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Title/Style of Cause: Kenneth Walker v. United States
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Decided by: President: Jose Zalaquett;
First Vice-President: Clare K. Roberts;
Second Vice-President: Susana Villaran;
Commissioner: Julio Prado Vallejo.
Commission Member Professor Robert K. Goldman, a national of the United States, 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: 10 October 2003
Citation: Walker v. United States, Petition 12.049, Inter-Am. C.H.R., Report No. 62/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)
Represented by: APPLICANT: the International Human Rights Law Clinic at the Washington College of Law

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I. SUMMARY

1. On July 17, 1995, the Inter-American Commission on Human Rights (hereinafter the “Commission”) received a petition dated July 17, 1995 from the International Human Rights Law Clinic at the Washington College of Law (hereinafter the “Petitioners”) against the Government of the United States of America (hereinafter the “State” or “United States”). The petition was presented on behalf of Mr. Kenneth Walker (hereinafter “Mr. Walker”), a citizen of Canada who is a fugitive in the United States after failing to appear at a sentencing hearing. The petition was also submitted on behalf of Mr. Hossein Alikhani and Mr. George Christoforou, but their complaints were subsequently severed from Mr. Walker’s petition in February of 1999, at the Petitioners’ request.

2. The petition alleges that the State is responsible for violations of Mr. Walker’s rights under Articles I, II, V, VIII, XIV, XVII, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter the “American Declaration” or the “Declaration”), based upon the United States’ practice of abduction by deceit and fraud, otherwise known as “irregular extraterritorial rendition.” The Petitioners claim that U.S. Customs officials improperly lured Mr. Walker to the United States as part of a covert sting operation and subsequently arrested and detained him and charged him with arms export offenses. The Petitioners also contend that Mr. Walker is unable to exhaust domestic remedies without being

subjected to arrest and detention in the United States and that the United States has failed to provide due process of law for the rights alleged to have been violated.

3. The State argues that the petition is inadmissible because remedies provided under domestic law have not been exhausted in accordance with generally recognized principles of international law, and because the petition fails to state facts that constitute a violation of the rights set forth in the American Declaration.

4. As set forth in this Report, having examined the information available and the contentions of the parties on the question of admissibility, the Commission has decided to declare the petition inadmissible in accordance with Article 31(1) of the Commission's Rules of Procedure for failure to exhaust domestic remedies.

II. PROCEEDINGS BEFORE THE COMMISSION

5. Following the receipt of the Petitioners' complaint, the Commission transmitted the pertinent parts of the complaint to the United States by means of a note dated August 27, 1998 with a request for observations within 60 days as established by the Commission's Rules of Procedure. By note of the same date, the Commission informed the Petitioners that the pertinent parts of their petition had been transmitted to the State.

6. In two letters dated September 19, 1998 and January 14, 1999, the Petitioners requested that the Commission hold a hearing concerning their petition. Subsequently, in notes dated February 2, 1999, the Commission informed the Petitioners and the State that a hearing on the admissibility and merits of the petition had been scheduled on March 5, 1999 during the Commission's 102nd session.

7. By a note dated January 25, 1999, the Commission informed the State that it had yet to receive any communication concerning the Petitioners' complaint. The Commission again transmitted the pertinent parts of the Petitioners' complaint and requested that the State submit relevant observations within 30 days.

8. In a communication dated February 16, 1999 and received by the Commission on February 17, 1999, the State requested an extension of time until March 31, 1999 within which to respond to the Petitioners' complaint and a postponement of the hearing that had been scheduled for March 5, 1999. In a note dated February 19, 1999, the Commission granted the State an extension but denied its request for a postponement of the hearing.

9. In a letter dated February 21, 1999 and received by the Commission on February 25, 1999, the Petitioners requested that Mr. Walker's complaint be severed from those of Mr. Hossein Alikhani and Mr. George Christoforou because they conceded that the requirement of exhaustion of domestic remedies had not been satisfied with respect to the latter individuals. According to the request, the Petitioners had originally joined the cases of Mr. Alikhani and Mr. Christoforou to that of Mr. Walker because all three petitioners alleged that the United States had employed deceptive and illegal tactics to abduct and detain the alleged victims and had forced them to sign guilty plea agreements under duress. The Commission granted the Petitioners'

request to sever the complaints and proceeded with the hearing on March 5, 1999 on Mr. Walker's claim alone.

10. The hearing was convened on March 5, 1999 with representatives of the State and the Petitioners in attendance. Both parties made representations concerning the admissibility and merits of Mr. Walker's claims and responded to questions from the Commission members who presided over the hearing.

11. In a communication dated March 26, 1999 and received by the Commission on March 30, 1999, the State provided its observations on the Petitioners' complaint. The Commission transmitted the State's observations to the Petitioners, with a response requested within 30 days.

12. By letter dated April 30, 1999 and received by the Commission on May 6, 1999, the Petitioners provided their observations on the State's March 26, 1999 response. The Commission transmitted the pertinent parts of the Petitioners' response to the State by a note dated May 12, 1999 with a response requested within 30 days.

13. In a letter dated June 16, 1999 and received by the Commission on June 17, 1999, the State delivered a response to the Petitioners' observations of April 30, 1999. The Commission transmitted the pertinent parts of the State's response to the Petitioners by a note dated June 24, 1999 with a response requested within 30 days. By a letter dated January 19, 2000, the Petitioners informed the Commission that they did not intend to reply to the State's response.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

14. According to the petition, Kenneth Walker is a citizen of Canada who had been working as a businessman and commodity trader in Toronto when the alleged events took place. Mr. Walker was a business contact of New York commodities broker trader Barry Brokaw, who was under surveillance by the United States Customs Service in early 1989. In an attempt to entrap Mr. Walker in a covert sting operation, Customs agents used Mr. Brokaw to call Mr. Walker in mid-1989 with a request for 1,000 chrome-plated pistols for delivery to Ecuador. According to the petition, although Mr. Walker had regularly traded in a variety of commodities, he had no source of firearms and had never previously traded in them. After initially declining and then making multiple inquiries, he located an arms dealer in Switzerland. Mr. Walker agreed to assist Mr. Brokaw, and the Customs Service covertly made arrangements for Mr. Walker to travel from Toronto to The Bahamas on November 28, 1989 to meet with Mr. Brokaw.

15. According to the Petitioners, the Customs Service sent Mr. Walker his plane tickets at the last possible moment, and once aboard the November 28, 1989 flight to The Bahamas, Mr. Walker learned that the flight was routed through La Guardia airport in New York. Pursuant to a warrant citing "conspiracy to defraud the United States and to violate the Arms Export Control Act," Mr. Walker was arrested by waiting U.S. customs agents as he departed the plane in New York for his connecting flight. The Petitioners claim that Mr. Walker was subsequently interrogated for eight hours without counsel. During this time, Mr. Walker cooperated with the

Customs officials and ultimately signed a statement concerning his involvement in the transaction on a promise by the officials that they would send him home. Instead, he was placed in custody and advised of his right to retain counsel, and in December 1989 was indicted in the U.S. District Court for the Eastern District on federal charges of violations of the U.S. Arms Export Control Act.

16. According to the petition, Mr. Walker was initially denied bail because he was a Canadian citizen and was then moved back and forth between different U.S. detention facilities in a practice known as “diesel therapy”, which is allegedly intended to disorient prisoners for the purpose of breaking down their psychological defenses. Mr. Walker was subsequently granted bail on condition that he remain in New York City until trial.

17. The petition states further that because his resources were depleted, Mr. Walker agreed to a plea bargain on March 30, 1990 at which time an Assistant U.S. attorney is alleged to have promised to endorse a defense request for a sentence of time served and threatened to add a charge of money laundering in connection with a deposit wired by Mr. Brokaw to the supplier. After executing the plea agreement, Mr. Walker was released and returned to Canada on April 6, 1990.

18. According to the petition, upon his return to Canada, Mr. Walker instructed his counsel to withdraw his plea, who filed a corresponding motion on January 17, 1991. The United States District Court of New York agreed to hear the motion but adjourned it pending Mr. Walker’s appearance and issued a bench warrant for his arrest. The U.S. government then requested that the Canadian government extradite Mr. Walker back to the United States. On September 9, 1993, the Canadian government rejected the extradition request and filed a diplomatic note formally protesting the actions and sting operation of the U.S. Customs agents.

19. The Petitioners state that Mr. Walker then filed a civil action for damages before the Ontario Court of Justice, which held that Mr. Walker’s abduction constituted de facto kidnapping, as he was lured by deceit to New York by undercover U.S. Customs agents, and that Mr. Walker’s abduction violated U.S. treaty obligations with Canada.[FN1] The Petitioners acknowledged during the course of the proceedings before the Commission that the decision of the Ontario Court of Justice was subsequently overturned by the Ontario Court of Appeal, but argue that the Court of Appeal’s decision turned on its finding that Mr. Walker boarded the plane in Toronto willingly, that his injuries did not take place in Canada, and therefore that Mr. Walker suffered no harm in Canada.[FN2] The Petitioners claim that the Court of Appeal nevertheless recognized that Mr. Walker was encouraged to enter the U.S. by false representations of U.S. customs officials and that Mr. Walker suffered mental duress, emotional harm and false imprisonment at the hands of the U.S. government, and argue that in any event the decision of the Court of Appeal should not be considered dispositive of the issue of whether Mr. Walker entered the United States of his own free will.

[FN1] Petitioners’ petition dated July 17, 1995, pp. 24-25, citing Walker v. Bank of New York, Inc., (1993) 16 O.R. (3d) 596 (Gen. Div.).

[FN2] Petitioners' Response dated April 30, 1999, p. 3, citing Walker v. Bank of New York, Inc., (1994) 16 O.R. (3d) (Court of Appeal).

20. According to the petition, Mr. Walker has since been unsuccessful in his attempts to withdraw the guilty plea or otherwise gain redress and has declined to go back to the United States for fear of further incarceration.

21. Concerning the merits of the criminal charges against Mr. Walker, the Petitioners argue that until his arrest, Mr. Walker had thought that the pistols at issue would be shipped to Ecuador, which they claim was a permissible destination for this product with no criminal liability under U.S. law. However, upon his indictment in New York, Mr. Walker learned that the pistols were to be shipped to Chile, which was a prohibited destination under the U.S. Arms Export Control Act. The Petitioners therefore contend that U.S. Customs agents deceived Mr. Walker into a transaction that, unbeknownst to him, violated U.S. law.

22. In relation to the admissibility of their complaint, the Petitioners argue that they are excused from exhausting domestic remedies because Mr. Walker is barred from filing any legal action before U.S. courts as long as he remains a fugitive in Canada. Mr. Walker had attempted to file a motion to withdraw his guilty plea before the U.S. District Court for the Eastern District of New York, which agreed to hear the motion but adjourned the hearing when Mr. Walker was not present. The Petitioners indicate that Mr. Walker would be subject to arrest and detention if he appears in person to withdraw his plea. The Petitioners cite the U.S. Doctrine of Fugitive Disentitlement, which precludes a fugitive from using the resources of the courts to resolve his claim.[FN3] According to the U.S. Supreme Court case of Degen v. United States, a fugitive is disentitled to standing in criminal appeals and is, therefore, precluded from pursuing remedies in U.S. courts.[FN4] The Petitioners also complain that since the Court adjourned the motion to withdraw pending Mr. Walker's appearance, there has been undue delay in issuing a final judgment in the proceeding.[FN5]

[FN3] Petitioners' Response dated April 30, 1999, pp. 1-2, citing Molinaro v. New Jersey, 396 U.S. 365, 366 (1970).

[FN4] Petitioners' observations dated April 30, 1999, citing Degen v. United States, 517 U.S. 820 (1996).

[FN5] Petitioners' petition dated August 28, 1998, pp. 54-55.

23. With respect to the circumstances of Mr. Walker's arrest in particular, the Petitioners claim that existing U.S. jurisprudence, including the decision of the U.S. Supreme Court in the case of United States v. Alvarez-Machain,[FN6] bars a defendant who has entered the United States through luring or abduction by U.S. government agents from challenging the jurisdiction of a court to entertain criminal proceedings against them. Accordingly, the Petitioners contend that because illegal abduction by state actors under U.S. criminal procedure cannot be raised to challenge an American courts' authority to try a criminal defendant, the Petitioners' due process rights have been violated and such violations are not cognizable under U.S. law.[FN7] The

Petitioners also argue in this regard that U.S. Customs officials take the position that they have the authority to arrest people if they are lured or abducted from outside of the United States and accordingly that attempts to resolve Mr. Walker's grievances with the U.S. government are futile.[FN8]

[FN6] *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

[FN7] Petitioners' petition dated August 28, 1998, pp. 6, 46, citing *Ker v. Illinois*, 119 U.S. 436 (1986), *Frisbie v. Collins*, 342 U.S. 519 (1952), *U.S. v. Yunis*, 681 F. Supp. 909 (D.D.C. 1988), *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

[FN8] Petitioners' petition dated August 28, 1998, pp. 54-55.

24. The Petitioners further indicate that the six-month deadline for filing the petition does not apply due to an exception to the requirement of prior exhaustion of domestic remedies. They claim that the petition was filed within a reasonable period of time, as prescribed by Article 32(2) of the Rules of Procedure of the Commission, given that the violations by the State are ongoing. They assert that Mr. Walker continues to suffer from a fear of illegal abduction and arbitrary detention by agents of the State.

25. The Petitioners also assert that no petitions or communications substantially the same as the present have been studied by the Commission or by another international organization in accordance with Article 33(1) of the Commission's Rules of Procedure.

26. With respect to the merits of the complaint, the Petitioners claim that the State is responsible for violating Mr. Walker's rights under the American Declaration and customary international law, including a violation of a *jus cogens* norm that prohibits state-sponsored abductions.[FN9] The Petitioners argue that the United States is responsible for violating Mr. Walker's right to liberty and personal security under Article I of the Declaration, his right to protection of honor, personal reputation, and private and family life under Article V, his right to residence and movement under Article VIII, and his right of protection from arbitrary arrest under Article XXV by deceiving, abducting, and arbitrarily detaining Mr. Walker for a crime he allegedly did not commit. The Petitioners contend that the United States resorted to "irregular extraterritorial rendition" because it considered that the Canadian government would refuse to extradite Mr. Walker for trafficking in illegal U.S. arms. The Petitioners argue further that the United States divested Mr. Walker of his right to equality before the law under Article II, his right to recognition of civil rights under Article XVII of the American Declaration, and his right to due process under Article XXVI of the American Declaration when it circumvented the extradition process and illegally abducted Mr. Walker without his consent or that of the Canadian government.

[FN9] Petitioners' petition dated August 28, 1998, pp. 50-53, citing Res. N° 3/87, Case N° 9674, *Roach and Pinkerton (United States)*, Annual Report of the IACHR 1987-88; *Bennett v. Horsefery Magistrates Court* [1993] 3 All E.R. 128 (H.L.); *R. v. Secretary of State for the Home Department, Ex Parte Schmidt* QBD (Unreported), 26 November 1993; *Canon Garcia v.*

Ecuador, UNHRC, Decision of 5/11/91, UN Doc. CCPR/C-43/D319/1988; R. v. Harley [1978] 2 NZLR 199; S. v. Reahan 1992 (1) South African Criminal Law Reports 307 (ZS) at 317 (Zimbabwe); Limits to National Jurisdiction, Documents and Judicial Resolutions on the Alvarez Machain Case, Vol. 1 (Mexico 1992) at 91; August 15, 1992 opinion of the Inter-American Juridical Committee; International Penal Law Association Congress, Rio de Janeiro (September 10, 1994), Part II, para. 9.

27. The Petitioners also argue that the United States interfered with Mr. Walker's right to work under Article XIV by secretly taping his business phone calls, supplying him with fraudulent information, and thwarting his attempts to conduct a due diligence investigation. They further contend that the United States is responsible for violating Mr. Walker's right to a fair trial under Article XVIII because he was detained against his will and without any formal legal process and because the courts have not heard his motion to withdraw his plea.

B. Position of the State

28. In its March 26, 1999 and June 16, 1999 observations, the State provides descriptions of the circumstances surrounding Mr. Walker's complaint, some of which conflict with the Petitioners' accounting of the relevant facts. More particularly, the State disputes the Petitioners' contention that Mr. Walker was not informed that the destination of the arms shipment would be Chile, not Ecuador. The State notes that Mr. Walker was informed of the final destination of the arms during a taped phone conversation on September 19, 1989. In addition, the State claims that on January 31, 1994, the Ontario Court of Appeal reversed the decision of the Ontario Court of Justice in Mr. Walker's civil claim in Canada,[FN10] and that a subsequent motion for leave to appeal to the Supreme Court of Canada was denied. According to the State, the Ontario Court of Appeal found that Mr. Walker had voluntarily cleared U.S. Customs and Immigration before boarding the plane to The Bahamas of his own free will, and that he only had to look at his plane ticket to realize that he would be stopping in New York.

[FN10] As indicated in the State's observations, however, on January 31, 1994 the Ontario Court of Appeal reversed the decision of the lower court, finding that Mr. Walker "got on the plane at Pearson International Airport of his own free will (albeit encouraged by a false representation of the American customs officials). He voluntarily cleared U.S. Customs and Immigration before he did so. He had only to look at his ticket to realize that he would be stopping in New York." Walker v. Bank of New York, Inc. (1994) 16 O.R. (3d) 504 (Court of Appeal).

29. With respect to the admissibility of the Petitioners' complaint, the State claims that the petition of Kenneth Walker is inadmissible on either of two grounds. First, the Petitioners have failed to invoke and exhaust domestic remedies in accordance with Article 31 of the Commission's Rules of Procedure. Second, the State asserts that the petition fails to state facts that would constitute a violation of rights set forth in the American Declaration and is manifestly groundless, as required under Article 34 of the Commission's Rules of Procedure.

30. The State argues that the Petitioner has not pursued a variety of remedies in U.S. domestic courts, with the exception of a motion to withdraw his plea. In this regard, the State asserts that the Doctrine of Fugitive Disentitlement is not a jurisdictional bar to the pursuit of proceedings by fugitives, but rather gives courts the discretion to dismiss an appeal or certiorari if a party seeking relief is a fugitive while the matter is pending. The State therefore argues that it remains open to Mr. Walker to pursue his motion to withdraw his plea, notwithstanding the fact that he may be considered a fugitive.[FN11] The State also emphasizes that procedural safeguards exist under U.S. law to ensure that plea agreements are entered voluntarily.

[FN11] State's observations dated June 16, 1999, pp. 2-3, citing *Degen v. United States*, 517 U.S. 820 (1996).

31. Concerning the Petitioners' allegations of undue delay in the resolution of Mr. Walker's motion to withdraw his plea, the State asserts that Mr. Walker did not immediately begin proceedings to contest the voluntariness of the plea agreement upon his return to Canada, as the Petitioners claim in their complaint. He waited from his arrival in Canada on April 6, 1990 until January 22, 1991 to file a motion to withdraw his plea. Mr. Walker also filed five requests to postpone the sentencing hearing that was originally scheduled for June 13, 1990 and then failed to appear at the hearing after leaving for Canada, as a consequence of which on January 25, 1991 the court issued a warrant for his arrest for failure to appear. The State, therefore, argues that any delay in the domestic court's consideration of Mr. Walker's plea is entirely attributable to Mr. Walker's own conduct.

32. Concerning the merits of the petition, the State argues that Mr. Walker entered the United States of his own free will, by voluntarily accepting the airline tickets, boarding the plane, and passing through U.S. Customs and Immigration. As a consequence, the State contends that Mr. Walker's arrest cannot be said to have amounted to a forcible abduction or de facto kidnapping, but rather that U.S. Customs agents were acting within the scope of their lawful authority to pursue and arrest individuals suspected of having violated U.S. federal law.

33. In addition, the State contends that the practice of luring cannot be equated with that of forcible abduction and kidnapping and does not violate customary international law. In particular, the State argues that the jurisprudence cited by the Petitioners relates to instances of forcible abduction or kidnapping and that the facts in Mr. Walker's case do not establish that he was kidnapped or abducted. The State also contends that there is no authority for the proposition that luring or trickery violates customary international law and that as a consequence, the Petitioners' petition is manifestly groundless.

34. With respect to the Petitioners' allegations concerning the fairness of Mr. Walker's legal proceedings, the State alleges that Mr. Walker's guilty plea was not coerced but was, on the contrary, entirely voluntary. In support of this allegation, the State cites a court transcript that it claims verifies that Mr. Walker understood the conditions of the plea agreement and had discussed it with his attorney.[FN12] Based upon Mr. Walker's statements, the State contends

that he understood that he could be sentenced for up to five years imprisonment and a special parole term of up to one year, and voluntarily accepted these terms on his guilty plea.

[FN12] State's observations dated June 16, 1999, p. 7, citing portions of Transcript of Criminal Cause for Pleading of Kenneth Walker before Judge Jack B. Weinstein dated 30 March 1990, as follows:

"Court: Have you read the plea agreement and discussed it with your attorney...?"

Mr. Walker: Yes

Court: Now you can be sentenced up to five years imprisonment and a special parole term of up to one year. It means that after you're released if you get into any further trouble you can go back to prison...do you understand that?

Mr. Walker: Yes

Court: So you must assume that you could go to prison for five years and be fined a quarter of a million dollars. Do you understand?

Mr. Walker: Yes.

Court: Have you read the indictment?

Mr. Walker: Yes.

Court: Do you understand it?

Mr. Walker: Yes.

Court: Are you satisfied with your present counsel?

Mr. Walker: Yes.

Court: Did you select him?

Mr. Walker: Yes."

IV. ADMISSIBILITY

35. The Commission has considered the admissibility of the present complaint pursuant to Articles 30 and 34 of its Rules of Procedure and makes the following determinations.

A. Competence of the Commission *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

36. The Commission is competent to examine the petition in question. Under Article 23 of the Rules of Procedure of the Commission, the Petitioners are authorized to file complaints alleging violations of rights protected under the American Declaration of the Rights and Duties of Man. The alleged victim, Mr. Walker, is a person whose rights are protected under the American Declaration, the provisions of which the State is bound to respect in conformity with the OAS Charter, Article 20 of the Commission's Statute and Article 49 of the Commission's Rules of Procedure. The United States has been subject to the jurisdiction of the Commission since June 19, 1951, the date on which it deposited its instrument of ratification of the OAS Charter.

37. Inasmuch as the Petitioners have filed complaints alleging violation of Articles I, II, V, VIII, XIV, XVII, XVIII, XXV, and XXVI of the American Declaration, the Commission is competent *ratione materiae* to examine the petition.

38. The Commission is competent *ratione temporis* to examine the complaints because the petition alleges facts that occurred on and after the date on which the United States' obligations under the American Declaration took effect.

39. Finally, the Commission is competent *ratione loci*, given that the petition indicates that Mr. Walker was under the jurisdiction of the United States at the time of his arrest, detention and subsequent criminal proceedings.

B. Exhaustion of Domestic Remedies

40. Article 31(1) of the Commission's Rules of Procedure specifies that, in order to decide on the admissibility of a matter, the Commission must 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 of Procedure specifies that this exception applies if the legislation of the State concerned fails to afford due process for the protection of the right allegedly violated, if the party alleging the violation has been hindered in his or her access to domestic remedies, or if there has been an unwarranted delay in the issuance of a final judgment.

41. Further, when the petitioner alleges that he or she is unable to prove exhaustion, Article 31(3) of the Commission's Rules of Procedure provides that the burden then shifts to the State to demonstrate that the remedies under domestic law have not previously been exhausted, unless it is clearly evident from the record.[FN13] If a State which alleges non-exhaustion proves the existence of specific domestic remedies that should have been utilized, the opposing party has the burden of showing that those remedies were exhausted or that the case comes within the exceptions of Article 46(2). As the Inter-American Court of Human Rights has affirmed, "[i]t must not be rashly presumed that a State party to the Convention has failed to comply with its obligation to provide effective domestic remedies [...] The rule of prior exhaustion of domestic remedies allows the state to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction." [FN14]

[FN13] See also I/A Court H.R., Velásquez Rodríguez Case, Merits, Judgment of July 29, 1988, Ser. C N° 4, para. 59.

[FN14] *Id.*, para. 62.

42. In the present complaint, the Petitioners acknowledge that Mr. Walker has not exhausted remedies available before the courts in the United States, but maintain that the exception to the rule of exhaustion of domestic remedies is applicable because Mr. Walker is restricted from

filing any motions in the United States while he is a fugitive living in Canada, under the U.S. Doctrine of Fugitive Disentitlement. They claim that if Mr. Walker returns to the United States in order to file a motion to withdraw his guilty plea, he will have to surrender himself to U.S. authorities and face indictment for failure to return for trial.

43. The State, on the other hand, has alleged that adequate and effective domestic remedies exist to address the alleged infringement of Mr. Walker's legal rights. According to the State, these remedies include Mr. Walker's motion to withdraw his guilty plea. The State indicates that the proceedings before the U.S. District Court for the Eastern District of New York had been stayed pending Mr. Walker's appearance at the sentencing hearing. It further notes that a criminal defendant may file a motion to withdraw a guilty plea and that the motion may be granted if the defendant shows a "fair and just reason" warranting withdrawal.[FN15]

[FN15] State's observations dated March 26, 1999, p. 5, citing Federal Rules of Criminal Procedure 32(2).

44. Based upon the record before it and the arguments of the parties, the Commission must determine whether Mr. Walker has been hindered in his access to domestic remedies in the United States so as to excuse him from the exhaustion requirement under the Commission's Rules of Procedure. In this regard, the parties appear to agree that the U.S. Doctrine of Fugitive Disentitlement presently precludes Mr. Walker from pursuing remedies before the courts in the United States as long as he remains outside of the U.S. In *Degen v. United States*, the U.S. Supreme Court held that federal courts have "the authority to dismiss an appeal or writ of certiorari if the party seeking relief is a fugitive while the matter is pending." [FN16]

[FN16] *Degen v. United States*, supra note 3, at 824.

45. Accordingly, the central issue before the Commission is whether, as a condition to engaging this Commission's contentious jurisdiction, Mr. Walker should be expected to return to the United States to attempt to pursue domestic remedies in that country, notwithstanding the existence of ongoing criminal proceedings against him before the U.S. District Court for the Eastern District Court of New York.

46. In determining this question, the Commission is satisfied based upon the record before it that certain remedies relating to the issues raised before this Commission would be available to Mr. Walker if he returned to the United States. First, the information indicates that Mr. Walker's motion to withdraw his guilty plea has been adjourned and therefore that it could be pursued if Mr. Walker returned to the United States. It cannot be disregarded in this respect that it was Mr. Walker's conduct in entering a plea of guilty and then leaving the United States that gave rise to his inability to pursue this, and potentially other remedies, before the United States courts. The Commission also notes in this regard that the Petitioners have not contended that a motion to

withdraw Mr. Walker's guilty plea would be an ineffective remedy, but that it is not available owing to the Doctrine of Fugitive Disentitlement.

47. It also appears that Mr. Walker would be in a position to pursue constitutional and other remedies before state and federal courts challenging the processes against him on grounds raised before this Commission, including those relating to the fairness of his proceedings and his treatment while in custody.[FN17] Concerning the legality of his arrest in particular, the Petitioners have argued that existing U.S. jurisprudence precludes individuals like Mr. Walker from challenging the personal jurisdiction of U.S. courts based upon the alleged illegality of their arrest or seizure by private or state actors through irregular territorial rendition. The record indicates, however, that previous precedents cited by the Petitioners have entailed circumstances different than those involving Mr. Walker, and have nevertheless led those complainants to pursue criminal and civil remedies before the courts in the United States.[FN18]

[FN17] In this regard, for example, 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...". 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."

[FN18] In the case of Humberto Alvarez-Machain, for example, Dr. Alvarez-Machain, a Mexican national, was abducted by U.S. Drug Enforcement Agency officials in Mexico and transported to the United States to face prosecution on a murder charge. Dr. Alvarez-Machain pursued both criminal and civil remedies before the courts in the United States. While he was ultimately not successful in attempting to dismiss the indictment against him on the basis that his abduction violated the extradition treaty between the United States and Mexico, he succeeded in bringing a civil claim for, inter alia, cruel and inhuman and degrading treatment or punishment, arbitrary detention, and false arrest and imprisonment before the federal courts under the Alien Tort Claims Act and the Federal Tort Claims Act. In ruling in Dr. Alvarez-Machain's favor on several of his claims, the courts considered the United States' international human rights obligations and rendered determinations of liability on the part of the State and its agents and corresponding awards of damages. See *United States v. Humberto Alvarez-Machain*, 504 U.S. 655 (1992). *Humberto Alvarez-Machain v. United States*, 266 F.3d 1045 (2001).

48. In this connection, the Commission considers it relevant that in the circumstances of the present case, Mr. Walker chose not to raise any of the issue in his petition before the U.S. courts during any of the stages of his criminal proceedings. Rather, as indicated by the record in this matter, he made a conscious and informed decision to admit his guilt before the U.S. courts and participate in an agreement through the U.S. justice system that facilitated his release and return to Canada, and which he subsequently renounced. While the Commission may appreciate the reasons for Mr. Walker's decision in this regard, the Commission must nevertheless consider

whether it is permissible in these circumstances for Mr. Walker to now impugn the government of the United States before this Commission when he chose to cooperate with, rather than challenge, the U.S. authorities before the U.S. judicial system. In these circumstances, and in light of the subsidiary nature of its jurisdiction, the Commission does not consider an exception to the exhaustion of domestic remedies requirement to be properly applicable.[FN19]

[FN19] See, similarly, Petition 12.274, Report N° 18/02, César Verduga Vélez (Ecuador), Annual Report of the IACHR 2002; Petition N° 12.259, Report N° 93/01, Alberto Dahik Garzozi (Ecuador), Annual Report of the IACHR 2001. The Commission also notes in this regard that allegations by a petitioner that ongoing criminal proceedings against him or her are unfair or otherwise suspect do not, without more, exempt the petitioner from pursuing domestic remedies in respect of those proceedings. See, e.g., Report N° 89/01, Case 12.342, Balkissoon Roodal v. Trinidad and Tobago, Annual Report of the IACHR 2001.

49. Moreover, there is no evidence that, should Mr. Walker return to the United States, he may be in jeopardy of violations of his fundamental rights. There are no allegations or evidence, for example, that Mr. Walker would be subjected to torture or other inhuman or degrading treatment, or that his due process rights would be threatened by reason of a lack of independence or impartiality on the part of the U.S. judicial system or otherwise. In this respect, the Commission shares the view of the European Court of Human Rights that the decisive element in deciding whether an exception applies to the exhaustion of domestic remedies is not the subjective fear of the affected person with regard to the tribunal's impartiality, but whether the fears can be justified objectively.[FN20] The Commission cannot conclude, on the basis of the information presented in this case, that any future decisions of a court or other tribunal in the United States will be taken in a biased manner and without regard for the due process norms, or that Mr. Walker will otherwise be at risk of violations of his fundamental rights.

[FN20] See Eur. Court H.R., *Albert and Le Compte v. Belgium*, February 10, 1983, Series A, N° 58, para. 32 (finding that “[i]n principle, the personal impartiality of the members of a tribunal must be presumed until there is proof to the contrary.”).

50. Accordingly, after considering the arguments of the parties, the Commission finds that in this case the exception to the rule of exhaustion of domestic remedies is not applicable because it has not been shown that Mr. Walker would be denied access to adequate and effective remedies upon returning to the United States or that U.S. legislation fails to provide due process of law for the rights alleged to have been violated.

51. The Commission wishes to emphasize, however, that the circumstances of the present case must be distinguished from cases in which there are grounds for considering that a petitioner who has fled the jurisdiction of a state will be subjected to further human rights violations if they return to that state to pursue domestic remedies. This may occur, for example, where a petitioner may be the victim of torture or other inhumane treatment, or where he or she

may be subjected to criminal proceedings that are manifestly incompatible with the due process standards applicable under inter-American human rights instruments. The Commission also wishes to note that its determination as to the admissibility of Mr. Walker's claims should not be interpreted as condoning or otherwise passing judgment upon the propriety of the alleged actions of U.S. officials in the circumstances of Mr. Walker's arrest and detention.

52. Based upon the information presented, the Commission finds that Mr. Walker's claims are barred from consideration under Article 31(1) of its Rules of Procedure, and accordingly that the Petitioners' petition is inadmissible.

53. In light of its conclusion as to exhaustion of domestic remedies, the Commission does not consider it necessary to address the remaining elements of admissibility.

V. CONCLUSIONS

54. The Commission concludes that it has the competence to examine the Petitioners' allegations.

55. 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.

56. On the basis of the findings of fact and law set forth above, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES TO:

1. Declare the present case inadmissible.
2. Transmit this report to the parties.
3. Publish this report and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., U.S.A., on the 10TH day of the month of October, 2003. (Signed): José Zalaquett, President; Clare Roberts, First Vice-President; Susana Villarán, Second Vice-President; Julio Prado Vallejo, Commissioner.