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Title/Style of Cause: Mario Lares-Reyes, Vera Allen Frost and Samuel Segura v. United States
Doc. Type: Decision
Decided by: President: Juan E. Mendez;
First Vice-President: Marta Altolaguirre;
Second Vice-President: Jose Zalaquett;
Commissioners: Julio Prado Vallejo, Clare K. Roberts.
Commission Member Professor Robert K. Goldman did not take part in the discussion and voting on this case, pursuant to Article 17(2) of the Commission's Rules of Procedure.

Dated: 27 February 2002
Citation: Lares-Reyes v. United States, Petition 12.379, Inter-Am. C.H.R., Report No. 19/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)
Represented by: APPLICANTS: the Center for Justice and International Law, the law firm of Gibbs Houston Pauw, and the Center for Human Rights and Justice

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I. SUMMARY

1. On November 21, 2000, the Inter-American Commission on Human Rights (the “Commission”) received a petition from the Center for Justice and International Law, the Washington, D.C. law firm of Gibbs Houston Pauw, and the Center for Human Rights and Justice (the “Petitioners”) against the Government of the United States (the “State” or “United States”). The petition was presented on behalf of three individuals, Mario Lares-Reyes, Vera Allen Frost and Samuel Segura (the “alleged victims”). The petition stated that the alleged victims, all of whom had been granted permanent resident status in the United States, were the subjects of decisions under the US Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”)[FN1] to be removed from the United States on the basis that they had been convicted of “aggravated felonies” as defined under that legislation.

[FN1] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

2. In their initial petition and subsequent observations, the Petitioners claim that each of the alleged victims had exhausted domestic remedies, or alternatively that they are excused from the exhaustion of domestic remedies requirement, and therefore that their claims are admissible.

With regard to the merits of their complaint, the Petitioners contend that the United States is responsible for violations of the right to family and special protection for minor children, the right to protection from arbitrary arrest, the right to a fair trial, and the right not to be arbitrarily detained, under one or more of Articles V, VI, VII, XVIII and XXV of the American Declaration of the Rights and Duties of Man (the “American Declaration”) because of the manner in which the IIRIRA authorized the alleged victims’ removal from the United States and the consequences of those removals.

3. The State argued in its response to the petition that the Petitioners’ claims are inadmissible on three main grounds, namely that the American Declaration is no more than a recommendation to the American States that does not create legally binding obligations, the alleged victims have failed to exhaust domestic remedies, and the petition does not state facts that would constitute a violation of the Declaration if it could be the subject of violations.

4. As set forth in this Report, having examined the information and arguments provided by the parties on the question of admissibility, the Commission decided to declare the Petitioners’ claims to be inadmissible, on the basis that the alleged victims failed to pursue and exhaust remedies of the domestic legal system in accordance with generally recognized principles of international law, or because the petition fails to state facts that tend to establish a violation of the rights under the American Declaration or other applicable instruments.

II. PROCEEDINGS BEFORE THE COMMISSION

5. Following the lodging of their initial petition on November 21, 2000, designated by the Commission as Petition N° P12.379, the Petitioners filed a further communication with the Commission on March 14, 2001, which elaborated upon the submissions in their initial petition.

6. On April 23, 2001, the Commission transmitted the pertinent parts of the Petitioners’ November 21, 2000 petition and March 14, 2001 observations to the State and requested information from the State on the petition within 90 days as established by the Commission’s former Regulations.[FN2]

[FN2] During its 109th special session in December 2000, the Commission approved the Rules of Procedure of the Inter-American Commission on Human Rights, which replaced the Commission’s prior Regulations of April 8, 1980. Pursuant to Article 78 of the Commission’s Rules of Procedure, the Rules entered into force on May 1, 2001.

7. In a letter dated August 13, 2001 and received by the Commission on August 14, 2001, the Petitioners requested that a hearing on their petition be convened by the Commission during its next period of sessions. In their request, the Petitioners noted that they had not yet received a response from the State to the allegations in their petition, and that they believed that a hearing in the case “would provide an opportunity to hear the government’s position on the issues presented in the petition and thus promote the prompt resolution of the matter.” By note dated August 28, 2001, the Commission informed the State and the Petitioners that it had decided to grant a

hearing, to be held on September 28, 2001 at the Commission's Headquarters in Washington, D.C. By subsequent notes dated September 28, 2001 and October 3, 2001, the Commission advised the Petitioners and the State that owing to the tragic circumstances of September 11, 2001, the hearing into the matter had been postponed until November 16, 2001.

8. In a communication dated November 9, 2001 and received by the Commission on the same date, the State delivered its observations on the Petitioners' petition. In its communication the State objected to the admissibility of the petition and asserted that the Commission should cancel the hearing in the matter and declare the petition inadmissible.

9. By note dated November 13, 2001, the Commission transmitted the State's response to the Petitioners and confirmed that the hearing in the matter would proceed on November 16, 2001 as scheduled. By note of the same date, the Commission likewise informed the State of the Commission's decision to proceed with the hearing.

10. At the November 16, 2001 hearing, representatives of the Petitioners and the State attended and provided the Commission with oral representations on the admissibility and merits of the complaints raised in the petition. This included submissions regarding the potential impact upon the Petitioners' claims of two decisions of the US Supreme Court issued in June 2001 after the petition was filed with the petition, *INS v. St. Cyr and Zadvydas et al. v. Davis*; *Attorney General et al. v. Ma*, which addressed issues similar to those raised before the Commission.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

11. According to the Petitioners, each of the three alleged victims had been the subject of proceedings under the IIRIRA, which amended the provisions of the Immigration and Naturalization Act ("INA")^[FN3] governing the admission of individuals to and their deportation from the United States. In particular, the alleged victims were ordered removed from the United States under the IIRIRA amendments based upon their convictions for certain criminal offenses designated under the legislation as "aggravated felonies."^[FN4] The Petitioners claim that the "aggravated felonies" are defined so broadly that lawful residents are being deported for criminal offenses that occurred years ago without due process. The Petitioners also claim that under IIRIRA, deportation upon proof of an aggravated felony is automatic and does not permit consideration of humanitarian or other mitigating factors.

[FN3] Immigration and Naturalization Act, 8 U.S.C. §1101 et seq.

[FN4] 8 U.S.C. §1227(a)(2)(A)(iii).

12. More particularly, the Petitioners argue that the definition of "aggravated felony" under the pre-1996 legislation has been radically expanded beyond such offenses as murder, drug trafficking and trafficking in firearms to cover an extremely long list of offenses including minor

non-violent criminal infractions such as gambling offenses and re-entering the US after deportation.[FN5]

[FN5] 8 U.S.C. § 1101(a)(43).

13. The Petitioners also claim that the broadened definition of “aggravated felony” is applied retroactively, by specifically providing that the new definition applies “regardless of whether the conviction was entered before, on, or after September 30, 1996.”[FN6] The Petitioners contend that the application of this definition of “aggravated felony” is exacerbated by the statute’s focus on the sentence imposed rather than the sentence served, such that even if an individual’s sentence is suspended and they serve no time in jail, the legislation will not take these circumstances into account in deeming a person deportable.

[FN6] 8 U.S.C. § 1101(a)(43).

14. The Petitioners similarly contend that relief from deportation which could previously have been granted to individuals convicted of aggravated felonies is no longer available. According to the Petitioners, relief from deportation known as a humanitarian waiver of deportation, or “212(c) waiver,” by which a legal resident subject to deportation would be permitted to continue to live with his or her family in the United States, is no longer allowed for persons who have been convicted of an “aggravated felony.”[FN7] The Petitioners claim that, when available, the adjudication of a request for a “212(c) waiver” involves consideration of the seriousness and recency of the offense, the danger the applicant posed to the community, family ties, length of residence in the US, evidence of rehabilitation, and other equitable factors.

[FN7] 8 U.S.C. § 1229b(a)(3).

15. The Petitioners similarly claim that the IIRIRA eliminated the right to judicial review, as the only levels of review for an initial decision to deport made by an immigration judge is an appeal to the Board of Immigration Appeals, but where any further review by courts is specifically precluded for deportations based upon aggravated felonies and other criminal offenses.[FN8] As a consequence, such persons have no recourse to a court of law to challenge the deportation decision or to submit the social or humane considerations that would weigh in favor of not deporting an individual.

[FN8] 8 U.S.C. §1252(a)(2)(C) (providing “[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense ... [including those classified as aggravated felonies]”).

16. Further, the Petitioners claim that the IIRIRA amendments permit legal permanent residents to be detained arbitrarily and without bond for prolonged periods of time during the deportation process. According to the Petitioners the INS can also detain legal residents subject to deportation in any location it chooses, thereby cutting off contact with the person's family and making legal representation of the person difficult or impossible.

17. Finally the Petitioners claim that the current system of mandatory detention and mandatory deportation seriously and unjustifiably interferes with family rights, for example by causing the family to lose the primary breadwinner and thereby suffer severe hardship, and causing the family to suffer the emotional trauma of not knowing whether they will ever be able to live with their loved one. The Petitioners also complain that there is no forum in which the family can explain their interest in continuing to live together.

18. With respect to the circumstances of each of the three alleged victims in this complaint, the information provided by the Petitioners reveal the following factual allegations.[FN9]

[FN9] In support of their arguments on several issues raised in their petition, the Petitioners have provided examples of individuals who they claim have been the subjects of decisions under the IIRIRA but who are not among the alleged victims represented in this process before the Commission. Accordingly, the Commission will limit its consideration of the facts in this matter to the three individuals represented by the Petitioners in this proceeding.

19. Mario Alfredo Lares-Reyes came to the US from Mexico in 1979 when he was 17 years old, married a US citizen and has one son from that marriage born in March 1984. He obtained permanent resident status in 1985. In 1987, Mr. Lares-Reyes divorced his first wife, following which his son resided with his ex-wife. Mr. Lares-Reyes re-married, and in 1991 Mr. Lares-Reyes was convicted of a simple misdemeanor assault of his second wife, for which he received a suspended sentence of 12 to 18 months imprisonment and did not serve any time in jail. Following the entry into force of the IIRIRA, Mr. Lares-Reyes was deemed to have been convicted of an "aggravated felony," was arrested and held in jail for over one year, and then was deported from the US in August 1999.

20. Vera Frost is a 41-year-old Canadian citizen who obtained permanent resident status in the US in 1980 and has three children who are US citizens and who were 18, 15 and 8 years of age as of January 2001. She is divorced from her husband and has sole custody of their two youngest children. In May 1987, Ms. Frost was attacked and shot in her chest and arms, following which she began using marijuana as pain medication. In 1998, Ms. Frost pleaded guilty to two misdemeanor charges for possession of a small amount of marijuana and was sentenced to one day in jail and given a fine. In lieu of her sentence, Ms. Frost performed community service and attended a drug and alcohol program. INS authorities then determined that she was guilty of an aggravated felony and therefore deportable. Ms. Frost's appeal from

this decision to the Board of Immigration Appeals was dismissed on October 11, 2000, following which she was arrested at her home and deported to Canada.

21. Samuel Segura arrived in the US from Mexico in 1975 when he was 8 years old, lived in the US since that time, and subsequently obtained permanent resident status. He was shot in 1994, which caused him to be paralyzed and confined to a wheelchair. On October 8, 1997, Mr. Segura was convicted of shoplifting with prior offenses and sentenced to serve two years in jail. After serving 13 months he was released from jail, and INS authorities took him into custody for deportation proceedings. He was held in jail without bond from October 1998 until August 2001 when he was deported from the US to Mexico.

22. Based upon these submissions, the Petitioners allege several violations of the rights of the alleged victims under the American Declaration on the part of the United States.

23. The Petitioners allege that the State is responsible for violations of the right to family life and special protections for minor children under Articles V, VI and VII of the American Declaration, because the three alleged victims were the subject of mandatory deportation without any consideration of mitigating factors such as family unity. In this regard, the Petitioners claim that unlike prior to the IIRIRA, legal residents who are subject to deportation can no longer apply for a humanitarian waiver of their deportation, by reason of their family situation or otherwise. They cite in support jurisprudence from the European Court of Human Rights addressing family rights in the context of the deportation of non-citizens.[FN10]

[FN10] Authorities cited by the Petitioners include *Mehemi v. France*, 6 E.H.R.R. (1997), *Beljoudi v. France*, 14 E.H.R.R. 801 (1992) and *Bouchelkia v. France*, 25 E.H.R.R. 686 (1998).

24. The Petitioners also allege that the State is responsible for violations of the right not to be subjected to arbitrary arrest under Article XXV of the American Declaration due to the retroactive application of the expanded definition of “aggravated felony” to Alfredo Lares-Reyes and Samuel Segura, which the Petitioners allege deprived these individuals of their liberty according to procedures that were not established by pre-existing law.

25. In addition, the Petitioners contend that the State is responsible for violations of the right to a fair trial and to due process under Articles XVIII and XXV of the American Declaration due to the denial to the three alleged victims of the right to access to a court of law and access to counsel. In particular, the Petitioners argue that the IIRIRA amendments specifically bar an individual from appealing a deportation order to a court of law, with the result that the sole remedy for a final order of deportation is an appeal to the Board of Immigration Appeals, a tribunal within the US Department of Justice. Moreover, the Petitioners argue that the United States does not provide legal assistance to individuals detained and subject to deportation, despite the fact that such assistance is required in order to give effect to the rights of the alleged victims relating to their mandatory detentions and deportations.

26. Finally, the Petitioners argue that the State is responsible for violations of Articles I and XXV of the American Declaration relating to the right not to be arbitrarily detained, because Alfredo Lares-Reyes was held in mandatory detention without bond for over one year until he was deported, and Samuel Segura was held in jail without bond for over two years prior to his deportation, and this despite the fact that the US government has apparently not argued that these individuals pose security risks.

27. In relation to the admissibility of their complaints, the Petitioners contend that the three alleged victims have exhausted domestic remedies, as each has availed him or herself of the administrative procedures provided under US laws, with the 1996 amendments explicitly precluding any appeal in these cases to a court of law. Alternatively, the Petitioners argue that the alleged victims should be exempted from exhausting domestic remedies because the IIRIRA specifically bars an individual who has been convicted of a crime from appealing a deportation to a court of law and therefore that US domestic law does not provide appropriate remedies to protect the alleged victims' rights. Finally, during the November 16, 2001 hearing before the Commission in this matter, the Petitioners contended that as the State did not deliver a response to the petition within the time period prescribed by the Commission for doing so, the State should be taken to have waived any objection to the exhaustion of domestic remedies requirement.

28. Also during the hearing before the Commission in this matter, the Petitioners acknowledged that individuals who have been the subject of deportation decisions under the IIRIRA amendments and who appeal their deportations to the Board of Immigration Appeals may lodge judicial review proceedings of those decisions with the US Courts of Appeals, and indeed recognized that Mr. Lares-Reyes and Mr. Segura pursued such proceedings. They argued, however, that these review proceedings should not be considered effective remedies, because the federal courts limit themselves to determining whether the person was properly determined to have committed an "aggravated felony" within the meaning of the IIRIRA. If the courts find the definition to have been properly satisfied, they dismiss the application on the basis that they lack jurisdiction under 8 U.S.C. § 1252(a)(2)(C) to entertain the petition for review any further.[FN11]

[FN11] See e.g. Mario Alfredo Lares-Reyes v. Reno, Decision dated May 22, 2000, Case Nos. 99-11504 & 99-12956 (US Court of Appeals for the 11th Circuit) (determining that Mr. Lares-Reyes was deportable because he had been convicted of an offense related to controlled substances, and therefore that the Court lacked jurisdiction over the petition for review).

29. At this stage, the Commission wishes to note the existence of two decisions issued by the US Supreme Court in June 2001 after the lodging of this petition and which appear to have direct relevance to the issues raised before the Commission by the Petitioners. In its June 25, 2001 decision in the case *INS v. St. Cyr*,[FN12] the Supreme Court found that the federal courts could review administrative actions taken under the IIRIRA amendments and that those legislative provisions could not be interpreted so as to give retroactive effect to the waiver revocation under the new legislation. Further, in its June 28, 2001 decision in the consolidated case of *Zadvydas et*

al. v. Davis; Attorney General et al. v. Ma (hereinafter “Zadvydas v. Davis”),[FN13] the Court found that the post-review-period detention of a removable alien cannot exceed a period reasonably necessary to secure removal, which generally should not exceed 6 months.

[FN12] INS v. St. Cyr, 121 S. Ct. 2271 (2001).

[FN13] Zadvydas v. Davis et al.; Attorney General v. Ma, 121 S. Ct. 2491 (2001) (hereinafter “Zadvydas v. Davis”).

30. During the hearing before the Commission, the Petitioners acknowledged the existence of these two decisions by the Supreme Court. They argued, however, that these decisions did not provide a satisfactory response to the claims raised in the petition. In particular, they argued that the decision in INS v. St. Cyr was of no assistance to aliens who were determined removable from the US based upon post-1996 criminal convictions, or aliens who were deported under the IIRIRA amendments before the Supreme Court decision was issued. Second, they claim that the Zadvydas v. Davis decision applied to the special case of an individual who cannot be sent back to his or her country of origin and effectively remains in permanent detention following his or her removal proceedings. In the Petitioners’ submission, this is distinct from the circumstances of aliens like Mr. Lares-Reyes and Mr. Segura where they are denied the possibility of obtaining a bond for their release during the administrative process.

B. Position of the State

31. With respect to the admissibility of the claims in the petition, the State asserts that the complaints of the three petitioners are inadmissible on three grounds. First, the State contends that the American Declaration does not create legally binding obligations on OAS member states and cannot be said to create rights or impose duties on the United States, and therefore any assertion that the United States has violated any of the Declaration’s provisions has no validity.

32. In addition, the State argues that the case is moot in view of the fact that all three of the alleged victims have been deported and are no longer in the United States.

33. Third, the State argues that the alleged victims failed to exhaust their domestic remedies prior to being deported. In particular, the State rejects the Petitioners’ suggestion that the administrative procedures available to the alleged victims to challenge their deportations are not fair and effective procedures. Rather, the State contends that due process guarantees the alleged victims no more than fair and effective procedures by which they may seek to challenge the legality of their detentions and deportations and that the US procedures satisfy these requirements.

34. The State also asserts that Mario Lares-Reyes failed to exhaust domestic remedies, because he did not seek judicial review from the US Supreme Court of the decision of the US Court of Appeals for the 11th Circuit in his case, which he could have done prior to his deportation.[FN14] Similarly, the State contends that Samuel Segura did not seek judicial review from the US Supreme Court of the decision of the US Court of Appeals for the 9th Circuit in his

case, which he could have done prior to his deportation,[FN15] and that Vera Allen Frost only appealed as far as the US Board of Immigration Appeals and failed to seek judicial review from either the US Court of Appeals for the 9th Circuit or the US Supreme Court, which she could have done prior to her deportation.[FN16]

[FN14] According to the State, on October 10, 1998, an immigration judge found Mario Alfredo Lares-Reyes to be removable to Mexico on three grounds under the IIRIRA and that he was barred from seeking cancellation of his removal based upon his admitted criminal convictions for two “aggravated felonies”: an assault conviction in 1991; and a conviction on June 29, 1998 for knowingly maintaining a dwelling for the purpose of using, keeping or selling marijuana, for which he was given a suspended sentence of 45-days incarceration and a term of two-years’ probation. The Immigration judge found Lares-Reyes to be removable as an alien convicted of a “crime of violence,” a “controlled substance offense” and an “offense involving domestic violence” for the purposes of the IIRIRA amendments. Lares-Reyes appealed to the Board of Immigration Appeals, which confirmed the immigration judge’s determinations and dismissed his appeal on May 17, 1999. Lares-Reyes then filed an application for review with the US Court of Appeals for the 11th Circuit as well as an application for review of a decision by the Board of Immigration Appeals not to re-open and/or reconsider its decision. The 11th Circuit Court of Appeals dismissed his petition on May 22, 2000 for lack of jurisdiction.

[FN15] According to the State, Samuel Segura was convicted of a felony charge of petty theft with prior offenses on October 8, 1997. On October 15, 1998 Mr. Segura was placed in removal proceedings under the INA for having been convicted of an aggravated felony, and on December 7, 1998 an immigration judge found Mr. Segura’s conviction to constitute an “aggravated felony” and therefore that he was removable. On May 26, 1999 the Board of Immigration Appeals affirmed the Immigration judge’s decision. Mr. Segura then sought an emergency stay of deportation and judicial review in the US Court of Appeals for the 9th Circuit, which issued a stay and then subsequently dismissed his petition on June 28, 2000. Further, on October 22, 1999 Mr. Segura filed a petition for a writ of habeas corpus in the US District Court challenging his removal order and his conditions of confinement, which dismissed his petition on December 7, 2000. At the hearing before the Commission in this matter, the Petitioners and the State confirmed that Mr. Segura was removed from the United States to Mexico in August 2001.

[FN16] According to the State, on April 23, 1998 Ms. Frost was convicted of criminal possession of a controlled substance, namely marijuana, and that on July 23, 1998 she was convicted of the same offense. On July 24, 1998 the INS initiated removal proceedings against Ms. Frost under the INA by virtue of having been convicted of an “aggravated felony.” An immigration judge subsequently found that her second drug conviction constituted an aggravated felony in light of her prior drug conviction and ordered her removed from the United States. Ms. Frost subsequently appealed to the Board of Immigration Appeals, which summarily affirmed the Immigration Judge’s decision. Ms. Frost had 30 days to seek judicial review of the Board’s decision, but did not file for a stay of deportation or otherwise seek judicial review with the US Court of Appeals for the 9th Circuit and was deported to Canada on October 11, 2001.

35. In these circumstances, the State contends that all three alleged victims have failed to pursue all of the administrative and judicial procedures available to them to challenge their detentions and/or deportations and therefore that they have failed to exhaust domestic remedies.

36. The State also argues that it would have been open to all three petitioners to challenge their deportations in the federal courts on other statutory or constitutional grounds, which they did not do. In support of its submissions, the State cites the US Supreme Court's June 2001 decisions in the cases *INS v. St. Cyr* and *Zadvydas v. Davis* as examples of the types of additional challenges that the alleged victims could have raised before domestic courts. The State notes in particular that in its decision in *INS v. St. Cyr*, the Supreme Court confirmed that while the IIRIRA took away the federal courts' appellate jurisdiction under the INA to review criminal aliens' pure statutory challenges to their removal orders, it did not take away district courts' habeas corpus jurisdiction to review the same challenges under 28 U.S.C. §2241. Further, at the hearing before the Commission, the State asserted in response to questions from the Commission that in light of the Supreme Court's decision in *St. Cyr*, habeas corpus relief would have been available to the alleged victims to raise constitutional challenges in respect of the various claims that they have raised before the Commission, including their contention that the expanded definition of "aggravated felonies" under the IIRIRA is over broad and fails to take into account mitigating circumstances. In this respect, the State's representative did not rule out the possibility that the IIRIRA provisions defining "aggravated felonies" might not withstand constitutional challenge but noted that such a challenge had not been attempted by the alleged victims in the present case.

37. With respect to the merits of the Petitioners' claims, the State asserts that the petition fails to state facts that disclose any violations of the American Declaration. In particular the State contends that Mario Alfredo Lares-Reyes was properly deported based not only upon his October 1991 domestic assault conviction, but also based upon his June 29, 1998 guilty plea to a charge of knowingly maintaining a dwelling for the purpose of using, keeping, or selling marijuana. Similarly, the State argues that Samuel Segura was properly removed from the US based upon his conviction of a felony charge of petty theft with prior offenses, and that Vera Allen Frost's removal was justified based upon her convictions of criminal possession of a controlled substance on two separate occasions. The State also reiterates that the Petitioners have been provided access to fair and effective procedures by which they could challenge the legality of their detentions and deportations.

38. In light of these circumstances, the State rejects the Petitioners' challenges to the propriety of their removals from the United States. In particular, the State argues generally that the Petitioners' complaint is a disguised attack on the legitimacy of the current immigration legislation in the United States, which it claims the Petitioners have no standing to assert and is beyond the mandate and jurisdiction of the Commission. The State also emphasizes that a sovereign state has the right to exclude from its territory aliens whose presence is not in the public interest or is potentially harmful to public safety or threatens the economic, social or political well being of its citizens.

39. In this regard, the State asserts that one of the primary aims of the IIRIRA when it was signed by the US President on September 30, 1996 was to address the widespread problem of

illegal immigration in the United States, on the premise that aliens who violate US immigration law should be removed from the US as soon as possible. According to the State, the legislation attempted to achieve this objective in part by expanding the definition of “aggravated felonies,” expediting the removal of aliens convicted of serious crimes, and denying aliens who have been convicted of aggravated felonies discretionary relief known as “cancellation of removal.” In support of its argument in this connection, the State noted by comparison that asylum seekers and those seeking refugee status who have committed “serious non-political crimes” or particularly serious crimes are excluded from the benefits of the 1951 Refugee Convention and the 1967 Refugee Protocol even if they have a well-founded fear of persecution in their country of origin. Accordingly, the State argues that the alleged victims in the present case, none of whom had asylum or refugee status, are “hardly entitled to better treatment under US immigration law, in view of their criminal conduct.”

40. In respect of the substantive violations of the American Declaration raised by the Petitioners, the State presents several arguments, as alternatives to its initial contention that the American Declaration cannot be the subject of violations by states. With regard to the alleged violations of the right to family and related rights under the Declaration, the State contends that such violations cannot be said to provide an alien with a liberty interest that outweighs a state’s legitimate responsibility to provide for the welfare and security of its citizens. Rather, the State argues that the nature of the offenses committed by the alleged victims in the present matter justified their removal on these grounds notwithstanding their family situations. Indeed, the State contends that the alleged victims claim to enjoy legal protection for familial consideration “would be tantamount to a ‘blank check’ in terms of a purported substantive right to be at liberty in a country not their own without regard to that State’s immigration or other legislation.” The State also objects to the Petitioners’ reliance on case law under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, on the ground that the US is not a party to that instrument and that interpreting the terms of the American Declaration in an expansive manner by analogy to the European Convention would require the Commission to go far beyond its actual power and would create rights and duties of familial association that do not exist in the Declaration.

41. With regard to the retroactive application of the legislative amendments under consideration, the State argues that there is no evidence that Article 25 of the American Declaration, which provides that “no person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law,” was intended to apply to immigration detention and deportation, which are not of a criminal nature and which ordinarily do not turn on an alien’s failure to perform a civil obligation. Accordingly, in the civil context, the State argues that it is open to the US to apply immigration legislation to conduct that occurred prior to that legislation’s enactment.[FN17] The State asserts in this regard that according to the US Supreme Court, deportation in an immigration context is not a punishment for past crimes but rather is a civil consequence of an alien’s lack of right to be in the US and his or her failure to abide by the domestic laws therein. In part for this reason, the US Supreme Court has repeatedly upheld the constitutionality of deportation proceedings that apply new law to past criminal conduct.[FN18]

[FN17] In this regard, the State asserts that under US constitutional law, four types of laws may not be the subject of ex post facto laws: 1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; 2. Every law that aggravates a crime, or makes it greater than it was, when committed, 3. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; and 4. Every law that alters the legal rules of evidence, and received less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. State's observations dated November 9, 2001, at 18-19, relying upon *Calder v. Bull*, 3 Dallas 386, 390 (1798), cited in *Rogers v., Tennessee*, 121 S. Ct. 1693, 1697 (2001).

[FN18] State's observations dated November 9, 2001, at 19, citing, inter alia, *Reno v. American Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999); *Lehmann v. US*, 353 U.S. 685, 690 (1957).

42. With regard to the Petitioners' submission concerning access to court and access to counsel, the State argues that the administrative review procedures before the immigration judges, the Board of Immigration Appeals and the judicial review procedures before federal courts are sufficient to satisfy the requirements of Articles XVIII and XXV of the American Declaration in respect of deportation proceedings. The State alleges, for example, that at the administrative level, an immigration judge presides in immigration court over a removal hearing, which all of the alleged victims received. In these proceedings, an alien is afforded substantial rights, such as the privilege of being represented by counsel at no expense to the government, the opportunity to examine the evidence against him or her and to cross-examine the witnesses presented by the government, and the right to have a complete record of the proceedings for appellate review, including all testimony and evidence presented at the hearing. During these proceedings, aliens may present applications for relief and protection from removal.

43. The State also contends that these procedural requirements do not extend to requiring states to provide free legal counsel to all removable aliens, although the legislation guarantees an alien's right to be represented by counsel at no expense to the government. In any event, the State indicates that all three alleged victims in the present petition had legal representation during their proceedings before the immigration court and the Board of Immigration Appeals and therefore do not have standing to allege violations of their right to counsel.

44. Respecting the Petitioners' allegations that Mr. Lares-Reyes and Mr. Segura have been the victims of violations of the right not to be arbitrarily detained, the State contends that the American Declaration does not limit the length, purpose or modalities of immigration detention, and that in the United States immigrants have full ability to challenge their detentions in administrative and judicial proceedings.[FN19] These include the administrative procedures that govern the jurisdiction of the INS and immigration judges to make bond determinations and that permit an alien to challenge whether he or she is appropriately subject to detention pending removal proceedings. These processes also include judicial review through a writ of habeas corpus of the constitutionality of the Government's decision to detain an alien pending his or her deportation. On this latter remedy, the State refers to the US Supreme Court's June 2001 decision in the *Zadvydas v. Davis* case as acknowledging that the Attorney General's authority

to detain an alien with a final order for removal beyond the 90-day statutory removal period must be construed not to authorize indefinite detention, but instead to be limited to detention for a period reasonably necessary to remove the alien.

[FN19] State's observations dated November 9, 2001, p. 24, citing administrative proceedings available for the INS and immigration judges to make bond determinations under 8 CFR §§ 3.19 and 239.1 (2000).

IV. ANALYSIS

A. Competence of the Commission

45. In its observations on the Petitioners' petition, the United States specifically contests the authority of the Commission to determine as against the State violations of the American Declaration. In the State's view, the Declaration is "no more than a recommendation to the American states that does not create legally-binding obligations and therefore cannot be 'violated'."

46. The State's position fails to consider, however, the long-standing practice and jurisprudence of the inter-American human rights system, according to which 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.[FN20] These obligations are considered to flow both from the human rights obligations of member states under the OAS Charter,[FN21] which member states have agreed are contained in and defined by the American Declaration,[FN22] as well as from the customary legal status of the rights protected under many of the Declaration's core provisions.[FN23] As sources of legal obligation, it is appropriate for the Commission to speak of violations of the rights under the American Declaration when discharging the mandate given to it by the United States and other OAS member states under Articles 18 and 20 of the Commission's Statute[FN24] to ensure observance by member states of those rights. Accordingly, the Commission rejects the State's contention that the American Declaration cannot be the subject of violations, and reaffirms the well-established principle that the Declaration constitutes a source of international obligations for member states of the OAS.

[FN20] See I/A Court H.R., Advisory Opinion OC-10/89 "Interpretation of the Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights", July 14, 1989, Ser. A N° 10 (1989), paras. 35-45; James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report of the IACHR 1986-87, paras. 46-49. For examples of decisions in which the Commission has found violations of the American Declaration in respect of OAS member states that are not parties to the American Convention on Human Rights, see Case 1742 (Cuba), May 1975, Annual Report of the IACHR 1975; Maclean v. Suriname, Case 10.116, Resolution N° 18/89, Annual Report of the IACHR 1988-1989; Michael Edwards et al. v. The Bahamas, Case 12.067, Report N° 48/01,

Annual Report of the IACHR 2000; *Garza v. United States*, Case 12.243, Report N° 52/01, Annual Report of the IACHR 2000.

[FN21] Charter of the Organization of American States, Arts. 3, 16, 51, 112, 150.

[FN22] See Advisory Opinion OC-10/89, paras. 42, 43 (citing numerous resolutions in which the General Assembly of the OAS has recognized the American Declaration as a source of international obligation for the member states of the OAS, and concluding that “it may be said that by means of an authoritative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental rights referred to in the Charter.”).

[FN23] It is beyond question that the core rights protected under the American Declaration, including the right to life, the right to liberty and the right to due process and to a fair trial, have attained the status of customary, and indeed peremptory, norms of international law. Parallel provisions of the Universal Declaration of Human Rights, adopted by the United Nations several months after the American Declaration, have likewise been recognized as binding states as a matter of custom. See e.g. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 *Am. U. L. Rev.* 1 (1982); Louis Henkin, *The Age of Rights* 19 (1990); Ian Brownlie, *Principles of Public International Law* 574-5 (5th ed. 1998); Vratislav Pechota, *Development of the Covenant on Civil and Political Rights*, in *The International Bill of Rights—The Covenant on Civil and Political Rights* 32, 38-39 (Louis Henkin ed., 1981); *Restatement of Foreign Relations Law of the United States (Third)* (1987) § 702 and comment n); See also *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS Doc. OEA/Ser.L/V/I.4 rev. 8 22 May 2001, pp. 4-6 (providing an overview of the adoption of the American Declaration by during the Ninth International Conference of American States in 1948).

[FN24] The Commission’s current Statute was approved by Resolution N° 447 taken by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz, Bolivia in October 1979. *Basic Documents Pertaining to Human Rights in the Inter-American System*, Doc. OEA/Ser.L/V/I.4 rev. 8 (22 May 2001), pp. 119-126.

47. In the petition presently under consideration, the Petitioners have alleged that the United States is responsible for violations of each of the alleged victim’s rights under some or all of the Articles V, VI, VII, XVIII and XXV of the American Declaration. The United States is a member State of the OAS, having deposited its instrument of ratification of the OAS Charter on June 19, 1951, and the events described in the petition occurred subsequent to the State’s ratification of the OAS Charter. The alleged victims are natural persons, and the petition was lodged by the Center for Justice and International Law, Gibbs, Houston, Pauw, and the Center for Human Rights and Justice, who are authorized to lodge petitions with the Commission under Article 23 of the Commission’s Rules of Procedure. The Commission is therefore competent to examine this petition.

B. Admissibility of Petition

48. Before proceeding with its analysis of the admissibility of the present petition, the Commission considers it instructive to summarize the claims raised by the Petitioners and the alleged victims in respect of whom those claims are raised. A review of the petition and

supporting documents indicates that the Petitioners have raised the following four claims in respect of some or all of the alleged victims:

- (a) Violations of the rights of the three alleged victims to family life and to special protections for minor children under Articles V, VI and VII of the American Declaration, because they were the subject of mandatory deportation without any consideration of mitigating factors such as family unity;
- (b) Violations of the rights of Mario Alfredo Lares-Reyes and Samuel Segura to protection from arbitrary arrest under Article XXV of the American Declaration due to the retroactive application of the expanded definition of “aggravated felony” to their circumstances;
- (c) Violations of the rights of the three alleged victims to a fair trial and to due process under Articles XVIII and XXV of the American Declaration due to their denial of access to a court of law and to access to counsel in the context of their removal proceedings;
- (d) Violations of the rights of Mario Alfredo Lares-Reyes and Samuel Segura not to be arbitrarily detained under Articles I and XXV of the American Declaration by reason of their detention for prolonged periods prior to their removal from the United States.

1. Exhaustion of Domestic Remedies

49. Article 31 of the Commission's Rules of Procedure specifies that, in order for a case to be admitted, “the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with generally recognized principles of international law.” When domestic remedies are unavailable as a matter of fact or law, however, the requirement that they be exhausted may be excused. Article 31(2) of the Commission's Rules specifies that this exception applies if the domestic legislation of the state concerned does not afford due process of law for protection of the right or rights allegedly violated, if the party alleging the violation has been denied access to domestic remedies or prevented from exhausting them, or if there has been an unwarranted delay in reaching a final judgment under the domestic remedies.

50. Further, when a petitioner alleges that he or she is unable to prove compliance with the exhaustion of domestic remedies requirement, Article 31(3) of the Commission’s Rules provides that the burden then shifts to the State to demonstrate that the remedies under domestic law have not previously been exhausted, unless that is “clearly evident from the record.”

51. As a preliminary objection, the Petitioners contended during the hearing before the Commission that in light of the fact that the State failed to respond to the petition within the 90 day period prescribed under the Commission’s former Regulations, it should be considered to have waived its right to object to the admissibility of the petition, on the basis of exhaustion of domestic remedies or otherwise.

52. In this connection, it is well-established in the jurisprudence of the inter-American system that the exhaustion of domestic remedies requirement is considered a means of defense and, as such, waivable by a state, even tacitly.[FN25] Moreover, the Commission wishes to emphasize the obligation of OAS member states, as reflected in Articles 18, 19 and 20 of the Commission’s Statute, to respond in a timely manner to the Commission’s requests for

information. The Commission has previously confirmed that in the absence of such a timely response by a state to a petition, the Commission is not obliged to consider any potential bars to the admissibility of a petitioner's claims that might have properly been raised relating to the exhaustion of domestic remedies.[FN26]

[FN25] See I/A Court H.R., Loayza Tamayo Case, Preliminary Objections, Judgment of January 31, 1996, Series C N° 25, para. 40.

[FN26] See e.g. Balkissoon Roodal v. Trinidad and Tobago, Case 12.342, Report N° 89/01 (10 October 2001), para. 29.

53. Upon considering the circumstances of the present case, including the fact that the State delivered a detailed response to the petition prior to the hearing before the Commission and that the Petitioners requested the hearing in part as an opportunity to hear the government's position on the issues raised in the petition, the Commission declines to find that the State waived its right to object to the admissibility of the Petitioners' petition and will proceed to consider the parties' submissions on this issue.

54. The State in the present matter has objected to the admissibility of the Petitioners' complaints on the ground that the alleged victims have failed to exhaust domestic remedies. More particularly, the State argues that each of the three alleged victims failed to pursue all of the administrative and judicial mechanisms available to them in the immigration process context, including seeking review of decisions of the US Court of Appeal in the US Supreme Court. The State also objects on the basis that the alleged victims are able to raise other substantial statutory or constitutional challenges relating to their removal orders, such as those pursued by the respondent in *INS v. St. Cyr*, which the alleged victims have also failed to exhaust.

55. With regard to the State's former contention, after considering the information before it, the Commission agrees with the Petitioners' allegations that the administrative appeal mechanism provided for under the INS legislation does not constitute an effective remedy to address in substance the claims raised in the petition before this Commission. It is clear from the record that in administrative appeals to both the Board of Immigration Appeals and the US federal courts, the tribunal concerned limits its review of an applicant's case to determining whether the crime or crimes for which the applicant has been convicted constitute "aggravated felonies" within the meaning of the INS Act. Should the tribunal find the definition to have been satisfied in the circumstances of the applicant's case, the tribunal simply dismisses the applicant's appeal or, in the case of the federal courts, declares that it has no jurisdiction to entertain the applicant's appeal.[FN27] There is no opportunity for the applicant to present or for the tribunal to consider substantive allegations of the nature raised before the Commission, such as the contention that the applicant's continued detention is unduly prolonged contrary to his or her human rights under domestic or international law. In these circumstances, the Commission cannot consider the administrative appeal mechanisms under the INA and other applicable legislation to constitute effective remedies within the meaning of Article 31 of the Commission's Rules of Procedure for the violations of the American Declaration alleged in the present petition.

[FN27] See e.g. In re: Mario Alfredo Lares-Reyes a.k.a. Mario Lares-Reyes, File N° A39 091 919, Appeal Decision dated May 17, 1999 (Board of Immigration Appeals); Mario Alfredo Lares-Reyes v. Reno, Decision dated May 22, 2000, Case Nos. 99-11504 & 99-12956 (US Court of Appeals for the 11th Circuit).

56. With respect to the State's latter contention above, the Commission considers that the recent decisions by the US Supreme Court in the cases of *INS v. St. Cyr* and *Zadvydas v. Davis* are relevant to the analysis of the present petition, dealing as they do with issues similar to those now before the Commission, and therefore require further consideration in the context of the Petitioners' complaint.

57. In particular, as noted above, the Commission understands the US Supreme Court to have made three pertinent determinations in these two cases. First, in both cases the Supreme Court confirmed that, while the IIRIRA removed the appellate jurisdiction of the US federal courts under the INA to review criminal aliens' statutory challenges to their removal orders, it did not take away the district courts' habeas corpus jurisdiction under 28 U.S.C. 2241 to review administrative actions.[FN28] This was held to include habeas corpus review as a forum for questions of law relating to the retroactive application of immigration legislation and for statutory and constitutional challenges to post-removal-period immigration detention.[FN29]

[FN28] 28 U.S.C. 2241 (a) provides that "[w]rits of habeas corpus may be granted by the Supreme Court, any justices thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

[FN29] See *INS v. St. Cyr*, 121 S. Ct. 2271 (2001); *Zadvydas v. Davis*, 121 S. Ct. 2491, 2497 (2001).

58. In addition, in the case *INS v. St. Cyr*,[FN30] the Court concluded that the IIRIRA's elimination of any possibility of 212(c) relief should not be interpreted so as to apply retroactively to criminal convictions entered prior to the September 30, 1996 effective date of the statute,[FN31] with the effect that 212(c) relief remains available for aliens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect.[FN32]

[FN30] The respondent in the *St. Cyr* case was a lawful permanent resident in the United States who had pleaded guilty to a criminal charge that made him deportable under US immigration law. He would have been eligible for a waiver of deportation under the immigration law in effect at the time when he was convicted, but his removal proceedings were commenced after the effective dates of the AEDPA and IIRIRA, which the Attorney General claimed withdrew his authority to grant a waiver. The respondent brought a habeas corpus application in the US District Court challenging the circumstances of his deportation based upon the alleged

retroactive application of the deprivation of consideration for a humanitarian waiver. St. Cyr succeeded before the District Court and the US Court of Appeals and the matter was ultimately appealed to the US Supreme Court. The Supreme Court held in its June 25, 2001 decision that the IIRIRA did not remove the federal court's jurisdiction to review administrative actions by way of habeas corpus under 28 U.S.C. 2241. The Court also held that the legislative provisions in issue could not be interpreted so as to give retroactive effect to the waiver revocation under the new legislation. This conclusion was based principally upon the Court's finding of lack of clear language in the legislation to this effect, together with the unfairness that would result if people like the respondent entered into plea agreements with prosecutors without possibly being aware of the future immigration consequences, namely the revocation of the authority to waive deportation in respect of such crimes.

[FN31] 8 U.S.C. §1101(a)(43).

[FN32] *INS v. St. Cyr*, 121 S. Ct. 2271, 2289 (2001).

59. Third, in the *Zadvydas v. Davis* case,[FN33] the Supreme Court concluded that the IIRIRA should not be interpreted to authorize indefinite detention, but rather should be interpreted to authorize post-removal-period detention only for the period reasonably necessary to secure removal which in the court's view was normally a period of 6 months. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing.[FN34]

[FN33] In the *Zadvydas* and *Ma* cases, the aliens concerned were the subject of removal orders and, pursuant to the post-removal-period detention amendments to the US immigration legislation, were held beyond the normal 90-day removal period for removable aliens because no other country would accept them. *Zadvydas* and *Ma* brought habeas corpus application in the US District Court challenging their detentions under the US Constitution, and the matters were ultimately appealed to the US Supreme Court. The Supreme Court, in its June 28, 2001 decision, held that the post-removal-period detention legislation, when read in light of the US Constitution's due process and other demands, should be read to implicitly limit an alien's detention to a period reasonably necessary to bring about the alien's removal from the United States and not to permit indefinite detention. The Court therefore found that post-review-period detention cannot exceed a period reasonably necessary to secure removal. For the sake of uniform administration in the federal courts, the Court also held that 6 months is a "presumptively reasonable period of detention." After this period, once an alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must furnish evidence sufficient to rebut that showing.

[FN34] *Zadvydas v. Davis*, *supra*, at 2497.

60. It is also apparent from the judicial history of these cases that these findings by the US Supreme Court were preceded by extensive litigation in federal courts across the United States, where several of those courts reached the same conclusions as those ultimately adopted by the country's highest court. Prior to the Supreme Court's decision in *INS v. St. Cyr*, for example,

five circuit appeals courts, including the second circuit decision which was the subject of the certiorari petition to the Supreme Court, had reached similar conclusions regarding the availability of habeas corpus relief and the non-retroactive effect of the IIRIRA on the availability of “212(c) waivers.”[FN35] Similarly, prior to the Supreme Court’s decision in *Zadvydas v. Davis*, numerous courts at the federal level had concluded that the prolonged or indefinite post-review-period detention of aliens to be unconstitutional as a violation of substantive or procedural due process.[FN36] It is therefore clear that issues similar to those raised before this Commission were the subject of active, and in some cases successful, litigation in domestic courts following the effective date of the IIRIRA amendments.

[FN35] See *INS v. St. Cyr*, supra, n. 1, citing *Mahadeo v. Reno*, 226 F.3d 3 (CA1 2000), *Liang v. INS*, 206 F.3d 308 (CA3 2000); *Fasios v. Reno*, 204 F.3d 544 (CA4 2000); *Flores-Miramontes v. INS*, 212 F.3d 1133 (CA9 2000). But see *Max-George v. Reno*, 205 F.3d 194 (CA5 2000); *Morales-Ramirez v. Reno*, 209 F.3d 977 (CA7 2000); *Richardson v. Reno*, 180 F.3d 1311 (CA11 1999).

[FN36] See e.g. *Kim Ho Ma v. Reno*, 208 F.3d 815 (CA9, 2000); *Attorney General, F. Hermanowski v. Farquharson*, 39 F.Supp.2d 148 (D.R.I., 1999); *Vo. V. Greene*, 68 F. Supp.2d 1278 (D. Colo., 1999); *Huynh v. Reno*, 56 F.Supp.2d 1160 (W.D. Wash., 1999).

61. The Commission has previously shared the view of the European Court of Human Rights that in accordance with general principles of international law, a petitioner need not exhaust domestic remedies if on the evidence such proceedings would be obviously futile or have no reasonable prospect of success.[FN37] This may include, for example, circumstances in which a decision of the state’s highest court could be regarded as likely to render an appeal based on arguments to the same or like effect to those raised before the Commission “obviously futile.”[FN38]

[FN37] See e.g. *Martinez-Villareal v. US*, Case 11.753, Report No. 108/00, Annual Report of the IACHR 2000, para. 70, citing *Eur. Court H.R., De Wilde, Oomas and Versyp Cases*, June 10, 1971, Publ. E.C.H.R. Ser. A, Vol. 12, p. 34, paras. 37, 62 (finding that at the times pertinent to the complaint, recourse to the appellate courts for the matter raised by the applicants would be inadmissible according to “settled legal opinion”); *Eur. Court H.R., Van Oosterwijck v. Belgium*, Judgment (Preliminary Objections), November 6, 1980, Case N° 7654/76, para. 32, 37 (finding the applicant’s case to be inadmissible for failure to exhaust domestic remedies, due in part to the absence of any decision on the issue from the Court of Cassation in Belgium that “could be regarded as likely to render obviously futile an appeal based upon the Convention or on arguments to the same or like effect”).

[FN38] See e.g. *Gary Graham, now known as Shaka Sankofa*, Case 11.193, Report N° 51/00, Annual Report of the IACHR 2000, para. 60 (referring to prevailing US Supreme Court jurisprudence in finding that a challenge before US domestic courts to the execution of individuals who were 16 years of age or older when they committed their offenses would have no reasonable prospect of success). See similarly UNHRC, *Hervé Barzhig v. France*, Communication N° 327/1988, UN GAOR (Supp. 40), A/46/40 (11 April 1991), para. 5.1

62. Applying these principles in the context of the present case the Commission cannot find on the record before it grounds that would justify or excuse the failure of the alleged victims to pursue habeas corpus relief before the domestic courts in respect of the claims that they have raised before this Commission. More particularly, the evidence before the Commission, including in particular the Supreme Court's determinations discussed above, suggest that it was reasonably open to each of the alleged victims to pursue habeas corpus proceedings before the US federal courts, in a manner similar to that of Enrico St. Cyr, Kustutis Zadvydas and Kim Ho Ma. Moreover, it is apparent that arguments could be made in the course of these proceedings that the provisions of the IIRIRA were applied retroactively so as to deny the alleged victims the benefit of a "212(c) waiver" in respect of pre-1996 convictions, and that the alleged victims were arbitrarily detained contrary to Articles I and XXV of the American Declaration by reason of their prolonged periods of detention.

63. While the Commission appreciates that the decision of the US Supreme Court in the *Zadvydas v. Davis* case dealt specifically with post-removal-period detention, it is not apparent that this fact alone would exempt the alleged victims from pursuing constitutional relief for prolonged detention at other stages of the immigration process. To the contrary, in its decision in *Zavdydas v. Davis*, the Supreme Court based its findings upon the well-established and broadly-applicable principle that the US Constitution's Fifth Amendment due process clause forbids the government to deprive any person of liberty without due process of law and that freedom from imprisonment from government custody, detention, or other forms of physical constraint lies at the heart of the liberty protected by the due process clause. The Court also relied upon its own previous jurisprudence prohibiting the non-punitive detention of individuals, including aliens who have entered the United States, except in certain narrow circumstances where a specific justification outweighs the individual's constitutionally-protected interest in avoiding physical constraint.[FN39] In this context, it cannot be said based upon the information available that settled legal opinion prior to the Supreme Court's decisions would likely have precluded any effective relief for the alleged victims. Rather, as noted above, the state of the jurisprudence was at best uncertain with numerous courts across the United States ultimately deciding favorably on the same or similar issues to those raised by the Petitioners, while others decided unfavorably.

[FN39] *Zadvydas v. Davis*, supra, citing, inter alia, *Fouche v. Louisiana*, 504 U.S. 71 (1992); *U.S. v. Salrno*, 481 U.S. 739 (1987).

64. The Commission has reached similar conclusions concerning the claims presented on behalf of Ms. Frost, Mr. Lares-Reyes and Mr. Segura that they have been the subject of mandatory deportation without any consideration of mitigating circumstances such as family unity, in violation of his rights to family life and to special protections for minor children under Articles V, VI and VII of the American Declaration. The Commission first notes in this regard that, according to the Petitioners, the deportations of Mr. Segura and Mr. Lares-Reyes were based in part upon their guilty pleas to offenses that were entered prior to the September 30, 1996 effective date of the IIRIRA. In light of the Supreme Court's finding that the INA may not

be applied in such circumstances to deprive an alien of the benefit of a “212(c) waiver,” the Commission considers that a habeas corpus petition before the federal courts might also have provided Mr. Lares-Reyes and Mr. Segura, like Mr. St. Cyr, with a forum within which to raise the mitigating circumstances of these cases, including those pertaining to Articles V, VI and VII of the Declaration. The Petitioners themselves have indicated that adjudication of a request for a waiver of this nature involves a consideration of the seriousness and recency of the offense, the danger the applicant poses to the community, family ties, length of residence in the United States, evidence of rehabilitation, and other equitable factors.

65. Moreover, it is not apparent from the record in this matter that relief for the Petitioners’ alleged violations of Articles V, VI and VII of the Declaration could not have been pursued directly through habeas corpus proceedings in the US federal courts. The Petitioners have contended that the sole remedy provided under United States law for a finding of deportation based upon an “aggravated felony” is an appeal to the Board of Immigration Appeals. The Supreme Court’s decisions in *INS v. St. Cyr* and *Zadvydas v. Davis* illustrate this not to be the case. Rather, numerous lower courts found, and the Supreme Court confirmed, that the remedy of habeas corpus under 28 U.S.C. 2241 was not repealed by the IIRIRA.[FN40]

[FN40] *INS v. St. Cyr*, 121 S. Ct. 2275, 2289 (2001).

66. The Commission has considered in this regard the State’s contention that, as federal courts have continued to retain their general habeas corpus jurisdiction, as affirmed by the Supreme Court’s decision in *INS v. St. Cyr*, it would have been open to the alleged victims to raise their claims through habeas corpus proceedings before the US federal courts. During the hearing in this matter the State specifically confirmed that this would include the Petitioners’ allegation that the expanded definition of “aggravated felonies” under the IIRIRA is over broad and fails to take into account mitigating circumstances. Indeed, the State’s representative did not foreclose the possibility that the broad definition of aggravated felony under the legislation might not withstand constitutional scrutiny. It is not otherwise evident from the record that such proceedings would have been obviously futile or would have had no reasonable prospect of success. Accordingly, the Commission is unable to find that the alleged victims exhausted domestic remedies in respect of the claimed violations of Articles V, VI and VII of the Declaration or that proper justification exists to excuse them from doing so.

67. Finally, in light of the continued availability of habeas corpus relief for constitutional and other challenges that aliens in the position of the alleged victims could reasonably have pursued, and given the fact that the alleged victims were legally represented throughout their removal proceedings, the Commission does not consider that the facts on the record before it tend to establish violations of the alleged victims rights to a fair trial and to due process under Articles XVIII and XXV of the American Declaration based upon a denial of access to a court of law and to access to counsel in the context of their removal proceedings. In this connection, Article 34 of the Commission’s Rules of Procedure requires the Commission to declare any petition or case inadmissible when it does not state facts that tend to establish a violation of the rights referred to in Article 27 of the Rules, including those under the American Declaration.

68. Based upon the foregoing analysis, the Commission concludes that the Petitioners claims of violations of the right to family and to special protection for children under Articles V, VI and VII of the Declaration, violations of Article XXV of the Declaration based upon the retroactive application of the IIRIRA to Mario Alfredo Lares-Reyes and Samuel Segura, violations of the right to a fair trial and to due process under Articles XVIII and XXV of the Declaration based upon the denial to the alleged victims of access to court to ensure respect for their fundamental human rights, and violations of Articles I and XXV of the Declaration based upon the prolonged detention of Mario Alfredo Lares-Reyes and Samuel Segura prior to their removal from the United States, to be inadmissible under Articles 31(1) and 34 of the Commission's Rules of Procedure.

V. CONCLUSIONS

69. The Commission concludes that it has the competence to examine the claims raised in the Petitioners' petition, which includes the competence to determine whether the State has violated rights enshrined in the American Declaration of the Rights and Duties of Man.

70. The Commission also concludes that the claims raised in the petition are inadmissible, on the basis that the alleged victims have failed to pursue and exhaust domestic remedies in accordance with the generally recognized principles of international law as required under Article 31 of the Commission's Rules of Procedure, or because the petition fails to state facts that tend to establish violations of the American Declaration as required under Article 34(a) of the Commission's Rules of Procedure.

71. On the basis of the findings of fact and law set forth above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the claims in the petition inadmissible.
2. To transmit this Report to the Parties.
3. To publish this Report and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the twenty-seventh day of the month of February, 2002. (Signed): Juan E. Méndez, President; Marta Altolaguirre, First Vice-President; José Zalaquett, Second Vice-President; Julio Prado Vallejo and Clare K. Roberts, Commissioners.