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Session: Hundred and Fourth Regular Session (27 September – 8 October 1999)  
Title/Style of Cause: Armando Alejandro Jr., Carlos Alberto Costa, Mario Manuel de la Pena and Pablo Morales v. Cuba  
Doc. Type: Report  
Decided by: Chairman: Professor Robert K. Goldman;  
First Vice-Chairman: Dr. Helio Bicudo;  
Second-Vice Chairman: Dean Claudio Grossman;  
Members: Prof. Carlos Ayala Corao, Dr. Jean Joseph Exume, Dr. Alvaro Tirado Mejia.  
Dated: 29 September 1999  
Citation: Alejandro Jr. v. Cuba, Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999)  
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## I. SUMMARY

1. On 25 February 1996, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) received several complaints brought against the Republic of Cuba (hereinafter “the State,” “the Cuban State,” or “Cuba”) according to which a MiG-29 military aircraft belonging to the Cuban Air Force (FAC) downed two unarmed civilian light airplanes belonging to the organization “Brothers to the Rescue.”[FN1] According to a report issued by the International Civil Aviation Organization (ICAO), the incidents occurred on 24 February 1996 at 3:21 p.m. and 3:27 p.m., respectively, in international airspace. The air-to-air missiles fired by the MiG-29 destroyed the civilian light aircraft, immediately killing Armando Alejandro Jr. (45 years old), Carlos Alberto Costa (29), Mario Manuel de la Peña (24), and Pablo Morales (29). The complaint concludes with the Commission being requested to begin proceedings in accordance with Articles 32 et seq. of its Regulations and to declare Cuba responsible for failing to comply with its international obligations contained in the American Declaration of the Rights and Duties of Man (hereinafter “the Declaration” or “the American Declaration”) for violating the right to life and the right to a fair trial as set forth in Articles I and XVIII of said international instrument.

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[FN1] “Brothers to the Rescue,” also known as Hermanos al Rescate, is a nonprofit organization founded by citizens, mainly civilian pilots, on 12 May 1991, and registered as a not-for-profit corporation in the public records of the State of Florida, United States of America. For more than eight years they have been patrolling the Straits of Florida to assist the “rafters” (boat people).

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2. After receiving several complaints regarding the same incident and persons, the Commission combined them, as provided for in Article 40(2) of its Regulations, as file N° 11.589.[FN2] Thus, the petitioners in the case at hand are the direct relatives of the victims (Marlene Alejandre, Marlene Victoria Alejandre, Mirta Costa, Osvaldo Costa, Miriam de la Peña, Mario de la Peña, and Eva Barbas), Dr. Haydeé Marín (Institute of Human and Labor Rights at Florida International University), Dr. Claudio Benedí (Cuban Patriotic Council), and Mr. José J. Basulto (Brothers to the Rescue).

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[FN2] Article 40(2): Separation and Combination of Cases. When two petitions deal with the same facts and persons, they shall be combined and processed in a single file.

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3. Since the start of proceedings in this case on 7 March 1996, the Cuban State has not replied to the Commission's repeated requests for information regarding the admissibility and merits of the matter. Therefore, based on an exhaustive analysis of the legal and factual grounds and in accordance with Article 42 of its Regulations,[FN3] the Commission believes that the complaint meets the formal requirements for admissibility as set forth in the Regulations and concludes that the Cuban State is responsible for violating the rights enshrined in the American Declaration as reported by the petitioners in their complaint of 25 February 1996.[FN4]. Based on the analysis and conclusions of this report, the Commission recommends that the Cuban State conduct an exhaustive investigation into the incidents in question, prosecute and punish the individuals responsible for the different violations described herein, and make adequate and timely amends to the victims' direct relatives, including the payment of fair compensatory indemnification.

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[FN3] Article 42: The facts reported in the petition whose pertinent parts have been transmitted to the government of the State in reference shall be presumed to be true if, during the maximum period set by the Commission under the provisions of Article 34 paragraph 5, the government has not provided the pertinent information, as long as other evidence does not lead to a different conclusion.

[FN4] See first paragraph of this report.

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## II. PROCEEDINGS BEFORE THE COMMISSION

4. The Commission, by means of a note dated 7 March 1996, began proceedings in this case, asking the Cuban State to provide the relevant information on the incidents described in that note, along with any evidence indicating whether or not the remedies available under domestic law had been exhausted. Following that date the case has been processed in accordance with Article 32 et seq. of the Commission's Regulations. As stated above, at no time between the start of proceedings and the present did Cuba reply to the requests for information, in spite of being warned on repeated occasions and being informed about the application of Article 42 of the Commission's Regulations. In fact, the Cuban State was notified on 7 March and 19 April

1996; 4 February and 25 September 1997; 21 and 30 January 1998; and 12 June 1998. At its meeting N° 1432, on May 5, 1999, during the 103rd session, the Commission adopted Report N° 81/99, pertaining to this case, in accordance with Article 53, paragraphs 1 and 2, of its Regulations. In a note dated May 19, 1999, the Commission transmitted the report to the Cuban State, granting it a period of two months in which to implement the report's recommendations. On July 19, 1999, when that period expired, the Cuban State had not presented any observations on the Commission's report.

### III. POSITIONS OF THE PARTIES

#### A. The petitioners

5. THE INCIDENT. Alejandro, Costa, De la Peña, and Morales were members of the "Brothers to the Rescue" organization, based in the city of Miami, Florida, United States of America. On the morning of 24 February 1996, two of the Brothers to the Rescue Cessna 337 airplanes departed Opa Locka airport in south Florida.[FN5] Costa was flying one airplane, and he was accompanied by Pablo Morales, a Cuban citizen who had fled the country on a raft. De la Peña was at the controls of the second plane, with Alejandro as his passenger. Before departing, the two aircraft notified air traffic controllers in both Miami and Havana of their flight plans, which were to take them south of the 24th parallel.

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[FN5] A third Brothers to the Rescue Cessna 337 also left on this mission. This aircraft returned unharmed.  
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6. Parallel 24 is located a good distance to the north of Cuba's 12-mile territorial waters and it serves as the northernmost limit of the Havana Flight Information Region. Commercial and civilian aircraft routinely fly in this area, and aviation practice requires that they notify Havana air traffic control when they move south of parallel 24. Both Brothers to the Rescue airplanes complied with this custom by communicating with Havana, identifying themselves, and giving their position and altitude.

7. While the two aircraft were still north of the 24th parallel, the Cuban Air Force ordered the scrambling of two military aircraft, a MiG-29 and a MiG-23, operating under the control of a military station on Cuban soil. The MiGs were carrying artillery, short-range missiles, bombs, and rockets, and they were flown by members of the FAC. Extracts from the radio communications between the MiG-29 and the military control tower in Havana detail what transpired next:

MIG-29: OK, the objective is in sight; the objective is in sight. It is a small airplane. Copied; small airplane in sight.

MIG-29: OK, we have it in sight, we have it in sight.

MIG-29: The objective is in sight.

Military Control: Go ahead.

MIG-29: The objective is in sight.

Military Control: Airplane in sight.

MIG-29: Is it coming again?

MIG-29: It is a small airplane, a small airplane.

MIG-29: It is white; white.

Military Control: Color and registration of the airplane?

Military Control: Buddy.

MIG-29: Hey, the registration as well?

Military Control: What type and color?

MIG-29: It is white and blue.

MIG-29: White and blue, at low altitude, a small airplane.

MIG-29: Give me instructions.

MIG-29: Instructions!

MIG-29: Hey, give me authorization . . .

MIG-29: If we overfly it, things are going to get complicated. Let's overfly it. There are some vessels coming that way, so I'm going to overfly it.

MIG-29: Talk to me; talk to me.

MIG-29: I've got a lock; I've got a lock.

MIG-29: We're locked on. Give us the authorization.

MIG-29: It's a Cessna 337. That one, that one. Hell, give us the authorization.

Military Control: Fire.

MIG-29: Hell, give us the authorization! We got it!

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Military Control: Authorized to destroy.

MIG-29: We copy. We copy.

Military Control: Authorized to destroy.

MIG-29: Understood; I had already received it. Leave us alone for a minute.

Military Control: Don't lose him.

MIG-29: First shot.

MIG-29: We blew his balls off! We blew his balls off!

MIG-29: Wait; look and see where he went down.

MIG-29: Yes! Yes! Shit, we hit him! Jesus!

MIG-29: Mark the place where we took him down.

MIG-29: We're on top of him. He won't give us any more fucking trouble.

Military Control: Congratulations to the pair of you.

MIG-29: Mark the place.

...

MIG-29: We are climbing and coming home.

Military Control: Stay there, circling above.

MIG-29: Above the objective?

Military Control: Correct.

MIG-29: Jesus, we told you, buddy.

Military Control: Correct; the objective is marked.

MIG-29: Go ahead.

Military Control: OK, climb to 3200, 4000 meters above the destroyed objective and keep a low speed.

MIG-29: Go ahead.

Military Control: I need you to stay . . . there. What direction did you fire in?

MIG-29: I have another aircraft in sight.

MIG-29: We have another aircraft.

Military Control: Follow it. Do not lose the other small aircraft.

MIG-29: We have another aircraft in sight. It is in the area where [the first plane] came down. It's in the area where it came down.

MIG-29: We have sight of the airplane.

Military Control: Stay there.

MIG-29: Buddy, it's in the incident area, where the objective came down. They are going to give us authorization.

MIG-29: Hey, SAR isn't necessary. There's nothing left. Nothing.

Military Control: Correct, follow the plane. You are going to remain above it.

MIG-29: We are above it.

Military Control: Correct . . .

MIG-29: What for?

MIG-29: Is the other one authorized?

Military Control: Correct.

MIG-29: Marvelous. Let's at it, Alberto.

MIG-29: Understood; we are now going to destroy it.

Military Control: Do you still have it in sight?

MIG-29: We have it, we have it; we are working. Let us do our job.

MIG-29: The other one is destroyed; the other one is destroyed. Homeland or death, you bastards! The other one is also down.[FN6]

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[FN6] See Transcripts of Cuban Military Radio Communications, International Civil Aviation Organization (ICAO), Report on the shooting down of two U.S.-registered private civil aircraft by Cuban military aircraft on 24 February 1996, C-WP/10441, June 20, 1996, pp. 35 ff., United Nations, Security Council, S/1996/509, July 1, 1996.

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8. The MiG-29's air-to-air missiles disintegrated the Brothers to the Rescue airplanes, killing their occupants instantaneously and leaving almost no recoverable remains. Only a broad slick of oil marked the place where the planes were downed. At no time did the FAC notify or warn the civilian airplanes, try to use other interception methods, or give them an opportunity to land. The MiGs' first and only response was the intentional destruction of the civilian airplanes and their four occupants. This actions were a clear violation of established international rules, which require all measures to be exhausted before resorting to aggression against any airplanes and utterly forbid the use of force against civilian craft.[FN7] In addition, agents of the Cuban State violated several basic human rights set forth in the American Declaration of the Rights and Duties of Man.

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[FN7] These rules have been set forth in several international documents. See, for example, the International Civil Aviation Convention, 7 December 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (both the USA and Cuba are parties to this convention). The ban on the use of force against civilian aircraft applies even if they have entered the airspace of a foreign country. See, for example, Kay Hailbronner, Freedom of the Air and the Convention on the Law of the Sea, 77 Am. J. Int'l. L. 490, 514 (1983), ("Even if an order to land is deliberately disregarded, a civil unarmed aircraft that intrudes into foreign airspace may not be fired upon."). Common sense dictates that the insignificant threat that civil airplanes may pose does not justify a potential loss of life.

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9. THE VICTIMS. Armando Alejandro was 45 years old at the time of his death. Although born in Cuba, Alejandro made Miami, Florida his home at an early age and became a naturalized U.S. citizen. Alejandro served an eight-month tour of duty in the Vietnam War, completed his college education at Florida International University, and worked as a consultant to the Metro-Dade Transit Authority. He was survived by his wife of 21 years, Marlene Alejandro, and his daughter Marlene, a university student.

10. Carlos Alberto Costa was born in the United States in 1966 and lived in Miami. He was only 29 years old. Always interested in aviation and hoping to someday oversee the operations of a major airport, Costa earned his bachelor's degree at Embry-Riddle Aeronautical University and worked as a Training Specialist for the Dade County Aviation Department. He was survived by his parents Mirta Costa and Osvaldo Costa and by his sister, Mirta Méndez.

11. Mario Manuel De la Peña was also born in the United States and was 24 years old at the time of his death. De la Peña was in his last semester at Embry-Riddle Aeronautical University, working toward his goal of being an airline pilot, when he was killed. During that semester he had obtained a coveted and highly competitive position with American Airlines. The university granted De la Peña a posthumous bachelor's degree in professional aeronautics. He was survived

by a younger brother, Michael De La Peña, and by his parents Mario T. De la Peña and Miriam De la Peña.

12. Pablo Morales was born in Havana, Cuba, on 16 May 1966. On 5 August 1992 he fled the island on a raft and was rescued by the Brothers to the Rescue organization. As a result, he joined the organization as a volunteer and flew as copilot. Morales studied cartography and graduated as a geodesist.

13. According to the petitioners, the responsibility of the Cuban State lies, first, in that the unprovoked firing of deadly rockets at a defenseless, unarmed civilian aircraft undoubtedly comes within the scope of “extrajudicial execution.” That term is defined in reference to its use in the Torture Victim Protection Act (TVPA), which states that the term “extrajudicial execution” means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees set forth in international human rights instruments and, in particular, in the American Declaration of the Rights and Duties of Man. Cuba’s actions in this case come within that definition. The occupants of the two unarmed civilian planes received no warning of any type regarding their imminent destruction.

14. The FAC was acting as an agent of Cuba when it committed the killings.[FN8] The evidence presented shows how the pilots of the Cuban MiGs obtained authorization from state officials prior to downing each plane and received hearty congratulations from those officials after the planes were destroyed.

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[FN8] The Cuban Air Force is clearly an agent of the Cuban state, as it acts on Cuba's behalf and is subject to Cuba's control. See *Archer v. Trans/American Servs., Ltd.*, 834 F. 2d 1570, 1573 (11no. Cir. 1988); *Redefinition (Second) of Agency & 1* (1958) (defining the relationship between agencies).

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15. The incidents in which the victims were killed occurred in international airspace. The ICAO concluded that the aircraft were over international waters when they were shot down. The first plane was 18 miles off the Cuban coast when it was destroyed by FAC missiles; the second was 30.5 miles away from Cuba. These numbers place the airplanes a good distance from the 12 miles of territorial waters Cuba is allowed under international law.[FN9] Furthermore, the evidence provided by the crew and passengers of the *Majesty of the Seas*, a cruise ship that was in the vicinity, and of the *Tri-Liner*, a private fishing vessel, indicated that the civilian aircraft were flying in international airspace toward Florida and away from Cuba when they were destroyed by the agents of the Cuban State.

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[FN9] The rules governing territorial waters and their permissible limits can be found in the United Nations Convention on the Law of the Sea, 7 October 1982, Art. 3, U.N. Doc. A/CONF 62/122 (1981), reprinted in 21 I.L.M. 1261 (1982).

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16. The practice of summary execution has been roundly condemned by the global community. Many international human rights conventions and declarations enshrine the right of all individuals to freedom from arbitrary or unjustifiable deprivation of life.[FN10] The consensus against extrajudicial executions is so extended that each instrument or agreement that has tried to define the scope of international human rights law has enshrined the right of due process for protecting that right. The forbidding of extrajudicial executions thus raises to the level of imperative law a provision of international law that is so basic that it is binding on all members of the international community. The human rights rules that have been generally accepted and that therefore have been incorporated into national law cover such basic rights as the right not to be murdered, tortured, or in any way submitted to cruel, inhuman, or degrading punishment and the right of freedom from arbitrary arrest. The ban on summary executions is universal and binding on states. A state violates international human rights law if, as state policy, it practices, encourages, or condones murder or allows the disappearance of individuals. Consequently, the extrajudicial killings of De la Peña, Costa, Alejandro, and Morales committed by agents of the Cuban State make that State's internationally responsible for violating the right to life set forth in Article I of the American Declaration of the Rights and Duties of Man. And by refusing justice, the Cuban State is responsible for ignoring the right to a fair trial enshrined in Article XVIII of that international instrument.

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[FN10] The many international human rights instruments that forbid extrajudicial executions include the following: the Universal Declaration of Human Rights, 10 December 1948, Art. 3, G.A. Res. 217A (III), U.N. Doc. A/810; the International Covenant on Civil and Political Rights, 16 December 1966, Art. 6(1), G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. a/6316, 999 U.N.T.S. 171; American Declaration of the Rights and Duties of Man, 2 May 1948, Art. I, OEA/ser.L/V/II.23, doc.21, rev. 6 (1979). Moreover, the international community's commitment to resolving disputes peacefully is a fundamental part of the structure of the United Nations Charter and of other international instruments. U.N. Charter, Articles 1, 2, 33, 39; see also Charter of the Organization of American States, Articles 24-27, 3 paragraph I.  
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## B. The State

17. The Cuban State did not reply to the Commission's repeated requests for information and for its comments on the admissibility and merits of the complaint. The Commission also notes that to date the State has not disputed the facts set forth in the complaint, in spite of the series of notes asking it to do so. Consequently, the period of time allowed in the Commission's Regulations for the State to provide information on the case at hand has expired by a wide margin.

## IV. ANALYSIS

### A. Competence of the Commission and formal requirements for admissibility

18. The Commission is competent *ratione materiae* to hear the case at hand since it involves violations of rights enshrined in the American Declaration of the Rights and Duties of Man. Its

competence stems from provisions of its Statute and Regulations and of the OAS Charter. Under the Charter, all member states pledge to respect the essential rights of individuals. In the case of states not parties to the Convention, the rights in question are those established in the American Declaration, which is a source of international obligations.[FN11] In its Statute, the Commission is instructed to place special emphasis on the observance of the human rights recognized in that Declaration's Article I (life, liberty, and personal security), Article II (equality before law), Article III (freedom of religion and worship), Article IV (freedom of investigation, opinion, expression, and dissemination), Article XVIII (fair trial), Article XXV (protection from arbitrary arrest), and Article XXVI (due process of law).

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[FN11] Inter-American Court of Human Rights, Advisory Opinion OC-10/89, July 14, 1989, 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, paragraphs 43 to 46.

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19. The Commission has processed this case in compliance with the provisions of Chapter III of its Regulations and Articles 1, 18, and 20 of its Statute. Article 51 of the IACHR Regulations states that the Commission "shall receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration of the Rights and Duties of Man, concerning the member states of the Organization that are not parties to the American Convention on Human Rights."

20. The procedure applied to this case was the one set forth in Article 52 of the Commission's Regulations, to wit: "The procedure applicable to petitions concerning member states of the Organization that are not parties to the American Convention on Human Rights shall be that provided for in the General Provisions included in Chapter I of Title II, in Articles 32 to 43 of these Regulations, and in the articles indicated below."

21. The presentation of the petition meets the formal requirements for admissibility contained in Article 32 of the Commission's Regulations, in that the procedure described in its Article 34 has been exhausted. Moreover, the claim is not pending any other international settlement procedure, nor does it reproduce any other petition that the Commission has previously examined.

22. The Commission is also competent *ratione personae*, since Article 26 of its Regulations provides that "[a]ny person or group of persons or nongovernmental entity legally recognized in one or more of the member states of the Organization may submit petitions to the Commission, in accordance with these Regulations, on one's own behalf or on behalf of third persons, with regard to alleged violations of a human right recognized, as the case may be, in the American Convention on Human Rights or in the American Declaration of the Rights and Duties of Man." In this context, the Commission must reiterate that the Cuban State's failure to respond in these proceedings is a breach of its international legal obligation to provide information in response to petitions and other communications containing allegations of human rights violations. The Commission has already stated on numerous occasions that the intent of the Organization of American States in its "Exclusion of the Present Government of Cuba from Participation in the

Inter-American System"[FN12] was not to leave the Cuban people without protection. The exclusion of that government from the regional system in no way means that it can fail to meet its international obligations in matters of human rights. Consequently, the Commission bases its analysis on the evidence at its disposal and on Article 42 of its Regulations.

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[FN12] Third operative paragraph of resolution VI of the Eighth Meeting of Consultation of Ministers of Foreign Affairs of the OAS, Punta del Este, Uruguay, OEA/Ser.F/II.8, doc. 68, pages 14-15.

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23. In terms of its competence *ratione loci*, clearly the Commission is competent with respect to human rights violations that occur within the territory of OAS member states, whether or not they are parties to the Convention. It should be specified, however, that under certain circumstances the Commission is competent to consider reports alleging that agents of an OAS member state have violated human rights protected in the inter-American system, even when the events take place outside the territory of that state. In fact, the Commission would point out that, in certain cases, the exercise of its jurisdiction over extraterritorial events is not only consistent with but required by the applicable rules. The essential rights of the individual are proclaimed in the Americas on the basis of equality and nondiscrimination, "without distinction as to race, nationality, creed, or sex." [FN13] Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. [FN14] In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control. [FN15]

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[FN13] Charter, Article 3.k. See American Declaration, Article II. See also Inter-American Conference on Problems of War and Peace, Resolution XL (1945), which indicates that one of the aims of instituting a regional human rights system was to eliminate violations of the principle of "equality between nationals and aliens."

[FN14] For example, "Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction or *de facto* jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues." Theodor Meron, in *Extraterritoriality of Human Rights Treaties*, 89 *A.J.I.L.* 78 (1995) 78, 81. See also n. 7, citing T. Buergenthal, "To Respect and Ensure: State Obligations and Permissible Derogations," in *The International Bill of Rights: The Covenant on Civil and Political Rights* 72, 74 (Louis Henkin ed. 1981).

[FN15] Instances in which the Commission has dealt with extraterritorial actions of a state, under the terms of its Statute and the American Declaration, can be found in IACHR, Report on the Situation of Human Rights in Chile, OEA Ser.L/V/II.66, doc. 17, 1985 (referring to the murder of Letelier in Washington, D.C.); Second Report on the Situation of Human Rights in Suriname,

OEA Ser.L/V/II.66, doc. 21, rev. 1, 1985 (on allegations that Surinamese residents of Holland have been harassed and/or assaulted by agents of Suriname); Case 1.983 (opened on the basis of allegations of extraterritorial actions; set aside for another reason); Report on case 9.239, United States, published in the 1986-87 Annual Report of the IACHR, OEA Ser. L/V/II.71, doc. 9 rev. 1, September 22, 1987, p. 184 (in which the case pertaining to actions by United States forces in Grenada is found admissible; case settled, see Report 3/96, published in the 1995 Annual Report of the IACHR, OEA/Ser.L/V/II.91, doc. 7 rev., February 28, 1996, p. 201); Report 31/93, Case 10.573, United States, published in 1993 Annual Report of the IACHR, OEA/Ser.L/V/II.85, doc. 9, rev., February 11, 1994, p. 312 (in which the case pertaining to actions by United States forces in Panama is found admissible).

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24. The European Commission on Human Rights has ruled on this matter in the case brought by Cyprus against Turkey following the Turkish invasion of that island. In its complaint, Cyprus alleged that the European Convention had been violated in the part of its territory occupied by Turkish forces. Turkey, for its part, maintained that, under Article 1 of the European Convention, the competence of the Commission was limited to the examination of actions allegedly committed by a state party in its own national territory and that Turkey could not be found to have violated the Convention since it had not extended its jurisdiction to Cyprus. The European Commission rejected that argument, as follows:

In Article 1 of the Convention, the High Contracting Parties undertake to secure the rights and freedoms defined in Section 1 to everyone "within their jurisdiction" (in the French text: "relevant de leur jurisdiction"). The Commission finds that this term is not, as submitted by the respondent Government, equivalent to or limited to the national territory of the High contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this article, and from the purpose of the Convention as a whole, that the High contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.[FN16]

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[FN16] European Court Human Rights, *Lozidou v. Turkey* A 310 paragraphs 56-64 (1995). European Commission of Human Rights *X v. UK* No. 7547/76, 12 DR 73 (1977); *Bertrand Russell Peace Foundation Ltd. v. UK*, No. 7597/76, 14 DR 117 at 124 (1978); *Mrs. W v. UK* No. 9348/81, 32 DR 190 (1983).

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25. In the case sub lite, the petitioners stated that their allegations were guided by the provisions of the American Declaration of the Rights and Duties of Man. The Commission has examined the evidence and finds that the victims died as a consequence of direct actions taken by agents of the Cuban State in international airspace. The fact that the events took place outside Cuban jurisdiction does not limit the Commission's competence *ratione loci*, because, as previously stated, when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues--in this case the rights enshrined in the American Declaration. The Commission finds conclusive evidence that agents of the Cuban State, although outside their territory, placed the

civilian pilots of the "Brothers to the Rescue" organization under their authority. Consequently, the Commission is competent *ratione loci* to apply the American Convention extraterritorially to the Cuban State in connection with the events that took place in international airspace on February 24, 1996.

26. As regards the requirement that domestic remedies be exhausted, Article 37(1) of the Commission's Regulations states that "for a petition to be admitted by the Commission, the remedies under domestic jurisdiction must have been invoked and exhausted in accordance with the general principles of international law." In this regard, the Inter-American Court of Human Rights has stated that:

Generally recognized principles of international law indicate, first, that this is a rule that may be waived, either expressly or by implication, by the State having the right to invoke it, as this Court has already recognized (see Viviana Gallardo et al., Judgment of November 13, 1981, N° G 101/81. Series A, para. 26). Second, the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed.[FN17]

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[FN17] Inter-Am.Ct.H.R., Velásquez Rodríguez Case, Preliminary Objections, Judgment of 26 June 1987, Series C, No. 1, OAS, p. 38, paragraph 88.  
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27. In the present case, the Cuban State made no objection asserting that domestic remedies had not been exhausted upon receiving formal notification of the petition and thus opposing its admissibility; neither did it respond to the Commission's repeated requests for information during processing of the case. In consideration of this, and with no evidence other than that contained in the case documents, the Commission concludes that the Cuban State has tacitly declined to make an objection asserting the nonexhaustion of domestic remedies.

B. Evidence in the case at hand

28. The Commission will now present the documents and other evidence, which have been thoroughly examined and which provide indications for reaching a decision regarding the events of the afternoon of 24 February 1996, when the four civilian pilots from Brothers to the Rescue lost their lives, allegedly as a result of actions taken by agents of the Cuban State. Thus, the documents and other evidence submitted to the Commission — which it has carefully processed, analyzed, and assessed — include: (1) the report of the International Civil Aviation Authority (ICAO) of 28 June 1996; (2) a descriptive summary of the incident drawn up by the victims' relatives; (3) a written transcript of the testimony given to the IACHR by the victims' relatives on 3 March 1997; (4) a leaflet with biographies and photographs of the four dead pilots, along with other general information; (5) the report of the United Nations Special Rapporteur for Cuba; (6) the final judgment against the Republic of Cuba handed down in a civil suit by Judge King of the United States District Court, South Florida; (7) the testimony given by Capt. Charles F. Leonard, aviation expert, during the civil trial in the U.S. courts; (8) the testimony given by Prof. Stephen J. Schnably, expert in international law, during the civil trial in the U.S. courts; (9) a

copy of the USA's 1996 Anti-Terrorism and Effective Death Penalty Act; (10) a copy of the USA's 1976 Foreign Sovereign Immunities Act; (11) an article from Times magazine, 11 March 1996, titled "The Cold War is Back"; (12) EFE newswire, dated 5 March 1996: Decisión de derribo se tomó para evitar nueva humillación [Decision to shoot down taken to prevent further humiliation]; (13) EFE newswire, dated 5 March 1996: Piloto admite que exclamó frase despectiva en el derribo [Pilot admits to exclaiming derogative phrase during downing]; (14) transcriptions of interviews with Gen. Rubén Martínez Puente, commanding officer of the Cuban Antiair Defense Force, broadcast by Cubavisión, Havana, on 6 March 1996; (15) audio tape of the flightdeck recorder from aircraft 2506, 24 February 1996; and (16) scale models of the Cessnas and MiGs involved in the shutdown.

C. Analysis of the evidence with regard to the material perpetrators of the incident

29. After assessing the evidence, the Commission must analyze the events of 24 February 1996 and determine whether they cause the Cuban State to incur in international responsibility for the alleged violation of rights enshrined in the American Declaration of the Rights and Duties of Man. In other words, the Commission must ascertain whether the Cuban State is responsible for the death of the four civilian pilots and, consequently, whether the three elements that cause a State to be internationally responsible are present, namely (i) whether there existed an action or a failure to act that violated an obligation enshrined in a rule of international law currently in force, which in this case would be the American Declaration; (ii) whether that action or a failure to act can be attributed to the State in its capacity as a juridical person, and (iii) whether harm or damage was caused as a result of the illicit act.

30. One of the pieces of evidence that casts light on the substance of the complaint is the report by the International Civil Aviation Organization (ICAO), which is included in the file on this case. Following the incident, during its 147th session on 6 March 1996 the ICAO Council adopted a resolution regarding the downing of two private U.S.-registered civilian aircraft by Cuban military airplanes on 24 February 1996. The ICAO studied this issue in response to a request made by the United Nations Security Council on 27 February 1996 and in consideration of the requests made by the governments of the USA and Cuba for an exhaustive investigation of the incident to be conducted. In compliance with that request, on 28 June 1996 the ICAO presented the Security Council with a report titled "Report of the Investigation into the Shooting Down of Two U.S.-Registered Private Aircraft by a Cuban Military Plane on 24 February 1996".

31. With regard to the events, the ICAO report establishes that the Brothers to the Rescue pilots and followers met at a hangar at Opa Locka airport, located in south Florida, in the morning of 24 February 1996, and that at 9:12 a.m. the pilot of the Cessna 337C, registration N2456S, who was the organization's flight operations chief, began presentation of the flight plans according to visual flight rules (VFR) prior to conducting a rafter rescue flight. However, due to other commitments on the part of some of the pilots, the flight did not leave at 10:15 a.m. as had been planned. The pilots returned to the hangar after 11:00 a.m. and decided to have lunch before taking off. At 1:01 p.m. the three Cessna 337 aircraft — registration numbers N2506 (José Basulto, Arnaldo Iglesias, Andrés and Silvia Iriondo), N2456S (Carlos Costa and Pablo Morales), and N5485S (Mario De La Peña and Armando Alejandre) — took off to the west at 1:11, 1:12, and 1:13 p.m., respectively. Once in the air, the three Cessnas contacted Miami

AIFSS (call sign Miami Radio) to activate their flight plans. At 2:39 p.m. Cuban air defense radar detected aircraft to the north of Parallel 24N. At 2:43 p.m. two military interception airplanes were immediately prepared at the San Antonio de los Baños airbase. These airplanes — a two-man MiG-29 UB and a MiG-23 ML — were armed with heat-seeking air-to-air missiles and machineguns. They took off at 2:55 p.m. to patrol around 15 to 20 km north of the coast at altitudes of between 200 and 500 meters.[FN18] The ICAO then concluded, inter alia, the following:

- At 15:21 hours on 24 February 1996, N2456S was destroyed by an air-to-air missile fired by a Cuban MiG-29 military aircraft.
- At 15:27 hours on 24 February 1996, N5485S was destroyed by an air-to-air missile fired by a Cuban MiG-29 military aircraft.
- The recorded positions and track of the Majesty of the Seas, the observations by its crew and passengers, the position of the Tri-Liner relative to the Majesty of the Seas, and the resulting estimated locations of the shootdowns were considered to be the most reliable position estimates.
- No corroborative evidence of the position of the Majesty of the Seas was obtained. With this qualification and based on the recorded positions of the Majesty of the Seas, N2456S was shot down approximately at position 23°29N 082°28W, 9 NM outside Cuban territorial airspace and N5485S was shot down approximately at position 23°30.1N 082°28.6W, 10 NM outside Cuban territorial airspace (emphasis added).
- Means other than interception were available to Cuba, such as radio communication, but had not been utilized. This conflicted with the ICAO principle that interception of civil aircraft should be undertaken only as a last resort.
- During the interceptions, no attempt was made to direct N2456S and N5485S beyond the boundaries of national airspace, guide them away from a prohibited, restricted or danger area or instruct them to effect a landing at a designated aerodrome.
- In executing the interception, the standard procedures for maneuvering and signals by the military interceptor aircraft, in accordance with ICAO provisions and as published in AIP Cuba, were not followed.
- The Protocol introducing Article 3-bis into the Chicago Convention had not entered into force. Neither Cuba nor the United States had ratified it.[FN19]
- The rule of customary international law that States must refrain from resorting to the use of weapons against civil aircraft applies irrespective of whether or not such aircraft is within the territorial airspace of that State.[FN20]

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[FN18] According to the ICAO report, Page 13, footnote 18: According to the ICAO report: “The MiG-29 UB is a two-seat combat trainer that has been in production since 1982. It is

powered by two Tumansky R-33D turbo-fan engines. It has one 30 mm gun, infra-red sensor, laser rangefinder and underwing pylons for six close-range air-to-air missiles. Maximum speed is Mach 2.3, service ceiling 17,000 m, take-off distance 240 m and landing distance 600 m. The MiG-29 carried six R-73 air-to-air missiles. The R-73 is a close-range solid propellant air-to-air missile with infra-red homing guidance. It has a canard configuration with small cruciform control surfaces in tandem with nose foreplanes and cruciform rear mounted wings. This configuration provides high manoeuvrability with a minimum range of under 500 m. The R-73 missile is 2.90 m long, 17 cm in diameter, has a mass of 105 kg and a maximum range of 20 km. The missile has both a contact and a proximity fuse. It has a 7.4 kg explosive charge that creates a ring shape of shrapnel that moves forward and outwards. The MiG-23 ML is a single-seat variable geometry air combat fighter that was in production from 1973 to the mid-1980s. It is powered by one Tumansky R-35F-300 turbojet with afterburner. It has one 23 mm gun; J band multi-mode radar; head-up display; pylons for air-to-air missiles, bombs, rocket packs or other external stores. Maximum speed is Mach 2.35, service ceiling 18,000 m, take-off distance 500 m and landing distance 750 m.” International Civil Aviation Organization (ICAO), Report on the shooting down of two U.S.-registered private civil aircraft by Cuban military aircraft on 24 February 1996, C-WP/10441, June 20, 1996, p. 18, paragraphs 1.6.6.1, 1.6.6.2, and 1.6.7.1, in United Nations, Security Council, S/1996/509, July 1, 1996.

[FN19] Both Cuba and the USA are parties to the International Civil Aviation Convention (Chicago, 7 December 1944). On 10 May 1984, the ICAO Assembly, attended by 107 states parties, including Cuba and the United States, unanimously adopted a Protocol regarding an amendment of the International Civil Aviation Convention [Article 3-bis]. This Protocol reads as follows: “[a] The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations. [b] The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft. [c] Every civil aircraft shall comply with an order given in conformity with paragraph (b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations. [d] Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph (a) or derogate from paragraphs (b) and (c) of this Article.”

[FN20] United Nations, Security Council, ICAO Report, op. cit., pp. 92–93, S/1996/509, 1 July 1996.

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32. The ICAO also notes: “There were several eyewitnesses to the event. Personnel and passengers on board the Majesty of the Seas and the crew of the fishing boat Tri-Liner observed the destruction of an aircraft (N2456S) as well as the later destruction of another aircraft (N5485S). An observer on duty in an observation post on shore in Havana and the yachtsman on the sailing boat heard and saw one event, but neither of them was able to tell whether he saw the destruction of the first or the second aircraft.” [FN21] According to ICAO, the Majesty of the Seas had an automatic system for recording the time, position, velocity, direction, relative wind, and depth every five minutes, based on an international system for determining position (GPS) and other sensors.[FN22]

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[FN21] United Nations, ICAO Report, op. cit., p. 10, paragraph 1130.

[FN22] Ibid., p. 8, paragraph 1118.

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33. Regarding the witnesses, the ICAO states that the watchkeeping staff on the bridge of the Majesty of the Seas, at 15:23 hours, observed an explosion in the air and the debris that fell into the sea. Several passengers and other members of the crew also saw the explosion and the falling debris. The occurrence was recorded in the ship’s log. The ICAO further notes that a crewman of the fishing boat Tri-Liner heard and saw the explosion directly overhead and called the master, who was below deck. Both observed the aircraft fall into the sea in flames, from 200 to 400 yards astern of their vessel. In addition, a military-type aircraft was seen. The fishing boat turned around, approached the place of the impact, and observed some small debris and an oil slick. A 1.5 ft square orange-colored box or float, with a yellow line attached, was seen but not recovered. The boat remained on the scene for about 10 minutes; no other items came to the surface. The Tri-Liner then resumed its course to the north. The master later estimated the time of the explosion as 15:15 hours and the position as 23 30N 082 17W. [FN23]

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[FN23] Ibid., pp. 10–12, paragraphs 1131 and 1132.

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34. The Commission has also been able to verify that the extracts from the radio communications exchanged by the MiG-29 and the military control tower in Havana, as supplied by the petitioners, agree with those contained in the ICAO report, as do the adjectives used by the FAC pilots before shooting down the civilian aircraft and the orders they received from their superiors in Havana, Cuba.

35. The International Civil Aviation Organization described the damage done to the civilian pilots and their aircraft in the following terms:

The pilot and the other occupant of the Cessna 337C, N2456S [Carlos Costa and Pablo Morales], are missing and presumed fatally injured. The pilot was a citizen of the United States, and the other occupant was a legal resident of the United States.

The pilot and the other occupant of the Cessna 337B, N5485S [Mario De La Peña and Armando Alejandro], are missing and presumed fatally injured. Both occupants were citizens of the United States.

The Cessna 337C, N3456S, and the Cessna B, N5485S, were each destroyed by one air-to-air missile fired from a Cuban MiG-29 military aircraft. Both Cessna aircraft broke up in the air from the explosions of the missiles, the wreckage impacted the sea and sank.[FN24]

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[FN24] United Nations, ICAO Report, op. cit., p. 15, paragraphs 122, 123, and 131.  
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36. As regards the pilots of the Cuban Air Force MiGs that were involved in the 24 February 1996 incident, the ICAO noted the following:

Pilot of the MiG-29. The pilot of the MiG-29 was qualified in accordance with existing Cuban Anti-Aircraft Defense/Air Force regulations. The pilot, male, 44 years of age, held the rank of Lieutenant Colonel. His total flying experience was over 1,000 hours, of which about 500 hours were in MiG-29 aircraft. He had been flying MiG aircraft for 19 years and had participated in three international assignments, including 74 combat missions.

Co-pilot of the MiG-29. The co-pilot of the MiG-29 was qualified in accordance with existing Cuban Anti-Aircraft Defense/Air Force regulations. The co-pilot, male, 44 years of age, held the rank of Lieutenant Colonel. His total flying experience was over 1,800 hours. He had been flying for 26 years and had participated in international assignments, including over 30 combat missions.

Pilot of the MiG-23. The pilot of the MiG-23 was qualified in accordance with existing Cuban Anti-Aircraft Defense/Air Force Regulations. The pilot, male, 35 years of age, held the rank of Major. His total flying experience was over 800 hours. He had been flying MiG aircraft for 15 years, and had participated in two international assignments, including some combat missions.  
[FN25]

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[FN25] Ibid., p. 16, paragraphs 154, 155, and 156.  
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37. The Inter-American Commission, based on the above considerations and on the evidence made available to it, offers the following clarifications regarding the events of 24 February 1996:

i. The incidents described in the petitioners' complaint, together with the evidence they provided, agree in full with the investigations conducted by the International Civil Aviation

Organization (ICAO) in their factual description of the events and of the persons directly behind them.

ii. The destruction of the two civilian aircraft in international airspace and the death of their four occupants at the hands of agents of the Cuban Air Force constitute flagrant violations of the right to life.

iii. The fact that weapons of war and combat-trained pilots were used against unarmed civilians shows not only how disproportionate the use of force was, but also the intent to end the lives of those individuals. Moreover, the extracts from the radio communications between the MiG-29 pilots and the military control tower indicate that they acted from a superior position and showed malice and scorn toward the human dignity of the victims.

iv. There is abundant evidence in this case to indicate the presence of the three elements that would make the Cuban State internationally responsible for the deaths of the four pilots in the afternoon of 24 February 1996.

D. The international responsibility of the Cuban state

#### EXISTENCE OF AN ACTION OR FAILURE TO ACT THAT VIOLATES AN OBLIGATION ENshrINED IN A PROVISION OF CURRENT INTERNATIONAL LAW

38. RIGHT TO LIFE: The first article of the American Declaration of the Rights and Duties of Man enshrines the right to life by stating that “every human being has the right to life, liberty and the security of his person.” In addition, the Inter-American Commission has also ruled that the right to life is “the foundation and basis of all other rights,”[FN26] adding that:

It can never be suspended. Governments may not use, under any circumstances, illegal or summary execution . . . This type of measures proscribed by the Constitutions of the states and is the international instruments that protect the fundamental rights of persons.[FN27]

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[FN26] IACHR, Ten Years of Activities 1971–1981, General Secretariat of the Organization of American States, Washington D.C., 1982, p. 331.

[FN27] Ibid.

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39. The Commission has also stated that “the obligation of respecting and protecting human rights is an obligation erga omnes, i.e., one that the Cuban State must assume--like all other member states of the OAS, whether or not they are signatories of the American Convention on Human Rights--toward the inter-American community as a whole, and toward all individuals subject to its jurisdiction, as direct beneficiaries of the human rights recognized by the American Declaration of the Rights and Duties of Man.”[FN28] In this regard, the Inter-American Court of Human Rights has indicated that for the states “the American Declaration is a source of international obligations. The fact that the Declaration is not a treaty should not lead one to conclude that it has no legal effect...”. [FN29]

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[FN28] IACHR, Report No. 47/96, Case 11.476, Victims of the Tugboat “13 de Marzo” vs. Republic of Cuba, OEA/Ser.L/V/II.93, Doc. 32, 16 October 1996, p. 20, paragraph 77.

[FN29] Inter-American Court of Human Rights, Advisory Opinion OC-10/89, July 14, 1989, Series A: Judgments and Opinions, 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, paragraphs 45 and 47.

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40. Furthermore, the public law doctrine regarding international human rights law is very broad in analyzing states’ obligations of ensuring respect for the right to life. For example, Héctor Faúndez Ledesma, a Venezuelan jurist and professor at the Central University of Venezuela, has stated that:

Substantively, the right to life seeks to protect the citizen from the capricious act by one who has state power and who, abusing that power, may feel the temptation to dispose of those who may disturb him . . .

. . . it should be observed that the right to life implies two distinct obligations on the state: first, the obvious consequence is that the state authorities, and in particular the police and military forces, should abstain from causing arbitrary deaths; and second, this guarantee implies the state’s duty to protect persons from acts of private persons that may constitute an arbitrary attack on their life, punishing them so as to deter or prevent such attacks.[FN30]

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[FN30] Héctor Faúndez Ledesma, *Administración de Justicia y Derecho Internacional de los Derechos Humanos (El Derecho a un Juicio Justo)*, Central University of Venezuela, Faculty of Legal and Political Sciences, 1992, pp. 61–62.

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41. In this regard, the Commission believes that in this case the presence of the first element giving rise to the international responsibility of the Cuban State has been adequately proven: the existence of actions originating with its agents that violated the first obligation set forth in the American Declaration--the right to life of Carlos Costa, Pablo Morales, Mario De La Peña, and Armando Alejandro in the course of the events of 24 February 1996.

42. Neither can the Commission fail to refer to the ICAO’s conclusions that the agents of the Cuban State made no effort to use means other than lethal force to guide the aircraft out of the restricted or danger area. The Commission believes that the indiscriminate use of force, and particularly the use of firearms, is an affront to the right to life and personal integrity. In this particular case, the military airplanes acted irregularly: without prior warning, without evidence that their actions were necessary, without keeping things in their correct proportion, and without the existence of due motivation.

43. The United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated that “if an agent of the services of repression uses force in excess of that necessary to attain his legitimate goal and a person is killed, that would equate to an arbitrary execution.”[FN31] In the case at hand, the pilots of the civilian light aircraft posed no danger to Cuba’s national security, to the Cuban people, or to the military pilots. Regarding the disproportionate use of force and the arbitrary taking of lives, the Inter-American Court of Human Rights has stated that:

Without question, the State has the right and duty to guarantee its security. It is also indisputable that all societies suffer some deficiencies in their legal orders. However, regardless of the seriousness of certain actions, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action.[FN32]

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[FN31] Quoted in O’Donnell, Daniel, *Protección Internacional de los Derechos Humanos*, Andean Commission of Jurists, Lima, Peru, 1983, p. 52.

[FN32] Inter-Am.Ct.H.R., *Neira Alegría et al. vs. Republic of Peru*, Judgment of 19 January 1995, paragraph 75.

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44. In the same regard, the European Court of Human Rights has stated that:

. . . soldiers [trained] to continue shooting once they opened fire until the suspect was dead. . . . Against this background, the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.[FN33]

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[FN33] European Court of Human Rights, Strasbourg, *Decisions and Reports*, Judgment of 27 September 1995, No. 17/1994/464/545, *McCann and Others vs. The United Kingdom*, p. 263.

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45. From the circumstances surrounding the events of 24 February 1996, from the disproportionate and indiscriminate use of lethal force applied to the civilian aircraft, from the intensity of that force, and from the way in which the authorities at the Havana military control tower congratulated the MiG-29 pilots after they had carried out their orders, the Commission finds sufficient evidence that Carlos Costa, Pablo Morales, Mario De La Peña, and Armando Alejandro were arbitrarily or extrajudicially executed at the hands of agents of the Cuban State.[FN34] Consequently, the Cuban State is responsible for violating the right to life, as enshrined in Article I of the American Declaration of the Rights and Duties of Man.

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[FN34] In his report for the year in which the incident occurred, the United Nations Rapporteur for Cuba at the time stated that “the shooting down of these aircraft was a premeditated act and

that it constituted a violation of the right to life . . . the manner in which the events took place, particularly the fact that approximately six minutes elapsed between the shooting down of one aircraft and that of the other, irrefutably indicates that the act did not represent the reflex of some confused pilots, but that there had been enough time for them to receive precise orders to act as they did.” (United Nations, General Assembly, Report on the Situation of Human Rights in Cuba, A/51/460, 7 October 1996, p. 13, paragraph 32.) Similarly, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has defined arbitrary executions as “the arbitrary deprivation of life as a result of the killing of persons carried out by the order of a government or with its complicity or tolerance or acquiescence without any judicial or legal process”. (United Nations, Doc. E/CN.4/1983/16, paragraph 66.)

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46. **RIGHT TO A FAIR TRIAL:** The American Declaration sets forth the remedies to which all individuals who believe their rights to have been violated by state authorities shall have access. Thus, Article XVIII stipulates that: “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.”

47. In the case documents there is no evidence to indicate that the victims’ families attempted to exhaust domestic Cuban law in order to secure the prosecution and punishment of the perpetrators of the incident at hand. Nevertheless, the Inter-American Commission has always maintained that in the case of crimes of public action, and even in those which may be prosecuted by a private actor, it is not valid to demand exhaustion of domestic remedies of the victim or the victim's relatives, for the state has a duty to maintain public order, and therefore it has an obligation to set the criminal law system into motion and to process the matter until the end. In other words, the obligation to investigate, prosecute, and punish the persons liable for human rights violations is a non-delegable duty of the state. One consequence is that public employees, unlike private persons, have a legal obligation to denounce all crimes of public action that they come to learn of in performing their duties. The preceding statement is confirmed in those procedural regimes that deny the victim or victim's relatives any standing, as the state monopolizes the ability to press criminal charges. And where such standing is provided for, its exercise is not compulsory, but optional for the person who has suffered harm, and does not take the place of state action.

48. Neither do the documents contain any evidence to indicate that the Cuban State, since 24 February 1996, has made any effort to investigate the incident, identify responsibilities, and punish either the air force pilots who executed the victims or the authorities who authorized the use of lethal force against defenseless civilian aircraft. In this regard, the European Court of Human Rights has stated that:

A general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the [European] Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in [the]

Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.[FN35]

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[FN35] European Court of Human Rights, *McCann and Others vs. United Kingdom*, op. cit., p. 56, paragraph 161.  
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49. The fact that in more than three years no exhaustive investigation was begun under Cuba’s domestic laws to study the legitimacy of the force used against the civilian aircraft, that neither the perpetrators nor the individuals who gave the orders from the military control tower have been brought to trial, and that fair reparations have not been made to the relatives of the victims makes the Cuban State responsible for violating the right to a fair trial as set forth in Article XVIII of the American Declaration. The Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations Commission on Human Rights, Theo Van Boven, analyzed the question of impunity in the following terms:

Perpetrators of human rights violations, whether civilian or military, become all the more irresponsible if they are not held to account before a court of law.... It may therefore be concluded that in a social and political climate where impunity prevails, the right to reparation for victims of gross violations of human rights and fundamental freedoms is likely to become illusory. It is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards gross misconduct of perpetrators.[FN36]

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[FN36] United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th session, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report submitted by Mr. Theo Van Boven, Special Rapporteur, paragraph 130, p. 58, E/CN.4/Sub.2/1993/8, 2 July 1993.  
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#### ATTRIBUTION OF THE ACTION OR FAILURE TO ACT TO THE STATE

50. After showing that the first element causing the international responsibility of the Cuban State--the actions that violated the American Declaration of the Rights and Duties of Man--was present in the case at hand, the Commission also believes it has been clearly proven that those illicit actions were attributable to the State, in that the responsible agents were officers of the Cuban Air Force and were thus acting in performance of official functions. This is confirmed by the eye-witnesses’ reports, the International Civil Aviation Organization’s investigation, and the transcript of the radio exchanges between the Havana control tower and the aircraft pilots who perpetrated the actions. Consequently, the events of 24 February 1996 are attributable to the Cuban State.

#### THE DAMAGE CAUSED BY THE ILLICIT ACTIONS

51. The final element giving rise to the international responsibility of the Cuban State is the damage caused as a result of the illicit actions carried out by its agents on the afternoon of 24 February 1996. In the Commission's opinion, the damage caused by the illicit actions of the Cuban State involved the following: (a) irreparable physical damage, consisting of the deaths of the four occupants of the civilian aircraft; (b) moral and psychological damage inflicted on the victims' relatives, consisting of emotional suffering over the loss of their loved ones, the trauma arising from the incident and from the impossibility of recovering the bodies to give them a decent burial, combined with the knowledge that justice has not been served--in other words, that the deaths caused by the agents of the Cuban State remain unpunished; and (c) material damage, consisting of loss of earnings and consequential damages.

52. The Inter-American Commission therefore believes that the Cuban State is obliged to: (i) investigate the incident, (ii) take appropriate steps in this regard, (iii) begin proceedings against the State agents and/or other authorities responsible for the incident, and (iv) provide the victims' families with adequate reparations.

## V. CONCLUSIONS

53. Cuba is responsible for violating the right to life (Article I of the American Declaration of the Rights and Duties of Man) to the detriment of Carlos Costa, Pablo Morales, Mario De La Peña, and Armando Alejandro, who died as a result of the direct actions of its agents on the afternoon of 24 February 1996 while flying through international airspace.

54. Cuba is responsible for violating the right to a fair trial (Article XVIII of the American Declaration of the Rights and Duties of Man) to the detriment of the relatives of Carlos Costa, Pablo Morales, Mario De La Peña, and Armando Alejandro, in that to date the Cuban authorities have not conducted an exhaustive investigation with a view toward prosecuting and punishing the perpetrators and have not indemnified those same relatives for the damage they suffered as a result of those illicit acts.

## VI. RECOMMENDATIONS

Based on the analysis and conclusions contained in this report, the Inter-American Commission on Human Rights recommends that the Cuban State:

1. Conduct a complete, impartial, and effective investigation to identify, prosecute, and punish the agents of the State responsible for the deaths of Carlos Costa, Pablo Morales, Mario De La Peña, and Armando Alejandro in the incident occurring in international airspace on 24 February 1996.

2. Ratify the Protocol to the International Civil Aviation Convention (Article 3-bis), an international instrument of which Cuba has been a signatory since 7 December 1944.

3. Take the steps necessary to ensure that the victims' families receive adequate and timely compensation, including full satisfaction for the human rights violations described herein and

payment of fair compensatory indemnification for the monetary and nonmonetary damages suffered, including moral damages.

## VII. PUBLICATION

In a note dated May 19, 1999, the Commission transmitted to the Cuban State its Report N° 81/99, pertaining to this case, and granted it a period of two months in which to implement the recommendations contained therein, pursuant to Article 53, subparagraphs 1 and 2, of its Regulations.

The Cuban State neither presented any observations nor implemented the Commission's recommendations.

On the basis of those considerations, and pursuant to Article 53, subparagraphs 3 and 4, of its Regulations, the Commission has decided to reiterate the conclusions and recommendations set forth in this report, to publicize it, and to include it in the Commission's Annual Report to the OAS General Assembly. In fulfillment of its mandate, the Commission will continue to evaluate the measures taken by the Cuban State regarding those recommendations, until they have been fully implemented.

The Commission has decided to transmit this report to the State of Cuba and to the petitioners, pursuant to 53(4) of the Regulations.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on September 29, 1999. (Signed): Robert K. Goldman, Chairman; Hélio Bicudo, First Vice-Chairman; Claudio Grossman, Second Vice-Chairman; Commissioners Jean Joseph Exumé, Alvaro Tirado Mejía and Carlos Ayala Corao.