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 123.

[138] The death penalty and the absolute prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment, Juan E. Mendez, Human Right Brief, Volume 20, Issue 1, Article 1, p. 3.

192. 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."[139]

193. Based on the above considerations, the IACHR concludes that, by refusing to reveal the execution protocol, the State is exposing Mr. Tamayo to 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 and impeding his right to question the methods to be used.

VI. ACTIONS SUBSEQUENT TO REPORT No. 1/14

194. On January 15, 2014, the Inter-American Commission approved Report Nº 1/14 on the merits of this matter, which comprises paragraphs 1 to 193 *supra*, with the following recommendations to the State:

1. Grant Edgar Tamayo Arias effective relief, including the review of his trial and sentence 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 the legal counsel provided by the State in death penalty cases is effective, trained to serve in death penalty cases, and able to thoroughly and diligently investigate all mitigating evidence;

6. Review its laws, procedures and practices to make certain that no one with a mental or intellectual disability at the time of the commission of the crime or execution of the death sentence receives the death penalty or is executed. The State should also ensure that anyone accused of a capital offense who requests an independent evaluation of his or her mental health and who does not have the means to retain the services of an independent expert, has access to such an evaluation;

7. 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;

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

[139] 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.

9. 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.

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 also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death.

195. On January 15, 2014, the report was transmitted to the State with a time period of two weeks to inform the Inter-American Commission on the measures taken to comply with its recommendations. On that same date, the report was transmitted to the petitioner.

196. On January 17, 2014, the IACHR issued a press release that included its determination that the United States had violated Mr. Tamayo's fundamental rights, and indicated that it had requested that his execution be suspended.[140]

197. On January 22, 2014, Mr. Tamayo was executed in the state of Texas. The IACHR issued a press release on January 27, 2014, condemning the execution of the alleged victim.[141]

198. By letter dated January 31, 2014, the United States provided its response to the recommendations set forth in Report Nº 1/14. In its response, the State reiterates its position that precautionary measures are not legally binding for States that have not ratified the American Convention on Human Rights. In this respect, it argues that, according to Article 25 of the IACHR's Rules of Procedure, precautionary measures are "requests" and cannot therefore bind or legally constrain the State to which they are made. The State concludes that the assertion that noncompliance with precautionary measures seriously contravenes the United States' international legal obligations is without basis.

199. With regard to the Commission's conclusion that carrying out a death sentence against a beneficiary of precautionary measures denies his right to petition the Inter-American human rights system, the State alleges that Mr. Tamayo fully exercised his right to petition the system, as is shown by the Commission's adoption of a report on the merits.

200. The United States also points out that there are no instruments derived from the OAS Charter that impose any binding human rights obligations on the United States. In this respect, the State indicates that the American Declaration is not a source of binding obligations, and that the United States is not party to any binding OAS human rights instruments.

201. Finally, the State questions the fact that the Commission published its conclusions on Mr. Tamayo's case when it had requested the State not to publish Report Nº 1/14. In its response, the United States requests that the Commission "publish the full version of its report together with this response or indicate that it would not object to the United States doing so" and encourages the Commission to make this response available on its webpage.

[140] IACHR Concludes that the United States Violated Tamayo's Fundamental Rights and Requests that his Execution be Suspended, Press Release No. 2/14, January 17, 2014. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2014/002.asp

[141] IACHR Condemns Execution of Edgar Tamayo Arias in the United States, Press Release No. 6/14, January 27, 2014. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2014/006.asp

202. With respect to the specific recommendations, the United States gives the following responses:

203. Recommendation Nº 1: the State indicates that the Department of State immediately transmitted the Commission's report to the Governor, Attorney General and Clemency Board in Texas, respectively.

204. Recommendation Nº 2: the State asserts that every criminal defendant in the United States is entitled to the full protection of the Constitution and laws of the United States, which protect the same rights as those recognized in the American Declaration.

205. Recommendation Nº 3: the United States stresses that the State Department has worked, through a variety of means, to ensure domestic compliance with the requirements of the VCCR, including outreach, guidance, and training to law enforcement, prosecutors, and judges at the federal, state, and local levels on consular notification and access. As a consequence of these efforts, the State maintains that certain national law enforcement and correctional groups require agencies to have consular notification and access procedures in place in order to earn accreditation. Therefore, according to the State, consular notification and access has become a standard professional norm for law enforcement agencies throughout the United States.

206. Recommendation Nº 4: the State indicates that the Departments of State and of Justice have engaged continuously with the U.S. Congress on the passage of legislation implementing the notification standards. It further asserts that, although implementing legislation has not yet been adopted, the Department of State remains committed to working with Congress toward that end.

207. Recommendation Nº 5: according to the State's response, the right to counsel is guaranteed by the U.S. Constitution to criminal defendants in death penalty cases, and each jurisdiction implements this guarantee.

208. Recommendation Nº 6: the State maintains that the Eighth Amendment to the U.S. Constitution prohibits the execution of persons who are "severely mentally impaired or who are insane." Proof of such a defense in cases where a defendant has court-appointed counsel would, in the State's view, be part of the preparation of the defense funded by the court.

209. Recommendation Nº 7: the State points out that the United States Constitution prohibits the use of solitary isolation in a manner that constitutes cruel and unusual punishment and that the State remains committed to preventing abuses with regard to detention conditions, protecting prisoners from such abuses and bringing to justice those who commit them. Further, the State indicates that inmates at the federal level are not deprived of human contact, recreation, environmental stimulation, or medical or mental health care. With regard to state and local facilities, it informs that the Department of Justice's Civil Rights Division works tirelessly to enforce federal safeguards against the "abuse of seclusion" at the state and local levels. Finally, the State indicates that information about the crimes for which the death penalty may be used varies by jurisdiction, although all must comply with the U.S. Constitution's prohibition on cruel and unusual punishments.

210. Recommendation Nº 8: the State informs that, at the federal level, Bureau of Prison inmates at all security levels are provided opportunities for visiting, correspondence, recreation, varying levels of interaction with others, environmental stimulation, and medical and mental health care.

211. Recommendation Nº 9: according to the State, prisoners routinely bring actions in U.S. courts challenging the conditions or their detention and the basis for their incarceration.

212. Recommendation Nº 10: the State indicates that currently there is a moratorium on the death penalty in certain jurisdictions of the United States; however, that is not the case in other states or at the Federal Government level.

213. In respect of the State's observations regarding the validity of precautionary measures vis-à-vis States not parties to the American Convention, the IACHR must first emphasize that precautionary measures are one of the Commission's key means to effectively protect the rights of persons who are in imminent danger of irreparable harm. Precautionary measures are issued in compliance with the Inter-American Commission's broad functions to promote and protect human rights established in the OAS Charter (Article 106); the American Convention on Human Rights (Article 41(b)); the Statue of the Commission (Article 18(b)) and the American Convention on Forced Disappearances (Article XIII). Therefore, the mechanism of precautionary measures is part of the Inter-American Commission's function of overseeing Member States´ observance and protection of human rights as set forth in the OAS Charter. The Commission also notes that, like a range of United Nations and regional bodies, the IACHR adopts precautionary measures based on an interpretation of its constitutive instruments.[142]

214. With regard to the legal status of the American Declaration, the IACHR considers that the fact that the Declaration is not a treaty *strictu sensu*, does not lead to the conclusion that it does not have legal effect. The 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.[143] 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.[144] 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."[145]

215. Concerning Mr. Tamayo's right to petition the Inter-American human rights system, the Commission notes that he was executed while his petition was pending before this body. A petition is pending before the Inter-American Commission from the time it is filed until there is full compliance with the recommendations issued by the IACHR or until the Commission refers the case to the Inter-American Court for those States that have accepted the jurisdiction of the Court. Therefore, the IACHR concludes that, by executing Mr. Tamayo before the Commission had the opportunity to adopt a final decision in his case, the State has denied the alleged victim's right to petition before the system.

216. The State correctly observes that following the adoption of Report No 1/14 the IACHR issued a press release referring to the Commission's conclusions in Mr. Tamayo's case. On January 17, 2014, two days after the merits report had been notified to the parties, the IACHR published a press release urging the United States to stay the execution of Mr. Tamayo and to grant the alleged victim effective relief.[146] The

[142] See in this regard, Rules of Procedure of the United Nations Human Rights Committee, Rule 86; Rules of Procedure of the Committee Against Torture, Rule 114; Rules of Procedure of the Committee on the Elimination of Racial Discrimination, Rule 94.3.

[143] 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.

[144] 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."

[145] 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.

[146] IACHR Concludes that the United States Violated Tamayo's Fundamental Rights and Requests that his Execution be Suspended, Press Release No. 2/14, January 17, 2014. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2014/002.asp

Commission also indicated that the United States is responsible for the violation of the rights guaranteed in Articles I, XVIII, XXV and XXVI of the American Declaration, with respect to Edgar Tamayo Arias and referred to some of the recommendations adopted in its merits report.

217. According to Article 44(2) of the Commission's Rules of Procedure, "[t]he State shall not be authorized to publish the [preliminary merits] report until the Commission adopts a decision in this respect." The fact that the State is not authorized to publish the preliminary merits report does not imply that the Commission cannot publicly refer to its conclusions and recommendations in cases of extreme urgency in which there is an imminent risk of serious and irreparable harm of the basic right to life. The Inter-American Commission notes in this regard that Mr. Tamayo's execution was scheduled to take place seven days after the adoption of the report. The Commission cannot, however, publish the report itself until the absolute majority of the members of the Commission decide to publish the final merits report in accordance with Article 47(3) of the IACHR's Rules.

218. As to the request regarding publication, the Government's full response has been published on the Commission's webpage.[147]

219. The State provides some general information with regard to the specific recommendations issued by the Inter-American Commission in Mr. Tamayo's case. Concerning the review of Mr. Tamayo's trial and sentence in accordance with the guarantees recognized in the American Declaration (Recommendation Nº 1), the State response is limited to informing that the Commission's report was transmitted to the Texan authorities. With respect to Recommendations Nº 2, 5, 6, 7 and 9 the State asserts, *inter alia*, that those rights are already protected by the U.S. Constitution and laws. Further, regarding the conditions of detention (Recommendations Nº 7 (first part) and Nº 8) the State refers solely to the conditions at the federal level.

220. Concerning Recommendations Nº 3 and 4, the Commission takes note of certain efforts of the Federal Government to ensure domestic compliance of the right to consular assistance and notification. The IACHR notes, however, that the bill for the "Consular Notification Compliance Act" ("CNCA") has not yet been passed.

221. Finally, with respect to Recommendation Nº 10, the State does not provide any information about the efforts of the Federal Government and of the states that still have the death penalty to adopt a moratorium on executions of persons sentenced to death.

222. On April 2, 2014, during its 150th period of sessions, the Inter-American Commission approved Report No. 10/14 containing the final conclusions and recommendations indicated *infra*. As set forth in Article 47.2 of its Rules of Procedure, on April 24, 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

223. By permitting Mr. Tamayo Arias' execution to proceed in these circumstances, the IACHR considers that the United States failed to act in accordance with its fundamental human rights obligations as a member of the Organization of American States. This is not the first time the United States has executed a person who has been the beneficiary of precautionary measures granted by the IACHR. The Inter-American Commission views the State's noncompliance in this regard as extremely grave and calls upon the United States to take all steps necessary to comply in any future matter with the IACHR's requests for precautionary measures. The Commission must also underline that the carrying out of the execution constituted a particularly grave form of noncompliance with the findings and recommendations issued in Report Nº 1/14.

[147] The full version of the United States' response in the present case is available on the IACHR's webpage at: http://www.oas.org/es/cidh/decisiones/respuestas/Case-12873-response-US.pdf

224. 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 Edgar Tamayo Arias.

225. 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 RECOMMENDS THAT THE UNITED STATES:

1. Provide reparations to the family of Edgar Tamayo Arias as a consequence of the violations established in this report; and

REITERATES ITS RECOMMENDATIONS THAT THE UNITED STATES:

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

6. Review its laws, procedures and practices to make certain that no one with a mental or intellectual disability at the time of the commission of the crime or execution of the death sentence receives the death penalty or is executed. The State should also ensure that anyone accused of a capital offense who requests an independent evaluation of his or her mental health and who does not have the means to retain the services of an independent expert, has access to such an evaluation;

7. 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;

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

9. 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.

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 also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death.[148]

VIII. PUBLICATION

226. 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 17h day of the month of July, 2014. (Signed): Tracy Robinson, President; Rose-Marie Belle Antoine, First Vice President; Felipe González, Second Vice President; Rosa María Ortiz, and Paulo Vannuchi, Commissioners.

[148] 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.