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Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 51/01; Case 9903
Session:	Hundred and Eleventh Special Session (3 – 6 April 2001)
Title/Style of Cause:	Rafael Ferrer-Mazorra, J. Jorrin-Alfonso, Marcelino Perez-Fernandez, Manuel Casalis-Noy, Sergio Sanchez-Medina, Jorge Cornel-Labrada, Reuben Alfonso-Arenciba, Roberto Gonzalez-Machado, Jose Cruz-Montoya, Jorge Remagne-Herrera, Pedro Prior-Rodriguez, Daniel Alvarez-Gamez, Pascual Cabrera-Benitez, Lourdes Gallo-Labrada, Marcelino Gonzalez-Arozarena, Domingo Gonzalez-Ferrer, Alfredo Gonzalez-Gonzalez, Juan Hernandez-Cala, Sixto Lanz-Terry, Lazaro O'Farrill-Lamas, Guillermo Paz-Landa, Jorge Rosabal-Ortiz, Enengio Sanchez-Mendez, Luis Urquiaga-Rodriguez, Armando Vergara-Peraza, Santiago Machado-Santana, Humberto Soris-Marcos, Lazaro Artilles-Arcia and Agustin Medina-Aguilar v. United States
Doc. Type:	Report
Decided by:	Chairman: Dean Claudio Grossman; First Vice-Chairman: Prof. Juan Mendez; Second Vice-Chairman: Lic. Marta Altolaguirre; Commissioners: Dr. Helio Bicudo, Dr. Peter Laurie, Dr. Julio Prado Vallejo Commission Member Professor Robert Goldman did not take part in the discussion and voting on this case, pursuant to Article 19(2) of the Commission's Regulations.
Dated:	4 April 2001
Citation:	Ferrer-Mazorra v. United States, Case 9903, Inter-Am. C.H.R., Report No. 51/01, OEA/Ser.L/V/II.111, doc. 20, rev. t 1188 (2000)
Represented by:	APPLICANTS: Covington and Burlington (Washington, D.C.); the Atlanta Legal Aid Society; Southern Minnesota Regional Legal Services; the International Human Rights Law Group; the American Civil Liberties Association; and the Lawyers Committee for Human Rights
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I. SUMMARY

1. The petition in the present case was lodged with the Inter-American Commission on Human Rights (hereinafter the “Commission”) against the United States of America (hereinafter the "State" or the "United States") on April 10, 1987 by six organizations: the Washington, D.C. law firm of Covington and Burlington; the Atlanta Legal Aid Society; Southern Minnesota Regional Legal Services; the International Human Rights Law Group; the American Civil Liberties Association; and the Lawyers Committee for Human Rights (hereinafter the “petitioners’ representatives”). By letter dated July 23, 1999, the International Human Rights

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Law Group informed the Commission that they had decided to discontinue their participation in this case.

2. The petition was filed on behalf of nationals of the Republic of Cuba who were part of the Mariel “Freedom Flotilla” to the United States in 1980 (hereinafter the "Mariel Cubans"). At the time of the filing of the petition in April 1987, approximately 3,000 Cubans were said to have been detained in the United States due to their irregular entry into the country. In their original petition, the petitioners' representatives purported to lodge the petition on behalf of approximately 335 of these Cubans, named as Rafael Ferrer-Mazorra and others, who were at that time detained at 10 federal, state or local detention centers across the United States (hereinafter the “petitioners”).[FN1] In their initial petition and subsequent observations, the petitioners alleged violations of Articles I, II, XVII, XVIII, XXV and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter the "American Declaration" or the "Declaration"), in connection with the length of time for which the petitioners had been detained in the United States, as well as the alleged absence of proper mechanisms to review the legality of the petitioners' detentions.

[FN1] In determining the present case, the Commission has relied in particular upon the circumstances of 29 petitioners in respect of whose status the State provided detailed information: J. Jorrin-Alfonso; Marcelino Perez-Fernandez, Manuel Casalis-Noy, Sergio Sanchez-Medina; Jorge Cornel-Labrada; Rafael Ferrer-Mazorra; Reuben Alfonso-Arenciba; Roberto Gonzalez-Machado; Jose Cruz-Montoya; Jorge Remagne-Herrera; Pedro Prior-Rodriguez; Daniel Alvarez-Gamez; Pascual Cabrera-Benitez; Lourdes Gallo-Labrada; Marcelino Gonzalez-Arozarena; Domingo Gonzalez-Ferrer; Alfredo Gonzalez-Gonzalez; Juan Hernandez-Cala; Sixto Lanz-Terry; Lazaro O'Farrill-Lamas; Guillermo Paz-Landa; Jorge Rosabal-Ortiz; Enengio Sanchez-Mendez; Luis Urquiaga-Rodriguez; Armando Vergara-Peraza; Santiago Machado-Santana; Humberto Soris-Marcos; Lazaro Artilles-Arcia; and Agustin Medina-Aguilar.

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3. In the present Report, the Commission decided to admit the case in relation to Articles I, II, XVII, XVIII, XXV and XXVI of the Declaration. In addition, after considering the merits of the case, the Commission found the State responsible for violations of Articles I, II, XVII, XVIII and XXV of the American Declaration, in connection with the deprivation of the petitioners’ liberty.

II. PROCEEDINGS BEFORE THE COMMISSION

A. Written Observations

4. By note dated April 15, 1987, the Commission transmitted the pertinent parts of the petitioners’ petition to the State, and requested that the State deliver information that it considered pertinent to the complaint within 90 days as prescribed by the Commission’s Regulations. By communication dated July 21, 1987, the Commission subsequently granted the State an extension of time until October 12, 1987 within which to respond to the petitioners’ petition.

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5. By communication dated October 9, 1987, the State responded to the petitioners' petition. By note dated October 14, 1987, the Commission transmitted the pertinent parts of the State's response to the petitioners, with a response requested within 45 days.

6. By communication dated November 24, 1987, the Commission made a request of the State for additional information concerning an apparent agreement between the United States and Cuba involving the deportation of approximately 2,600 Cubans from the United States.

7. In a letter dated December 1, 1987, the petitioners requested an extension of time to January 6, 1988 within which to respond to the State's October 9, 1987 observations, which the Commission granted by communication dated December 1, 1987. Subsequently, in a letter dated January 4, 1988 the petitioners requested a further extension of time to March 6, 1988, which the Commission granted by communication dated January 13, 1988.

8. The State delivered to the Commission a Supplementary Submission in a note dated January 19, 1988, which provided further obscurations respecting the petitioners' petition and responded to the Commission's November 24, 1987 letter. By letter dated January 20, 1988, the Commission transmitted the pertinent parts of the State's Supplementary Submission to the petitioners, with a response requested within 45 days.

9. In a communication dated March 7, 1988, the petitioners delivered a response to the State's observations on their petition. The Commission transmitted the pertinent parts of the petitioners' response to the State in a communication dated March 8, 1988, with a response requested within 60 days.

10. By note dated May 19, 1988, the petitioners delivered to the Commission Spanish language copies of their original petition and their reply brief of March 7, 1988.

11. The State, by letter dated June 10, 1988, requested an extension of time within which to respond to the petitioners' March 7, 1988 observations, which the Commission granted in a communication dated June 20, 1988.

12. By note dated July 2, 1988, the State transmitted to the Commission a Second Supplemental Submission in the case. The Commission communicated the pertinent parts of the State's Second Supplemental Submission to the petitioners by communication dated August 16, 1988, with a response requested within 45 days.

13. In a letter dated August 31, 1988, one of the petitioners' representatives, the law firm of Covington and Burlington, indicated that it had just received the State's Second Supplementary Submission and argued, inter alia, that the State's submission was not made in a timely manner. Subsequently, by letter dated September 29, 1988, Covington and Burlington, on behalf of the petitioners, provided further written observations on the State's Second Supplemental Submission. These observations essentially replicated the petitioners' previous submissions and were added to the Commission's file.

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14. By communication dated January 10, 1989, the petitioners delivered additional observations to the Commission in this case, and the Commission, by note dated February 6, 1989, transmitted the pertinent parts of the petitioners' observations to the State, with a response requested within 60 days.

15. Following a March 5, 1999 hearing convened by the Commission in the case, the Commission, by communications dated March 18, 1999 to the State and the petitioners, confirmed that upon completion of the March 5 hearing, the Commission had requested that the parties submit to it any additional information that they deemed pertinent to the case within 15 days of the hearing, and that any such information would then be forwarded to the opposite party within 30 days of receipt.

16. In a note dated March 22, 1999, the State delivered to the Commission a post-hearing brief, in accordance with the Commission's request at its March 5, 1999 hearing. The Commission subsequently transmitted the pertinent parts of the State's post-hearing brief to the petitioners by letter dated April 8, 1999, with a response requested within 30 days.

17. By communication dated April 2, 1999, the petitioners delivered to the Commission a post-hearing brief, in accordance with the Commission's request of its March 5, 1999 hearing. The Commission subsequently transmitted the pertinent parts of the petitioners' post-hearing brief to the State, with a response requested within 30 days.

18. On May 17, 1999, the petitioners requested a further 20 days within which to respond to the State's post-hearing brief, which the Commission granted. Subsequently, by communication dated June 8, 1999, the petitioners delivered a response to the State's March 22, 1999 post-hearing brief. By note dated July 28, 1999, the Commission transmitted the pertinent parts of the petitioners' June 8, 1999 observations to the State for informational purposes.

19. Among the supplementary documents provided by the petitioners at various stages of the proceedings in this matter were the following:

a) a Report by the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Court, Liberties and the Administration of Justice, on the Atlanta Federal Penitentiary, 99th Congress, 2nd Session (April 1986);
b) a copy of a 29 May 1986 communication under ECOSOC Resolutions 728F (XXVIII) and 1503 (XLVIII) relating to the Mariel Cubans;
c) copies of various legal decisions by U.S. courts, disposing of petitions for writs of habeas corpus brought by or on behalf of Mariel Cubans in relation to their detentions. These decisions included in particular: Garcia-Mir v. Smith 766 F.2d 1478 (11th Cir., 1985), cert. Denied 106 S. Ct. 1213 (1986); In re Mariel Cuban Habeas Corpus petitions, 822 F. Supp. 192 (7 May 1993) (U.S. Dist. Ct. - Penn); and Barerra-Echavarria v. Rison, 44 F.3d (9th Cir. En banc, 1985);
d) Report of the Minnesota Lawyers International Human Rights Committee on "The Freedom Flotilla Six Years Later: From Mariel to Minnesota", dated November 1986;
e) an analysis of the Cuban Review Plan prepared by the Coalition to Support Cuban Detainees, dated 29 June 1987;

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f) Report of the Minnesota Lawyers International Human Rights Committee on the First Year of Operation of the Oakdale Detention Center, dated July 1987;
g) I.N.S. Ruling 59 FR 13868-01 of 24 March 1994 regarding Mariel Cuban Parole Determinations, clarifying and expanding the discretionary authority of the I.N.S. under the Cuban Review Plan to withdraw parole approval for excludable Mariel Cubans.

20. Among the supplementary documents provided by the State at various stages of the proceedings in this matter were the following:

a) U.S. Code of Federal Regulations, Title 8 (8 C.F.R.), sections 212.12, 212.13;
b) Attorney General's Status Review Plan and Procedures, dated 28 April 1983;
c) Cuban Review Plan, adopted May 1987;
d) I.N.S. Ruling 52 FR 48799 dated 28 December 1987, establishing a separate immigration parole review process for Mariel Cubans
e) Copy of a 6 June 1988 memorandum attaching "Special Instructions Regarding Information Availability to Representatives of Mariel Cubans in the Parole and Repatriation Programs";
f) State's "Information Availability Policy", provided with the State's Second Supplementary Submissions of July 2, 1988;
g) Sample "Letter of Intent to Deny Parole" to Mariel Cuban, in English and in Spanish;
h) Sample I.N.S. Parole Denial in English and in Spanish issued in respect of a 13 November 1987 panel review hearing, providing a summary of facts and reasons for denial;
i) lists of Mariel Cuban detainees held at certain federal facilities that were visited by the Commission during its on-site visits, described in Part II.C of this Report;
j) A Report to the U.S. Attorney General on the Disturbances at the Federal Detention Center, Oakdale, Louisiana and the U.S. Penitentiary, Atlanta, Georgia, U.S. Department of Justice, Federal Bureau of Prisons (1 February 1988);
k) U.S. Department of Justice, Federal Bureau of Prisons, Report on the Federal Detention of Mariel Cubans, dated January 1995.

B. Hearings before the Commission

21. By note dated March 3, 1988, the Commission informed the State that the petitioners had requested a hearing before the Commission in the present case, and that the Commission decided to convene a hearing in the matter on March 22, 1988 at the Commission's Headquarters in Washington, D.C.

22. The State, in a communication dated March 8, 1988, requested a postponement of the hearing. By note dated March 15, 1988, the Commission informed the State that the Commission had considered the State's request and decided to proceed with the hearing, which the Commission indicated would be of a strictly informative nature. The Commission subsequently held a hearing in the case on March 22, 1988.

23. By letter dated November 25, 1998, the petitioners requested a further hearing before the Commission in the matter. By letters dated February 2, 1999 to the petitioners and to the State, the Commission informed the parties that a further hearing on the admissibility and merits of the

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matter had been scheduled for March 5, 1999, during the Commission's 102nd Period of Sessions.

24. In a note dated February 25, 1999, the State objected to the convening of a hearing in the case, on the basis, inter alia, that the notice of the hearing was practically insufficient, that due process was not properly respected in scheduling the hearing, and that there appeared to be no reason for a further hearing.

25. The Commission, in a responding letter dated March 1, 1999, informed the State that the Commission had considered the State's representations, and that the hearing would nevertheless proceed as scheduled.

26. By communication dated March 3, 1999, the State reiterated its objection to the convening of the hearing in the case, and repeated its request that the Commission cancel the hearing and rule the petition inadmissible. By letter dated March 4, 1999, the Commission informed the State that it had reaffirmed its decision to conduct a hearing into the matter as previously announced.

27. On March 5, 1999, a hearing into the petitioners' complaint was convened, during which both parties made representations respecting the current status of the Mariel Cubans and the issues in the petitioners' complaint. At the conclusion of the hearing, the Commission requested that the parties submit any additional information that they deemed pertinent in the case to the Commission within 15 days of the hearing, and indicated that any such information would be forwarded to the opposite party within 30 days of receipt by the Commission.

C. On-Site Visits

28. By letter dated July 9, 1994 to the Commission, the petitioners' representatives requested that the Commission conduct on-site visits at centers in which Mariel Cubans were being detained, and that the Commission ask for information from the State pertinent to this request.

29. At the invitation of the State, the Commission subsequently undertook on-site visits to four locations at which Mariel Cubans were held: Lompoc, California; Leavenworth, Kansas; Allenwood, Pennsylvania; and various facilities in Louisiana.

30. From May 3 to May 5, 1995, the Commission conducted an on-site visit to the U.S. Penitentiary at Lompoc, California. The Commission's delegation was comprised of Commissioner John Donaldson, Assistant Executive Secretary David Padilla, Staff Attorney and Human Rights Specialist Relinda Eddie, and Interpreter Janet Pahlmeyer-Davies.

31. During the site visit to Lompoc, the Commission benefited from the cooperation of numerous officials, including: Jim Zangs, Administrator of the Detention and Naturalization Service Branch of the U.S. Department of Justice, Bureau of Prisons; John Castro of the Immigration and Naturalization Service, Cuban Review Panel; Patrick Keohane, Warden and Joe Henderson, Acting Executive Assistant to the Warden, U.S. Penitentiary at Lompoc; Juan Muñoz, INS Liaison Officer with the Bureau of Prisons at Lompoc; Michael Purdy, Warden and

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John Nash, Associate Warden of Programs at the Federal Correctional Institute at Lompoc; and other staff at the U.S. Penitentiary and the Federal Correctional Institute at Lompoc.

32. On May 30, 1995, the Commission conducted an on-site visit to the U.S. Penitentiary at Leavenworth, Kansas. The Commission's delegation was comprised of Commission Members John Donaldson and Patrick Robinson, Staff Attorneys and Human Rights Specialists Relinda Eddie and Milton Castillo, and Interpreters Marjorie Buergenthal and Ronnie Rodríguez.

33. During its visit to Leavenworth, the Commission benefited from the cooperation of several officials, including: Jim Zangs, Administrator of the Detention and Immigration Branch of the U.S. Department of Justice, Bureau of Prisons; John Castro of the Immigration and Naturalization Service, Cuban Review Panel; Willie Scott, outgoing Warden of the U.S. Penitentiary, Leavenworth; Paige True, in-coming Warden of the U.S. Penitentiary, Leavenworth; and other staff members at the institution.

34. On April 26, 1996, the Commission conducted an on-site visit to the U.S. Penitentiary in Allenwood, Pennsylvania. The Commission's delegation was comprised of Commission Members John Donaldson, Alvaro Tirado Mejía and Jean Joseph Exumé, Assistant Executive Secretary David Padilla, Staff Attorney and Human Rights Specialist Relinda Eddie, Commission Secretariat staff members Henry MacDonald and Tania Hernández, and interpreters Michel Valeur and Miriam Deutsch.

35. During its visit to Allenwood, the Commission benefited from the cooperation of several officials, including: Jim Zangs, Administrator of the Detention and Immigration Branch of the U.S. Department of Justice, Bureau of Prisons; Amy Dale, Assistant Administrator of the Federal Bureau of Prisons; John Castro of the Immigration and Naturalization Service, Cuban Review Panel; J.T. Holland, Warden of the U.S. Federal Penitentiary (High Security); R.L. Hamm, Executive Assistant; Margaret Harding, Warden of the Federal Correctional Complex (Medium Security); Laurie M. Rule, Executive Assistant; Michael V. Pugh, Warden of the Federal Correctional Complex (Low Security); Ken Arnold, Executive Assistant; and staff members at these institutions.

36. From December 9 to December 12, 1996, the Commission conducted an on-site visit to various detention facilities in the State of Louisiana, including the prisons of Avoyelles Parish in the City of Marksville and Orleans Parish in New Orleans. This visit was also conducted in conjunction with the Commission's Working Group on Prisons and Prison Conditions in the Americas. The Commission's delegation was comprised of Commission Members John Donaldson, Alvaro Tirado Mejía and Jean Joseph Exumé, Assistant Executive Secretary David Padilla, Staff Attorneys and Human Rights Specialists Relinda Eddie and Bertha Santoscoy, and Commission Secretariat staff member Tania Hernández.

37. The purpose of the Commission’s various on-site visits, as particularized above, was to assess the general conditions of detention of the Mariel Cubans detained at these various institutions, and the Commission received information in this regard from State officials and from inmates with whom it spoke.

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38. The principal issues discussed by the Commission during its visits included the medical facilities and services available to Mariel Cubans, housing accommodation for Mariel Cubans; educational, recreational and vocational programs available to Mariel Cubans, methods of discipline, and visiting difficulties alleged to have been experienced by distant relatives of the inmates. The Commission also inquired into the arrangements for annual review of detention for post-sentence detainees and the availability of legal counsel for inmates.

39. In the course of its on-site visits, the Commission observed in particular that Mariel Cubans are, as a consequence of their status as administrative detainees, at a significant disadvantage in several respects compared to detainees who are serving criminal sentences. As administrative detainees, the Mariel Cubans are not, for example, entitled to the benefits of programs of reform and rehabilitation, such as continuing education and work experience, that characterize the criminal incarceration process. As a consequence, many Mariel Cubans expressed frustration with having few constructive endeavors to fill their time, which was amplified by the uncertainty over the length of their periods of detention.

40. Also in connection with the conditions of detention of the Mariel Cubans in the United States, information provided by the parties, as well as reports in the public media, indicate that several major disturbances have occurred at various institutions in which Mariel Cubans have been incarcerated since their arrival in the United States. In particular, between November 21 and December 4, 1987, two major disturbances occurred at the Oakdale, Louisiana and Atlanta, Georgia facilities of the Federal Bureau of Prisons. In these disturbances, rioting inmates, largely Mariel Cubans, took substantial control of the facilities, held hostages, and destroyed property. Other disturbances included an incident in May 1986 in which 125 Mariel Cubans rioted at the Krome Detention center in Florida, which is said to have been the fourth major disturbance in one year at that facility, and an incident in August 1991 at FCI Talladega, in which hostages were held for 10 days.[FN2] In addition to these disturbances, there have been several "hunger strikes" convened by Mariel Cubans at various facilities, including a hunger strike in December 1999 and January 2000 by Mariel Cubans held at the detention facility at New Roads, Louisiana.

[FN2] U.S. Bureau of Prisons, January 1995 Report on Federal Detention of Mariel Cubans, p. 12.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

1. Admissibility

41. The petitioners have contended since lodging their petition in April 1987 that the present case is admissible before the Commission. In this regard, they have claimed that the Commission has jurisdiction to consider alleged violations of the American Declaration as against the United States, by reason of its status as a Member State of the Organization of American States.

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42. In addition, the petitioners argue that the facts set out in their petition, if true, tend to disclose violations of, inter alia, Articles I, XVII, XXV and XXVI of the Declaration in relation to the detention of the Mariel Cubans by the State. In particular, they claim that the Mariel Cubans have effectively been subjected to indeterminate detention without proper mechanisms to ascertain the legality of their detention.

43. The petitioners have also contended that they have exhausted all domestic remedies in relation to their complaints before the Commission. The petitioners claim in this regard that they have pursued challenges to their detentions in the U.S. District Court, the U.S. Court of Appeals,[FN3] and, finally, a petition to the U.S. Supreme Court for a writ of certiorari, which was ultimately denied by that Court in an order dated October 14, 1986.[FN4]

[FN3] In this respect, the petitioners cite the U.S. Court of Appeals for the Eleventh Circuit as finally disposing of the petitioners' claims in 1986 as follows:
As both the government and the appellees concede, with today's decision we have reached the point in this longstanding controversy where we have rejected all legal theories, constitutional and otherwise, advanced by the appellees. They have exhausted all claims for relief available in the federal court system at all levels save that of the Supreme Court. Accordingly, it is our judgment that, unless the appellees elect to seek, and the United States Supreme Court elects to grant, a petition for a writ of certiorari, these cases have reached the terminal point and shall be dismissed.
petitioners' 10 April 1987 petition, pp. 6-7, citing Garcia-Mir v. Meese, 788 F.2d 1446, 1455 (11th Circuit 1986).
[FN4] Id., p. 7, citing Ferrer-Mazorra v. Meese, 107 Sup. Ct. 289 (1986).

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44. Also in this connection, the petitioners argue that the petition was filed in compliance with the limitation period prescribed under Article 38(1) of the Commission’s Regulations, namely within 6 months from the October 14, 1986 rejection of their petition to the U.S. Supreme Court.

45. Finally, with respect to duplicity, the petitioners claim in their original petition that the matters raised therein were not at that time barred from consideration by the Commission under Article 39 of the Commission's Regulations as pending before another international forum for settlement. The petitioners recognized in this respect that a communication had been filed under U.N. ECOSOC Resolution 1502 in May 1986 in relation to the detention of the Mariel Cubans. They contended, however, that this did not preclude consideration of the petitioners’ claim by the Commission, for three reasons: the U.N. procedure did not examine the specific facts of the petition submitted to the Commission; the U.N. procedure would not lead to an effective settlement of the violations denounced; and the U.N. communication was filed by human rights and religious organizations other than the petitioners' representatives and on behalf of a broader population of the Mariel Cubans than the petition before the Commission.

2. Merits

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a. Original Petition

46. In their original petition, the petitioners provided background information concerning the manner in which they and other Mariel Cubans arrived in the United States. According to the petitioners, the Mariel Cuban detainees belong to a group of approximately 125,000 Cubans who fled to the United States in 1980 from the port of Mariel in Cuba. The situation developed after an incident in April 1980 when a group of Cubans sought refuge in the Peruvian Embassy in Havana, Cuba. Cuban leader Fidel Castro allowed the emigration to the United States of some of the members of this group, and then announced on April 20, 1980 that any Cubans wishing to leave the country could depart through the port of Mariel. According to the petitioners, U.S. President Jimmy Carter stated in a speech that these Cubans would be greeted in the United States "with open hearts and open arms". The result was a large influx of Cubans into the United States who were seeking to escape from Cuba.

47. The petitioners further claim that prior to the arrival of the Mariel Cubans, aliens seeking admission into the United States had been liberally granted parole.[FN5] Mariel Cubans, on the other hand, were detained upon their arrival in the U.S., and the sheer number of Mariel Cubans led to procedural difficulties with the U.S. Immigration and Naturalization Service (hereinafter the "INS"), the federal authority principally responsible for immigration and naturalization matters. Subsequently, some of the Mariel Cubans were released from detention on parole, although they were still considered to be excludable aliens subject to INS proceedings as to whether they should be granted asylum or otherwise permanently admitted into the United States.

[FN5] Petition dated April 10, 1987, p. 11, citing a statement by the U.S. Supreme Court that the parole of aliens seeking admission to the United States is "simply a device through which needless confinement is avoided while administrative proceedings are conducted…Certainly this policy reflects the humane qualities of an enlightened civilization." Leng May Ma v. Barber, 357 U.S. 185, 190 (1958).

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48. Certain Mariel Cubans, however, were never released from custody, but rather were refused parole based upon their mental condition or because they were known or suspected of having Cuban criminal records. At the time of filing their original petition in April 1987, the petitioners estimated the total number of Mariel Cubans continuously detained since their arrival in the United States to be approximately 300. These Cubans had been placed into various federal prison facilities in the United States, and eventually most incarcerated in the U.S. federal penitentiary in Atlanta, Georgia.

49. In addition, the petitioners claim that many Mariel Cubans who were initially released on parole were returned to detention, in most cases for parole violations, such as contravening the rules at halfway houses, as well as for offenses such as driving under the influence of alcohol. The petitioners also indicate that some Mariel Cubans were detained simply for having been charged with a crime, even though they had not been convicted. Moreover, the petitioners allege that parole was revoked for some Mariel Cubans because they pleaded guilty to lesser drug

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offenses based on assurances given by lawyers, often public defenders, that this would result in probationary sentences, but apparently without realizing that a guilty plea could lead to further detention by the INS.

50. As a consequence of this continued or renewed detention of the Mariel Cubans, the petitioners claim that the Mariel Cubans face indefinite detention in the United States, without adequate evaluation in each individual case of the necessity for their continued imprisonment. This class of detainees includes those Mariel Cubans who were never released based upon their known or suspected criminal records in Cuba or their mental health, or who were initially released on parole but were subsequently detained for both serious and minor parole violations.

51. Further in this regard, the petitioners claim that at the time of filing their petition, the only mechanism for reviewing the Mariel Cubans' detentions was the INS's "Status Review Plan". The petitioners claim that this mechanism was "sketchy and inadequate" because, for example, it relied primarily upon a review of each Cuban's file. In addition, according to the petitioners, the Status Review Plan was discontinued in 1985, following a tentative agreement between the United States and Cuba whereby Cuba agreed to accept the return of 2,746 Mariel Cubans, which agreement was subsequently broken.

52. The petitioners also claim that no procedures for review of individual cases had been put into place since 1985 by the legislative or executive branches or granted by the Courts in the United States, as a consequence of which the State had failed to review in any meaningful way the status of the Mariel Cubans. According to the petitioners, the State's policy provided that Cuban detainees could be released only to halfway houses preliminary to their full parole in to the community, despite the fact that sufficient positions were not available in halfway houses.[FN6] Consequently, the petitioners claim that at best the State conducted only sporadic and inconsistent reviews of individual cases of incarcerated Mariel Cubans, and any criteria applied by the INS in releasing some detainees and not others were not clear.

[FN6] Petition dated April 10, 1987, p. 16, citing a February 10, 1987 letter from Assistant Attorney General John Bolton to U.S. Congressman Robert Kastenmeier, which indicated that there were only approximately 350 spaces per year available at half-way houses for the Cubans.

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53. With respect to the applicable law in the United States, the petitioners indicate that the parole of excludable aliens is entirely in the discretion of the INS, as provided for under section 1182(d)(5)(A) of 8 U.S.C., that "[t]he Attorney General may… in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest…" Hence, the petitioners claimed at the time of filing their petition that the law provided little hope that their cases would ever be meaningfully reviewed by the INS or that the Cuban detainees would ever be eligible for release.

54. In addition, the petitioners claim that the U.S. courts have considered Cuban detainees, as excludable aliens, to have never entered U.S. territory and therefore that they do not enjoy the same due process guarantees available to others in the U.S. According to the petitioners, the

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Courts have also held that international law has been displaced by controlling acts of the executive and judicial branches and therefore may not be relied upon by the Mariel Cubans in challenging their detentions.

55. The petitioners contend further that disparities exist in the circumstances of the Cubans being detained, and therefore that individual hearings in each case are necessary in order to properly determine whether they should be detained. In particular, the petitioners indicate that at the time of filing their petition, there was evidence that many of the Mariel Cubans had strong claims for release on parole and yet had not been given opportunities to present their cases. They cite as an example the case of petitioner Pedro Prior-Rodriguez, who was attacked and beaten by three men while walking to his halfway house, resulting in the loss of one of his eyes. According to the petitioners, Mr. Prior-Rodriguez was sent to a hospital for treatment for his injuries and soon thereafter his parole was revoked because his "medical condition required a treatment not available." Further, the petitioners indicate that in November 1983, Mr. Prior-Rodriguez was approved for release under the Status Review Plan but was nevertheless kept in detention and had remained in custody as of the date of the petition.

56. In respect of detention conditions, the petitioners claim that the tensions in federal facilities were high, due to the "futile" situation in which Mariel Cubans considered themselves as well as overcrowding and outdated facilities in the federal penitentiaries. Such conditions led to a riot in the U.S. penitentiary in Atlanta in 1984, and according to a 1986 Congressional Report on the incident, the living conditions of Mariel Cubans at the Atlanta penitentiary were "intolerable considering even the most minimal correctional standards".

57. Based upon their description of the Mariel Cubans' detention, the petitioners claim that the State is responsible for violations of Articles I, XVII, XXV and XXVI of the American Declaration. In particular, the petitioners argue that these articles, and international law more generally, recognizes the right of an individual not be deprived of his or her liberty without due process to determine the reasonableness of the deprivation.[FN7]

[FN7] Petition dated April 10, 1987, p. 27, citing Universal Declaration of Human Rights, G.A. Res. 217 (III) of Dec. 10, 1948, U.N. GAOR, 3rd Sess., Res. A/810, p. 71, Arts. 3, 9; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, E.T.S. 5 as am., Art. 5; American Convention on Human Rights, Treaty Series Nº 36, OAS Off. Rec. OEA/SerK/XI/1.1, Arts. 5, 7, 8.

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58. The petitioners also rely upon past reports of the Inter-American Commission, in which the Commission has criticized deprivations of liberty for prolonged or indefinite periods of time without due process or formal charges, including detentions that are carried out under executive authority and are not subject to judicial review.[FN8]

[FN8] Petition dated April 10, 1987, p. 28, citing I/A Comm. H.R., Annual Report 1980-81, at 119 (October 16, 1981).

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59. The petitioners emphasize in this connection that none of them was serving a criminal sentence at the time the petition was filed. The petitioners indicate further that, while they recognize that detention may be proper in some cases, for example if the person is a danger to society, there must be a fair hearing in each such case to determine whether the detainee is in fact dangerous. According to the petitioners, the State has made "sweeping" determinations of dangerousness "unilaterally and arbitrarily" without due process, and therefore claim that the State's determinations in this regard are invalid.

60. The petitioners also contend that the State cannot rely upon the uncertain immigration status of detainees to justify their continue detention. To the contrary, they argue that international authorities which speak to the detention of aliens seeking to enter the territory of a state make such detention provisional and temporary in nature, and in support of this proposition cite, inter alia, Article 5(1)(g) of the European Convention on

Human Rights.[FN9] In the present case, the petitioners argue that a seven-year detention with no foreseeable termination is no longer proportionate to the limited government interests that justify it and constitutes a failure to respect the rights to liberty of the detainees. They also claim that such detention cannot be justified under international law pursuant to the authority of states to control illegal immigration, but rather that hearings are necessary to resolve each detainee's case.

[FN9] Petition of April 10, 1987, at pp. 29-30, citing, inter alia, European Convention, supra, Art. 5(1), which provides as follows:

5.(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;

b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f. the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. [emphasis added]

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61. In this regard, the petitioners note that Article XVII of the Declaration guarantees every individual the right to be recognized everywhere as a person having rights and obligations and to

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enjoy basic civil rights, and that the preamble to the Declaration provides that the essential rights of man are derived from the attributes of his personality and not the fact that he is a national of a certain state. Accordingly, given that all of the Mariel Cubans are in fact in the United States, the petitioners argue that "irrespective of the failure of domestic United States law to afford the Cuban detainees fundamental protections and irrespective of the uncertain immigration status of the Cuban detainees, the United States Government is obligated by the American Declaration to afford the Cuban detainees their rights to due process."

62. According to the petitioners, proper hearings would involve fair and reliable procedures that afford an individual detainee the opportunity to be heard before an impartial tribunal, to have such assistance of counsel as is necessary and appropriate, to present evidence on his or her own behalf, and to challenge adverse evidence. This would also require the cases of those Cuban detainees who continue to be detained after an initial adverse decision to be re-examined on a regular basis, so as to ensure that no person is held beyond the time that he or she presents a threat to the community.

63. The petitioners therefore request that the Commission find violations of their rights under the Declaration, recommend that the State grant fair hearings to the Mariel Cubans to determine each detainee's case, or alternatively release them on parole, and conduct a full on-site investigation of the Mariel Cubans' detention by the United States.

b. petitioners' Subsequent Observations

64. In their subsequent observations of August 31, 1988, September 29, 1988, April 2, 1999 and June 8, 1999, the petitioners provided additional information and arguments in support of their petition, and responded to the various observations made on behalf of the State.

65. In their August 31, 1988 and September 29, 1988 observations, the petitioners suggest that the State's position on the interpretation of the Declaration would essentially mean that there are no limits whatsoever on the U.S. Government's actions, such that it would justify uncontrollable discretion over excludable aliens. The petitioners claim conversely that the American Declaration should be interpreted to prohibit indefinite imprisonment without fair processes to determine whether such imprisonment is necessary.

66. The petitioners also dispute the State's claim that entitlement to judicial review through habeas corpus is available to the Mariel Cubans. Rather, the petitioners claim that U.S. courts have withheld from the Mariel Cubans any right whatsoever under U.S. law to judicial review of their individual detention. The petitioners also contend that the existence of disputes between them and the State over the particulars of their cases illustrates the need for such disputes to be resolved through fair and equitable hearings with a full right to present evidence.

67. In their April 2, 1999 and June 8, 1999 observations, the petitioners provided further up-dated information respecting the status of the detained Mariel Cubans, as well as additional responses to the State's position.

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68. More particularly, in their April 2, 1999 written submission, the petitioners note that for 11 years following the March 1988 hearing before the Commission, diplomatic efforts to return the Mariel Cubans to Cuba had apparently failed, legislative efforts to prevent continued administrative detention of Cubans had been abandoned, and the State had not unilaterally authorized the release of the Mariel Cubans.

69. The petitioners also note that at that time, the State had acknowledged that approximately 2,000 Mariel Cubans were incarcerated under INS's discretionary authority, and that some of these detainees had been held since their initial arrival in the U.S. 19 years prior.

70. With respect to the admissibility of their petition, the petitioners reiterated that the Mariel Cubans have exhausted all of their domestic remedies, and submitted that under the Commission's Regulations, the crucial determination is not whether each detainee has the right to apply for habeas corpus relief, but rather whether potential remedies still exist under U.S. law. In this connection, the petitioners claim that potential remedies do not exist in the United States, but rather that in the circumstances of the Mariel Cubans a petition for a writ of habeas corpus is an empty gesture. In particular, the petitioners claimed that since 1981, all petitions by detained Mariel Cubans seeking relief by way of writ of habeas corpus had been rejected, with the exception of one in 1981. According to the petitioners, these petitions have failed because U.S. domestic law clearly gives the INS discretionary authority to administratively detain Mariel Cubans, and the courts have rejected the claims of the detainees under U.S. constitution, statutory law and international law.

71. In particular, according to the petitioners, the U.S. courts have held that detainees are not entitled to habeas relief from administrative detention based upon violation of the due process clause of the Fifth amendment to the U.S. Constitution, or the right to a fair trial under the Sixth amendment, since detention is administrative rather than criminal in nature. According to the petitioners, the courts had also held that there is no limit to the length of time for which an individual can be detained under U.S. law, and that regardless of whether the indefinite detention of Mariel Cubans violates international law, this law is not recognized because a petition for habeas corpus applies only U.S. law.

72. Consequently, given the INS's discretion to indefinitely detain aliens like the Mariel Cubans, the petitioners claim that the only judicable question that a court will consider in a petition for habeas corpus is whether the INS followed its procedures applicable to the parole of the Mariel Cubans, which since 1987 were governed by the Cuban Review Plan. According to the petitioners, the test applied by the domestic courts only requires that the responsible person acting under the authority of the Attorney General gives a "facially legitimate and bona fide reason for his [or her] decision."

73. Based upon these submissions, the petitioners claim that the right to submit a petition for habeas corpus is "nothing more than a mirage", and accordingly that all remedies in the U.S. have been invoked and exhausted in relation to their complaint.

74. Further, the petitioners argue that their petition is not premature in light of the fact that their cases may be reviewed under the Cuban Review Plan, because the procedures under that

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Plan fall below the minimum requirements of due process under the Declaration and under international law. Consequently, they claim that there is a ripe issue as to whether the Mariel Cubans' rights to due process have been violated.

75. Finally, the petitioners submit in relation to exhaustion of domestic remedies that in any event, the burden of proof should lie on the State to prove that meaningful remedies continue to exist for detained Mariel Cubans, and claim that it would be "futile" for the State to attempt to discharge this onus.

76. On the merits of their claim, the petitioners reiterate their position that the indefinite detention of the Mariel Cubans violates the Declaration. In this regard, the petitioners claim that they accept that the U.S. is a sovereign nation possessing the right to protect its borders and determine those people who may enter its territory, and also accept that they and other Mariel Cubans are classified as "excludable aliens". They argue, however, that the detention of the Mariel Cubans constitutes a violation of the Declaration, for two principal reasons. First, they claim that the Cubans have been subjected to administrative detention, which in turn cannot be more than a very short time and certainly not indefinite.[FN10] They therefore complain that they have been the subject of indefinite detention under poor conditions in violation of the Declaration.

[FN10] petitioners' April 2, 1999 observations, p. 17, citing Eur. Court H.R., Amuur v. France, (1996) E.H.R.R. 533.

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77. Second, the petitioners claim that the Cuban Review Plan, as the only procedure to which the detainees are, according to U.S. courts, entitled, violates the detainees' rights to due process, for several reasons. First, the INS may, in its discretion, grant parole to a detained Mariel Cuban "for emergent reasons or for reasons deemed strictly in the public interest", which in turn creates a presumption of detention and places the onus on the detainee to provide that his release is in the public interest. Second, the panel of INS employees that reviews detainee's cases are authorized to make "findings" that are "no more than subjective speculation regarding the future behavior of a detained Mariel Cuban", cannot be proved, require no specific justification for the conclusions reached, and are "essentially incapable of judicial review". Third, if a detainee is denied parole, he or she is not entitled to a right of impartial review, but rather is reviewed by the same panel at a time set at the discretion of the Director of the Plan, and is given an inadequate opportunity to attend and make submissions to the panel. For example, the detainee has no right to paid assistance of an attorney and no right to reschedule the hearing.

78. Also in this connection, the petitioners emphasize the discretionary nature of a detainee's release, as illustrated by a 1994 amendment to the Cuban Review Plan that permitted the Associate Commission for Enforcement at the INS to withdraw approval for parole based upon the conduct of the detainee or any other "circumstance" that indicates that parole would no longer be appropriate. The withdrawal can be effected without a hearing and without notice, and does not require a written decision.

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79. The petitioners further submit that apart from habeas corpus, the only available review of a decision not to permit parole is a decision by a panel of employees of the Department of Justice. A detainee is only permitted one such appeal upon 30 days notice. The detainee is permitted to hire an attorney at his own cost to prepare a written statement of "any factors that he deems relevant to the parole consideration", but is not informed in advance of what factors the panel may deem relevant or the basis on which the INS panel denied a previous parole recommendation.

80. Finally, the petitioners argue that the detention of the Mariel Cubans is indefinite and that the U.S. courts have recognized this reality.[FN11] Correspondingly, the petitioners contend that the rights under the American Declaration "do not allow indefinite detention regardless of the alien status of an individual", and that the United States may not "shift the blame" to the failure of the Republic of Cuba to accept the Mariel Cubans into their territory. In this regard, the petitioners note that the U.S., and not Cuba, caused the Mariel Cubans to be detained in prisons over the past 18 years.

[FN11] petitioners' April 2, 1999 observations, p. 23, citing Barrera-Echavarria v. Rison, 44 F.3d at 1445; In re Mariel Cuban, 822 F.Supp. at 196.

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81. In their most recent written observations of June 8, 1999, the petitioners principally responded to the submissions contained in the State's March 22, 1999 post-hearing brief. In so doing, the petitioners emphasize that the issue in the case is whether the actions of the State violate the rights guaranteed by the American Declaration, not U.S. domestic law, and suggest that the State has failed to adequately address this issue.

82. In this connection, the petitioners refute what they characterize as the State's position, namely that the Declaration presumes that detention is acceptable unless one can prove his right to be set free. They also note the State's acknowledgement that the liberty of the Mariel Cubans is not being deprived for any violation of law, but because the Mariel Cubans cannot "demonstrate that their release will not endanger other persons or property."

83. In countering this contention, the petitioners say that the Declaration guarantees the right to liberty, and places the burden on the Government to prove that this or other guaranteed rights may be abrogated, a burden that the petitioners say the State has failed to meet in this case.

84. With respect to the State's discussion of particular detainees in its post-hearing brief, the petitioners claim that the State's observations are "irrelevant" because the petition and subsequent submissions were made on behalf of the class of Mariel Cubans who continue to be detained under the State's administrative authority, and were not limited to a list of 335 individuals. The petitioners further say that, in any event, the State has provided inadequate information as to the reasons for the detention of each Mariel Cuban.

85. Finally, the petitioners emphasize that the standards under the Declaration should be considered to apply to all persons equally, and should not be considered to create a double

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standard, one for persons who have never committed a crime and one for persons who have been accused of crimes. Nor, say the petitioners, should basic human rights standards be considered different for those who are considered excludable aliens rather than citizens, and therefore administrative detention should not be considered permissible merely for these categories of persons.

86. Based upon their submissions, the petitioners seek relief, in the form of a decision that the Mariel Cubans' rights under the Declaration have been violated, a recommendation of the immediate release of all Mariel Cubans detained under the authority of the Attorney General of the United States or the INS, and "monetary reparations to all Mariel Cubans who were detained under the discretionary authority of the INS at least the implementation of the Cuban Review Plan."

B. Position of the State

87. In its original response to the petitioners' petition, as well as in its first and second supplemental observations and its March 22, 1999 post-hearing brief, the State presented several arguments relating to the admissibility and merits of the complaint. In addition, the State provided detailed information respecting the operation of the mechanisms available to review the Mariel Cubans' detentions, and supplied particulars regarding the background and status of several of the individual petitioners.

1. Background to the Mariel Cuban Situation

88. In its initial October 9, 1987 observations to the Commission, the State provided particulars concerning the background to the Mariel Cuban situation in the United States. According to the State, the petitioners' petition was submitted on behalf of a subgroup of approximately 125,000 Cubans who came to the U.S. in 1980 as part of a mass exodus from Mariel, Cuba. All of the members of this subgroup were detained in various facilities in the U.S. at the time the petition was filed with the Commission.

89. The State indicates that the exodus of Cubans from Mariel was triggered by the occupation of the Peruvian Embassy of over 10,000 Cubans who desired to leave Cuba. In connection with that incident, on April 14, 1980, the President of the United States authorized the admission to the U.S. as refugees of up to 3,500 of those Cubans in the Peruvian Embassy, provided that they satisfied the requirements of the applicable U.S. immigration and refugee laws.

90. The State claims, however, that the orderly transport of these individuals by air was halted almost immediately by the Cuban government, which, on April 20, 1980, announced that all Cubans wishing to go to the United States were free to board boats at the port of Mariel. Consequently, individuals in Miami at once began to shuttle back and forth between Florida and Cuba to transport the Cubans waiting at Mariel to the United States. According to the State, the U.S. government called for the immediate cessation of this activity, and on April 23, 1980 the U.S. Coast Guard and Customs Service began issuing warnings in English and Spanish that participation in the growing flotilla was illegal and that the INS would act to stop those who

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were attempting to bring Cubans into the U.S. without valid visas. Similarly, between April 23 and 27, 1980 the U.S. Department of State, the U.S. Interest Section in Havana and the Vice-President of the U.S. reiterated publicly the illegality of bringing undocumented aliens into the U.S., urged a halt to the boat lift, and called for compliance with U.S. immigration law.

91. Eventually unable to stem the growing number of boats transporting Cubans to the United States, the State indicates that the U.S. Navy and Coast Guard undertook rescue operations and began channeling inbound vessels to Key West, Florida in an effort to keep control over the arriving Cubans. Further, the U.S. President used his authority under the Migration and Refugee Assistance Act of 1962 to make $10 million available for processing, transporting and caring for the arriving Cubans.

92. The State claims further that, in the midst of these events, it became known that the Cuban government had intermingled common criminals and persons with serious mental health problems with those who were leaving Cuba. As a consequence, the White House announced that very careful screening of arrivals would be conducted, and that individuals with records of criminal activity who represented a threat to the country or whose presence would not be in the best interests of the United States would be subject to arrest, detention and deportation to their countries.

93. The uncontrolled flow of Cubans to the United States continued through late September 1980. Throughout that time, the State contends that its government repeatedly called for a halt to the illegal entries and warned that immigration laws would be enforced, which included the seizure of vessels and criminal prosecutions, and the Coast Guard began attempting to intercept vessels. At the same time, the U.S. President announced that for humanitarian reasons the U.S. would accept prescreened escapees from Cuba, specifically those who had sought refuge in the U.S. Interest Section or in the Peruvian Embassy in Havana, certain political prisoners, and close family members of permanent residents of the U.S.

94. In this regard, the State accuses the petitioners of "grossly misrepresenting" the statement by the President that the U.S. would greet the Cubans with "open hearts and open arms", and contends that this statement by the President must be read in the context of other statements made during the Mariel boatlift. The State claims further that, in any event, comments of this nature made by the U.S. President cannot support the suggestion that immigration laws were suspended for the benefit of all 125,000 Cubans who eventually came to the United States. The State stresses in this respect that the U.S. President consistently emphasized the need to uphold immigration laws, while at the same time attempting to act humanely in light of the circumstances of the Mariel Cubans.

95. Moreover, the State claims that the President expressed his intention to address the criminal element alleged to have been included in the boatlift, and in June 1980 directed that "Cubans identified as having committed serious crimes in Cuba are to be securely confined" and ordered that "exclusion proceedings…be started against those who have violated American law while waiting to be reprocessed or relocated."

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96. The boatlift continued until September 26, 1980, when Cuban President Castro closed Mariel Harbor and ordered all boats awaiting passengers to depart. According to the State, in the end more than 125,000 visaless Cubans arrived in the U.S. during the Mariel boatlift. Of these, over 23,000 admitted to having a prior criminal record in Cuba. When the initial screening process ended in August 1981, approximately 1,800 remained in detention because of suspected or admitted criminal background that would make them ineligible for admission to the U.S. and possibly a danger to the community. The State also acknowledged that a number of other Mariel Cubans were detained because of serious medical or psychiatric problems.

97. The State further noted that approximately 123,000 of the total of 125,000 Mariel Cubans had been released under the Attorney General's parole power notwithstanding their lack of any immigration documentation or right to enter the United States. Indeed, according to the State, "all of the decisions on whom to release and who to detain were made essentially on the basis of what the Cubans told the U.S. immigration officials about themselves, since the Cuban government supplied no records."

98. In its October 9, 1987 observations, the State also confirmed that some of those Mariel Cubans who were initially released began committing crimes in the United States, and some of their sponsorship arrangements broke down. Consequently, on November 12, 1980, the INS issued parole revocation guidelines, providing for revocation of parole in sponsorship breakdown cases "if the alien has no means of support, no fixed address and no sponsor" and, in criminal cases, if "an alien is convicted of a serious misdemeanor or felony." According to the State, these guidelines were twice revised, so that in March 1983 parole of any Mariel Cuban would be revoked if he had been "convicted in the United States of a felony or a serious misdemeanor and … completed the imprisonment portion of [his] sentence" or if he "presents a clear and imminent danger to the community or himself."

99. The State further argues that throughout this time, the Government of Cuba refused to take back any of its own nationals who were excluded from the United States and held in detention. Since this created the possibility that the excluded Cubans would be held indefinitely, the Attorney General adopted a Status Review Plan and Procedure in July 1981 (hereinafter the "Status Review Plan"), which was revised from time to time, and which in 1984 provided that Department of Justice panels would make parole recommendations based upon past criminal histories, disciplinary infractions while in detention, and progress in institutional work and vocational programs. The Status Review Plan operated approximately from July 1981 to December 1984, and according to the State over 2,000 Cubans were approved for parole under the plan to suitable halfway houses or sponsors. Particulars of the Status Review Plan are described in Part III(B)(2) of this Report.

100. Subsequently, according to the State, the U.S. government and the Government of Cuba entered into an agreement in 1984 that provided for the return of 2,746 named excluded Mariel Cubans to Cuba and the resumption of normal immigration from Cuba to the United States. As a consequence, the U.S. Attorney General cancelled the Status Review Plan on February 12, 1985, in the expectation that the Cubans in detention would be returned to Cuba shortly. By that time, approximately 2,040 detained Cubans had been paroled under the Status Review Plan.

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101. The State further claims that in May 1985, the Cuban Government unilaterally and, in the State's view, improperly, suspended implementation of the repatriation agreement, after only 201 excludable Cubans had been returned. The Cuban government apparently claimed that the suspension of the agreement was due to a change in programming on the Voice of America, and indicated that it would resume implementation of its obligations if the Voice of America ceased its revised programming. According to the State, however, broadcasting was a matter wholly unrelated to the substance of the migration agreement or to Cuba's international legal obligation to accept return of its nationals, and moreover, the Cuban Government had in fact known of the change in programming before the migration agreement was concluded. The implementation of the 1984 agreement had thus been suspended since 1985. The State adds that the Government of the United States and the Government of Cuba have discussed the reinstatement of the agreement, and that both governments continue to "endorse the concept" of resuming implementation. The State has also indicated that notwithstanding events concerning the repatriation agreement, 1,294 Mariel Cubans were paroled under the normal INS parole procedures between September 1985 and September 1987. Apart from the regular parole procedures, however, there was no mechanism in force during this time to release Cuban detainees from federal authority, until the State's Cuban Review Plan was adopted in May 1987 to provide particular detention review procedures for the Mariel Cubans.

102. In its October 1987 observations, the State described its Cuban Review Plan, the particulars of which are discussed in Part III(B)(2) of this Report. As of the date of its October 1987 observations, the State confirmed that the Cuban Review Plan had been in operation for four months and that the cases of 891 Mariel Cubans had been reviewed and 570 were recommended for parole. Also at that time, an additional 310 individuals were recommended for further detention and in interviews had resulted in split decisions, and as of the same date, the Central Office Review Committee had concurred in 557 release decisions and 210 detention decisions. The balance of the Cuban Review Plan recommendations were in the Central Office at that time for concurrence. In addition, 42 Cubans had been paroled to half-way house projects and 34 had been paroled to family members, for a total of 76 individuals paroled.

103. Further, as of the date of their October 9, 1987 observations, the State indicated that 3,625 Mariel Cubans were in detention, and that the U.S. government expected that "the pattern of granting and revoking parole depending upon the conduct and circumstances of each individual Mariel Cuban to continue until the Cuban Government agreed to honor its obligations under international law and under the Mariel patriation agreement to accept back those Cubans who are excludable from the United States."

104. According to the State's January 19, 1988 observations, on November 20, 1987, the Governments of the United States and Cuba announced that they were immediately resuming implementation of the 1984 migration agreement establishing regular migration procedures between the two countries. The State therefore claimed that with the resumed agreement, normal migration procedures would again exist, and Cuba had agreed to accept the return of the 2,746 excludable Mariel Cubans identified by the U.S. to Cuba.

105. At that time, independent of the migration agreement, the U.S. Attorney General decided that every Mariel Cuban destined for return under the agreement would have his or her case

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reviewed by a special Justice Department review panel before a final decision of return was made.

106. Additionally, in its March 22, 1999 observations, the State delivered to the Commission a copy of a February 4, 1999 declaration from Michael E. Ranneberger, Coordinator, Office of Cuban Affairs, Department of State, concerning the status of discussions with the Government of Cuba about the return of Cuban Nationals such as the petitioners, who were excluded from the United States for conviction of serious crimes and ordered excluded, deported or removed from the United States. The declaration indicated in part that:

2. For almost two decades, the United States has been discussing with Cuban authorities the issue of return of excludable Cubans. In 1984, the United States and Cuba reached an agreement for the return of 2,746 criminal Cubans who had arrived in the United States during the Mariel outflow. Almost 1,400 of those Cubans named on the 1984 list have been returned to Cuba. At the time the 1984 agreement was reached, it was clear that the names did not constitute a definitive list and that additional excludables would be identified in the future

3. Over the past several years U.S. officials have met periodically with the Government of Cuba to discuss pending immigration matters, including the return of Cuban nationals who have been convicted of serious crimes and ordered excluded, deported or removed from the United States.

4. In an effort to normalize the migration relationship between the two countries, the United States and Cuba concluded further agreements on September 9, 1994 and May 2, 1995, respectively, to promote safe, legal and orderly migration and to deter dangerous boat voyages across the Florida Straits. In addition, the September 1994 agreement expressly stated that the United States and Cuba "agreed to continue to discuss the return of Cuban nationals excludable from the United States."

5. Delegations from the two countries have continued to meet periodically to discuss migration issues, including this subject. The latest round of talks took place on December 4, 1998 in Havana. The U.S. delegation is led by the Department of State and includes officials of the Immigration and Naturalization Service. I cannot go onto the substance of the sensitive diplomatic exchanges in a public forum. I can confirm that the return of Cuban nationals excludable from the United States for conviction of serious crimes and orders excluded, deported or removed remains under discussion between the two governments.

2. Detention and Review of Excludable Aliens and the Mariel Cubans under the U.S. Immigration and Naturalization Act, the Status Review Plan and the Cuban Review Plan

107. In its January 19, 1988 and subsequent observations, the State provided a review of those aspects of U.S. immigration and naturalization law which it considered relevant to the situation of the Mariel Cubans. It also provided particulars of the two principal administrative procedures developed by the State to review the detention of the Mariel Cubans, the Status Review Plan and the Cuban Review Plan.

a. Immigration and Naturalization Act and Related Jurisprudence

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108. Under U.S. immigration and naturalization law, which is governed principally by the U.S. Immigration and Naturalization Act ("INA"), “excludable aliens” are those who fall into one of thirty-three specific classes of aliens “excluded from admission into the United States.”[FN12] under section 212(a) of the U.S. Immigration and Nationality Act (“INA”), 8 U.S.C. §1182(a). These categories pertain to, inter alia, health-related grounds, criminal and related grounds, security and related grounds, and the absence of required documentation. Excludable aliens are normally required to depart immediately and are detained for immigration control purposes, at the border if possible, until they do.[FN13] Such aliens are entitled to have the legality of their detention reviewed upon writ of habeas corpus to the federal judiciary, but the INA does not limit the period that they may be detained.[FN14]

[FN12] State’s January 19, 1988, pp. 2-4, citing 8 U.S.C. 1182(a).
[FN13] Id., citing 8 U.S.C. §1225(b), 1227.
[FN14] Id., citing 8 U.S.C. § 1225(b), 1227, Mayet Palma v. Verdeyen, 676 F.2d 100, 104 (4th Cir., 1982), 8 U.S.C. § 1182(d)(5)(A), cf. 8 U.S.C. § 1252(c), (d).

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109. The Attorney General releases excludable aliens from immigration detention and permits their physical presence in the United States through the use of its “parole” authority.[FN15] The use of this authority is limited by statute, however, to cases where there are “emergent reasons” or where release is “strictly in the public interest”.[FN16] In addition, the authority to parole is discretionary and gives an excludable alien no legal entitlement.[FN17]

[FN15] Id., p. 20, citing 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5
[FN16] Id., citing 8 U.S.C. § 1182(d)(5)(A).
[FN17] Id., p. 3, citing Singh v. Nelson, 623 F.Supp. 545, 552-54, 558 (S.D.N.Y., 1985).

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110. The parole authority can be used not only to release an excludable alien from immigration detention pending his return to his country, but also to allow an excludable alien to remain in the United States indefinitely for compelling humanitarian reasons, such as to ensure family unity. Where the purposes of the grant of parole have been served, however, the grant of parole is revoked and the alien is returned to custody and treated like any other applicant for admission to the United States.[FN18] Grants of parole are also typically conditioned upon, for example, the alien’s good behavior or the posting of bond, and are regularly terminated when the conditions are broken.[FN19]

[FN18] Id., citing 8 U.S.C. § 1182(d)(5)(A).
[FN19] Id., citing 8 U.S.C. § 1182(d)(6), 8 C.F.R. § 212.5(c).

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111. As a legal matter, parolees are not considered to be “admitted” to the United States. Rather, “[c]onceptually, they stand always at the border, seeking admission, and their physical

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presence within the United States does not change their status as excludable aliens."[FN20] According to the State, this doctrine and its implications are important for the flexible and humanitarian administration of the immigration laws because, "by allowing the Attorney General to grant an alien's request for parole without giving up his authority to exclude the alien, it facilitates a more generous parole policy."[FN21]

[FN20] Id., p. 4, citing 8 U.S.C. § 1182(c)(5)(A); Shaughnessy v. Mezei, 345 U.S. 206, 212 73 S.Ct. 625, 629, 97 L.Ed. 956 (1953); Garcia-Mir v. Smith, 766 F.2d 1478, 1483-84 (11th Cir. 1985), cert. denied, 106 S.Ct. 1213, 89 L.Ed. 325 (1986).
[FN21] Id.

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112. If a paroled excludable alien violates the conditions of his or her parole or commits a crime and is incarcerated by federal, state or local authorities, the INS is normally notified. Using a screening process, the INS then normally reviews the criminal history of the alien and, if it is believed that the alien's parole is contrary to public interest, places detainers on the alien's release. As a consequence, once such an alien completes all, or in some cases part, of his or her sentence, he or she is returned to the INS and is detained by either the INS or the federal Bureau of Prisons.[FN22]

[FN22] U.S. Bureau of Prisons, January 1995, Report on the Federal Detention of Mariel Cubans, at 16.

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113. With respect to the situation of the Mariel Cubans in particular, the State indicated in its January 19, 1988 observations that virtually all of the Cubans who arrived in the Mariel boatlift were excludable under section 212(a) of the INA for lack of proper documentation, and that some of the Mariel Cubans who were detained also had histories of criminal behavior or serious mental illnesses.[FN23]

[FN23] State's January 19, 1988 Observations, p. 2., citing 8 U.S.C. § 1182(a)(20), 8 U.S.C. 1182(a)(1)-(5), (7), (9), (10), (23)).

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114. In this regard, the State clarified in its January 19, 1988 observations that, with the exception of approximately 100 to 150 Mariel Cubans who have been detained continuously since their arrival in the United States in 1980, all of the Mariel Cubans who were then in immigration detention were there because they committed crimes while free on parole or otherwise violated their parole conditions.

115. Finally, the State notes that in general, parolees are unable to become permanent resident aliens or United States citizens. It also claims, however, that the vast majority of the 125,000 Mariel Cubans who arrived in 1980 are able to become permanent residents or citizens of the

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U.S. because of a special law passed in 1966, and which remains in effect, that permits Cuban nationals physically present in the United States for two years or more to adjust their status.[FN24] The State notes further that this law generally does not permit adjustment of status by those Cubans who are excludable because of serious mental health problems or because they have committee crimes. Thus, according to the State, many Mariel Cuban detainees who are paroled out of detention will in all probability remain in parole status for as long as they are permitted to remain in the United States, assuming that they do not again violate the conditions of their parole, and that as they will remain excludable, they will as a legal matter always remain subject to return to Cuba.[FN25]

[FN24] Id., p. 4, citing Cuban Adjustment Act of 1966, Pub. L. Nº 89-732, § 1, 80 Stat. 1161 (1966).
[FN25] Id.

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b. Status Review Plan

116. As indicated previously, in light of the Government of Cuba's refusal to accept the return of the excludable Mariel Cubans and the resultant possibility that these aliens might be detained indefinitely, the Attorney General adopted a Status Review Plan and Procedure in July 1981, which remained in place until approximately December 1984. This Plan was revised from time to time, and in 1984 provided that Department of Justice panels would make parole recommendations based upon past criminal histories, disciplinary infractions while in detention, and progress in institutional work and vocational programs.

117. Under the Status Review Plan, release was recommended only if the panel agreed that: 1. The detainee was presently a non-violent person; 2. The detainee was likely to remain non-violent; and 3. The detainee was unlikely to commit any criminal offense following his release.[FN26] The Status Review Plan also provided that "[d]isturbing doubts are … to be resolved against the detainee as he has the burden to convince review participants that he qualified for release…".[FN27] Further, actual parole of a detainee required both approval by the Commissioner of the INS or his representative,[FN28] and sponsorship to a halfway house.[FN29] Moreover, parole could be revoked if the alien violated parole conditions, such as possession of weapons or drugs, halfway house curfew violations or failures to participate in treatment programs, or if the Panel "discovers adverse information pertaining to the detainee which was not available to the Panel during its review process."[FN30]

[FN26] Status Review Plan, July 1981, Part II.C.2.
[FN27] Id., Part III.C.2.e.
[FN28] Id., Part III.E.2.
[FN29] Id., Part III.E.3.
[FN30] Id., Part III.E.4.

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c. Cuban Review Plan

118. In its July 2, 1988 observations, the State also provided particulars respecting the operation of the U.S. Cuban Review Plan, based upon the relevant Federal Regulations and INS Instructions, which are described below. The State contended, however, that it provided this overview for informational purposes only because, in its view, the American Declaration does not mandate review proceedings such as those under the Plan.

119. In December 28, 1987, the U.S. Department of Justice issued Regulations on Mariel Cuban Parole Determinations[FN31] that set out the framework of the Cuban Review Plan. According to the Plan, in case of a detainee whose parole has been revoked, the review process is ordinarily to begin within three months of revocation of his or her previous parole. For those detainees whose cases have previously been reviewed and who have remained in detention, a subsequent review is to commence within one year of a refusal to grant parole. In addition, the Director of the Cuban Review Plan may schedule a review of a detainee at any time he deems such a review to be warranted.[FN32]

[FN31] 52 F.R. 48799. 8 C.F.R. 212.12, 212.13.
[FN32] Id., Section 212.12(g).

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120. With respect to the procedure followed under the Cuban Review Plan, the parole review begins with a review of the detainee's file by the Director or by a panel consisting of two ISN officers.[FN33] If the director or the INS panel recommends that the detainee be released on parole following the file review, a written recommendation, including a brief statement of the factors which were deemed material to the recommendation, is transmitted to the Associate Commissioner for Enforcement or his designee, who then decides whether to exercise his or her discretion to grant parole.[FN34] Prior to recommending release, the panel must conclude that: (i) the detainee is presently a non-violent person; (ii) the detainee is likely to remain nonviolent; (iii) the detainee is not likely to pose a threat to the community following his release; and (iv) the detainee is not likely to violate the conditions of his parole.[FN35]

[FN33] Id., Section 212.12(d)(4)(i).
[FN34] Id., Section 212.12(b)(1), (d)(1)
[FN35] Id., Section 212.12(d)(2)

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121. In reaching their conclusions, panels are directed to weigh such factors relating to the detainee as disciplinary infractions committed while in detention, past history of criminal behavior, psychiatric and psychological reports, participation in work, educational and vocational programs while in detention, ties to the United States, the likelihood the detainee will abscond, and "any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole."[FN36]

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[FN36] Id., Section 212.12(d)(3).

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122. If the Director or the Panel recommends against parole based upon the record review, the detainee is, at the discretion of the Director, scheduled for a personal interview before the panel.[FN37] During the interview, the detainee may be accompanied by a person of his or her choice who is able to attend at the time of the scheduled interview, to assist in answering any questions.[FN38] Thirty days in advance of the scheduled interview, the detainee is given notice specifying the date and time for the interview and explaining the interview process. The notice also asks the detainee to specify whether he or she wishes to have a representative assist at the hearing. In the case of detainees who indicate that they do wish such representation but do not specify a name, the Director provides them with a list of attorneys willing to assist the detainees pro bono, at least two weeks in advance of the interview.

[FN37] Id., Section 212.12(d)(4)(ii).
[FN38] Id.

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123. The INS "instructions" on the Cuban Review Plan, which were provided by the State with its July 2, 1988 observations, provide that a detainee's file should be made available to him and his personal representative in a timely fashion, no later than five days prior to the interview. All of the information in the file may be inspected, subject to some exceptions, including information, which would reveal the name or identity of informants, which pertains to an ongoing law enforcement investigation, or which the investigative agency has requested not be released. An interpreter must be present for each interview.[FN39]

[FN39] State's July 2, 1988 Observations, p. 9.

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124. During the interview, the INS panel asks the detainee questions about his criminal record, his prison record, his ties to the United States, and other factors relevant to deciding whether to recommend the detainee for parole according to the standards under the Cuban Review Plan. A recommendation for or against release is then made to the Associate Commissioner for Enforcement or his designee, who decides whether to grant parole in the exercise of discretion. Those detainees who are denied release are first given a notice of intent to deny, and then a longer and more specific statement of the reasons for the denial.[FN40]

[FN40] Id.

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125. Detainees who receive denials and who were in INS detention as of December 28, 1987 are automatically given a one-time review of the denial by a Departmental Panel established by the U.S. Associate Attorney General, which is comprised of three persons within the Department of Justice, one of whom is an attorney, and one of whom is from the Community Relations Service.[FN41] INS employees are not to be represented on the Departmental Panels, and these Panels have the power to grant parole in their discretion. In the case of such reviews, the detainee is given a notice that he is about to receive further review by the Departmental Panel and has 30 days to submit a written statement setting forth any factors he believes relevant to the parole consideration.[FN42] The Departmental Panels may decide on the paper record, or may schedule an interview with the detainee.

[FN41] Id., Section 212.13(a), (b), (c).
[FN42] Id., Section 212.13(e).

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126. Detainees who are approved for parole by the Associate Commissioner or by a Departmental Panel are released after a suitable sponsorship or placement has been found for them.[FN43] This may include placement by the U.S. Public Health Service, the U.S. Community Relations Service in an approved halfway house or community project, or placement with a close relative who is a lawful permanent resident or a citizen of the United States.[FN44] Paroled detainees are required to abide by any special conditions that may have been placed on their parole, and a Departmental panel may, in its discretion, withdraw its approval for parole of any detainee prior to release when, "in its opinion, the conduct of the detainee, or any other circumstance, indicates that parole would no longer be appropriate." According to the State, the sponsorship placement requirement and conditions placed on parole are intended to minimize dangers to public safety and order and to maximize the chance that the detainee will successfully integrate into the community.[FN45]

[FN43] Id., Section 212.13(h).
[FN44] Id.
[FN45] State’s July 2, 1988 Observations, p. 10.

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127. The State also advises that INS panel members are given two days of intensive training in carrying out their roles under the Cuban Review Plan and are provided with guidance in the conduct of interviews.[FN46]

[FN46] Id.

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3. State’s Observations on Admissibility and Merits

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128. With respect to the petitioners' legal claims, the State has requested that the Commission find the petition inadmissible, for two principal reasons. First, in its March 22, 1999 observations, the State has contended that the petition should be found inadmissible on the basis that the petitioners have failed to exhaust their remedies under domestic law, because review processes have been and remain available to all detained Mariel Cubans at regular intervals in the form of the Status Review Plan and/or the Cuban Review Plan. Second, the State claims that the petition is inadmissible for the reason that it does not state facts that constituted a violation of rights referred to in the Declaration.

129. Further in this regard, the State presented two principal submissions in its January 19, 1988 observations: (1) that a state has absolute sovereign authority to detain and exclude excludable aliens, which authority is not restricted or otherwise the subject of rights or obligations under the American Declaration; and (2) that in any event the detention of the Mariel Cubans has not violated the norms of the American Declaration.

a. Absolute Authority of the State to Detain and Remove "Excludable Aliens"

130. With respect to the first point in its January 18, 1988 observations, the State contends that the detention of the Mariel Cubans at various times has not reflected a violation of the State's international obligations, but rather was "necessitated by Cuba's refusal to accept the return of the detainees, contrary to its obligations under international law–detention is imposed not as punishment but as a necessary immigration measure". In addition, the State argues that because the Mariel Cubans have no substantive right under international law to be free of detention pending their deportation, they necessarily have no procedural rights regarding review of their cases. Nevertheless, the State "reinstituted" a special review plan to examine in each case whether release is appropriate, namely whether they are not a "danger to the community or a threat to the public safety or the national security".

131. More particularly, the State argues that no person has a right to any particular procedure unless the state is depriving him or her of something. In the case of the Mariel Cubans, the State contends that they do not have a substantive right not to be detained in the United States and have no right to be at liberty in the United States, and therefore that they have no right to any particular procedures in respect of their detention.

132. Rather, according to the U.S., states have a largely unlimited authority to forbid the entrance of foreigners within their dominions, subject perhaps only to limited exceptions in the non-refoulement provisions of the U.N. Convention on the Status of Refugees, to which, the State notes, only a third of the world's states have agreed. Even in the latter instance, the State notes that under Article 33 of the Refugee Convention, the commitment does not exist if a refugee is a danger to security or, having been convicted by a final judgment of a particularly serious crime, is a danger to the community. Moreover, the State claims that states have stopped short of agreeing to give up their prerogatives to decide whether to allow refugees to enter their territory or to provide them with legal status in the form of asylum.

133. As a corollary to this, international law has, according to the State, always insisted on the obligation of all states to accept the return of their own nationals, to protect individuals and to

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avoid violating the rights of the states that may be left with unwanted aliens as a result.[FN47] In the State's view, this obligation is “interdependent” with the right of states to exclude aliens, and therefore that to accept the petitioners' submission that excludable aliens should be released unless they are considered “dangerous” would “allow states to exile their unwanted-but-not-dangerous nationals knowing that they would have to be released into the communities of other states regardless of their legal status as excludables.” The State claims that the present case is a precise illustration of this dilemma.

[FN47] State's January 19, 1988 Observations, p. 8, citing, inter alia, 1977 Annual Report of the IACHR, at 86-88, 1 G. Schwarzenberger, International Law 360-61 (3d ed. 1957).

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134. Further in this connection, the State argues that the authority to exclude aliens includes the right to detain them pending expulsion,[FN48] and cites instances of state practice in support of the “broad recognition of the right to detain excludable aliens…even with respect to refugees”. In particular, the State refers to situations in which countries, including Mexico, Honduras and Costa Rica, have detained refugees in camps "indefinitely" until they return home or to a third country, because the host country is unable or unwilling to resettle them. The State asserts in this regard that the international community has not questioned the legal right of states to control the presence of refugees in this way, nor has it suggested that such detention is a violation of basic human rights norms. In its July 2, 1988 observations, the State also referred in this respect to the situation of Vietnamese refugees in Hong Kong, who at that time had, according to the State, been held in "closed camps" since 1982. The State cited in particular an announcement of Hong Kong's intention to place all incoming Vietnamese boat people whom it determined not to qualify for refugee status in a close camp under austere conditions, with no entitlement to apply for third-country resettlement or to enter Hong Kong society. The State claims in this regard that although some have criticized Hong Kong's decision on policy grounds, there was no suggestion that it violated international law.

[FN48] Id., p. 9, citing Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention, and Exile, U.N. Doc. E/CN.4/826/Rev.1 (1964), at 180-81, paras. 741, 742.

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135. Also in support of its allegedly unlimited authority under international law to detain excludable aliens, the State refers to the Executive Committee of the U.N. High Commissioner for Refugees as recognizing a “wide and flexible set of reasons that might justify detention of refugees–including the very broad grounds of ‘public order’, and explicitly distinguished between refugees as defined in relevant international instruments and other aliens, who have less protection.”[FN49] The State therefore contends that its treatment of the Mariel Cubans is a record of generosity, not of human rights abuses. The State also indicates in this regard that it has not received protests from any other states regarding the treatment of the Mariel Cubans, and that the U.N. ECOSOC Resolution. 1503 communication relating to the Mariel Cubans was ultimately not referred to the minorities sub-commission.[FN50]

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[FN49] Id., p. 10, citing Note on Accession to International Instruments and the Detention of Refugees and Asylum-Seekers (submitted by the High Commissioner) at 12, EC/SCP/44 (1986), Report of the Sub-Committee of the Whole on International Protection (11th mtg.) at 78-9, A/AC.96/685 (1986), and Report of the Thirty-Seventh Session of the Executive Committee of the High Commissioner's Programme at 29-30, A/AC.96/688 (1986).
[FN50] Id., p. 12.

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136. The State notes that the petitioners have referred to Article 5(1)(f) of the European Convention on Human Rights[FN51] as the only international authority addressing the detention of “ordinary” aliens for immigration purposes, and submits that this provision actually supports the lawful arrest or detention of such an alien to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken “with a view to deportation or extradition”.

[FN51] European Convention, supra, Article 5(1)(g) (providing:
5.(1)Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (g) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

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137. In interpreting this provision, the State claims that the term “lawful” is found to be subject to domestic, not international, standards. It also observes that there is no time-limiting language applicable to Article 5(1)(f), that "exclusion" under the provision is not subject to the “with a view to” qualification applicable to deportation and extradition and therefore may not require continuing pursuance of exclusion, and that in any event the U.S. government has continuously attempted to return the Mariel Cubans.[FN52] Consequently, the State contends that the European Convention sets time limits on the deportation of aliens but not their exclusion, and in this respect is similar to U.S. domestic law and, indeed, supports the State's practice in this regard.

[FN52] State's January 19, 1988 Observations, p. 13, citing Eur. Comm. H.R., Caprino case, 21 Y.B. Eur. Conv. 284, 290.

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138. Finally, the State argues with respect to its first position that there is no or insufficient evidence of a customary norm of international law that limits the detention of excludable aliens,[FN53] but rather that state practice recognizes “absolute state sovereignty” in this respect.

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[FN53] Id., pp. 14-15, citing, inter alia, North Sea Continental Shelf (FRG v. Denmark, Netherlands) 1969 I.C.J. 1.

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b. Absence of a Violation of the Norms of the American Declaration

139. With regard to its second argument noted above, the State contends in its January 19, 1988 observations that the "right of states to detain aliens in the exercise of their right to exclude them is so firmly established that it would be extraordinary to find in the American Declaration some other governing principle."[FN54] The State emphasizes in this regard the fact that the Declaration was adopted before instruments such as the European Convention and the U.N. Refugee Convention, which themselves do not prohibit the detention of excludable aliens.

[FN54] Id., p. 15, citing Universal Declaration of Human Rights, European Convention on Human Rights, U.N. Convention on the Protection of Refugees, and indicating that none of these instruments provides for a right of an alien to enter a country or prohibit their detention for immigration control purposes, and indeed, that one, the European Convention, explicitly authorizes the right to detain in order to exclude.

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140. More particularly, the State claims that there is nothing in the provisions of Articles I, XVII, XXV or XXVI of the American Declaration which provides aliens with the right to be at liberty in any country he or she chooses or to any country to which his own government unlawfully expels him, and argues that these provisions must be read in light of a state's competing right to restrain an individual's liberty in "appropriate circumstances". In particular, the State argues that Article XXV of the Declaration does not appear to contemplate proceedings other than those of a criminal nature, such as immigration proceedings, and in any event cannot be said to have been violated in respect of the Mariel Cubans.

141. The State claims further that Article XXVI of the Declaration is even more clearly concerned with the rights of accused criminals and is inapposite to detaining immigrants. According to the State, this is partly because there is no presumption that an alien is admissible, and their detention is predicated on their immigration status and does not constitute punishment for a crime. Accordingly, the State claims that Article XXVI of the Declaration does not apply to the situation of the Mariel Cubans.

142. The State proceeds in its January 19, 1988 observations to suggest that a broader range of reasons, in practice and in law, may justify the long-term detention of refugees and aliens, and that these reasons are not just limited to dangerousness. Rather, in the State's view, long-term detention of aliens may be justified on the basis that a state cannot absorb them into its economy or society, if the state does not wish to or cannot afford to incur associated social welfare costs, or if the state disapproves of the alien's behavior. According to the State, this authority is based on the right of a state to exclude an alien for any reason, such that "whether and under what circumstances to allow an alien to be at large in the community involves policy judgments that only the state is entitled to make."[FN55]

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[FN55] State's January 19, 1988 Observations, p. 19.

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143. Similarly, in its July 2, 1988 observations, the State refutes the petitioners' contention that detention of excludable aliens is justifiable only if it is a temporary measure pending exclusion or resettlement or if the detainee is dangerous or a threat to public safety.[FN56] Further, the State argues that the Declaration does not prescribe the modalities of immigration detention; for example, it does not dictate that a state may only detain excludable aliens in camps where they can live with families or that states must permit such aliens to hold jobs or generally circulate in the larger society, nor does the Declaration explicitly prohibit the detention of excludable aliens in penal facilities.

[FN56] The State observes in this regard that the only authority cited by the petitioners for this proposition is a note from the UNHCR indicating that the detention of refugees and asylum seekers should not be unduly prolonged. Report on the Thirty-Seventh Session of the Executive Committee of the High Commissioner's Programme at 29-30, A/AC.96/688 (1986).

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144. The State also rejects the suggestion that it is required to apply more limited rules under U.S. law of detention of deportable aliens to excludable aliens, and indeed, suggests that States Parties to the European Convention on Human Rights appear to make a similar distinction between deportable and excludable aliens in their immigration detention practices.[FN57]

[FN57] Garcia-Mir v. Smith, 766 F.2d 1478, 1484 (11th Cir., 1985) (finding that “deportable” aliens, unlike “excludable” aliens, have succeeded in either legally or illegally entering the U.S. and that “[e]xcludable aliens have fewer rights than do deportable aliens, and those seeking initial admission to this country have the fewest of all.”).

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145. In summary, the State contends that the U.S. practice with respect to the detention of Mariel Cubans has been reasonable and more generous than the requirements of the American Declaration or the usual practice of states in similar mass influx situations. The State claims that it has given those in detention extensive opportunities for review of their suitability for parole, including habeas corpus proceedings and the standing INS parole procedures, as well as different versions of the Mariel Cuban Review Plans that prescribe procedures over and above those available to other excludable aliens.

146. The State also contends in this respect that the detention of Mariels has never been indefinite, in that the U.S. has never ceased trying to return detainees with serious criminal records or mental illnesses, or refused to let detainees go elsewhere, such as admission to a third country. Indeed, the State argues that the unwillingness of third countries to accept the Mariel

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Cubans further illustrates the reasonableness of the U.S. decision not to release all of them into U.S. society.

147. Finally, in its March 22, 1999 observations, the State refutes any suggestion by the petitioners that their immigration parole has been revoked for insubstantial reasons such as minor traffic violations. Rather, the State contends that the petitioners who were detained at that time all appear to have engaged in serious, violent or repeated criminal conduct when paroled into the State. Their cases are nonetheless reviewed every year to determine if they can again be paroled into the community. In light of their criminal conduct when previously released, however, including such offenses as manslaughter, assault, drug offenses, and sexual crimes against children, the State argues that the revocation or denial of immigration parole pending repatriation to Cuba or further reconsideration for release into the United States in a year's time in these cases is "eminently proper".

c. Fairness of the State's Detention Review Procedures

148. Specifically with respect to the petitioners' challenge to the fairness of the procedures available to Mariel Cubans, the State contends in its July 2, 1988 observations that the Declaration does not require that detainees be given adversarial hearings before judges to determine whether they should be released on parole into U.S. society. The State reiterated in this regard that there is no evidence that Article XXV of the Declaration was intended to apply to immigration detention, and that, even if it were, the U.S. has complied fully with its requirements.

149. In particular, the States notes that the Mariel Cubans' detention has been "according to the procedures established by pre-existing law", namely the INA, that their detention is on account of the detainees' lack of a right to be admitted to the U.S. and their failure to abide by criminal statutes and the terms of their conditional release, and that they are entitled under U.S. law to judicial review of the legality of their detention through habeas corpus proceedings. With regard to this last point, the State indicates that the Mariel Cubans have taken full advantage of the right to seek habeas corpus, and that U.S. courts have determined that their detention is legal. Consequently, according to the State, a right to challenge the legality of detention of the Mariel Cubans is available, and any further decision whether to release Mariel Cubans notwithstanding the legality of their detention is a matter of discretion for the United States.

150. Also in its July 2, 1988 observations, the State specifically argues that the provisions of the Cuban Review Plan refute the petitioners' allegations that the procedures available to Mariel Cubans are inadequate. The State contends that the procedures are more than adequate to arrive at a reasonable and fair determination whether a detainee should be released into U.S. society. Indeed, the State indicates that the Cuban Review Panel procedures are modeled on those for parole of persons convicted of federal crimes in the United States, and notes that the INS has approved for release on parole detainees in three individual cases in which the petitioners have alleged INS bias against the detainees. The State adds in its January 19, 1988 observations that the Status and Cuban Review Plans have given Mariel Cubans the benefit of special procedures for annual review for parole over and above those available to other excludable aliens.

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151. The State also indicates in this connection that the U.S. Government has attempted to expedite the process of arranging sponsorships and other placements, but emphasizes that verifying relationships and financial guarantees requires time, and that placement in halfway houses and other specialized settings are judged necessary for the successful integration of many detainees into society. According to the State, such placements must be carefully evaluated and facilities are not always immediately available.

152. The State therefore claims that even assuming the Declaration was applicable, these review procedures go "well beyond" the minimum norms stated in Article XXV of the American Declaration, such that only those with the most serious criminal records or mental illnesses have been detained continuously in the public interest. In this connection, the State suggests that it has struck the correct balance of assuring basic fairness through minimal procedures, considering that the Mariel Cubans have no right to be in the United States, and that the United States is both obligated and entitled to protect the public welfare and has an absolute sovereign right to control the presence of aliens in its territory. The State also reiterates that procedures that are judicial in nature are not required in addressing the detention of excludable aliens, but rather that administrative review is adequate and appropriate.[FN58]

[FN58] State's January 19, 1988 Observations, p. 21, citing European Commission on Human Rights, Case 8081/70, reported in 1 Digest of Strasbourg Case L. Relating to the European Convention on Human Rights 437 (1984).

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153. Furthermore, in its March 22, 1999 observations, the State emphasizes the fact that a vast majority of the petitioners are not now detained by the State, and therefore no longer have a basis for complaint. The State claims that its conduct in this regard has been "extraordinarily generous", given that the 120,000 Cuban nationals in the 1980 boatlift were "uninvited and undocumented" and that none of them arrived through legal orderly immigration, but nevertheless virtually every person who came in the boatlift was paroled in to the U.S. at least once and given an opportunity to become a full member of society on condition that they did not pose an unacceptable risk to the community. The State argues that the petitioners in this case are among the minority of Mariel Cubans who violated the conditions under which the State released them from custody by committing serious and violent crimes in the U.S.

154. With respect to the availability to the Mariel Cubans of habeas corpus to challenge their detentions, the State in its March 22, 1999 observations refutes the petitioners' claims that domestic courts have dismissed the Mariel Cubans' petitions for writs of habeas corpus for lack of jurisdiction. Rather, the State says that the Mariel Cubans have not been denied access to the courts of the United States, and have not lacked for meaningful consideration of their claims by the courts, and that the petitioners simply disagree with the outcome of those proceedings. The State contends further that the petitioners' allegation of lack of access to habeas corpus relief is refuted by the sheer volume of cases that have been litigated or are pending in the courts of the United States. The State estimated there to have been approximately 5,289 petitions for writs of habeas corpus filed in District Courts by Mariel Cubans since 1980, challenging their admission and removal or their detention pending repatriation. Another 176 such cases have been taken to

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the courts of appeals, which includes a class action of several years' duration in the U.S. District Court for the Northern District of Georgia and the Court of Appeals for the Eleventh Circuit.

155. In any event, the State contends that neither domestic nor international law guarantees any individual a remedy for which there is no legal, constitutional or other basis, as neither domestic nor international law guarantees any alien the right alleged here, namely to illegally enter or remain in the United States in violation of its immigration laws.

156. The State confirms in this regard that in most cases, the U.S. courts have found that the aliens are not illegally detained, and consequently they have declined to grant writs of habeas corpus, not for lack of subject matter jurisdiction, but because the petitions have lacked merit. In particular, they have not stated any cognizable legal or factual ground for the relief sought, in that they have not proved the petitioners' claim that they are entitled to admission to the United States or that discretionary release is warranted under domestic immigration parole legislation.

157. Moreover, the State noted in its March 22, 1999 observations that the courts have also thoroughly reviewed the petitioners' various challenges to the administrative process afforded them and have found that sufficient procedures are in place for excluded Mariel Cubans who seek release in the United States pending continued efforts to repatriate them to Cuba. Accordingly, under neither domestic nor international law do aliens illegally present in the United States enjoy an "unhampered right to liberty".

158. Finally, the State reiterates that a trial or full-blown adversarial hearing is not required to determine whether discretionary immigration parole is warranted in an individual case. Rather, the State argues that aliens such as the petitioners seek a favorable exercise of discretion. According to the State, their desire to be returned to American society, despite their lawful exclusion from the United States or the crimes that they have committed when previously released, "is at best a privilege, and not under any theory a right or entitlement."[FN59]

[FN59] State’s March 22, 1999 Observations, p. 14.

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159. In summary, the State's view is that the American Declaration does not restrict the State's discretion to detain aliens who enter the United States illegally, pending their deportation, and that the review procedures in place have properly ensured that Cuban detainees who do not pose a threat to the community will be released.

d. Statistical Information on Mariel Cuban Detention Reviews

160. Also in connection with its submissions respecting the propriety of the Mariel Cuban review processes, the State provided statistical data concerning the processing of the Mariel Cubans under these processes. For example, in its October 9, 1987 observations, the State indicated that, as of September 25, 1987, all but approximately 3,625 of the approximate 125,000 Mariel Cubans had been released on parole. Of these 3,625, all but 212 had been paroled from detention at one time or another and re-detained due to violations of their parole, with the

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remaining 212 having been held in detention continuously since arriving in the United States in 1980. Moreover, according to the State, all 212 of the continuous detention cases either had been reviewed or were in the process of being reviewed under the Cuban Review Plan.

161. Subsequently, in its January 19, 1988 observations, the State indicated that a review of INS records subsequent to the State's October 1987 observations suggested that the number of Mariel Cubans in continuous detention was in fact between 100 and 150. The State contended in this regard that determining the exact number was complicated, because a Mariel Cuban convicted of committing a crime, such as assault, while in immigration detention may have been transferred to a criminal detention facility and returned to immigration detention after serving his criminal sentence. According to the State, its estimate of 100 to 150 inmates in continuous detention attempts to count all Mariel Cubans who have never been released on parole, and may include some whose immigration detention has been interrupted by one or more periods of criminal detention.

162. Further, in its July 2, 1988 observations, the State indicated that from May 1987 to July 28, 1988, the INS conducted parole determination reviews of approximately 4,227 Mariel Cubans, of which approximately 2,436 had been conducted following disturbances that occurred in 1997 in certain facilities in which Mariel Cubans had been incarcerated. During this time, the INS approved approximately 2,612 detainees, with approximately 60 detainees awaiting a decision at that time. Thus, the State indicated that at that time, the overall approval rating for the release of detained Mariel Cubans was over 60%. Of those approved for release, approximately 1,976 had actually been released, and 79 of those had subsequently had their parole revoked. The State indicated further that all of the Mariel Cubans who were in INS custody as of December 28, 1987 had then had parole reviews, as had a large number of those who entered INS custody since that time.

163. In addition, in its March 22, 1999 observations, the State reiterated that the Cuban Review Plan process was available at regular intervals to all detained Mariel Cubans and had up to that time resulted in the release of more than 6,700 of them. Moreover, the State claims that as of March 22, 1999, every one of the Mariel Cubans on whose behalf the petition was lodged was paroled into the United States at some time since his or her arrival on the 1980 boatlift. The State therefore argues that there is no merit to the claim by the petitioners' representatives that some of the petitioners have been detained since 1980.

164. Finally, in its March 22, 1999 observations, the State claimed that as of that date, 252 of the 335 petitioners were not in custody but had been released or re-released within the State since 1988 under the immigration parole review procedures for Mariel Cubans. A further 62 could be or had been repatriated to Cuba under the 1984 repatriation agreement with Cuba and the remaining 21 who were detained were excludable Mariel Cubans whose repatriation to their country of nationality had been refused by the Government of Cuba. Of these, all had been paroled into the U.S. since 1980 and 3 were at the time approved for immigration parole and were to be released upon successful completion of the substance abuse program for Mariel Cubans in Englewood, Colorado and or placement with an appropriate sponsor. 14 of the remaining 18 had been released or re-released since 1988, some of them for the third time, and most recently returned to immigration custody between 1994-1998 after engaging in further

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unlawful conduct. As of March 22, 1999, these 14 individuals continued to receive consideration for further immigration parole in accordance with the immigration parole review procedures for Mariel Cubans. The remaining 4 detainees had not been released since 1988.

e. Information on Individual petitioners

165. In its October 9, 1987, July 2, 1988 and March 22, 1999 observations, the State provided specific information respecting the status at these times of 29 of the petitioners.

166. The State subjected its provision of this information to a caveat, namely that it did so "in an effort to be informative and to demonstrate the pitfalls of attempting to second guess discretionary decisions based on many complex factors" and without prejudice to its position that the petitioners had failed to assert arguable violations of the American Declaration or to exhaust domestic remedies.

i. October 9, 1987 Observations

167. The State provided information regarding the following petitioners in its October 9, 1987 observations:[FN60]

[FN60] The State also provided information respecting the status of petitioners Pedro Prior-Rodriguez and Rafael Ferrer-Mazorra, in both its October 9, 1987 observations and in its July 2, 1988 observations. The information on these two petitioners is therefore discussed in the section relating to the State's July 2, 1988 observations.

J. Jorrin-Alfonso

Mr. Jorrin-Alfonso was re-paroled from the Oakdale facility on September 8, 1987 to the Community Relations Service Halfway House in Detroit, Michigan, where he was then residing.

Marcelino Perez-Fernandez

Mr. Perez-Fernandez had, according to the State, admitted to convictions in Cuba of assault with a deadly weapon and disorderly conduct. Since his arrival in the United States, he had been the subject of numerous "incident reports", including: assaults on INS staff, threatening with bodily harm, fighting, stealing, refusing to obey orders, encouraging a work stoppage and unexcused absence from work. In addition, a Public Health Service psychological evaluation conducted on March 1, 1983 indicated that Mr. Perez-Fernandez suffered from an intermittent explosive disorder and a passive-aggressive personality disorder. His detention was reviewed in July 11, 1984 and continued detention was recommended, based upon his violent behavior. On June 16, 1987, Mr. Perez-Fernandez was interviewed under the Cuban Review Plan, and again continued detention was recommended. At the time of its submission, the State indicated that he would be scheduled for re-interview within one year of his last interview.

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ii. July 2, 1988 Observations

168. The State provided information regarding the following petitioners in its July 2, 1988 observations:

Manuel Casalis-Noy, Sergio Sanchez-Medina and Jorge Cornel-Labrada

These inmates were approved for release on parole pursuant to the procedure under the Cuban Review Plan.

Rafael Ferrer-Mazorra

Mr. Ferrer-Mazorra was paroled into the U.S. in July 1980. He was subsequently convicted in 1983 by the State of Illinois on three counts of delivery of heroin and cocaine and sentenced to two years probation on each count. On March 21, 1984, Mr. Ferrer-Mazorra was again arrested after allegedly failing to report to his probation officer for two consecutive months. Rather than prosecute the parole violation claim, the State asked the INS to revoke his immigration parole and take him into custody.[FN61] Consequently, on March 22, 1984, the INS revoked Mr. Ferrer-Mazorra's immigration parole based upon his convictions and placed him in administrative detention. On June 7, 1984, Mr. Ferrer-Mazorra was interviewed under the Attorney General's Status Review Plan but was not recommended for parole at that time, based upon his recent criminal history. He was interviewed again on April 7, 1988 under the Cuban Review Plan, and at the time of the State's observations had been approved for release due to his excellent institutional record, the fact that he was married to a U.S. citizen who could sponsor him, and his credibility and candor during the interview.

[FN61] The State indicated in this regard that for budgetary and other reasons, U.S. states sometimes request the INS to take custody over aliens who have committed serious crimes, even though the individual's state sentence or period of criminal parole have not yet been served. The INS also frequently places aliens in immigration detention after completion of their criminal sentence or parole.

Reuben Alfonso-Arenciba

Mr. Alfonso-Arenciba was convicted in 1984 of possession of cocaine and carrying a loaded fire arm, and served a six-month prison term for these crimes. His subsequent period of criminal parole was then cut short in December 1984, when the INS revoked his immigration parole based upon his convictions. Although he had relatives offering to sponsor and employ him, the review panel was unconvinced of the bona fides of the offer, and, taking into account his past criminal record, his associations with narcotics, and the evasiveness of his responses, the panel felt unable to conclude that he was unlikely to commit any criminal offenses following his release, and recommended continued detention. The Associate Commissioner for Enforcement subsequently ordered Mr. Alfonso-Arenciba continued in detention on November 24, 1987.

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Roberto Gonzalez-Machado

In its July 2, 1988 observations, the State indicated that Mr. Gonzalez-Machado was detained at St. Elizabeth's hospital in Washington D.C. Previously, during an October 26, 1987 interview before an INS panel, the panel found that he was unable to keep events in sequence, and in particular responded incoherently to questions about his allegedly having stabbed a man in December 1982. Consequently, the panel was unable to conclude that Mr. Gonzalez-Machando was likely to remain non-violent or unlikely to commit a criminal offense following his release, and the Associate Commissioner for Enforcement ordered him continued in detention on November 23, 1987.

Jose Cruz-Montoya

Mr. Cruz-Montoya was convicted in 1983 of sodomy with a minor under 16 years of age, oral copulation with a minor under 16, and carrying a loaded weapon. On January 10, 1985, his immigration parole was revoked due to these convictions and he was subsequently placed in INS custody. He was subsequently interviewed by the Cuban Review Panel on November 11, 1987, and, based on his criminal record and a psychiatric evaluation, the panel members were not convinced that he would remain non-violent or was unlikely to commit a criminal offense following his parole. Consequently, the Associate Commissioner for Enforcement ordered him continued in detention on November 25, 1987.

Jorge Remagne-Herrera

Mr. Remagne-Herrera was convicted of burglary, grand theft and possession of cocaine in 1983. His immigration parole was subsequently revoked, and he was detained at the Atlanta Federal Penitentiary. His record indicated that he had worked for only three months during his initial immigration parole, and that he did not avail himself of language or vocational training while in detention. Following an interview on October 15, 1987, an INS panel was unable to conclude that he was unlikely to commit any criminal offenses following his release, and the Associate Commissioner for Enforcement ordered him continued in detention on November 25, 1987.

Pedro Prior-Rodriguez

Mr. Prior-Rodrigues was re-paroled from the Oakdale detention facility on August 3, 1987 to the Public Health Service Halfway House in Kansas City, Missouri, where he was then residing.

Mr. Prior-Rodriguez's re-parole was, however, subsequently revoked on November 4, 1987 due to his disruptive and abusive behavior at that facility, which caused the facility to withdraw its sponsorship. The State indicated that Mr. Prior-Rodriguez suffers from alcoholism, and that his previous period of parole ended due to his involvement in a fight, which entailed the loss of an eye for which a special prosthesis had to be fitted, and due to his unwillingness to continue participating in an alcohol treatment program that was deemed necessary to his reintegration into the community. Mr. Prior-Rodriguez was again approved for parole on June 30, 1988 and attempts were being made at the time of the State's July 2, 1988 observations to arrange an appropriate placement.

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iii. March 22, 1999 Observations

169. The State provided information regarding the following petitioners in its March 22, 1999 observations:

Daniel Alvarez-Gamez

Mr. Alvarez-Gamez had been detained by INS since 1994. He was last released on immigration parole by way of a halfway house program in 1994, but violated the conditions of immigration parole through cocaine use, absconded, and was subsequently convicted of assault and possession of a controlled substance. His immigration parole had also previously been revoked in 1988 following his conviction for similar crimes. According to the State, Mr. Alvarez-Gamez's institutional record since his return to immigration custody included disciplinary reports for possession of intoxicants and drugs or drug items.

Pascual Cabrera-Benitez

Mr. Pascual Cabrera-Benitez was last released from detention in 1988, but while paroled was convicted of trespass in 1989, resisting a law enforcement officer with violence in 1993, and aggravated assault in 1995. In addition, while in custody he was cited in May 1997 for possessing contraband and razor blades.

Lourdes Gallo-Labrada

Ms. Gallo-Labrada was paroled to a halfway house program in November 1993, but was removed to county jail after she assaulted a staff member, and was subsequently transferred to immigration authorities in June 1994. She was last denied immigration parole in March 1998 after she refused to be interviewed by a parole review panel.

Marcelino Gonzalez-Arozarena

Mr. Gonzalez-Arozarena was released from immigration custody in 1989 to a halfway house program, from which he absconded after seven months. While released from immigration custody, he was arrested in 1991 for second degree burglary, and in 1992 for violating the terms of his release from criminal custody. Mr. Gonzalez-Arozarena did not return to immigration custody until 1994.

Domingo Gonzalez-Ferrer

Mr. Gonzalez-Ferrer was returned to immigration custody in September 1997, and was last paroled to a family sponsor in 1988. In 1994, he was sentenced to 5 years for burglary, resisting arrest and theft, and his record reflects 5 prior arrests between 1991 and 1993 for charges ranging from possession of cocaine and resisting arrest to aggravated assault with a deadly weapon and sale, purchase and delivery of cocaine.

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Alfredo Gonzalez-Gonzalez

Mr. Gonzalez-Gonzalez was approved for immigration parole and released to a halfway house program in Ohio in 1988. 5 months later he was arrested and sentenced to a year in jail for possession and sale of cocaine. Mr. Gonzalez-Gonzalez returned to immigration custody in 1989, was again approved for immigration parole in 1994, and was unsuccessfully released to a halfway house program in 1994.

Juan Hernandez-Cala

Juan Hernandez-Cala was approved for immigration parole in 1988, but was subsequently arrested for cocaine possession and sentenced to 1 1/2 to 4 years in prison. He was returned to immigration custody in 1994, was again approved for immigration parole in 1998, and was released to a halfway house program in Florida. He was removed from the program, however, after he tested positive for drug use, namely cocaine, and was returned to immigration custody in September 1998.

Sixto Lanz-Terry

Mr. Lanz-Terry was last approved for immigration parole by a Department of Justice review panel in 1990. He was paroled to a halfway house program in Kansas City, but in 1993 was arrested for second degree assault after he attacked his wife with a hammer, for which he was sentenced to five years in prison. He was returned to immigration custody in 1996.

Lazaro O'Farrill-Lamas

Mr. O'Farrill-Lamas was last paroled in 1988 through a halfway house program. He was arrested in 1989 for a drug trafficking offense and convicted in 1993 of voluntary manslaughter. He has been detained by INS since January 1994.

Guillermo Paz-Landa

Mr. Paz-Landa was scheduled to return to immigration custody in September 1998. He was twice granted immigration parole since 1988, first to an individual sponsor in February 1988, and again in August 1993 to a halfway house program. In 1989, he was convicted of burglary of a dwelling with a knife and grand theft, and in 1994 was sentenced to three years in prison plus probation for a drug offense.

Jorge Rosabal-Ortiz

Mr. Rosabal-Ortiz had been detained by the INS since July 1996. He had previously been paroled from immigration custody in 1988, was briefly jailed and sentenced to criminal probation in 1992 for burglary, and in 1993 was sentenced to three years for residential robbery and kidnapping.

Enengio Sanchez-Mendez

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Mr. Sanchez-Mendez had been detained by INS since July 1986. He was last paroled in 1988, and in 1990 was convicted of grand larceny and related offenses, unauthorized use of a motor vehicle, and jumping bail. Subsequently, in 1992 he was convicted of burglary of a dwelling. State and federal institutional records include infractions for sexual offenses, fighting, and weapon possession.

Luis Urquiaga-Rodriguez

Mr. Urquiaga-Rodriques was last released from detention in 1990, but while paroled into the United States he was sentenced to 1 to 3 years for possession of cocaine in 1991, sentenced to 2 1/2 to 5 years for possession of heroin in 1994, and arrested in 1995 after he absconded from a temporary release program. He had been detained by the INS since September 1997. While in detention, he had been cited for refusals to obey orders resulting in disruptions of security.

Armando Vergara-Peraza

Mr. Vergara-Peraza had been in INS custody since 1986. In 1988, he was paroled through a halfway house program, but his immigration parole was revoked in 1994 after he was convicted and incarcerated for drug trafficking. In 1996, Mr. Vergara-Peraza was again released unsuccessfully to another halfway house program, and since returning to custody has been reported for possessing drugs or drug items and gambling.

170. In its March 22, 1999 observations to the Commission, the State also provided information respecting the following four petitioners who, at that time, had not been released from detention since 1988.

Santiago Machado-Santana

Mr. Machado-Santana was arrested in 1981 for rape, indecent assault, indecent exposure, false imprisonment, aggravated assault and simple assault. He was subsequently convicted in 1983 of rape, aggravated assault and simple assault, and sentenced to 2 1/2 to 10 years in prison. He was transferred to immigration custody in 1985. Mr. Machado-Santana has been described as a “management problem”, and his disciplinary record while detained reflects 29 incident reports for charges ranging from assault, fighting, and death threats, to possession of marijuana and possession of intoxicants. In one incident, he was disciplined for injuring another detainee whom he assaulted with a pool stick. On four occasions, in 1991, 1992, 1995 and 1996, Mr. Machado-Santana refused to be interviewed by an immigration parole panel, although he has been reconsidered or afforded the opportunity of review for parole annually since his return to immigration custody.

Humberto Soris-Marcos

Mr. Soris-Marcos was paroled into the United States from 1980 to 1987, during which time he served brief sentences in 1980 for shoplifting and for possession of marijuana and resisting an officer. In 1981, he was arrested for aggravated assault, which charge was subsequently

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dismissed, for burglary of an occupied residence and assault, and sentenced to one year for breaking and entering an unoccupied building. In 1982, he was arrested for sexual assault and burglary, but fled the state of Florida when he was released. He was a fugitive until 1983, when he was finally arrested for flight, found guilty of the sexual assault charge and sentenced to 5 years probation. Mr. Soris-Marcos was subsequently arrested in 1983 for trespassing and possession of marijuana, and in 1984 for aggravated assault and possession of a knife. In 1985, he was charged with aggravated arson and sexual assault and convicted on his plea of arson.

Lazaro Artilles-Arcia

Mr. Artilles-Arcia was returned to immigration custody in 1987 following his conviction in 1985 for a sexual offense against a child. According to the State, records reflect a prior arrest on similar charges, namely lewd and lascivious acts involving a child, but there was no disposition. Mr. Artilles-Arcia was again approved for immigration parole in 1988 but the decision was ultimately rescinded because no sponsorship or halfway house program could be found that was willing to accept placement.

Agustin Medina-Aguilar

Mr. Medina-Aguilar had been in INS custody since 1987. In 1986, while he was paroled into the United States, he was convicted and sentenced to two years in prison for sexual offenses involving two young children, ages six and seven years. He has undergone extensive reconsideration for immigration parole since 1988 but no panel has recommended his release.

IV. ANALYSIS

A. Commission's Competence

171. The petitioners claim that the State has violated their rights under Articles I, XVII, XVIII, XXV and XXVI of the American Declaration of the Rights and Duties of Man. The State is a Member of the Organization of American States that is not a party to the American Convention on Human Rights, as provided for in Article 51 of the Commission's Regulations, and deposited its instrument of ratification of the OAS Charter on June 19, 1951.[FN62] The events raised in the petitioners' claim occurred subsequent to the State's ratification of the OAS Charter. The petitioners are natural persons, and the petitioners' representatives were authorized under Article 26 of the Commission's Regulations to lodge the petition on behalf of the petitioners. The Commission therefore has jurisdiction ratione temporis and jurisdiction ratione personae to examine this petition.

[FN62] The Inter-American Court of Human Rights and this Commission have previously determined that the American Declaration of the Rights and Duties of Man is a source of international obligation for the United States and other OAS Member States that are not parties to the American Convention on Human Rights, as a consequence of Articles 3, 16, 51, 112, and 150 of the OAS Charter. See I/A Court H.R., Advisory Opinion OC-10/89 Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of

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the American Convention on Human Rights, July 14, 1989, Ser. A Nº 10 (1989), paras. 35-45; I/A Comm. H.R., James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, paras. 46-49. See also Statute of the Inter-American Commission on Human Rights, Art. 20.

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172. Also in connection with the Commission's competence in this matter, the State has raised the question of whether the petitioners' detentions by the State are subject to the rights prescribed under the American Declaration or are exclusively a matter of state sovereignty over the entry and removal of aliens to and from its territory.

173. The Commission considers that this issue relates at base to the jurisdiction ratione materiae and the jurisdiction ratione loci of the Commission to interpret and apply the American Declaration in the circumstances of the complaints raised by the petitioners. Accordingly, the Commission will address the State's observations in this regard at this stage of the Commission's analysis.

174. In this connection, the State has argued that the detention of the petitioners is not governed by the rights under the American Declaration, but rather is exclusively a matter of state sovereignty.

175. The State has argued in this respect that states have absolute sovereign authority to detain and remove excludable aliens, and that this authority is not restricted by or otherwise the subject of rights or obligations under the American Declaration. The State refers, for example, to instances of state practice, such as the detention of Vietnamese refugees in Hong Kong, as evidence of a broad recognition of the right on the part of state to control the presence of aliens in its territory. It also refers to international authorities, such as the Executive Committee of the U.N. High Commissioner for Refugees, which are said to recognize a wide and flexible set of reasons that might justify detention even in the context of refugees under the U.N. Convention for the Protection of Refugees.

176. Correspondingly, the State contends that the petitioners, and aliens generally who are "excludable" under U.S. law, have no substantive rights under international law to be at liberty in U.S. territory pending their deportation, and correspondingly cannot be said to have a right to be free from detention, nor can they be said to have any procedural rights respecting their detention, under the American Declaration or otherwise. More particularly, the State claims that there is nothing in the provisions of the American Declaration that provides aliens with the right to be at liberty in any country that he or she chooses or to any country to which his government unlawfully expels him or that prescribes the modalities of detention of aliens such as the Mariel Cubans, and therefore suggests that nothing in the American Declaration gives rise to a right that the State could be said to have violated by detaining the petitioners in this case. The State claims in particular that neither Article XXV nor Article XXVI of the American Declaration appear to contemplate proceedings of a non-criminal nature, such as those governing the detention of aliens due to their immigration status, and therefore that these provisions are inapplicable in the petitioners' circumstances.

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177. In addressing this first issue, the Commission accepts that states have historically been afforded considerable discretion under international law to control the entry of aliens into their territory. This does not mean, however, that this discretion need not be exercised in conformity with states' international human rights obligations. Indeed, the Commission considers that the State's assertions on this first issue fail to appreciate the fundamental nature and scope of human rights protections provided for in international instruments such as the American Declaration.

178. In particular, the American Declaration, as a modern human rights instrument, must be interpreted and applied in such a way as to protect the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other States for which the instrument constitutes a source of international obligation.[FN63] This basic precept in turn is based upon the fundamental premise that human rights protections are derived from the attributes of a person's personality and by virtue of the fact that he or she is a human being, and not because he or she is the citizen of a particular State. This principle is explicitly recognized in the preamble to the American Declaration, which declares that the "American States have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality."[FN64] Other provisions of the American Declaration similarly reflect this basic tenet, including in particular Article II, which provides that the rights and duties under the Declaration apply to all persons "without distinction as to race, sex, language, creed or any other factor", and Article XVII, which specifically provides for the right of every person "to be recognized everywhere as a person having rights and obligations, and to enjoy basic civil rights."[FN65]

[FN63] I/A Court H.R., Advisory Opinion OC-2/82 of September 24, 1982, The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Ser. A Nº 2 (1982), para. 29 (holding that the object and purpose of modern human rights treaties is to protect the basic rights of individual human beings "irrespective of their nationality, both against the State of their nationality and all other contracting states.").
[FN64] See American Declaration, Preamble.
[FN65] See similarly Charter of the Organization of American States, Article 3(l) (reaffirming among the principles under the Charter for the American States the proclamation of the "fundamental rights of the individual without distinction as to race, nationality, creed or sex.").

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179. It is evident that these basic human rights protections under the Declaration, as with international human rights protections generally, constitute obligations that states of the Americas, including the United States, must guarantee to all persons within their authority and control[FN66] and are not dependent for their application upon such factors as a person's citizenship, nationality or any other factor, including immigration status. It is notable in this regard that one of the objectives in formulating the Declaration was to assure as fundamental the "equal protection of the law to nationals and aliens alike in respect to the rights set forth in the Declaration."[FN67] Contrary to this construction of the Declaration, however, the State appears to suggest in its proposed interpretations of Articles I, XVII, XXV and XXVI of the Declaration that the Commission must find language in the American Declaration explicitly extending the application of its provisions to persons, such as the petitioners, who are deemed under a

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particular state's domestic law as not entitled to be present in the state's territory notwithstanding that the that the individual may in fact be present in the territory of or otherwise under the authority and control of that state.

[FN66] The Commission has specifically held in the context of the American Declaration that each American State is obliged to uphold the protected rights of any person subject to its jurisdiction, and that, "[i]n principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control." See IACHR, Case 10.951, Annual Report of the IACHR 1999, p. 1283, para. 37 (hereinafter the "Coard Case"). See similarly International Covenant on Civil and Political Rights, Art. 2(1) (requiring each State Party to the Covenant to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"); American Convention on Human Rights, supra, Art. 1(1) (specifying that the States Parties to the Convention "undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms"); European Convention on Human Rights, supra, Article 1 (providing that the High Contracting Parties "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention"); Eur. Comm. H.R., Cyprus v. Turkey, 18 Y.B. Eur. Conv. Hum. Rgts. 83 (1975) at 118 (finding in respect of Article 1 of the European Convention on Human Rights that "[i]t 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 within their actual authority and responsibility, whether that authority is exercised within their own territory or abroad."). See also Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment, Adopted by U.N. General Assembly Resolution. 43/173 (9 December 1988), A/RES/43/173, 76th plen. mtg., Principle 5(1) (providing that "these principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.").
[FN67] See Inter-American Juridical Committee, "Draft Declaration of the International Rights and Duties of Man and Accompanying Report" (1946), p. 55.
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180. The Commission considers, however, that the language of the Declaration, as well as prevailing international human rights principles, compel the opposite conclusion: that OAS Member States are obliged to guarantee the rights under the Declaration to all individuals falling within their authority and control, with the onus falling upon the State to prove the existence of a provision or permissible reservation explicitly limiting or excluding the application of some or all of the provisions of the instrument to a particular class of individuals, such as excludable aliens.[FN68] No such provision or reservation has been identified or proven by the State in the present case.

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[FN68] Article 5 of the European Convention on Human Rights, for example, specifically prescribes the unauthorized entry of a person into a High Contracting Party or the deportation or extradition of a person as circumstances which may justify the deprivation of a person's liberty. It does not, however, exempt individuals in these circumstances from protection under the Convention. To the contrary, the European Court has specifically acknowledged that, while State Parties have a right to control aliens' entry into and residence in their territory, this right might be exercised in accordance with the provisions of the Convention, including Article 5 (art 5). Amuur Case, supra, para. 41.

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181. There is no question based upon the record in this case that as a matter of fact, the petitioners, and the Mariel Cubans generally, have fallen fully within the State's authority and control. Not only have they been physically present within U.S. territory since 1980, they have been the subject of extensive judicial and administrative proceedings within the State's justice system, paroled into the general U.S. population, and have been subjected to detention at various facilities throughout the State's territory. It is therefore clear that the State is obliged to afford the petitioners the rights provided for under the American Declaration, including those rights regulating when and under what conditions the State may deprive persons of their liberty.

182. In the interests of completeness, the Commission also wishes to recall the fundamental principle in international law according to which states may not invoke the provisions of their internal law as justification for their failure to perform a treaty.[FN69] As a consequence of this principle, the fact that the courts in the United States may consider "excludable aliens" such as the petitioners in the present case as having never entered the State's territory for the purposes of domestic law cannot serve as a justification for any failure on the part of the State to guarantee the rights under the Declaration to such persons if they have, as a factual matter, fallen within the State's authority and control.

[FN69] Vienna Convention on the Law of Treaties, Art. 27 (providing that a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."). See also I/A. Court H.R., International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of 9 December 1994, Ser. A Nº 14 (1994), para. 35 (recognizing that "[p]ursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions.").

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183. Consequently, the Commission considers that the rights prescribed under the American Declaration apply to the petitioners, and that the State became the guarantor of those rights when the petitioners came within the State's authority and control in 1980. The State's treatment of the petitioners, including their detention, is therefore not exempt from, but rather must be in accord with, the provisions of the Declaration. This is not to say that the immigration status of

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individuals such as the petitioners might not constitute an appropriate factor to consider in evaluating the manner in which the State may properly give effect to the rights under the Declaration; it may not, however, serve to exempt the petitioners from the fundamental protections under the Declaration. Accordingly, the Commission is competent to address the petitioners' complaints, which competence includes jurisdiction ratione materiae and jurisdiction ratione loci.

B. Admissibility

1. Duplication of Procedures

184. The petitioners have acknowledged that a communication was filed with the United Nations pursuant to ECOSOC Resolution 1503 (XLVIII)[FN70] in May 1986, in relation to the situation of the Mariel Cubans. They claim, however, that this should not be considered to render their claim before the Commission inadmissible, for three reasons: the communication was filed by human rights and religious organizations other than the petitioners; the U.N. communication applies to a broader population of the Mariel Cubans than the petition before the Commission; and the U.N. procedure would not involve an examination of the specific facts stipulated in the petition before the Commission and would not lead to an effective settlement of the violations denounced.

[FN70] U.N. Economic and Social Council, Resolution 1503 (XLVIII), 1693rd Plenary Meeting (27 May 1970), "Procedure for dealing with communications relating to violations of human rights and fundamental freedoms." The Resolution authorizes the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint a Working Group consisting of not more than five of its members to meet once a year in private meetings to consider all communications , including replies of Governments thereon, received by the Secretary-General under Council resolution 728(XXVIII) of 30 July 1959. The purpose of this review is to bring to the attention of the Sub-Commission those communications, together with replies of Governments, if any, which appear to reveal a "consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission." If a particular situation is referred by the Working Group to the Sub-Commission, it may be made the subject of a study by the Commission and a report and recommendations thereon to the Council in accordance with paragraph 3 of Council resolution 1235(XLII), or may be made the subject of an investigation by an ad hoc committee to be appointed by the Commission. The latter approach can be taken only with the express consent of the State concerned and conducted in "constant cooperation with that State and under conditions determined by agreement with it."

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185. The State has not disputed the admissibility of the petition on the ground of duplicity. Indeed, in its January 19, 1988 observations, the State indicated that the U.N. communication relating to the Mariel Cubans was ultimately not referred to the Sub-commission on Prevention of Discrimination and Protection of Minorities by its Working Group on Communications.[FN71]

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[FN71] State’s January 19, 1988 Observations, p. 12.

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186. Given the State's indication that the ECOSOC Resolution 1503 communication relating to the Mariel Cubans ultimately did not proceed through the United Nations mechanism, the Commission finds that the subject of the petitioners' petition cannot be said to be pending settlement in another procedure under an international governmental organization of which the State concerned is a member, or that it essentially duplicates a petition pending or already examined and settled by another intergovernmental organization of which the State is a member. Accordingly, the Commission finds no bar to the admissibility of the petition under Article 39 of the Commission's Regulations.

2. Exhaustion of Domestic Remedies

187. The petitioners have argued that they have exhausted their domestic remedies, as required under Article 37 of the Commission's Regulations. In particular, the petitioners indicate that they have pursued remedies before the domestic courts in the United States, including a petition for a writ of certiorari before the U.S. Supreme Court, which was dismissed on October 14, 1986. The petitioners have argued further that applications for writs of habeas corpus do not constitute effective domestic remedies for the detention of the Mariel Cubans, because the U.S. federal courts have determined that excludable aliens are not entitled to protection under the Fifth and Sixth amendments to the U.S. Constitution and therefore that the Executive may detain the Mariel Cubans indefinitely. Similarly, the petitioners claim that review of their cases under the Cuban Review Plan does not constitute an effective domestic remedy, because the procedures under the Plan fall below the minimum requirements of due process under the American Declaration and under international law.

188. The State has not denied that the petitioners have pursued applications for writs of habeas corpus and appeals therefrom without success, up to and including certiorari applications before the U.S. Supreme Court, although it has disputed the petitioners’ characterization of the grounds upon which the courts have denied their habeas applications. The State has, however, argued that domestic remedies remain for the petitioners to exhaust, in light of the fact that the petitioners have in the past and continue to benefit from regular reviews under the Status and Cuban Review Plans.

189. Based upon the parties’ observations, the Commission finds that the petitioners have pursued and exhausted domestic remedies before the U.S. courts to the extent that they have been available.

190. With respect to the State's objection to the admissibility of the case based upon the potential review of the petitioners' cases under the Cuban Review Plan, the Commission observes that one of the central issues raised by the petitioners on the merits of the present case is whether the Cuban Review Plan and its predecessor, the Status Review Plan, constitute adequate mechanisms for reviewing the legality of the petitioners' detentions, for the purposes of Articles

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I, II, XVII, XVIII, XXV and XXVI of the American Declaration. Given the interplay between the adequacy of these administrative procedures for the purposes of exhaustion of domestic remedies and the very violation of human rights at issue in the case, the Commission considers that the question of the prior exhaustion of these remedies must be taken up with the merits of the case.[FN72] Accordingly, the Commission will join this aspect of the exhaustion of domestic remedies question to the merits of the case.

[FN72] See similarly I/A Court H.R., Velasquez Rodriguez Case, Preliminary Objections, Judgment of June 26, 1989, Ser. C Nº 1 (1994), para. 94.

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191. The Commission therefore finds that the petitioners' petition is not barred by Article 37 of the Commission's Regulations, subject to its evaluation under the American Declaration of the State's procedures in the Status Review Plan and the Cuban Review Plan in the merits of the case.

3. Timeliness

192. The record in this case indicates that the petitioners' petition was lodged with the Commission on April 10, 1987, and therefore within six months from the October 14, 1986 dismissal by the U.S. Supreme Court of the petition for the writ of certiorari in the Ferrer-Mazzora v. Meese matter. The State has not contested the admissibility of the petition on the ground of timeliness. Accordingly, the Commission finds that the petition is not barred from consideration under Article 38 of the Commission's Regulations.

4. Colorable Claim

193. The State has urged the Commission to find the petitioners' petition to be inadmissible, for the reason that it does not state facts that constitute a violation of rights referred to in the American Declaration. Having reviewed the extensive observations filed on behalf of both parties in the present case relating to compliance with Articles I, II, XVII, XVIII, XXV and XXVI of the American Declaration, as summarized in Part III of this Report, and given the Commission's findings respecting its competence to entertain the case, the Commission cannot conclude that the petition is manifestly groundless or inadmissible, on the basis of any statements made by the petitioners or the State or otherwise. Consequently, the Commission does not consider the petitioners' petition to be inadmissible under Article 41 of the Commission's Regulations.

5. Summary

194. In accordance with the foregoing analysis of the requirements of the applicable provisions of the Commission’s Regulations, the Commission decides to declare as admissible the claims presented by the petitioners with respect to Articles I, II, XVII, XVIII, XXV and XXVI of the Declaration, and to proceed to examine the merits of the case.

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C. Merits

1. Summary of Issues and Factual Circumstances

195. As indicated previously, the parties' observations in this case have raised two principal issues: whether the detentions of the petitioners by the State are subject to the rights prescribed under the American Declaration; and if so, whether the State has complied with the rights under the Declaration in the manner in which it has detained the petitioners.

196. In Part IV(A) of this report, the Commission answered the first issue in the affirmative, clarifying that the State became the guarantor of the petitioners' rights under the Declaration when the petitioners came within the State's authority and control in 1980.

197. Prior to addressing the second issue noted above, the Commission first considers it necessary to articulate its understanding, based upon the record in the case, of the circumstances under which the petitioners have been detained by the State, including in particular the lengths of time for which and the general conditions under which they appear to have been detained.

198. In this regard, with the exception of limited information provided by the State in relation to 29 petitioners, the Commission has not been provided with clear or consistent information from either the petitioners' representatives or the State as to precise circumstances of release and detention of each of the 335 petitioners alleged to have been included in the initial petition. Consequently, in examining the merits of the present case, the Commission has found it necessary to rely upon information pertaining to the detention of the 29 individuals referred to above, as well as information provided by the State and the petitioners pertaining to the detention of the Mariel Cubans more generally, even if that information might not necessarily be shown to pertain specifically to one of the petitioners. This latter information includes in particular a January 1995 Report prepared by the U.S. Bureau of Prisons on the "Detention of Mariel Cubans", which summarized generally the history and status of the population of detained Mariel Cubans at that point in time. This information is summarized below.

199. Between April and September 1980, approximately 125,000 Cubans arrived in the United States as part of the Mariel "Freedom Flotilla." Although most of the Mariel Cubans were not properly documented in accordance with U.S. immigration law, approximately 117,000 were released essentially immediately into the broader U.S. community. The remaining 8,000 Mariel Cubans were sent to resettlement camps for immigration screening, and when this process was completed in mid-1981, approximately 6,200 of the 8,000 had been released. The remaining 1,800 individuals continued to be detained, because they had been disruptive in resettlement camps, because of their suspected or admitted criminal background that would render them ineligible for admission to the United States under domestic law, or because they had serious mental or psychiatric problems. It appears from the State's observations that decisions respecting who to detain, as well as who to release, was at this stage based essentially upon what the individual Cubans told U.S. immigration officials about their backgrounds, as the Cuban Government provided the U.S. with no records on the Mariel Cubans.

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200. The petitioners in this case represent a subgroup of approximately 335 of the 125,000 Cubans who arrived as part of the Mariel "Freedom Flotilla". At the time the petition in this case was filed, all of the 335 petitioners were under detention by the State, some since their arrival in 1980, and others who had been released but were subsequently detained due to crimes they committed or violations of the terms of their parole while released.

201. The 1,800 Mariel Cubans who continued to be detained by the State were initially placed in U.S. Bureau of Prison facilities in Talladega, Alabama, Leavenworth, Kansas, Lewisburg, Pennsylvania, McNeil Island, Washington, Oxford, Wisconsin and Atlanta, Georgia. Subsequently, in March 1981, the State decided to hold most of the detained Mariel Cubans, save those with medical or mental health problems, in one location, the U.S. Penitentiary in Atlanta, which had up to that time been scheduled to close. As of August 1981, approximately 1,844 Mariel Cubans remained in detention, most in Atlanta.

202 .In late 1986 and early 1987, the State decided to transfer from the Atlanta Penitentiary to the Oakdale Detention Facility in Louisiana Mariel Cubans who were considered less problematic or who were likely candidates for release to half way houses. Consequently, as of November 1987 approximately 1,394 Mariel Cubans were held in Atlanta, and approximately 987 Mariel Cubans were detained at Oakdale. In November and December 1987, however, serious disturbances occurred in the Atlanta and Oakdale facilities, following which the State decided to re-locate the Mariel Cubans throughout other Bureau of Prison facilities.

203. Throughout the period since the arrival of the Mariel Cubans, various Mariel Cubans who had been released have committed crimes or have breached the conditions of their parole, as a consequence of which they have been brought back into Bureau of Prisons and INS detention. Other Mariel Cubans have been screened and released under the Status Review Plan implemented by the Attorney General between July 1981 and February 1985, and subsequently under the Cuban Review Plan from 1987 to the present, as well as pursuant to the generally-applicable INS immigration parole procedures. For example, the State estimates that as of February 1985 when the Status Review Plan was cancelled, approximately 2,040 detained Cubans had been paroled under that Plan. Consequently, the number of Mariel Cubans in custody has fluctuated, and continues to fluctuate, as a result of several factors. The following chart sets out the number of Mariel Cubans in State custody between 1987 and 1994, based upon the State's statistics:

Year	Total	BOP Detention	INS Detention
1987	3,506	2,384	1,122
1988	2,273	1,314	959
1989	2,360	1,521	839
1990	2,490	1,539	951
1991	2,262	1,343	919
1992	1,839	1,066	773
1993	1,639	1,182	457
1994	1,447	963	484

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204. With respect to Mariel Cubans who have remained in continuous detention since 1980, the State estimated this number in its January 1988 observations to be between 100 to 150. It appears that this figure applied to the total population of Mariel Cubans in the custody of the State at that time and not exclusively to the petitioners on whose behalf the present petition was lodged. Subsequently, in its March 1999 observations, the State indicated that all of the Mariel Cubans who are the subject of the petitioners' petition had been paroled into the United States at least once and therefore could not be said to have been continuously detained. It remains unclear, however, how long each of the petitioners had been held by the State after 1987 and prior to their release.

205. Rather, the only detailed information in this regard may be drawn from the particulars provided by the State on the 29 petitioners, described in Part III(B)(3)(e) of this Report. More particularly, the information provided by the State in its March 1999 observations respecting 18 of the petitioners indicates that of these: 4 had not been released from detention since 1988 and therefore had been held for approximately 11 years; at least 2 had been detained by the INS continuously since 1994 and therefore for at least 5 years; and at least 4 others had been held in INS detention since 1996 and therefore for at least 3 years. During their detention, all of these petitioners appear to have had regular access to the State's parole procedures, but have either been refused release, or have refused to participate in those procedures.

206. Finally, it appears that most of the petitioners have been incarcerated in federal, state or local penal facilities for the duration of their detentions.

2. Has the State complied with the American Declaration in the manner in which it has detained the petitioners?

207. The petitioners have contended in their petition that the State is responsible for violations of Articles I, XVII, XVIII, XXV and XXVI of the Declaration in connection with the manner in which the they have been detained by the State since their arrival in the United States in 1980.

a. Articles I and XXV – The Rights to Liberty and Protection from Arbitrary Arrest or Detention

208. Articles I and XXV of the Declaration provide as follows:

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

Right to life, liberty and personal security.

Article XXV. No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.
Right of protection from arbitrary arrest.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

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Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

i. Governing Principles

209. The right to liberty under Article I of the Declaration is, as with correspondent provisions of other international human rights instruments, concerned with the exercise of physical freedom.[FN73] As discussed above, this right, as with all others under the Declaration, applies to every individual falling within the authority and control of the State and must be afforded to all such persons without distinction in accordance with the right to equal protection of the law under Article II of the Declaration.[FN74]

[FN73] See Yoram Dinstein, Right to Life, Physical Integrity, and Liberty, in The International Bill of Rights - The Covenant on Civil and Political Rights 114,128 (Louis Henkin ed., 1981).
[FN74] Article II of the Declaration provides that "all persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor".

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210. At the same time, Article XXV of the Declaration clarifies that the right to liberty is not absolute, but rather permits states to deprive individuals of their liberty under certain conditions. Prevailing authorities, including the Commission's own jurisprudence, suggest that the circumstances of such deprivations of liberty are not limited to those involving the investigation and punishment of crimes, but also extend to other areas in which states may administer authority. States may, for example, detain individuals for the purpose of controlling the entry and residence of aliens in their territories[FN75] or for reasons relating to physical or mental health, [FN76] and, during occupations governed by international humanitarian law, may intern the civilian population as a safety measure and for imperative reasons of security.[FN77] In all such cases, however, any deprivation of an individual's liberty must be informed by the norms prescribed under Article XXV of the Declaration.

[FN75] See e.g. IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, 28 February 2000, OEA/Ser.L/V/II.106 Doc. 40 rev. (hereinafter the "Canada Report"), paras. 134-142; (evaluating under Article I and XXV of the American Declaration the preventative detention of immigrants by Canadian authorities on the ground that they may constitute a "danger to the public"); Amuur Case, supra, para. 53
[FN76] Eur. Ct. H.R., Winterwerp Case, Judgment of 24 October 1979, Series A Nº 33, 2 E.H.R.R. 387 (addressing procedural safeguards relating to the detention of persons on grounds of mental illness).
[FN77] See e.g. Coard Case, supra, paras. 37, 42, 47, 59 (addressing under Article I and XXV of the American Declaration the detention of individuals held by the United States for, inter alia,

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"security and tactical reasons" during the military action led by the armed forces of the United States in Grenada in 1983).

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211. The Commission notes in this connection that Article XXV of the Declaration places the "lawfulness" of detention, including the question of whether a procedure established by pre-existing law has been followed, in reference essentially to domestic law, and prescribes the obligation to conform with substantive and procedural rules of domestic law. It must additionally be considered, however, that Article XXV also requires substantive and procedural rules of domestic law themselves to conform with the fundamental purposes underlying Article XXV, namely to protect individuals from arbitrary deprivations of their liberty.[FN78] This in turn requires not only that a deprivation of liberty be shown to conform with the requirements of applicable domestic law, but also that the domestic law itself be fair, predictable, and therefore not arbitrary.[FN79]

[FN78] See similarly Eur. Ct. H.R., Winterwerp Case, supra, para. 37 (observing that "[I]n a democratic society subscribing to the rule of law…no detention that is arbitrary can ever be regarded as 'lawful'"). It is revealing to note in this regard that during the drafting of Article 9 of the International Covenant on Civil and Political Rights, prohibiting arbitrary arrests or detentions, the United States similarly expressed the view that "[a]rbitrary arrest or detention implied an arrest or detention which was incompatible with the principles of justice and with the dignity of the human person irrespective of whether it had been carried out in conformity with the law." 13 GAOR C.3 (863rd mtg.), A/C.3/SR.863 at 137 (1950).

[FN79] In this respect, the Commission considers that the notion of arbitrary detention entails not only the absence of fair procedures to review detention, but also incorporates elements of inappropriateness, injustice and lack of predictability. See similarly U.N.H.R.C., Van Alphen v. Netherlands, Comm. Nº 305/1988 (23 July 1990), para. 5.8 (defining arbitrariness not merely being against the law, but as including elements of "inappropriateness, injustice and lack of predictability"); Amuur, supra, para. 50 (citing compliance with the rule of law as fundamental to protection against arbitrary deprivations of liberty).

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212. Correspondingly, in evaluating the propriety under the Declaration of instances of preventative and other detention, Article XXV specifies three fundamental requirements that must be satisfied in such circumstances: first, preventive detention, for any reason of public security, must be based on the grounds and procedures set forth in law; second, it may not be arbitrary; and third, supervisory judicial control must be available without delay.[FN80] In situations of continuing detention, this necessarily includes supervision at regular intervals.[FN81]

[FN80] See similarly Coard Case, supra, para. 45; IACHR, Report on the Situation of the Human Rights of Asylum Seekers in the Canadian Refugee Determination System 2000, OEA/Ser.L/V/II.106 Doc 40 rev., para. 137.

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[FN81] See e.g. Herczegfalvy v. Austria, supra, para. 75; U.N.H.R.C., Communication Nº 560/1993, CCPR/C/59/D/560/1993 (30 April 1997), para. 9.4 (observing that "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed).

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213. The Commission wishes to emphasize that the notion of fairness is particularly fundamental to ensuring that a process for the deprivation of liberty is not rendered arbitrary contrary to Article XXV of the Declaration. While the particular requirements may vary depending upon the circumstances of a particular case, including, for example, the capabilities of the detainee, detention review proceedings must at a minimum comply with the rules of procedural fairness. These rules require, inter alia, that the decision-maker meets currently prevailing standards of impartiality, that the detainee is given an opportunity to present evidence and to know and meet the claims of the opposing party, and that the detainee be given an opportunity to be represented by counsel or other representative.[FN82]

[FN82] See similarly IACHR, Loren Laroye Riebe Starr and others, Report Nº 49/99, Annual Report of the IACHR 1999, para. 70 (addressing the requirements of procedural fairness in the context of extradition proceedings).

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ii. Are the petitioners' Deprivations of Liberty Arbitrary?

214. In the present case, there appears to be no dispute that the petitioners are at present, or were at some previous point, detained by the State by reason of their status as "excludable aliens" under the Immigration and Naturalization Act. According to the State, virtually all of the Mariel Cubans, including the petitioners, have been considered excludable due to lack of proper documentation, although certain detainees are also said to have serious mental health problems, or committed or are suspected to have committed certain criminal offenses in Cuba or in the United States, which may also constitute grounds for excludable status.[FN83] While aliens in this class would normally be removed to their country of origin,[FN84] this has not occurred in the present case because the Government of Cuba has refused to accept the return of the petitioners and other excludable Mariel Cubans. Further, while most excludable Mariel Cubans have been released pursuant to the Attorney General's "parole" authority under the Immigration and Naturalization Act,[FN85] the petitioners have been in the past or are currently detained by the State because they have failed to satisfy the parole authority requirements, which in turn relate to such considerations as whether the individual is likely to remain "nonviolent" and whether he or she is likely to pose a "threat to the community" if released.[FN86]

[FN83] 8 U.S.C. Sections 1181, 182(a)(1)-(5).

[FN84] 8 U.S.C. Section 1227 (providing that "[a]ny alien (other than an alien crewman) arriving in the United States who is excluded under this Act, shall be immediately deported, in accommodations of the same class in which he arrives, unless the Attorney General, in an

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individual case, in his discretion, concludes that immediate deportation is not practicable or proper.")
[FN85] 8 U.S.C. Section 1182(d)(5)(a), 8 C.F.R. Sections 212.5, 212.12.
[FN86] 8 C.F.R. 212.12(d)(2).
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215. It appears from the record, therefore, that the petitioners have been deprived of their liberty by the State, and that their detention has ostensibly been of an administrative nature relating to their immigration status.[FN87] The Commission is therefore satisfied that the provisions of Article XXV of the Declaration apply to the petitioners.

[FN87] It must be said that on the record before it, the Commission considers it difficult to distinguish between the circumstances of the petitioners' detentions and detention for the purpose of criminal punishment. For example, the petitioners' detentions have to a significant extent been predicated upon crimes that they committed or are suspected to have committed in Cuba or the United States. Most of the petitioners have been held in federal, state or local facilities utilized for the punishment of offenders, and many have been held for periods of time that are equivalent to or exceed sentences imposed for serious criminal offenses. Further, the State has indicated that the parole provisions of the Cuban Review Plan have been modeled after those for the parole prior to the completion of their sentences of criminals under the federal system.
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216. Further, the Commission considers that the circumstances of the petitioners' detentions, including the law which is alleged to authorize the detentions and the mechanisms for ascertaining the legality of the detentions, fail to comply with the requirements of Articles I and XXV of the Declaration. Fundamentally, the State's domestic law fails to recognize any right to liberty on the part of the petitioners contrary to Article I of the Declaration. This failure has in turn undermined the propriety of the law that purports to authorize the petitioners' detention, as well as the mechanisms available to ascertain the legality of their detentions.

217. In particular, the provisions of the Immigration and Naturalization Act under which the petitioners' detentions have been effected provide the Attorney General with largely unrestricted authority to detain excludable aliens pending their removal, subject to the Attorney General's discretionary authority to "parole" the aliens into the United States.[FN88] Further, the physical presence of an excludable alien in the United States, including his or her release into the U.S. under the Attorney General's parole authority, does not change his or her status as excludable.[FN89] As a consequence, an excludable alien has no right under domestic law to be at large in the United States and may be removed from the United States at any time, regardless of the nature or length of the alien's physical presence in the State's territory.

[FN88] 8 U.S.C. Section 1182(d)(5)(A) (providing in part that "[t]he Attorney General may…in his discretion parole into the United States temporarily under such conditions as he may

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prescribe only on a case by case basis for urgent humanitarian reasons or significant public interest any alien applying for admission to the United States…").
[FN89] Id.
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218. The U.S. courts in turn have interpreted this legislation as conceptually placing excludable aliens always at the border seeking admission and as never having entered the United States.[FN90] This construction, together with the domestic courts' characterization of the Mariel Cubans' detention as administrative rather than criminal in nature,[FN91] has resulted in the absence on the part of the petitioners of any liberty, due process, or fair trial protections under the domestic constitution in connection with their detentions.[FN92] It has also led the U.S. courts to conclude that the Executive may detain excludable aliens such as the petitioners indefinitely in the absence of an explicit statutory limit to the length of time for which such aliens may be held.[FN93]

[FN90] Shaughnessy v. Mezei, 345 U.S. 206; Garcia-Mir v. Smith, 766 F.2d 1478, 1483-84 (11th Cir., 1985), cert. Denied 106 S.Ct. 1213 (1986); Barerra-Mezzora at p. 389. See also Appendix 1, Report on the Atlanta Federal Penitentiary of the Subcommittee on Court, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives (99th Cong., 2d Sess.), Ser. Nº 8 (1986), at 8-21 (providing a history of the judicial response to the detention of Mariel Cubans).
[FN91] See In re Mariel Cuban 822 F Supp. at 196.
[FN92] In the words of one court, excludable aliens who seek admission to the United States "have no constitutional rights with regard to their application, and must be content to accept whatever statutory rights and privileges they are granted by Congress." Garcia-Mir v. Smith 766 F 2d 1478, 1483-4 (11th Cir., 1985), aff'd 472 U.S. 846, 968 (1985). See similarly In re Mariel Cubans, supra, at 195-6 (finding that Mariel Cubans, as excludable aliens, are not entitled to habeas relief from administrative detention either on the basis that the said detention violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution, or the right to a fair trial under the Sixth Amendment). The Fifth Amendment to the U.S. Constitution provides in part: "No person shall be … compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law…" [emphasis added]. The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."
[FN93] See e.g. In re Mariel Cuban 822 F.Supp. at 196; Barrera-Echavarria v. Rison 44 F.3d 1441, 1445-1448 (9th Cir.) (interpreting the Immigration and Naturalization Act as authorizing the U.S. Attorney General to detain excludable aliens indefinitely pending deportation).
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219. The Commission considers that the domestic law upon which the petitioners' detention was based, as described above, is fundamentally antithetical to the protections prescribed under

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Articles I and XXV of the Declaration, because it fails to recognize any right to liberty on the part of the petitioners notwithstanding their physical presence within the State's territory; indeed, it prescribes a presumption of detention rather than a presumption of liberty and is therefore incompatible with the object and purpose of Articles I and XXV of the Declaration, namely to secure the liberty of the individual save in exceptional circumstances justified by the state as lawful and non-arbitrary. Consequently the Commission considers that the treatment of the petitioners in this manner under domestic law is per se inconsistent with their right to liberty under Article I of the Declaration as well as the right not to be arbitrarily deprived of liberty under Article XXV of the Declaration.

220. Moreover, the Commission has found that the procedures by which the petitioners' detentions have been effected, and those by which the legality of their detentions is ascertained, predicated as they are on the assumption that the Executive has nearly unfettered discretion to detain the petitioners indefinitely, are not consistent with the requirements prescribed under Article XXV of the Declaration, in two principal respects.

221. The Commission first considers that the procedures by which the petitioners have been or continue to be deprived of their liberty are arbitrary, for four principal reasons: they fail to define with sufficient particularity the grounds upon which the petitioners have been deprived of their liberty; they place the onus upon the detainee to justify his or her release; they are subject to a degree of discretion on the part of officials that exceeds reasonable limits; and they fail to provide for detention reviews at reasonable intervals.

222. More particularly, a review of the State's domestic legislative and administrative standards and the manner in which they have been applied reveals ambiguities that deprive the law of the precision necessary to ensure consistency in decision-making and to enable the petitioners to fairly and effectively defend his or her right to be released.[FN94] The Immigration and Naturalization Act, for example, provides that an excludable alien may be released under the Attorney General's parole authority only where there are "emergent reasons" or where release is "strictly in the public interest", without further elaboration in the text of the Act.[FN95] Such conditions are, in the Commission's view, patently imprecise and, moreover, fall foul of the fundamental principle that restrictions on fundamental rights, where permissible, must be reasonable and proportionate to the end sought, and may not be such as to deprive a right of its essence.[FN96] By codifying a general presumption against release, and doing so in such broad, indistinct and discretionary terms, the Commission cannot reach any other conclusion but that the law authorizing the petitioners' detentions is ambiguous.

[FN94] The European Court of Human Rights has emphasized the need for the law upon which a deprivation of liberty may be founded to be "sufficiently accessible and precise in order to avoid all risk of arbitrariness." Amuur Case, supra, para. 50. See also Canada Report, supra, para. 139.
[FN95] 8 U.S.C. Section 1182(d)(5)(A).
[FN96] See e.g. Eur. Ct. H.R., Golder v. U.K., Ser A, Nº 18, 1 E.H.R.R. 524, PAGE REF. (1975).

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223. While the terms of the Status Review Plan and its successor Cuban Review Plan endeavor to provide further guidance as to the grounds upon which the Mariel Cubans in particular may be released from detention, they prescribe conditions that are, in the Commission's view, unduly speculative and susceptible to varying and potentially inconsistent interpretations, and in any event are by reason of their discretionary nature incapable of properly rectifying the deficiencies in the standards of release under the Immigration and Naturalization Act. These conditions include, for example, the requirement that the Director of the Cuban Review Plan or a review panel to be satisfied that a detainee is “presently a non-violent” person, is “likely to remain non-violent”, and is “not likely to pose a threat to the community following his release”. These conditions are on their face vague, speculative and open to various interpretations, and yet the regulations fail to provide clear or detailed criteria to define when a person is considered to satisfy these broad standards. In particular, the Regulations do not prescribe specific factors defining when a detainee may be considered “violent” or a “threat to the community”, much less how future conduct in this regard is to be predicted. At most, the regulations prescribe a variety of factors that should be "weighed" in considering whether to recommend further detention or release on parole, including the number of disciplinary infractions or incident reports received while in custody and the detainees past history of criminal behavior. The Commission considers that standards of this nature give rise to an unacceptable risk of inconsistency in decision-making. They also deprive detainees of sufficient notice of the case they must meet in order to justify their release.

224. The risk of inconsistency and uncertainty presented by these conditions is substantiated to some degree by the procedural histories of certain of the 29 petitioners in respect of whom the State provided detailed information. It appears, for example, that certain petitioners have been denied parole based to a significant extent upon their criminal histories, while other petitioners having comparably more serious criminal histories for similar offenses have been released, and the State’s descriptions of the cases do not refer to any factors that would appear to justify these petitioners’ dissimilar treatment.[FN97]

[FN97] petitioner Reuben Alfonso-Arenciba, for example, who was sentenced in 1984 to 6 months imprisonment for possession of cocaine and carrying a loaded firearm, was ordered detained by the Associate Commissioner of Enforcement in 1987. In contrast, petitioner Juan Hernandez-Cala, who was sentenced to 1 ½ to 4 years imprisonment for cocaine possession, was ordered released from detention in 1998. The facts of the cases, as conveyed by the State, do not reveal any factors that would appear to justify the distinctions in their treatment.

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225. Moreover, regardless of any determination reached by the Director or a review panel on consideration of the legislative criteria in the circumstances of a particular case, it constitutes a recommendation only; whether a particular detainee is ultimately released remains entirely in the discretion of the Associate Commissioner for Enforcement or his or her designate, with no legislatively-prescribed criteria for the exercise of his or her discretion.[FN98] Similarly, the Associate Commissioner for Enforcement or his or her designate may, on his or her discretion, withdraw approval for parole for any detainee prior to release when, in his or her opinion, "the conduct of the detainee, or any other circumstance, illustrates that parole would no longer be

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appropriate."[FN99] Further, even in the event that the Associate Commissioner for Enforcement grants parole to a detainee, the detainee cannot be released unless a suitable sponsorship or placement has been found for him or her.[FN100]

[FN98] 8 CFR Section 212.12(b)(I), (d)(4)(iii).
[FN99] Id., Section 212.12(e).
[FN100] 8 C.F.R. Section 212.12(f) (providing that "[n]o detainee may be released on parole until suitable sponsorship or placement has been found for the detainee. The paroled detainee must abide by the parole conditions specified by the Service in relation to his sponsorship or placement.").

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226. In this connection, the Commission recognizes that the principle that fundamental rights may not be restricted except by law does not necessarily exclude the use of discretion in applying the law.[FN101] However, a legislative procedure by which individuals are deprived of their liberty cannot, in the Commission's view, be considered to be sufficiently precise, fair and predictable as required under Article XXV of the Declaration, when that outcome of that procedure is ultimately dependent upon the largely unfettered discretion of the very officials who are responsible for carrying out those detentions.[FN102] In such circumstances, the Commission considers that the discretionary power left to the public authorities to deprive the petitioners of their liberty are so wide that they exceed acceptable limits.[FN103]

[FN101] See e.g. P.C.I.J., Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, (Advisory Opinion) 3 World Court Reports 516, 529 (1938) (hereinafter the "Danzig Decrees Case").
[FN102] The Commission has previously stated in this respect that the "requirement that detention not be left to the sole discretion of the State agent(s) responsible for carrying it out is so fundamental that it cannot be overlooked in any context." Coard, supra, para. 55.
[FN103] Danzig Decrees Case, supra, at 529.

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227. With respect to the requirement that a "suitable sponsorship or placement," be found for a detainee prior to his or her release, the Commission is particularly concerned with respect to the case of petitioner Lazaro Artilles-Arcia, who was convicted in 1985 for a sexual offense against a child. According to information provided by the State, although Mr. Artilles-Arcia was approved for release on parole in 1988, this decision was rescinded because "no sponsorship or halfway house program could be found that was willing to accept placement." The Commission considers it entirely unacceptable that an individual would be held in detention for over 10 years, in circumstances in which the Executive has deemed him releasable under its own criteria, but has failed to grant him his liberty based upon the discretionary judgments of sponsorship or halfway house programs as to which detainees should be given placements.

228. The Commission also considers that the risk of arbitrariness posed by the Cuban Review Process is exacerbated by the fact that the onus falls squarely upon the detainee to justify why he

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or she should be released from detention, which onus becomes increasingly onerous the longer the detainee is held in detention.[FN104] The Commission has previously warned against procedures in which the burden upon a detainee to adduce new evidence of a change of circumstances renders the review process increasingly pro forma, such that continuation of his or her detention no longer justified as a security measure but effectively converted into a penalty imposed absent due process.[FN105] A review of the circumstances of the 29 petitioners referred to above reveals indicia of this very development: the reviews are conducted based upon a presumption of detention, which the detainee must rebut based upon evidence of a bona fide change in his or her circumstances.[FN106] This burden is further aggravated by the length of time for which many the petitioners have been held in detention,[FN107] some of whom have not been released since 1988 or before.

[FN104] See e.g. Status Review Plan, Part III.C.2.e (providing that disturbing doubts in a case are to be "resolved against the detainee as he has the burden to convince review participants that he qualified for release.").

[FN105] Canada Report supra, para. 142.

[FN106] In the case of Reuben Alfonso-Arenciba, for example, the State indicated in its July 2, 1988 observations that the alleged victim's parole was revoked in December 1984 based upon his conviction in 1984 for possession of cocaine and carrying a loaded firearm, for which he served a six-month prison term. In November 1987, his detention was ordered by the Associate Commissioner of Enforcement to be continued because, although he had relatives who offered to sponsor and employ him, the panel was unconvinced of the bona fides of the offer. This, together with the detainee's past criminal record, his "associations" with narcotics, and the "evasiveness of his responses" during the panel interview, led the panel to recommend his continued detention. These circumstances in turn strongly suggest that Mr. Alfonso-Arenciba faced a considerable burden of proof before the panel, and that the length of his continued detention exacerbated this burden by appearing to render any change in circumstances that might satisfy a panel virtually impossible.

[FN107] The Commission has articulated as a threshold principle the observation that the longer detention as a preventative measure continues, the greater the resulting burden on the rights of the person deprived of liberty. See Canada Report, supra, para. 142.

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229. A further indicia of arbitrariness in the procedures by which the petitioners have been deprived of their liberty detention stems from the fact that detention reviews are varied out infrequently. According to the Cuban Review Plan, for example, in the situation of detainees whose cases have previously been reviewed and who have remained in detention, a subsequent review is to commence within one year of a refusal to grant parole, unless a shorter time is specified by the Director.[FN108] While no specific time period for the review of continuing detentions is prescribed under the Declaration, the Commission considers that in all instances of preventative and other detention the period of review should be reasonable in the circumstances of each individual case.

[FN108] 8 CFR Section 212.12(g)(2).

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230. Requiring reasonable periods of review for continuing detentions is consistent with the principle of effectiveness,[FN109] as well as with the object and purpose of the Declaration,[FN110] which, in the context of Article XXV of the Declaration, is clearly to protect individuals against arbitrary detention by subjecting the responsible authority to immediate, regular and effective supervision. A reasonableness requirement for detention review is also consistent with the practice of other states in comparable circumstances.[FN111] In light of the circumstances of the petitioners' detentions, including the dynamic nature of the grounds for their detention, the punitive conditions in which the petitioners have been detained, and the absence of an explanation on the record for the length of the review period prescribed, the Commission considers that detention reviews that are conducted every 12 months exceed a reasonableness standard.[FN112]

[FN109] See generally Artico v. Italy, May 13, 1980, Series A Nº 37, 3 E.H.R.R. 1, para. 33 (emphasizing that the European Convention on Human Rights, as a system for the protection of human rights, must be interpreted and applied in a manner that renders the rights practical and effective, not theoretical and illusory).
[FN110] See Vienna Convention on the Law of Treaties, Art. 31(1) (providing that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").
[FN111] See e.g. Canada Report, supra, para. 132 (indicating that under Canadian law, ongoing detention in an immigration context may continue for "a reasonable length of time, given all the circumstances of the case.").
[FN112] See e.g. Amuur Case, supra, para. 23 (indicating that under legislative amendments adopted in France in July 1992, any person who is refused leave to enter French territory may be detained beyond four days only under the authority of the President of the Tribunal de grande instance, which detention can then only be extended for 8-day periods); Canada Report, supra, paras. 128, 129 (indicating that in situations in which Canadian authorities detain aliens on ground they are likely to pose a danger to the public, a further review is held 7 days after the initial detention and at 30 day intervals thereafter).
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231. Based upon the foregoing considerations, therefore, the Commission considers that the law and procedures by which the petitioners have been deprived of their liberty are arbitrary and do not conform with the fundamental requirements of Articles I and XXV of the Declaration.

iii. Has the State Afforded the petitioners an Effective Right to have the Legality of their Detentions Ascertained by the Courts?

232. As indicated above, Article XXV of the Declaration includes among its fundamental elements the requirement that judicial control over detention be available without delay and, in situations of continuing detention, that the detention be the subject of regular reviews. In this connection, the Commission cannot overemphasize the significance of ensuring effective

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supervisory control over detention as an effective safeguard, as it provides effective assurances that the detainee is not exclusively at the mercy of the detaining authority.[FN113]

[FN113] See Coard, supra, at para. 55. The Commission has emphasized in this regard that "[w]hile international human rights and humanitarian law allow for some balancing between public security and individual liberty interests, this equilibrium does not permit that control over a detention rests exclusively with the agents charged with carrying it out." Id., para. 59. The fundamental role of judicial control over detention is also reflected in the U.N.'s Body of Principles for the Protection of All Persons under Any Form, of Detention or Imprisonment, which was adopted on December 9, 1988 with the concurring vote of the United States. Principle 4 of this Body of Principles provides that "[a]ny form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority." "Detention" for the purposes of the principles refers to "any person deprived of personal liberty except as a result of conviction for an offense." See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, supra.

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233. Based upon the limited nature and scope of judicial control that the courts have exercised in ascertaining the legality of the petitioners' detentions in the present case, however, the Commission cannot conclude that the State has satisfied this requirement under Article XXV of the Declaration. In the circumstances of the present case, the State's courts have accepted as valid the "entry fiction" upon which the petitioners' detentions are founded, and moreover, have on this basis denied the petitioners and other excludable aliens constitutional protections, including the right to liberty and the right not to be deprived thereof except by due process of law. Accordingly, any judicial review of the petitioners' detentions, like the schemes under the Status Review and Cuban Review Plans, have been predicated on the assumption that the petitioners have no right not to be detained, whether indefinitely or otherwise. In this context, the courts have limited their role to considering the question of whether the INS followed its procedures applicable to the parole of the Mariel Cubans.[FN114]

[FN114] See Garcia-Mir v. Smith, supra, 1483-84.

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234. Even within this narrow purview of judicial oversight, the domestic courts have determined that their scope of review is not the traditional "abuse of discretion" standard, but rather is limited to ascertaining whether the Attorney General has advanced a "facially legitimate and bona fide reason" for his decision to deny parole and continue to detain a Mariel Cuban.[FN115]

[FN115] Id., at 1485.

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235. The Commission cannot consider a review of this nature and scope to be sufficient to effectively and properly guarantee the rights under Articles I and XXV of the Declaration. Rather, in respect of individuals falling within the authority and control of a state, effective judicial review of the detention of such individuals as required under Article XXV of the Declaration must proceed on the fundamental premise that the individuals are entitled to the right to liberty, and that any deprivation of that right must be justified by the state in accordance with the principles underlying Article XXV, as outlined above. In other words, it must address not only compliance with the law, but the quality of the law itself in light of the fundamental norms under the Declaration.

236. Based upon the foregoing analysis, the Commission finds that the State has detained the petitioners in violation of their rights under Articles I and XXV of the American Declaration.

b. Articles II, XVII and XVIII – Rights to Equality, Recognition of Juridical Personality and a Fair Trial

237. Articles II, XVII and XVIII of the Declaration provide as follows:

Article II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.
Right to equality before law.

Article XVII. Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.

Right to recognition of juridical personality and civil rights.

Article XVIII. 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.
Right to a fair trial.

238. The notion of equality before the law set forth in the Declaration relates to the application of substantive rights and to the protection to be given to them in the case of acts by the State or others.[FN116] Further, Article II, while not prohibiting all distinctions in treatment in the enjoyment of protected rights and freedoms, requires at base that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought.[FN117]

[FN116] Canada Report, supra, para. 96, citing "Draft Declaration and Accompanying Report", supra; IACHR, Report Nº 51/96, Annual Report of the IACHR 1996, p. 550, paras. 177-178.
[FN117] See generally Eur. Ct. H.R., Belgian Linguistics Case, July 23, 1968, Series A Nº 6, 1 E.H.R.R. 252, p. 35, para. 10.

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239. In the immigration context in particular, the Commission recognizes that it is generally regarded in democratic societies as appropriate for states to afford aliens treatment that is distinct from that enjoyed by others within the State's jurisdiction to, for example, control aliens' entry into and residence in their territory.[FN118] Consistent with the principles underlying Article II of the Declaration, however, any such distinctions must be shown by the State to be reasonable and proportionate to the objective sought in the circumstances. Regard should also be given to the fact that one of the objectives in formulating the Declaration was to assure as fundamental the "equal protection of the law to nationals and aliens alike in respect to the rights set forth in the Declaration."[FN119]

[FN118] See e.g. Amuur Case, supra, para. 41.
[FN119] "Draft Declaration and Accompanying Report", supra, at 55.

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240. In the present case, the foregoing analysis makes plain that the petitioners have, like other excludable aliens present in the United States, been subjected to a legal and procedural regime in relation to their deprivations of liberty that is fundamentally distinct from that applicable to other individuals falling within the State's authority and control: it has denied the petitioners any recognition of a right to liberty and, as concluded above, has denied them effective protection from arbitrary deprivations of their liberty, contrary to Articles I and XXV of the Declaration. The basis of this distinction is the petitioners' immigration status under the State's domestic law.

241. In the Commission's view, based upon the record in this case, the petitioners' treatment in this regard has not been shown to be either reasonable or proportionate. The principal justification proffered by the State for this distinction is, as the Commission understands it, the concern that if the State was forced to release all excludable aliens into its territory, it would "allow states to exile their unwanted-but-not-dangerous nationals knowing that they would have to be released into the communities of other states regardless of their legal status as excludables." While the Commission does not doubt the bona fides of the State's concerns in this respect, such an assertion, without more, cannot justify the petitioners' treatment as reasonable. Not only does this justification presuppose that affording the petitioners a right to liberty would inevitably require the State to release them into its society, a proposition that does not follow from the terms of the Declaration as interpreted by this Commission, but the State has offered no evidence which would suggest that the legal status of excludable aliens under U.S. law would have any discernable effect on the emigration policies of other countries. Consequently, the Commission does not consider the petitioners' distinctive treatment under the State's domestic immigration law to be reasonable, based upon the record before it.

242. The Commission is also not satisfied that the petitioners' treatment in this manner has been shown to be proportionate to the objective sought by the State in imposing the distinction. The Commission fully appreciates the State's prerogative in regulating access to its territory by aliens, and recognizes that this may necessitate the imposition of controls over the physical freedom or movement of individuals seeking such access in accordance with the State's laws. As is apparent from the Commission's analysis herein, however, the American Declaration, like

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other international human rights instruments, does not prescribe an absolute right to liberty. Rather, the Declaration permits deprivations of the right to liberty, potentially on an extended basis, subject to the requirement that such deprivations are not arbitrary and are subject to immediate and regular review in accordance with the requirements under Article XXV of the Declaration. Further, the State has offered no clear justification as to why the circumstances of the petitioners cannot be accommodated within this regime, but rather must be deprived of their right to liberty under law in its entirety and subjected to the largely unfettered discretion of the Executive respecting the duration of their detention. The Commission therefore considers the petitioners' treatment as excludable aliens under the State's law to be disproportionate, and also for this reason inconsistent with Article II of the Declaration.

243. For reasons analogous to those described above, the Commission has concluded that the manner in which the petitioners have been deprived of their liberty by the State is inconsistent with Articles XVII and XVIII of the Declaration. Both of these Articles are predicated upon the recognition and protection by a state of an individual's fundamental civil and constitutional rights. Article XVIII further prescribes a fundamental role for the courts of a state in ensuring and protecting these basic rights, which role must be effective.[FN120]

[FN120] See e.g. Artico case, supra.

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244. The Commission's investigation on the merits of this case indicates, however, that none of the executive, legislative or judicial branches of the State's government have recognized the petitioners' right to liberty, nor have they afforded the petitioners with adequate or effective protection from deprivations of that right, in accordance with the terms of the American Declaration. While the petitioners have been extended the right to seek habeas corpus relief from the State's courts, any relief available from the courts has been predicated upon the absence of any right to liberty on the part of the petitioners. The Commission can therefore only conclude that the State has failed to secure the enjoyment by the petitioners of their basic civil rights, and that the petitioners have been denied effective protection by the State's courts from acts of authority that have prejudiced their fundamental constitutional rights.

245. Based upon the foregoing analysis, the Commission finds that the State is responsible for violations of the petitioners' rights under Articles II, XVII and XVIII of the Declaration, in respect of the circumstances under which they have been deprived of their liberty.

246. In light of the Commission's findings respecting the procedural fairness requirements inherent in Article XXV of the Declaration, and in the circumstances of the present case, the Commission does not consider it necessary to determine whether the circumstances of the petitioners' detentions may violate Article XXVI of the Declaration.

V. PROCESSING OF REPORT Nº 85/00 PREPARED PURSUANT TO ARTICLE 53 OF THE REGULATIONS OF THE COMMISSION

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247. On October 5, 2000, the Commission adopted Report 85/00 pursuant to Article 53 of its Regulations, setting forth its analysis of the record, findings and recommendations to the State designed to repair violations of Articles I, II, XVII, XVIII and XXV of the American Declaration relating to the petitioners' deprivations of liberty.

248. Report 85/00 was transmitted to the State on October 23, 2000, with a request that it inform the Commission within three months of that date of the measures that it had taken in compliance with the recommendations set forth to resolve the violations established.

249. By means of a note dated January 29, 2001, the State requested a 90-day extension of the time to respond to Report 85/00 and requested that the Commission not publish the report in the interim. The State based its request on the grounds that the case was extremely complex and controversial, had been under litigation for more than 13 years, and had produced extensive documentation. The State also contended that roughly 18 months had elapsed since the last hearing and exchange of correspondence in the matter, and that the State needed additional time to analyze the Commission's Report and to formulate a response, given the fact that a new Administration was required to review the entire case. The State indicated further that it required more time to locate and review the files of the 335 individuals alleged to have been included in the original petition in the matter in order to determine the present status of each individual. The State emphasized in this respect that an overwhelming majority of the 335 individuals were no longer in custody, that as of early 1999 approximately 29 were in custody, and that those in custody could be considered for release by means of a continuous review process in accordance with the existing regulations. Finally, the State indicated that it needed additional time "to determine the possible applicability to this case of Article 39 (Duplication of Procedures) of the Commission's Regulations."

250. In a communication to the State dated February 1, 2001, the Commission indicated that it had considered the State's request and had decided to grant a further period of one month, expiring on March 1, 2001, to receive the State's response to Report 85/00. The Commission did not receive a response from the State within the time limit prescribed by the Commission.

VI. CONCLUSIONS

251. The Commission, based upon the foregoing considerations of fact and law, and in the absence of a timely response from the State to Report 85/00, hereby ratifies its decision to admit the present case in respect of Articles I, II, XVII, XVIII, XXV and XXVI of the American Declaration. The Commission also hereby ratifies its conclusions that the State is responsible for violations of Articles I, II, XVII, XVIII and XXV of the Declaration in respect of the petitioners' deprivations of liberty.

252. In reaching these conclusions, the Commission has not disregarded the difficult situation faced by the State with the influx of Mariel Cubans in an abbreviated period of time, which was exacerbated by the refusal of the Government of Cuba to accept the return of its nationals. Nor should the Commission be taken to discount the generosity exhibited by the State in accepting a vast majority of the Mariel Cubans into American society.

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253. That said, the Commission is mandated to ensure that the treatment received by the more limited, but by no means insignificant, number of Mariel Cubans who have been or continue to be held in detention for extended periods of time comply with the State's fundamental obligations under the American Declaration. While the Commission's findings do not inevitably lead to the conclusion that all of the petitioners who currently remain in detention must be released, they do necessitate that each of them receive detention reviews in accordance with the above principles as soon as is practicable.

254. Finally, the Commission wishes to reiterate its concern with respect to one particular aspect of the petitioners' conditions of detention. As indicated previously, the Commission observed during its on-site visits in this matter that Mariel Cubans did not have the benefit of certain programs of reform and rehabilitation that are otherwise available to inmates in circumstances of criminal detention. This deficiency in turn has amplified the frustration experienced by many Mariel Cubans as a result of the ambiguity of their situation. In this connection, the Commission urges the State to extend to those Mariel Cubans who continue to be detained, or who may be detained in the future, some minimal activities of personal development, such as those available to criminal offenders. Activities of this nature would permit the detainees to use their time constructively, and would also provide them with means by which to improve their personal circumstances with a view to seeking release from detention.

VII. RECOMMENDATIONS

255. In accordance with the analysis and conclusions in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE UNITED STATES:

1. Convene reviews as soon as is practicable in respect of all of the petitioners who remain in the State's custody, to ascertain the legality of their detentions in accordance with the applicable norms of the American Declaration, in particular Articles I, II, XVII, XVIII and XXV of the Declaration as informed by the Commission's analysis in this report.
2. Review its laws, procedures and practices to ensure that all aliens who are detained under the authority and control of the State, including aliens who are considered "excludable" under the State's immigration laws, are afforded full protection of all of the rights established in the American Declaration, including in particular Articles I, II, XVII, XVIII and XXV of the Declaration as informed by the Commission's analysis in this report.

VIII. PUBLICATION

256. In light of the above, and in conformity with Articles 53(3) and 53(4) of the Commission's Regulations, the Commission decided to transmit this report to the State and to the petitioners' representatives, to publish this report, and to include it in its Annual Report to the General Assembly of the OAS. The 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 they have been complied with by the United States.

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Done and signed in Santiago, Chile., on the 4 day of the month of April, 2001. (Signed): Dean Claudio Grossman, Chairman; Prof. Juan Méndez, First Vice-Chairman; Lic. Marta Altolaguirre, Second Vice-Chair; Dr. Hélio Bicudo, Dr. Peter Laurie, and Dr. Julio Prado Vallejo, Commissioners.