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Title/Style of Cause: Victor Nicolas Sanchez et al. v. United States
Doc. Type: Decision
Decided by: First Vice-President: Susana Villaran;
Second Vice-President: Paulo Sergio Pinheiro;
Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett Daher, Florentin Melendez.
The concurring opinion of President Clare K. Roberts is included immediately after this report.
Dated: 27 October 2005
Citation: Nicolas Sanchez v. United States, Petition 65/99, Inter-Am. C.H.R., Report No. 104/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by: APPLICANTS: Jordan Budd, Claudia Smith, Paul L. Hoffman and William Aceves
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I. SUMMARY

1. On February 10, 1999, the Inter-American Commission on Human Rights (hereinafter the “Commission”) received a petition dated February 9, 1999 from the Mr. Jordan Budd of the American Civil Liberties Union of San Diego and Imperial Counties, Ms. Claudia Smith of the California Rural Legal Assistance Foundation, Mr. Paul L. Hoffman of the law firm of Bostwick & Hoffman, LLP, and Associate Professor William Aceves of the California Western School 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. Victor Nicolas Sanchez and 354 other Mexican nationals, 240 of whom were identified and 114 of whom were unidentified (the “alleged victims”).[FN1] The petition states that the alleged victims lost their lives on various occasions between January 21, 1995 and February 12, 1999 attempting to cross the border between California and the United Mexican States.

[FN1] In Exhibit G to the their Supplementary Memorandum dated February 25, 1999 in this matter, the Petitioners provided a list of 354 identified and unidentified alleged victims, including for each, where available, the name, age, gender, and date, place and cause of death.

2. The petition alleges that the State is responsible for violating Article I of the American Declaration of the Rights and Duties of Man (hereinafter the “American Declaration” or the

“Declaration”), based upon an initiative, known as “Operation Gatekeeper”, whereby the United States has endeavored to prevent illegal migration into its territory by channeling migrants eastward out of the San Diego region of California and into the more hostile terrain of the Tecate mountains and the Imperial desert, where the alleged victims are said to have died. The Petitioners claim in particular that the United States has organized and implemented its immigration and border control policies in a way that has knowingly led to the deaths of immigrants seeking to enter the United States, in violation of Article I of the American Declaration and the principle good faith and the abuse of rights doctrine. The Petitioners also claim that the alleged victims are excused from exhausting domestic remedies because there are no adequate remedies in the United States judicial system to protect the rights sets forth in the petition and therefore that the petition is admissible.

3. The State contends that the petition fails to state facts that tend to establish a violation of rights set forth in the American Declaration, that the Petitioners have failed to pursue and exhaust all remedies within the domestic legal system, and that the case is moot in view of recent developments and changes in U.S. border control policy.

4. As set forth in the present report, having examined the information available and the contentions on the question of admissibility, the Commission decided to declare the Petitioners’ claims to be inadmissible, on the basis that remedies of the domestic legal system have not been pursued and exhausted in accordance with generally recognized principles of international law, to transmit the report to the parties, and to publish the report and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS BEFORE THE COMMISSION

5. Following the receipt of the Petitioners’ petition, the Commission conducted a preliminary review of the complaint, following which it transmitted a note to the Petitioners requesting additional information on the issue of exhaustion of domestic remedies. By letter dated February 25, 1999 and received by the Commission on February 26, 1999, the Petitioners delivered to the Commission a “supplementary memorandum” concerning their complaint.

6. Following letters of inquiry from the Petitioners dated July 22, 1999 and September 20, 2000, the Commission, in a note dated October 25, 2000, informed the Petitioners that it was unable to process their communication as an individual case because it did not, on the information provided, satisfy the requirements of Articles 37 to 41 of the Commission’s former Regulations.

7. By letter dated May 9, 2001 and received by the Commission on May 10, 2001, Professor William J. Aceves of the California Western School of Law, on behalf of the Petitioners, submitted a “Second Supplemental Memorandum”, in order to address the matters raised in the Commission’s letter of October 25, 2000. In a note dated May 14, 2001, the Commission acknowledged receipt of Professor Aceves’ communication of May 9, 2001 and indicated that the information was under study in accordance with the Commission’s Rules of Procedure.

8. Following further communications between the Executive Secretariat of the Commission and the Petitioners, by letter dated August 28, 2001, the Commission informed the Petitioners that a hearing of a general nature on the Operation Gatekeeper border control policy had been scheduled for Friday, September 28, 2001 during the Commission's 113th regular period of sessions in Washington, D.C. The hearing was subsequently rescheduled for November 14, 2001 and proceeded on that date with the representatives of the Petitioners in attendance. During the course of the hearing, the Petitioners presented oral and written information concerning the nature and implementation of the Operation Gatekeeper initiative and responded to questions from the Commissioners. Following the hearing, the Petitioners provided the Commission with additional written observations in a letter dated November 29, 2001 and received by the Commission on November 30, 2001.

9. After considering the additional information and submissions provided by the Petitioners following the lodging of their initial petition, in a note dated July 8, 2002, the Commission transmitted the pertinent parts of the Commission's petition and supplementary information to the United States in accordance with Article 30(2) of the Commission's Rules of Procedure. This information included the Petitioners' original petition, their supplementary memorandum of February 25, 1999, and the Petitioners' additional written submissions dated July 22, 1999, May 9, 2001 and November 29, 2001. In its note, the Commission requested that the State submit its response to the petition within a period of two months as provided for under Article 30(3) of the Commission's Rules of Procedure.

10. By note dated September 9, 2002, the United States acknowledged receipt of the Commission's correspondence of July 8, 2002 and requested an extension of time of 30 days, to October 9, 2002, within which to respond to the Commission's request for information. In a note dated September 11, 2002, the Commission acknowledged receipt of the State's September 9, 2002 note and informed the State that its request for an extension of time to October 9, 2002 had been granted.

11. Subsequently, on February 20, 2004, the State delivered a response to the petition. The Commission transmitted the response to the Petitioners by note dated February 25, 2004 with a request for reply within one month. On March 5, 2004 the Petitioners requested an extension of time of three months within which to provide a reply, which the Commission granted on March 11, 2004.

12. On June 24, 2004, the Petitioners delivered their reply to the State's response. The Commission transmitted the pertinent parts of the response to the State on June 28, 2004 with a request for a response within one month. As of the date of the present report, the State has not received any further observations from the parties regarding the complaint.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

1. Context for the Petitioners' Complaint

13. According to the Petitioners, in the four years prior to filing their petition with the Commission, hundreds of migrants had died attempting to enter the United States illegally from Mexico along the California border. They claim that the number and cause of deaths were directly related to a program known as “Operation Gatekeeper”, which they describe as a concentrated effort by U.S. Border Patrol to channel illegal migrants eastward out of the San Diego region, where it is safer to cross the border, and into the harsher terrain and climate of the Tecate mountains and the Imperial desert. The Petitioners claim that the enforcement plan approved for California recognized that the areas in which illegal entrants would be redirected could put them in “mortal danger”. The Petitioners also indicate that the planners anticipated that many people desperate for work and family reunification would not be deterred by the new strategy and would adjust by attempting their crossings farther and farther eastward.

14. The Petitioners indicate that the migration along the California-Mexico border is conservatively estimated to include over 300,000 Mexican citizens who cross illegally into the United States each year, with many thousands more coming from Central and South America. They also claim that the most heavily traveled corridor in this regard is the route between Tijuana and San Diego.

15. According to the Petitioners, this volume of migration is driven by several factors, which include securing work from U.S. businesses that thrive on undocumented labor, as well as desires for family reunification and weaknesses in the Mexican economy.[FN2]

[FN2] Petitioners’ petition dated February 9, 1999, pp. 8-12, paras. 15-27, citing, inter alia, Wayne Cornelius, *The Roles of Immigrant Labor in the U.S. and Japanese Economies*; *The Binational Study on Migration (United States/Mexico, 1997)*; Congressional Testimony by INS Commissioner Doris Meissner, November 3, 1993; Statement by Doris Meissner, Commissioner, Immigration and Naturalization Service, INS Press Release, October 14, 1998; Marcelli and Cornelius, *The Changing Profile of Mexican Immigrations to the U.S.*, p. 11.

16. The petition states that the failure of the federal government in the United States to stem the flow of illegal immigration from Mexico became a significant and emotional political issue beginning in the early 1990’s and led to an aggressive new enforcement strategy, developed by the Administration of U.S. President William J. Clinton and signed by the Commissioner of the U.S. Immigration and Naturalization Service, entitled “Border Patrol National Strategic Plan for 1994 and Beyond.” According to the Petitioners, this document set forth the new border enforcement strategy and gave rise to a number of specific regional enforcement mechanisms in areas where migrants frequently cross. These mechanisms emphasized “prevention through deterrence” by virtually blocking traditional entry and smuggling routes with border enforcement personnel and physical barriers and thereby seeking to channel migrants into terrain less suitable for crossing and more conducive to apprehensions.[FN3]

[FN3] Petitioners’ petition dated February 9, 1999, pp. 15-16, para. 30, citing Border Patrol National Strategic Plan for 1994 and Beyond (1994), pp. 6-9; INS News Release, July 14, 1998.

The Petitioners identify four specific regional operations that were part of the new border enforcement strategy: (1) Operation Blockage, later renamed Hold the Line, which commenced in September 1993 in the Greater El Paso, Texas area; (2) Operation Gatekeeper, which commenced in October 1994 south of San Diego; (3) Operation Rio Grande, which commenced in August 1997 in Brownsville, Texas; and (4) Operation Safeguard, which commenced in October 1994 in Arizona.

17. The Petitioners state that the new border enforcement strategy was implemented by dramatically increasing border enforcement funding, which was used to increase the number of Border Patrol agents as well as state-of-the-art technology such as new surveillance systems using electronic sensors with low light video cameras, infrared night-vision devices, forward-looking infrared systems for Border Patrol aircraft, and physical barriers such as primary and back up border fencing.

18. As one of the specific initiatives developed under this policy, Operation Gatekeeper went into effect in October 1994 and was designed to

reduce illegal immigration into San Diego and to force alien traffic eastward to deter and delay aliens' attempts to reach urban areas. The operational tactics and the deployment of resources are specifically tailored to the geography, crossing patterns and characteristics of aliens who attempt to enter the U.S. illegally through San Diego.[FN4]

[FN4] Petitioners' petition dated February 9, 1999, p. 17, para. 33, citing "Operation Gatekeeper: Three Years of Results", Immigration and Naturalization Service, p. 3.

19. The Operation sought to "alter dramatically the pattern of undocumented aliens and force them into a much more inhospitable and rugged terrain"[FN5] where, for example, border patrol agents would be at an advantage because it is open territory and increasingly mountainous territory that is not urbanized.[FN6]

[FN5] Petitioners' petition dated February 9, 1999, p. 17, para. 33, citing Bersin Congressional testimony, April 23, 1997.

[FN6] Petitioners' petition dated February 9, 1999, pp. 17-18, para. 33, citing Meissner Interview, San Diego Union Tribune, April 16, 1995.

20. According to the Petitioners, Operation Gatekeeper has been implemented in three phases, which they describe as follows:

[...] Operation Gatekeeper was designed to shift migration successively eastward across each of the three geographic regions spanning the 140-mile border between California and Mexico.

Phase I of Gatekeeper focused on blocking border crossings in the first geographic region, comprised of 114 miles of coastal plains stretching east from the Pacific Ocean to the base of Otay Mountain. Phase II focused on blocking crossings in the second region of the border, comprised of the Jacumba, Cuyamaca, and Laguna Mountains, which span the next 40 miles of borderland. Phase III of Gatekeeper, currently underway, seeks to drive migration farther eastward into the western portion of the Sonoran Desert, which stretches 85 miles from the mountains to the California-Arizona border. (See Exhibit A) The U.S. Border patrol described these three border regions as “[s]ome of the most diverse terrain in the southwestern U.S....ranging from coastal beaches and expansive mesas to coastal and inland mountains, rugged canyons and high desert.”[FN7]

[FN7] Petitioners’ petition dated February 9, 1999, p. 18, para. 34, citing Operation Gatekeeper: Three Years of Results, *supra*, p. 2). In their petition, the Petitioners also provided detailed information concerning the manner in which each phase of the operation has been implemented.

21. Concerning the effects of the strategy’s implementation, the Petitioners claim that during the first two phases of the Operation between 1993 and 1997, apprehensions in the San Diego sector, which includes both the coastal plain the mountainous region, dropped 47% from 531,689 to 283,889, and between 1994 and 1998 apprehensions increased 715% in the El Centro sector to the east, from 27,654 to 226,703.[FN8]

[FN8] Petitioners’ petition dated February 9, 1999, p. 22, para. 41, citing INS Press Release, October 7, 1997.

22. Also according to the Petitioners, the death toll of illegal migrants has risen dramatically with each new phase of the operation. In particular, they claim that as of the date of their initial petition, at least 360 migrants had died since the operation was launched in October 1994, with that number rising to 635 as of the date of their May 9, 2001 Second Supplementary Memorandum,[FN9] owing to such causes as hypothermia, heatstroke and drowning[FN10] as well as the dangers of wildfires, falls, snakebites, and animal attacks.[FN11]

[FN9] Petitioners’ Second Supplementary Memorandum dated May 9, 2001, p. 4; Letter dated November 29, 2001 from Petitioners to the Executive Secretariat of the Commission, p. 2 and November 14, 2001 hearing before the Commission, Exhibit 4 (two sets of maps pinpointing locations of all border-crossing deaths that occurred between San Diego and Yuma over the previous seven years, and ranking all possible crossing routes from Baja California by the possibility of injury or death).

[FN10] Petitioners’ petition dated February 9, 1999, p. 23, paras. 44, 45. According to the Petitioners, Imperial County is one of the hottest locations in the United States, where summertime daily high temperatures can climb as high as 125 degrees, and where the maximum temperature in El Centro, a town in the center of Imperial County, averages over 100 degrees.

They also state that the All American Canal runs parallel to the border between Imperial County and Mexico for 44 of its 84 miles, is 21 feet deep, nearly as wide as a football field, has a strong current that is extremely difficult, and is unfenced and unlighted.

[FN11] Petitioners' petition dated February 9, 1999, p. 24, para. 46.

23. The Petitioners claim that U.S. officials have been aware of the increased risks and deaths attributable to the implementation of Operation Gatekeeper,[FN12] and indeed that these dangers were understood from the beginning of the Operation.[FN13] Further, the Petitioners state that the U.S. government moved slowly to mitigate the lethal consequences of Operation Gatekeeper during its first three years of implementation, and that it was not until June 1998 that the Border Patrol announced that it would undertake a safety initiative, "Operation Lifesaver", to reduce injuries and fatalities in a joint effort with the Mexican government, which they claim has still not prevented deaths from occurring.[FN14]

[FN12] Petitioners' petition dated February 9, 1999, p. 26, para. 49, citing a September 1997 newsletter for the San Diego Border Patrol as stating: "With Gatekeeper moving more and more alien foot traffic into East County where the days are blazing hot and the nights freezing cold, agents and aliens alike are finding themselves at risk of both heat exhaustions and hypothermia...Because the heat and humidity of summer hang on tenaciously in southern California, heat exhaustion is an extreme danger even into autumn. Countless aliens have succumbed to the heat and two agents this summer had to be airlifted to local hospitals to avoid certain death."

[FN13] Petitioners' petition dated February 9, 1999, pp. 26-27, para. 50, citing 1994 National Strategic Plan, p. 2.

[FN14] Petitioners' Second Supplementary Petition dated May 9, 2001, p. 4, citing Center for Immigration Research, Causes and Trends in Migration Deaths Along the U.S.-Mexico Border, 1985-1998 64-65 (2001) (concluding that "[t]he long-term solution to migrant mortality at the border lies in reducing the demand for undocumented entry in the United States by reducing the sharp differences in the efficiencies of the economies of neighboring countries").

24. The Petitioners assert in particular that Operation Gatekeeper has resulted in a dramatic increase in the number of migrants who have died attempting to cross the California-Mexico border, with 140 more migrants dying in 2000.[FN15] At the same time, it has failed to deter migration itself, as illegal border-crossers still come by the hundreds of thousands seeking jobs that remain available in the United States but must face the mortal dangers of the mountains and desert in doing so.[FN16] The Petitioners argue that no data has yet demonstrated that Operation Gatekeeper has actually reduced the level of migration, rather than simply redirecting it eastward and dramatically increasing the role of smugglers in moving migrants north through the deadly mountains and deserts.[FN17] According to the Petitioners, apprehension figures similarly provide no evidence that illegal immigration is abating,[FN18] and even the Border Patrol sector chief for the San Diego and Imperial County region acknowledged that the Gatekeeper strategy is unlikely to deter migration.[FN19]

[FN15] See Petitioners' Second Supplemental Memorandum dated May 9, 2001, p. 1.

[FN16] In their letter dated November 29, 2001 to the Commission, the Petitioners stated that "[s]even years and hundreds of deaths later, the reality is that the old strategy of apprehending migrants as they tried to cross illegally near border cities (e.g., along the 14 miles which run from the Pacific Ocean to the foot of the Otay Mountains) was no less effective than the current "prevention through deterrence" model."

[FN17] Petitioners' petition dated February 9, 1999, pp. 36-39, paras. 65-71, citing, inter alia, "Illegal Immigration: Southwest Border Strategy Results Inconclusive; More Evaluation Needed", General Accounting Office, December 1997, p. 4 (concluding that the data suggests an "increased difficulty in illegally crossing the border" but does not show "whether the increased difficulty of entry deterred the flow of illegal entries into the country, the ultimate goal of the Attorney General's strategy."); Binational Study, supra, p. 28 (concluding that the border enforcement strategies begun in 1994 are "affecting migration patterns, but not preventing unauthorized entry."); United States Commission Immigration Reform (1995). Petitioners' Second Supplementary Memorandum, pp. 5-6, citing General Accounting Office, Illegal Immigration: Status of Southwest Border Strategy Implementation 3 (1999); Carnegie Endowment for International Peace, Mexico-U.S. Migration: A Shared Responsibility 5 (2001) (acknowledging a "growing apprehension that the enforcement approach is failing to produce the promised outcome of reducing further unauthorized immigration, Moreover, it has perverse, if predictable, consequences. Most troubling among them are a death toll of would be immigrants which has been rising by about 25 percent per year (and reached nearly 500 persons last year...)"); Center for Immigration Research, supra, at 62.

[FN18] Petitioners' petition dated February 9, 1999, pp. 39, para. 70, indicating that the combined apprehension figures for the San Diego and El Centro sectors indicate that there has been virtually no change in the number of apprehensions for the entire California-Mexico border between 1994 and 1998, with 477,806 apprehension sin 1994 compared with 474,795 apprehensions in 1998.

[FN19] Petitioners' petition dated February 9, 1999, p. 39, para. 71, quoting Border Patrol Sector chief de la Vina as indicating during a March 10, 1995 Congressional oversight hearing on border security that the blockade tactic used along the Texas border likely could not be duplicate successfully in San Diego, as "you could put an army out there and still not slow them down," because they are "fiercely determined to succeed".

25. Further, the Petitioners assert that the United States cannot avoid responsibility for the migrant deaths by placing blame upon other actors involved in the problem, including smugglers and the Government of Mexico. More particularly, the Petitioners assert that Operation Gatekeeper itself has made smugglers indispensable by only trying to manage the follow across the border rather than sealing it altogether and at the same time failing to crackdown on smugglers, and the Government of Mexico has taken certain measures in relation to the deaths of migrants crossing the US/Mexico border.[FN20]

[FN20] Petitioners' November 29, 2001 letter to the Commission, pp. 6-8.

26. Of the 354 alleged victims who are the subject of this complaint, the Petitioners provided limited information on the personal situation of some of these individuals. They indicated, for example, that alleged victims Guillermo Osario Lopez, 25, and Evedo Osorio Lopez, 19, were the first migrants to die of hypothermia in 1998, in the Pine Valley area on February 9, 1998. They also indicated that Raul Gonzalez Cruz, 29, died of hypothermia in the Mount Laguna area on May 13, 1998 and Pedro Orozco Gomez, 16, was the first migrant to die of heat stress in 1998, in the Winterhaven area on May 2, 1998.

2. Petitioners' Arguments on Admissibility

27. Concerning the admissibility of their claims, the Petitioners contend that there are no adequate remedies in the United States judicial system to protect the rights at issue in the petition. As such, they claim that any attempt to bring legal action to assert such rights would be futile and therefore that no exhaustion of domestic remedies is required.

28. In particular, the Petitioners argue that the United States Constitution grants the political branches of the federal government plenary power over matters of immigration and border enforcement,[FN21] including the adoption of immigration enforcement policies that would be unacceptable if applied to citizens.[FN22] The Petitioners claim that as a consequence of this "judicial doctrine of nonjudiciability", the domestic courts of the United States are constitutionally precluded from considering the human right implications of border enforcement strategies such as Operation Gatekeeper.[FN23]

[FN21] Petitioners' supplemental memorandum dated February 25, 1999, p. 4, citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citing *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) and ruling that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens"; also citing *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953), and stating that Supreme Court "cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control'").

[FN22] Petitioners' supplemental memorandum dated February 25, 1999, p. 4, citing *Matthews v. Diaz*, 426 U.S. 67, 80 (1976).

[FN23] Petitioners' supplemental memorandum dated February 25, 1999, pp. 4-5, citing *Galvan v. Press*, 347 U.S. 522, 532 (1954) (Frankfurter, J.) (writing that "[w]e are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been the most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize constitutional power in dealing with aliens").

29. Also according to the Petitioners, they cannot seek relief in domestic courts due to strict standing requirements requiring that litigants suffer a direct injury before bringing suit. Because the Petitioners are advocacy organizations rather than the actual victims of Operation Gatekeeper, they claim that no such injury could be shown.[FN24] The Petitioners similarly contend that the victims of Operation Gatekeeper themselves could not obtain relief in domestic

courts, because rigid standing requirements applicable in the United States courts would effectively preclude injunctive relief.[FN25] Further, the Petitioners submit that the alleged victims are indigent economic migrants with few resources, which precludes them from obtaining the legal counsel necessary to file and litigate a suit in the domestic courts.

[FN24] Petitioners' supplemental memorandum dated February 25, 1999, p. 5, citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342 (1977).

[FN25] Petitioners' supplemental memorandum dated February 25, 1999, pp. 5-6 (indicating that under the doctrine set forth in *Los Angeles v. Lyons*, 461 U.S. 95 (1983), only those individuals who face a "real or immediate threat" of repeated injury can seek an injunction to prohibit illegal conduct", and stating that because the victims of Operation Gatekeeper do not immediately suffer their injuries again, but rather suffer only once, when they cross the border, they lack standing to seek an injunction).

30. Concerning their merits of their claims, the Petitioners argue that the United States has abused its right to protect its borders and its human rights obligation to refrain from enforcement strategies that ensure that migrants will die. In particular, the Petitioners assert that by organizing and implementing its border control policies in a way that has knowingly and ineluctably led to deaths of an increasing number of immigrants seeking to enter the United States to obtain jobs or family reunification, the United States violated and is violating Article I of the American Declaration and has abused its rights and the principle of good faith underlying the obligation of all states parties to the Charter and the Declaration.

31. The Petitioners first contend that it has long been recognized that conduct attributable to states can consist of actions or omissions,[FN26] and argue that the conduct of the United States in the present case involves both acts, in the creation of Operation Gatekeeper, and omissions, by failing to take all reasonable efforts to minimize the potential loss of life, that violate Article I of the Declaration. The Petitioners also contend that it makes no difference that the death may not have resulted directly from acts of the State, or that the State did not intend for death to occur, as the intent or motivation of the agent who has violated rights is irrelevant.[FN27]

[FN26] Petitioner's response dated June 23, 2004, p. 4, citing Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 2; I/A Court H.R., *Velásquez Rodríguez Case*, Judgment, Ser. C No. 4 (1988), para. 170; International Court of Justice, *Diplomatic and Consular Staff (U.S. v. Iran)*, 1980 ICJ Rep. 3, 32.

[FN27] Petitioner's response dated June 23, 2004, pp. 9-10, citing I/A Court H.R., *Velásquez Rodríguez Case*, Judgment, Ser. C No. 4 (1988), para. 173; Case 10.675, Report 51/96, *Haitian Center for Human Rights v. US*, Annual Report of the IACHR 1995, at 55.

32. With regard to the principles of good faith and the abuse of rights doctrine, the Petitioners contend that these concepts are enshrined in the basic principles of international law recognized in the OAS Charter and the American Declaration, including Article 5(c) of the Charter and the

preamble to and Article XXIV of the Declaration, and require the United States to exercise its legitimate rights, including its border patrol policies, in a manner that does not undermine the fundamental rights of others. According to the Petitioners, these doctrines are well under international law[FN28] and have been codified in numerous agreements, including Article 2(2) of the UN Charter,[FN29] Article 26 of the Vienna Convention on the Law of Treaties,[FN30] and Article 300 of the UN Convention on the Law of the Sea.[FN31]

[FN28] Petitioners' petition dated February 9, 1999, pp. 42-44, citing, inter alia, Mark Janis, *An Introduction to International Law* 26(1993); Restatement (Third) of the Foreign Relations Law of the United States, section 321 (1987); Max Sorensen, *Manual of Public International Law* 316 (1968); Hersch Lauterpacht, *The Development of International Law by the International Court* 164 (1982); *Free Zones of Upper Savoy and the District of Gex*, 1930 PCIJ (ser. A), No. 24, at 12; *Certain German Interests in Polish Upper Silesia (Ger. V. Pol.)* 1926 PCIJ (ser. A) No. 7, at 30; *Admission of a State to the United Nations (1948)* ICJ Rep. 57, 91-92 (May 28); *Rights of Foreign Nationals in Morocco (France v. US)* (1952) ICJ Rep. 176, 212 (Aug. 27); *Corfu Channel (U.K. v. Alb.)* (1949) ICJ Rep. 4, 47 (Apr. 9) (Individual Opinion of Judge Alvarez); *Fisheries (UK v. Norway)* (1951) ICJ Rep. 116, 149-153 (Dec. 18); *Anglo-Iranian Oil Company (UK v. Iran)* (1952) ICJ Rep. 93, 133 (July 22); Petitioners' Second Supplementary Memorandum dated May 9, 2001, p. 11, citing Advisory Opinion OC-14/94, *Inter-Am. Ct. H.R.* (ser. A) No. 14, para. 35

[FN29] Petitioners' petition dated February 9, 1999, p. 43, citing UN Charter, Art. 2(2) (compelling all member states to "fulfill in good faith the obligations assumed by them in accordance with the present Charter.")

[FN30] Petitioners' petition dated February 9, 1999, p. 43, citing Vienna Convention on the Law of Treaties, Art. 26 (requiring all treaty obligations to be performed in good faith).

[FN31] Petitioners' petition dated February 9, 1999, p. 43, citing UN Convention on the Law of the Sea, Art. 300 (providing that member states should comply with their obligations in good faith and in a manner which would not constitute an abuse of right). -----

33. In relation to the circumstances of the present petition, the Petitioners argue that the United States must not abuse its right to regulate national borders. While the Petitioners recognize that the United States has the right to protect its borders and implement an effective border policy, they argue that, as with all state conduct including matters involving national security and public safety, it must do so in a manner that will minimize the threat to life and the security of the person. In particular, they argue that Article I of the American Declaration, which provides that "[e]very human being has he right to life, liberty and security of his person" and is absolute and nonderogable, should be read consistent with the principle of good faith and the abuse of rights doctrine, so as to establish an affirmative obligation on the United States to ensure that its border policy does not cause harm to the life, liberty or security of migrants and to ensure that the right to life is not threatened.[FN32]

[FN32] Petitioners' Second Supplementary Memorandum dated May 9, 2001, pp. 7-9, citing *Neira Alegria Case*, *Inter-A. Ct. H.R.* (ser. C) No. 20 (1995) (acknowledging that while Peru has

the right to use force in the maintenance of its security, such action must be proportionate and must always comport with the obligations set forth in the Convention, including the right to life under Article 4); Velázquez Rodríguez, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988); McCann v. United Kingdom, 21 Eur. HR. Rep. 97 (1996) (addressing limitations on the use of lethal force by states to protect against terrorist violence).

34. The Petitioners contend that the principal goal of Operation Gatekeeper has been to channel migrants into terrain that represents a mortal threat to illegal border crossers. Because the United States' border policy is explicitly designed to impose mortal danger on illegal border crossers, and because the United States has failed to take adequate and reasonable steps to protect these vulnerable individuals, the Petitioners argue it has violated Article I of the American Declaration as well as the principle of good faith and the abuse of rights doctrine as essential components of the inter-American system and of international law.

35. Finally, the Petitioners assert that the State's obligations exist regardless of the purported culpability of migrants seeking to enter the United States illegally.[FN33]

[FN33] Petitioners' Second Supplementary Memorandum dated May 9, 2001, p. 17, citing Neira Alegría, *supra*; Velasquez Rodriguez, *supra*, para. 154 (stating that "[r]egardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited nor may the State resort to any means to attain its ends"). See also Petitioners' response of June 23, 2004, p. 10, citing I/A Court H.R., Advisory Opinion OC-18/03, Legal Status and Rights of Undocumented Migrants, Ser. A No. 18 (2003), para. 168.

36. With regard to the State's reply to the petition, the Petitioners argue as a preliminary point that the State has waived its procedural and substantive challenges to the petition due to the length of time that it took the State to respond to the petition and the prejudice that they claim to have suffered from the delay, by precluding them from pursuing their claim in a timely manner[FN34] and because of the impact of the delay on the family members of unidentified and other victims.[FN35] The Petitioners therefore argue that the Commission should disregard the State's reply and proceed directly to the merits of the petition.

[FN34] Petitioners' Response of June 23, 2004, pp. 2-4, citing Commission's Rules of Procedure, Article 30(3) (providing that the "State shall submit its response within two months counted from the date the request is transmitted. The Executive Secretariat shall evaluate request for extensions of this time period that are duly founded. However, it shall not grant extensions that exceed three months from the date of the first request for information sent to the State).

[FN35] Petitioners' Response of June 23, 2004, pp. 2-4, citing Margreit Blaauw and Virpi Lahteenmaki, 'Denial and Silence' or 'Acknowledgement and Disclosure', 84 Int'l Rev. Red Cross 767 (2002); I/A Court H.R., Bamaca Velaquez Case, Reparations, Ser. C No. 91 (2002) (separate opinion of Judge Cançado Trindade), at para. 9.

37. With regard to the State's contention that the petition does not state facts that tend to establish a violation of the American Declaration, the Petitioners essentially reiterate their arguments on the merits of the petition. In particular, they emphasize that the State knew that immigrants would die as a result of the border control policy and failed to take any significant steps to minimize the potential loss of life.[FN36] The Petitioners also dispute the claim that the issues in the petition are moot on factual or legal grounds, as they assert that there is no indication that any remedial efforts taken by the US have been sufficient or that any such measures will continue in the future, and because the Petitioners seek relief for injuries that have already occurred.[FN37]

[FN36] Petitioners' Response of June 23, 2004, pp. 4-11.

[FN37] Petitioners' Response of June 23, 2004, pp. 12-14, citing, inter alia, Eur. Court H.R., *Tyrer v. United Kingdom*, 2 E.H.R.R. 1 (1978).

38. Finally, with respect to the State's claim that domestic remedies have not been exhausted, the Petitioners reiterate their argument that they are excused from this requirement. In particular, the Petitioners contend that the issues raised in the petition are non-judiciable and no remedy can be found in the United States, as the U.S. Supreme Court has long recognized that the power to expel or exclude aliens is a "fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control." [FN38] The Petitioners also restate their arguments that the strict standing requirements in the United States prevent access to effective remedies, as many of the alleged victims of the policy at issue are dead and identified and therefore cannot bring claims and because the Petitioners are advocacy groups rather than victims. Further, the Petitioners claim that the onus lies on the State to prove both that domestic remedies exist and that they have not been exhausted, and that the United States has failed to do so with respect to either civil or criminal penalties.[FN39]

[FN38] Petitioners' Response of June 23, 2004, p. 11, citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), *Shaughnessy v. Mezei*, 345 U.S. 206 (1953).

[FN39] Petitioners' Response of June 23, 2004, pp. 12, citing, inter alia, I/A Court H.R., *Advisory Opinion OC-11/90, Ser. A No. 10* (1990), citing *Velázquez Rodríguez*, supra, para. 31; *Commission's Rules of Procedure*, Art. 31(3).

B. Position of the State

39. In its response of February 20, 2004, the State argues that the petition should be dismissed, on the ground that it fails to state facts that tend to establish a violation of the rights set forth in the American Declaration and is manifestly groundless, and because the case is moot in view of recent developments and changes in the US border control policy.

40. The State argues that the Petitioners have not and cannot present any evidence that the alleged human rights violations are attributed to state action but rather are attributed as a result of people being ill-prepared to cross harsh terrain. The State also contends that the Petitioners have to show a breach of Article I or any other provisions of the American Declaration, and in this respect distinguishes the judicial decisions relied upon by the Petitioners. In particular, the State argues that the present case, unlike the circumstances addressed by the Inter-American Court of Human Right in the Neira Alegría Case,[FN40] does not involve the death or disappearance of individuals involved in a prison riot. The State similarly distinguishes the present complaint from the facts in the case of McCann and Others v. UK,[FN41] which involved the killing of three Republican Army terrorists by UK military personnel, and the case of K.H.W. v. Germany,[FN42] in which East German nationals attempting to cross the Berlin Wall died as a result of anti-personnel mines, automatic firing systems, and gun fire from East German border guards.

[FN40] State's Response of February 20, 2004, p. 2, citing I/A Court H.R., Case of Neira Alegría, Ser. C No. 20 (1995).

[FN41] State's Response of February 20, 2004, p. 2, citing Eur. Court H.R., McCann and others v. UK, Application No. 17/1994/464/545 (27 August 1995).

[FN42] State's Response of February 20, 2004, p. 3, citing Eur. Court H.R., K.H.W. v. Germany, Application No. 37201/97 (22 March 2001).

41. The State also argues that there is no basis under the American Declaration to impose a standard of "all reasonable efforts" to minimize threats to the right to life to government policies of a general nature. At the same time, the State claims that the United States has been taking reasonable efforts to minimize the threat to life for those illegally crossing the border, such as the US "Border Safety Initiative," or "BSI", which the State asserts has significantly increased its capabilities in addressing the humanitarian needs of migrants, as well as through targeting smugglers who are responsible for leading illegal migrants through the worst parts of the desert in an attempt to escape detection. The State therefore asserts that it is acting in good faith in implementing its border control policy.[FN43]

[FN43] State's Response of February 20, 2004, p. 4.

42. Further, the State contends that it cannot be held responsible for the natural landscape or for the illegal activity that its law enforcement personnel are acting to prevent. The State argues that it cannot reasonably be argued that the United States has a duty to make the illegal acts easier for individuals nor to indiscriminately forgo its sovereign right and duty to control the entry of foreign nationals within its territory. The State claims that in the present instance, the right to life is a decision that rests in the hands of an individual of whether or not to take the risk of crossing the harsh terrain of the US southern border.[FN44]

[FN44] State's Response of February 20, 2004, p. 4.

43. The State therefore argues that the right to life does not impose an affirmative obligation for the State to somehow prevent all loss of life, but rather provides protection against the arbitrary loss of life, and that the US policies in the present matter are reasonable.[FN45]

[FN45] State's Response of February 20, 2004, p. 5.

44. With regard to the issue of exhaustion of domestic remedies, the State asserts that there are available domestic remedies that would address specific human rights violations, if such violations existed, with both civil and criminal penalties, and that the Petitioners have not noted any US federal or state court cases that they have filed or lobbying efforts before Congress. According to the State, the proper remedy for a critique of US border control policy is in the forum of the domestic legislature, not an international human rights commission, and that none of the exceptions to exhaustion under Article 21 of the Commission's Rules apply to the Petitioners.[FN46]

[FN46] State's Response of February 20, 2004, p. 5, n. 14.

45. Finally, the State argues that the petition is moot within the terms of Article 34(c) of the Commission's Rules in view of recent developments and changes in the US border control policy.[FN47] The State indicates that since the implementation of Operation Gatekeeper in 1994 there have been numerous other border control policies, including the Border Safety Initiative announced in June 1998. According to the State, the goal of the BSI is to reduce injuries and fatalities along the southwest border. Apparently as part of this initiative, on June 22, 2001 the US and Mexico issued a formal joint communiqué in which they agreed to conduct joint training in search and rescue techniques, exchange intelligence relating to migrant smuggling, and enhance the effectiveness of their joint outreach efforts to would-be migrants on the dangers of unauthorized crossings, especially in remote areas during hot summer and cold winter months. The State claims that from the inception of the BSI in June 1998 until February 2003, Border Patrol Agents rescued over 5,000 aliens.[FN48]

[FN47] State's Response of February 20, 2004, pp. 6-7.

[FN48] State's Response of February 20, 2004, p.6, n. 15 referring to [http://www.cbp.gov/xp/cgov/enforcement/border patrol/safety initiative.xml](http://www.cbp.gov/xp/cgov/enforcement/border%20patrol/safety%20initiative.xml).

46. Further, the State indicates that in June 2003, Operation Desert Safeguard was introduced, constituting a multi-agency operation performed in conjunction with the Mexican government to reduce the number of persons attempting to enter illegally through the desert, and

correspondingly the number of deaths. Examples of methods used by the initiative include increasing the number of agents, helicopters, and surveillance flight hours, interior check points, and the involvement of the Shadow Wolves from Tohono O’Oodham reservation.

47. According to the United States, two additional initiatives have been pursued in relation to the border crossing issue: the creation by the US Border Control of the Border Patrol Search, Trauma and Rescue Team (“BORSTAR”); and the agreement between the US and Mexico on an up-dated Action Plan for Cooperation and Border Safety and a Memorandum of Understanding on the Safe, Orderly, dignified and Humane Repatriation of Mexican Nationals. With respect to the former initiative, the State indicates that BORSTAR is comprised of a highly specialized team of individuals who are trained to conduct search and rescue mission in different terrain and to provide the best medical care possible to stabilize patients and transport them to areas accessible to more advanced emergency medical facilities. The State also indicates that as of July 2003, for every border death, BORSTAR reported saving at least four lives.[FN49] Concerning the latter initiative, the State indicates that the agreements with Mexico “enhance efforts to ensure a safe, orderly and humane border and signal continued, deepened bi-national coordination and cooperation to address a common problem.”[FN50]

[FN49] State’s Response of February 20, 2004, p. 7, citing BORTAC, Border Patrol’s mobile tactical unit, working our desert, Tucson Citizen, September 8, 2003. .

[FN50] State’s Response of February 20, 2004, p. 7.

48. Based upon its submissions, the State asserts that the petition should be declared inadmissible in light of recent developments and changes in the US border policy that provide humanitarian assistance while protecting national borders.

III. ADMISSIBILITY

49. 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*

50. 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 355 alleged victims are natural persons whose rights are therefore 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 of America deposited its instrument of ratification of the OAS Charter on June 19, 1951 and has been subject to the Commission’s jurisdiction since 1959, the year in which the Commission was created.[FN51]

[FN51] Article 20 of the Statute of the IACHR provides that, in respect of those OAS member states that are not parties to the American Convention on Human Rights, the Commission may examine communications submitted to it and any other available information, to address the government of such states for information deemed pertinent by the Commission, and to make recommendations to such states, when it finds this appropriate in order to bring about more effective observance of fundamental human rights. See also Charter of the Organization of American States, Arts. 3, 16, 51, 112, 150; Regulations of the Inter-American Commission on Human Rights, Arts. 26, 51-54; I/A. Court H.R., Advisory Opinion OC-10/8 “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 No. 10 (1989), paras. 35-35; I/A Comm. H. R., James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87 paras. 46-49.

51. However, the Commission notes that according to the information provided by the petitioners, only 240 of the 354 alleged victims have been identified. With respect to the remaining 114 alleged victims, in most instances the information available is limited to the sex and approximate age of the individual and the date, approximate location and cause of death.[FN52] In this regard, the Commission must take into consideration the fact that its instruments do not allow for an *actio popularis*. Rather, a petition must alleged concrete violations of the rights of specific individuals, whether separately or as part of a group, in order that the Commission can determine the nature and extent of the State’s responsibility for those violations as well as the appropriate reparations to be afforded to that victim or his or her next of kin.[FN53] In the present complaint the Commission considers that there is insufficient information concerning the 114 unidentified alleged victims in the Petitioners’ petition upon which to evaluate the State’s potential responsibility for violations of their rights under the American Declaration. Accordingly, the Commission considers that it lacks competence *ratione personae* to consider the Petitioners’ petition insofar as it relates to the 114 unidentified alleged victims included in their complaint.

[FN52] See Petitioners’ Supplementary Memorandum dated February 25, 1999, Exhibit G.

[FN53] See, e.g., IACHR, Case 12.404, Report No.51/02 (Peru), IACHR 2002 Annual Report, para. 35; IACHR, Case 11.553, Report No. 48/96 (Costa Rica), IACHR 1996 Annual Report, para. 28; Petition 11.533, Report 88/03, (Panama), Annual Report of the IACHR 2003, paras. 26-33. See also I/A Court H.R., International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights), Advisory Opinion OC-14/94 of December 9, 1994, Ser. A No. 14, paras. 45-49. See similarly Eur. Comm. H.R., Application N° 6742/74, D.R. 3, p. 98; Eur. Comm. H.R., Application N° 8765/79, D.R. 21 p. 211; Eur. Comm. H.R., Application N° 9297/81, D.R. 28, p. 204.

52. Inasmuch as the Petitioners have alleging violations of Article I of the American Declaration on the part of the United States, the Commission is competent *ratione materiae* to examine the petition.

53. The Commission is competent *ratione temporis* to examine the complaint because the petition alleges facts that occurred on and after January 21, 1995, the date on which the first identified alleged victim is said to have died after crossing into the United States. The facts alleged therefore occurred subsequent to the date on which the United States' obligations under the American Declaration took effect.

54. Finally, the Commission is competent *ratione loci* to consider the petition, insofar as the deaths of the identified alleged victims are claimed to have occurred within the territorial jurisdiction of the United States.

B. Delay in Delivery of the State's Observations

55. As a preliminary matter, the Commission wishes to address the Petitioners' submission that the State waived its procedural and substantive challenges to the petition due to the length of time that it took the State to respond to the petition and to the prejudice that they claim to have suffered from the delay, and therefore that the Commission should disregard the State's reply.

56. According to Article 30(3) of the Commission's Rules of Procedure, once the Commission first transmits the pertinent parts of a petition to a State

[t]he State shall submit its response within two months counted from the date the request is transmitted. The Executive Secretariat shall evaluate request for extensions of this time period that are duly founded. However, it shall not grant extensions that exceed three months from the date of the first request for information sent to the State.

57. In the present case, the record indicates that the Petitioners' petition was first transmitted to the State on July 8, 2002. On September 9, 2002, the State requested a 30-day extension of time, to October 9, 2002, within which to respond to the petition, which the Commission granted on September 11, 2002. Also according to the record, a response was not received from the State until February 20, 2004. The Petitioners were then provided with an opportunity to respond to the State's submissions, which included an extension of time of three months with which to do so.

58. The Commission observes with concern the State's delay in delivering its response to the Petitioners' petition. The time periods prescribed under the Commission's Rules are intended to facilitate the fair, transparent and expedient processing of complaints and should be respected by all parties to a proceeding. Further, if parties fail to comply with the time limitations, they run the risk that the Commission will apply the exceptions or presumptions prescribed under Articles 37(3)[FN54] and 39[FN55] of the Commission's Rules or will otherwise make determinations of rights and responsibilities under international law without the benefit of their observations.

[FN54] Article 37(3) of the Commission's Rules provides: "In exceptional circumstances, and after having requested information from the parties in keeping with the provisions of Article 30 of these Rules of Procedure, the Commission may open a case but defer its treatment of

admissibility until the debate and decision on the merits. The case shall be opened by means of a written communication to both parties.”

[FN55] Article 39 of the Commission’s Rules of Procedure provides: “The facts alleged in the petition, the pertinent parts of which have been transmitted to the State in question, shall be presumed to be true if the State has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion.”

59. At the same time, the Commission considers that its Rules must be interpreted and applied in the context of each individual case and in a manner that best advances the effective execution of its mandate to promote the observance and protection of human rights in the Hemisphere, including the fair and balanced processing of petitions and other communications. As the Inter-American Court has similarly observed:

[i]t is not possible to apply the procedural rules of the American Convention without giving their proper weight to its context, object and purpose, as a basis for the interpretation of all the applicable provisions in given case. “What is essential,” as the Court has pointed out, “is that the conditions necessary for the preservation of the procedural rights of the parties not to be diminished or unbalanced, and that the objectives of the different procedures be met.”[FN56]

[FN56] I/A Court H.R., Paniagua Morales et al., Case, Preliminary Objections, Judgment of January 25, 1996, Ser. C No. 23, para. 42, citing I/A Court H.R., Velázquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, Ser. C No. 1, para 33; Fairén Garbi and Solís Corrales Case, Preliminary Objections, Judgment of June 26, 1987, Ser. C No. 2, para. 38 and I/A Court H.R., Godínez Cruz Case, Preliminary Objections, Judgment of June 26, 1997, Ser. C No. 3, para. 36.

60. In the present matter, the State had requested one extension of the maximum period provided for in 30(3) of the Rules, and the Petitioners were provided with a full opportunity to consider and respond to the State’s reply once it was received. The Commission must also take into account the novelty and complexity of the issues presented by the Petitioners as well as the large number of alleged victims included in the petition, and considers that the State’s observations may contribute to a proper determination of the matter before it. Accordingly, the Commission will take into account the State’s response of February 20, 2004 and the Petitioners’ reply thereto dated June 23, 2004 in determining whether the admissibility requirements under Article 20(c) of the Commission’s Statute and Articles 31 to34 of the Commission’s Rule have been satisfied.

C. Exhaustion of Domestic Remedies

61. 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. Article 31(2) of the Commission's Rules of Procedure, however, specifies that this requirement does not apply if the domestic legislation of the state concerned does not afford due process of law for protection of the right 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.

62. Additionally, the Inter American Court of Human Rights has observed that domestic remedies, in order to accord with generally recognized principles of international law, must be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they are designed.[FN57]

[FN57] I/A Court H.R., Velásquez Rodríguez Case, Merits, Judgment of July 29, 1988, Ser. C. No 4, (1988), paras. 64-66.

63. 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.

64. In the present case, the Petitioners do not argue that they have exhausted domestic remedies or that they are unable to prove exhaustion, and the State contends that the Petitioners have failed to file any cases in the U.S. federal or state courts concerning the situation raised in their petition. It is therefore clear to the Commission that the Petitioner have not pursued or exhausted any domestic remedies in respect of their claims.

65. At the same time, the Petitioners argue that they should be considered exempt from the exhaustion requirement on three grounds: that the claims raised in their petition are not judiciable before the courts in the United States; that the Petitioners do not have standing to pursue the claims before the courts in the United States; and that the alleged victims are indigent and therefore lack the resources necessary to pursue litigation. The Commission must therefore determine whether an exception to exhaustion applies in the present case based upon one or more of the grounds invoked by the Petitioners.

66. With respect to the first ground, the Petitioners contend that domestic remedies are not available because any court proceedings raising the issues in their petitions are not likely to succeed in light of existing jurisprudence in the United States. In particular, the Petitioners have alleged generally that the US federal government's power over matters of immigration and border control are "largely immune" from judicial control. The Petitioners claim that as a result, U.S. Courts are constitutionally precluded from considering the human rights implications of border enforcement strategies such as Operation Gatekeeper.[FN58]

[FN58] Petitioners' Response of June 23, 2004, p. 11, citing *Fiallo v. Bell*, 430 U.S. 7687 (1977), *Shaughnessy v. Mezei*, 345 U.S. 205 (1953); Laurence Tribe, *American Constitutional Law* 359 (2d ed. 1988).

67. In order to accept the Petitioners' submissions on this ground, the Commission must be satisfied that remedies before the domestic courts are effectively unavailable to the Petitioners by reason of a general deference on the part of U.S. courts to the federal government's plenary power over matters of immigration and border control. In this respect, the Commission has recognized that remedies may be considered ineffective when it is demonstrated that any proceedings raising the claims before domestic courts would appear to have no reasonable prospect of success, for example because the State's highest court has recently rejected proceedings in which the issue posed in a petition had been raised.[FN59] In order to meet this standard, however, there must be evidence before the Commission upon which it can effectively evaluate the likely outcome should a claim be pursued by the Petitioners. Mere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.[FN60]

[FN59] See e.g. Case 11.193, Report 51/00, *Gray Graham v. United States* Annual Report of the IACHR 2000, para. 60; Case 11.753, Report 108/00, *Ramon Martinez Villareal v. United States*, Annual Report of the IACHR 2000, para. 70; Case 12.379, Report 19/02, *Mario Alfredo Lares-Reyes et al. v. United States*, Annual Report of the IACHR 2002; para. 61.

[FN60] See, e.g., Case 12.006, Report 87/03 *Oscar Sirí Zuñiga v. Honduras*, Annual Report of the IACHR 2003, para. 43. See similarly *Eur. Comm. H.R., Whiteside v. U.K.*, App. 20357/92, (Dec.) March 7, 1994, 76A D.R. 80.

68. After reviewing the precedents relied upon by the Petitioners, the Commission is unable to conclude that a proceeding raising the matters contained in the petition would have no reasonable prospect of success so as to excuse the exhaustion of domestic remedies requirement. In particular, the Commission considers that the authorities relied upon by the Petitioners do not address circumstances substantially similar to those in the present case.[FN61] In addition, the most recent precedent cited by the Petitioners is dated from 1977. Therefore, it is not apparent that the Commission can rely upon these authorities in order to evaluate the manner in which the U.S. judiciary would address the issue in the petition at the present time.

[FN61] The case of *Fiallo v. Bell*, 430 U.S. 787 (1977), for example, involved the exclusion from "special preference" immigration status under the Immigration and Nationality Act the relationship between an illegitimate child and his natural father, while the matter of *Shaughnessy v. Mezei*, 345 U.S. 205 (1953) addressed the situation of an alien who had been ordered to be excluded from the United States on a finding that his entry would be prejudicial to the public interest.

69. Indeed, the Commission's more recent experience with complaints against the United States involving issues of immigration and border enforcement suggest that a challenge by the Petitioners may not be rejected the domestic courts as nonjudicial. In the 1993 Haitian Interdiction Case,[FN62] for example, the petitioners were able to challenge under applicable domestic and international law the US policy of interdicting Haitian boat people on the high seas and returned them to Haiti, up to and including the United States Supreme Court.[FN63] Similarly, in the case of Rafael Ferrer-Mazorra et al. v. United States,[FN64] decided by the Commission in 2000, the petitioners pursued claims before the U.S. courts challenging the federal government's practice of detaining Mariel Cubans based upon their status as "excludable aliens." [FN65] Moreover, in June 2004, the U.S. Supreme Court held that Mariel Cubans could not be detained for more than six months where the detainee could demonstrate that there was no significant likelihood of removal in the reasonably foreseeable future.[FN66] Further, in the case of Mario Alfredo Lares-Reyes et al. v. United States,[FN67] the Petitioners challenged the prolonged detention and removal of three permanent residents from the United States under the US Illegal Immigration Reform and Immigrant Responsibility Act of 1996 for aggravated felony convictions, and argued that they had no recourse to a court of law to challenge the deportation decisions. The Commission found the petition to be inadmissible, however, based upon evidence that other similarly-situated individuals had successfully litigated their cases up to the U.S. Supreme Court[FN68] and therefore that it was reasonably open to each of the alleged victims to pursue habeas corpus proceedings before the US federal courts to challenge their detentions and deportations.

[FN62] Case 10.675, Report 28/93, Haitian Interdiction Case, Annual Report of the IACHR 1993.

[FN63] USSC, Sale, Acting Commissioner, Immigration and Naturalization Service et al. v. Haitian Centers Council Inc., 509 U.S. 155 (1993).

[FN64] Case 9903, Report 51/01, Rafael Ferrer-Mazorra et al. v. United States, Annual Report of the IACHR 2000.

[FN65] Garcia-Mir v. Meese, 788 F.2d 1446, 1455 (11th Circuit 1986); Ferrer-Mazorra v. Meese, 107 Sup. Ct. 289 (1986).

[FN66] U.S.S.C., Clark v. Martinez, 543 U.S. _ (2005). See also Annual Report of the IACHR 2004, Chapter III, para. 278.

[FN67] Case 12.379, Report 19/02, Mario Alfredo Lares-Reyes et al. v. United States, Annual Report of the IACHR 2002.

[FN68] INS v. St. Cyr, 121 S. Ct. 2271 (2001); Zadvydas v. Davis et al.; Attorney General v. Ma, 121 S. Ct. 2491 (2001).

70. Accordingly, the Commission is unable to conclude that the Petitioners' claims would have no reasonable prospect of success before U.S. courts insofar as they concern issues relating to immigration and border enforcement.

71. For similar reasons, the Commission cannot accept the Petitioners' contentions that domestic remedies are unavailable owing to strict standing requirements before the U.S. courts or due to indigency. In these respects, the Petitioners argue that because they are advocacy groups, namely the American Civil Liberties Union of San Diego and Imperial Counties, the California Legal Assistance Foundation, the law firm of Bostwick and Hoffman, LLP, and the California Western School of Law, rather than direct victims of the US policy, they would be barred from seeking injunctive relief. They also argue that the alleged victims are indigent migrant workers with few economic resources and are therefore unable to retain counsel to file and litigate a case in the U.S. courts. As in the case of their arguments concerning nonjudicability, however, the Petitioners have relied upon U.S. court decisions issued more than 20 years ago and which address factual and legal circumstances significantly distinct from those in the present case.[FN69] Further, the Petitioners' arguments speak only to the availability of injunctive relief and not other remedies that might be available in the U.S. justice system, such as constitutional challenges to the substance or application of the legislation and policies authorizing Operation Gatekeeper. Moreover, to the extent that the exhaustion of domestic remedies requirement under the Commission's Rules applies to the alleged victims and not to the Petitioners, the standing of the Petitioners to seek a remedy in their own right is irrelevant. Rather, the question is whether the alleged victims or their next of kin, as those directly affected by the impugned acts or omissions, are able to seek remedies through the Petitioners as their representatives.

[FN69] See, e.g., *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) (determining that the Washington Apple Advertising Commission had standing in a representational capacity to challenge the constitutionality of a North Carolina statute regulating the grading of apples); *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (finding that the federal courts were without jurisdiction to entertain the respondent's claim for injunctive relief against municipal police barring the use of chokeholds).

72. In this latter connection, the three proceedings before the Commission described above suggest that it is possible for advocates such as the Petitioners to bring claims before the U.S. federal courts on behalf of individuals who allege that their constitutional rights have been violated as a consequence of the application of immigration-related legislation and policy, and notwithstanding the indigent status of the alleged victims concerned. In this respect, in the present case it is not apparent that any efforts have been undertaken to seek legal assistance in order to pursue the claims before the courts in the United States, nor is it apparent why the Petitioners, who themselves have the capacity to provide legal assistance, have not made efforts in this regard.

73. The Commission is therefore unable to find, based upon the arguments and information on the record, that the Petitioners are excused from exhausting domestic remedies owing to lack of standing or indigency.

74. Consequently, the Commission concludes that the Petitioners have failed to exhaust domestic remedies or to substantiate an exception to the exhaustion requirement in accordance with the requirements of its Rules of Procedure, and therefore that the petition is inadmissible.

75. Based upon this finding, the Commission does not consider it necessary to address the remaining conditions governing admissibility under Articles 31 to 34 of the Commission's Rules of Procedure.

76. Notwithstanding its decision on the admissibility of the Petitioners' claims, however, the Commission wishes to express its concern regarding the matters raised in the petition, as they point to the existence of longstanding and serious circumstances in which the lives and physical integrity of people who traverse the border between two OAS Member States have been and continue to be threatened. Accordingly, the Commission will continue to monitor the situation, consistent with its broad mandate to promote the observance and protection of human right in the Hemisphere as well as the specific authority under its Statute to make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions and international commitments.

V. CONCLUSIONS

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

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. Declare the present petition 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., on the 27th day of the month of October, 2005. (Signed): Susana Villarán de la Puente, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Evelio Fernández Arévalos, José Zalaquett Daher and Florentín Meléndez, Commissioners. The concurring opinion of President Clare K. Roberts is included immediately after this report.

CONCURRING OPINION OF PRESIDENT CLARE K. ROBERTS

I concur in the result reached by the Commission that the present petition is inadmissible pursuant to the requirements of the Commission's Rules of Procedure. However, I base my finding on a ground different from that of my colleagues. In my view, the petition should be declared inadmissible pursuant to Article 34(a) and (b) of the Commission's Rules because it does not state facts that tend to establish a violation of the rights protected under the American Declaration of the Rights and Duties of Man and is manifestly groundless.

In particular, I understand the Petitioners to argue that the United States is responsible for violations of the right to life under Article I of the American Declaration because it has enhanced security for areas of its border that are susceptible to entry by unauthorized foreign nationals, with the consequence that some immigrants have lost their lives attempting to enter the State's territory unlawfully through more inhospitable terrain. Based upon current international legal principles and standards, I fail to see how these circumstances can give rise to state responsibility for individual human rights violations.

The Commission has recognized that states have historically been afforded considerable discretion under international law to control the entry of aliens into their territory,[FN70] and that exercising such control can constitute one element of a state's obligation to guarantee the security of its population.[FN71] At the same time, the Commission has affirmed that this discretion must be exercised in conformity with states' international human rights obligations. In particular, the Commission has held that the basic human rights protections under the American Declaration and other applicable instruments must be guaranteed to all persons within the authority and control of OAS Member States and are not dependent for their application upon such factors as a person's citizenship, nationality or any other factor, including immigration status.[FN72] The Commission has held, for example, that in the course of regulating access to its territories, States may in some circumstances subject foreign nationals to administrative detention but only where such detention is based on grounds and procedures set forth in law, is not arbitrary, and supervisory judicial control is available without delay.[FN73] The Commission has also emphasized that, where there are substantial grounds for believing that a foreign national would be in danger of being subjected to torture or other inhumane treatment in their home country, states have an absolute obligation not to return that individual.[FN74] Further, it is apparent from prevailing international human rights standards that the use of lethal force cannot be used as a means of regulating access to the state's territory[FN75] absent justifications recognized under international law, for example circumstances in which the use of such force by law enforcement officials is strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury.[FN76]

[FN70] See Case 9903, Report 51/01, Rafael Ferrer-Mazorra et al. v. United States, Annual Report of the IACHR 2001, para. 177 (hereinafter "Mariel Cuban Case").

[FN71] See e.g. IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, 28 February 2000, OEA/Ser.L/V/II.106 Doc. 40 rev. (hereinafter "Canada Report"), paras. 134-142; (evaluating under Article I and XXV of the American Declaration the preventative detention of immigrants on the ground that they may constitute a "danger to the public")

[FN72] Mariel Cuban Case, supra, para. 179. See also Case 10.951, Report 109/99, Coard et al. v. United States, Annual Report of the IACHR 1999, para. 37.

[FN73] See, e.g. Coard Case, supra, para. 45; Canada Report, supra, para. 137; Mariel Cuban Case, supra, para. 212.

[FN74] See IACHR, Report on Terrorism and Human Rights (2002), OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (22 October 2002) (hereinafter "Terrorism Report"), para. 395; Canada Report, supra, para. 154.

[FN75] See, e.g., Eur. Court H.R., *K.-H.W. v. Germany*, Application No. 37201/97 (March 22, 2001), para. 98 (addressing the use of mines, firearms and other lethal measures by East German border guards to prevent border crossings into West Germany).

[FN76] See Terrorism Report, *supra*, para. 87, citing Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 112 (1990), Principle 9; I/A Court H.R., *Neira Alegría Case*, Judgment of January 19, 1995, Ser. A N° 20, para. 74. See similarly Eur. Court H.R., *Andronicou and Constantinou v. Cyprus*, 25 Eur. H.R. Rep. 491 at para. 171 (1998).

In my view, the present petition presents a very different situation. The information on the record indicates that the State has relied upon the natural barriers along its border, including mountains, deserts and waterways, as a deterrent against individuals who seek to enter its territory unlawfully, and that some immigrants have nevertheless chosen to risk the hazards presented by those barriers. I cannot accept that these circumstances, in and of themselves, are sufficient to engage the State's responsibility to guarantee the rights of the individuals concerned. Indeed, accepting the Petitioners' arguments would suggest that states are required to ensure that individuals who chose to enter their territories unlawfully can do so with a minimum risk of danger from the natural environment, a proposition for which I see no basis under the American Declaration or other applicable instrument.

The harsh reality is that many foreign nationals are prepared to hazard hostile terrain in order to enter the United States unlawfully and, tragically, some have died in their efforts. As the Petitioners have pointed out, this phenomenon is driven by numerous factors, including the availability of gainful employment in the United States and efforts for family reunification. The fact that the risks assumed by some immigrants may have been a foreseeable consequence of prevailing immigration and economic policies in the region may well give rise to a moral obligation on the part of the United States, and indeed other states in the Hemisphere, to make concerted efforts to alleviate this crisis. In this respect, the United States has indicated that it has taken a number of initiatives aimed at addressing the situation, including the establishment of search and rescue operations, targeting smugglers who are responsible for leading illegal immigrants through the worst parts of the terrain, and conducting negotiations with other governments in the region. I share my colleagues' concerns about this serious situation and agree that the Commission should continue to monitor the matter as part of its mandate to promote the observance and protection of human rights in the Hemisphere. In my view, however, the circumstances raised by the Petitioners' petition are not matters for the Commission's individual petition process.

For these reasons, I find the claims in the Petitioners' petition to be inadmissible pursuant to Article 34(a) and (b) of the Commission's Rules for failing to state facts that tend to establish a violation of the rights under the American Declaration and manifestly groundless.

Done and signed in the city of Washington, D.C., on the 10th day of the month of November, 2005. (Signed): Clare K. Roberts, President.