# THE EXTRATERRITORIAL SCOPE OF HUMAN RIGHTS TREATIES

## THE AMERICAN CONVENTION ON HUMAN RIGHTS

Christina M. Cerna[1]

## INTRODUCTION

In March of this year, the Human Rights Interest Group of the American Society of International Law, sponsored a panel on the *Bankovic* case before the European Court of Human Rights.[2] The panel comprised Hurst Hannum, one of the lawyers for the applicants in the case, and Christopher Greenwood, one of the lawyers representing the United Kingdom, one of the respondent States. Tom Farer, a former Chairman of the Inter-American Commission on Human Rights, was the official Commentator on the debate, and I would like to begin my presentation with one of his comments. He stated that: "The issue could be seen in terms of whether and when an official human rights body should press against the textual envelope of its jurisdiction." In his view, the language of article 1 of the European Convention was *not* decisive in depriving the Court of exercising jurisdiction in the *Bankovic* case,[3] whereas Professor Greenwood had argued that the Court "held the [*Bankovic*] application inadmissible on the substantive ground that the Convention did not apply." Article 1 of the European Convention, is, like all legal texts, of course, subject to interpretation: "The High Contracting Parties shall secure to everyone within their jurisdictions the rights and freedoms defined in Section 1 of this Convention."[4] According to Professor Greenwood, the European Court held that for a State party to be found responsible for a violation of the Convention, the alleged victim must be within the jurisdiction of a respondent State. The persons killed and injured in the RTS building had not been within the jurisdiction of any of the respondents at the time of the attack, since the FRY was not party to the European Convention and the respondent States did not exercise effective control ("as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory"[5]). Consequently, the Convention was held not to apply and the petition was declared inadmissible.[6]

Professor Farer, in an example involving the Inter-American Commission's exercise of jurisdiction over Cuba, suggested that the Inter-American Commission on Human Rights, in that case, "chose to push the jurisdictional envelope." He stated in relation to this example involving Cuba that the Commission's decision "on the jurisdictional issue was not inevitable, but neither was it arbitrary."[7] Although not in total accord with the example given, which I would argue was more rather than less "inevitable" (since the 1962 OAS resolution depriving the Government of Fidel Castro of the right to participate in the organs of the OAS did not deprive Cuba of the status of a member state of the Organization) and that the Commission had little alternative but to exercise jurisdiction over Cuba. The larger point, however, is well taken, important and in my view, emblematic of the inter-American system. The inter-American system has pushed the

---

[1] Principal Specialist at the Inter-American Commission on Human Rights of the OAS. The opinions expressed in this paper are in the author's personal capacity and are not to be attributed either to the Inter-American Commission on Human Rights or to the Organization of American States.

[2] Bankovic and Others v Belgium and 16 Other Contracting States, Eur. Ct. H.R. 52207/99, 41 ILM 517 (2001).

[3] "In this instance, the Court was not confronting language that plainly forbade the Court to review a case like this." Quoted in "Bombing for Peace: Collateral Damage and Human Rights", Proceedings of the 96th Annual Meeting, (March 13-16, 2002), 95, at 106.

[4] *Id.* at 100.

[5] Bankovic at para. 71, quoted in "Bombing for Peace," *id.*, at 103.

[6] *Id.* at 100.

[7] *Id.* at 107.

jurisdictional envelope more so than the European system and has taken jurisdiction over cases, when it, more conveniently, could have declined to do so.

This notion of "pushing the jurisdictional envelope" guides the *modus operandi* of the Inter-American Commission and accords with Ted Meron's conception that: "In view of the purposes and objects of human rights treaties, there is no *a priori* reason to limit a state's obligation to respect human rights to its national territory."[8]

The Statute of the Inter-American Commission provides that the Commission is an organ of the Organization of American States, created to promote the observance and defense of human rights.[9] Human rights are understood to be the rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto, and those set forth in the American Declaration on the Rights and Duties of Man, in relation to the other member States that have not yet ratified or acceded to the Convention.[10]

The American Declaration, unlike the American Convention, has no express jurisdictional scope. Clearly, it was not intended to function as a treaty and no consideration was given to describing how to apply it to the OAS member States. The Declaration was adopted in 1948, some six months prior to the adoption of the Universal Declaration of Human Rights, and was generated by the same prevailing international concern for creating a non-binding instrument that would serve as a standard of achievement, at the regional level. The Inter-American Commission was created, eleven years later, in 1959, not by a treaty, as was the case with the European Commission, but by a political resolution. Since the Commission's mandate was to promote and protect human rights in the hemisphere, the only existing human rights instrument, at the regional level, was the American Declaration, and by dint of pushing the "jurisdictional envelope", the Commission began to apply the Declaration to all the member States in 1965, when it was granted the authority, by the political bodies, to examine and decide individual petitions alleging violations of human rights. This lack of an express jurisdictional scope is relevant since most of the examples from the inter-American system involving the extraterritorial application of its human rights instruments concern the United States, which has not ratified the American Convention and which is considered, as a consequence, subject to the American Declaration.

Article II of the American Declaration is sometimes referred to, inappropriately, as the jurisdictional clause, but is, more accurately, identified as an autonomous substantive rights provision entitled "Right to equality before law." The right to equality before the law is not dependent upon the finding of a violation of another substantive right set forth in the Declaration, but is an autonomous right that is violated when there is an unreasonable differentiation as regards the treatment of persons of the same class or category. It provides that:

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

The Commission began receiving petitions virtually from the time of its creation, but had not been authorized by the political bodies of the OAS, to process these petitions. Unlike the European system, the Commission's functions were not originally intended to include the examination and decision on individual petitions. In its early years, the Commission's primary

---

[8] Theodore Meron, "Extraterritoriality of Human Rights Treaties" 89 AJIL 78, 80 (1995).
[9] Statute of the Inter-American Commission on Human Rights, adopted in La Paz, Bolivia, October 1979.
[10] Article 1, "Nature and Purposes", of the Statute.

function was to study the situation of human rights in the region and to make general recommendations to the member states, and only later, to carry out on-site visits and to prepare country reports on the situation of human rights in the member states, and then to examine and take decisions on individual petitions.

The American Convention, a treaty modeled after the European Convention[11], sets forth its jurisdictional scope under the "General Obligations" inherent in the treaty, in article 1(1):

> The States Parties to the Convention undertake to respect the rights and freedoms recognized herein and to ensure *to all persons subject to their jurisdiction* the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. (Emphasis added)

Unlike the European Convention, juridical persons are not considered "subject to their jurisdiction", since article 1(2) specifically limits the obligations of States under the American Convention to "human beings."[12]

**Early examples of the Commission referring to the exercise of extraterritorial jurisdiction**

It should be mentioned that the Commission first noted the extraterritorial violations of human rights committed by governments in its country studies. Unlike the European system, the inter-American system has the competence to carry out on-site visits to the member states of the Organization, but only with their express consent, and to prepare reports on the situation of human rights in those countries. If it does not receive consent to carry out the visit, it will prepare a report based on information received from other sources, if it deems it convenient to do so.

In its 1985 Report on the Situation of Human Rights in Chile, which was drafted without the benefit of an on-site visit, due to the unwillingness of the Pinochet regime to allow the Commission to visit Chile, the Commission noted that two well-known Chilean figures, the former Minister of State and Ambassador, Orlando Letelier and the former Commander-in-Chief of the Army and former Vice President, General Carlos Prats, had both been killed outside of Chile, in Washington, D.C., and Buenos Aires, respectively, by agents of the Chilean Government.[13] Similarly, the Commission in its 1985 Second Report on the Situation of Human Rights in Suriname, following on-site visits to both Suriname and Holland, commented on the attacks on Surinamese citizens living in Holland and harassment of these individuals, who were prevented from obtaining passports and returning home if they were considered to be opponents of the Government.[14]

**Case of extraterritorial exercise of jurisdiction under the American Convention of Human Rights**

***Victor Saldaño Case [15](March 11, 1999)***

The Saldaño case involved a petition presented in June 1998 against Argentina, by an Argentine national, who had been sentenced to death in the United States. The petitioner

[11] Convention for the Protection of Human Rights and Fundamental Freedoms, Adopted 4 November 1950.
[12] Article 1(2) provides: "For the purposes of this Convention, 'person' means every human being."
[13] IACHR, Report on the Situation of Human Rights in Chile, OAS/Ser.L/V/II.66, doc. 17, September 27, 1985 at p. 64.
[14] IACHR, Second Report on the Situation of Human Rights in Suriname, OAS/Ser.L/V/II.66, doc. 21, rev.1, October 2, 1985 at pp. 14 and 40.
[15] Report No. 38/99, Victor Saldaño, (Argentina) March 11, 1999.

contended that Argentina had an obligation to present an interstate complaint under the American Convention against the United States. The Commission declared the complaint inadmissible and stated that Argentina had no such obligation.

This was an odd case in several respects. It is the only case in memory in which an in/admissibility decision was issued on a petition that had *not* been communicated to a respondent State. Today, such a petition would be rejected at the Secretariat level, which screens all incoming complaints, for failure to characterize a violation under the Convention, pursuant to article 47 of the American Convention.[16] Also, the petition appears to have been influenced by a pending request for an advisory opinion from the Inter-American Court. On December 9, 1997, Mexico had requested an advisory opinion on the obligations of the host state to provide notification to aliens as regards their right to seek assistance from their state of nationality (under article 36(1)(b) of the Vienna Convention on Consular Relations), when the alien is detained for crimes punishable by the death penalty in the host state and that notification has not been provided. The Inter-American Court did not issue its Advisory Opinion in OC-16 until October 1, 1999, and the ICJ did not issue its judgment in the LaGrand case, dealing with the same issue, until June 27, 2001..

The Commission stated in Saldaño that the term "jurisdiction" in the sense of article 1(1) is not limited to, or merely coextensive with national territory. It found that "a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory."[17] The Commission cited the European Commission as authority for expanding the concept of "jurisdiction" beyond a state's national territory. It stated:

> The European Commission addressed the issue in the interstate complaint Cyprus lodged against Turkey following Turkey's invasion of that island. In that complaint, Cyprus charged Turkey with violations of the European Convention in that part of Cypriot territory invaded by Turkish armed forces. For its part, Turkey claimed that under Article 1 of the European Convention the Commission's competence is limited to the examination of acts allegedly committed by a state party in its own national territory and that its responsibility could not be engaged under the Convention since it had not extended its jurisdiction to any part of Cyprus. The Commission rejected this argument stating:
>
> > In article 1 of the Convention, the High Contracting Parties undertake to secure the rights and freedoms defined in Section 1 to everyone "within their jurisdiction" (in the French text: "relevant de leur jurisdiction"). The Commission finds that this term is not, as submitted by the respondent Government, equivalent to or limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this article, and from the purpose of the Convention as a whole that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad… (Emphasis added).
>
> This understanding of jurisdiction– and therefore responsibility for compliance with international obligations– as a notion linked to authority and effective control, and not merely to territorial boundaries has been confirmed and elaborated on in other cases decided by the European Commission and Court.[18]

The Commission found that the petitioner "has not adduced any proof whatsoever that tends to establish that the Argentine State has in any way *exercised its authority or control* either over the person of Mr. Saldaño, prior or subsequent to his arrest in the United States, or over the

---

[16] The Commission's Rules of Procedure were amended on May 1, 2001.

[17] *Id*. at para. 17.

[18] *Id*. at paras. 18 and 19. The Commission cited to Loizidou v. Turkey (1995), X v UK (1977), Bertrand Russel Peace Foundation Ltd. v. UK (1978) and Mrs. W v UK (1983).

local officials in the United States involved in the criminal proceedings against him."(Emphasis added)[19] It concluded finding no violation of article 1(1) of the Convention due to the fact the petitioner had not substantiated the allegation that Argentina had breached any obligation to the alleged victim under the Convention:

> The Commission also finds the petitioner's reliance on the bond of nationality between the Argentine State and Mr. Saldaño insufficient to sustain her legal claims. The mere fact that the alleged victim is a national of Argentina cannot, in and of itself, engage that state's responsibility for the allegedly wrongful acts of agents of another state performed wholly within their own national territory. The Commission wishes to emphasize that neither the drafting history of the American Convention, nor the decisions of the Inter-American Court or this body, supports the proposition that States parties to the Convention assumed an obligation to protect their nationals against violations committed abroad by another state. In addition, the petitioner has failed to show any act or omission by Argentine authorities that implicate that state in the alleged violations arising out of Mr. Saldaño's prosecution in the United States so as to subject him to Argentina's jurisdiction within the meaning of Article 1(1) of the American Convention.[20]

Given the Inter-American Court's decision in Advisory Opinion in OC-16, establishing a human right on the part of the foreign national to information on consular assistance, and "that said rights carry with them correlative obligations for the host State"[21], the more interesting question would have been, if Mr. Saldaño had been advised of his right to consular assistance, whether Argentina also had obligations, under international human rights law, to provide assistance to its nationals in proceedings in the host State. According to the above-cited language of the *Saldaño* decision, the Commission appears to be saying that States parties to the Convention have not assumed obligations to protect their nationals against violations committed abroad by another State. But then again, that decision was written before OC-16 was issued and before the ICJ issued its decision in *LaGrand*, and it might be revised were the issue to come up today.

**Cases of extraterritorial exercise of jurisdiction under the American Declaration of the Rights and Duties of Man**

To refer back to our March ASIL panel, Hurst Hannum, in describing the applicants' litigation strategy in *Bankovic* before the European Court, stated that the applicants conceded that jurisdiction was normally territorial, but sought to bring the acts in *Bankovic* within one of the three exceptions that the Court had identified in its jurisprudence.[22]

The three exceptions were as follows: 1) the first exception is found in the *Soering* line of cases, which held that the Convention is violated if **lawful acts committed within the territory of a state** (such as extradition or deportation determinations) **were likely to give rise to actual violations outside the state's territory**; 2) the second exception is exemplified by a number of cases concerned with the Turkish occupation of northern Cyprus, as in the *Cyprus v Turkey* case, which holds states responsible for human rights violations in territories that are under their '**effective control**," even if the territories are outside the state; and 3) the third exception, where extraterritorial responsibility reached its zenith, as in the *Issa v. Turkey*, case, where neither the Court nor Turkey questioned that the Convention applied to Turkish forces operating in Iraq, a state nor party to the Convention; in this last example, the Court did not examine issues of

[19] *Id.* at para. 21.
[20] *Id.* at para. 23.
[21] I/A Court H.R., The right to information on consular assistance in the framework of the guarantees of the due process of law. Advisory Opinion OC-16/99 of October 1, 1999 at para. 141.
[22] "Bombing for Peace" *supra* n. 5 at 97-98.

Turkish control or legal authority, **the only question appeared to be whether the Turkish forces, did in fact, cause the deaths of the applicants' relatives.**[23]

We find this to be a useful approach for distinguishing the different applications of the Inter-American Commission's exercise of extraterritorial jurisdiction under the American Declaration as well. 1) **The *Soering* line of cases**: **Interference by the US with Haitians on the high seas;** (Report No. 51/96, Case No. 10.675, United States, March 13, 1997; Report No. 8699 involving US interdiction of Haitians on the high seas); 2) **"Effective control": US military intervention in another OAS member State** (Report No. 109/99, Case No. 10.951, United States, September 29, 1999, involving US military action in Grenada in October 1983); and **Cuban military interference in international airspace** (Report No. 86/99, Case. No. 11.589, Armando Alejandre Jr. et al., September 29, 1999 involving Cuban military aircraft downing two unarmed civilian light airplanes, belonging to the organization "Brothers to the Rescue", outside Cuban airspace); and **The indefinite detention of aliens by the US in camps outside the US, in Guantanamo Bay, Cuba** (Report No. 51/01, Case No. 9903, Rafael Ferrer-Mazorra et al., United States, April 4, 2001; and Precautionary Measures for the Guantanamo detainees, March 12, 2002); and 3) **no questioning of extraterritorial application: US military intervention in another OAS member State** (Report No. 31/93, Case No. 10.573, United States, October 14, 1993 involving US military action in Panama in December 1989).

The Saldaño case, discussed above, would fit under the "effective control" exception. As can be seen from the above grouping of cases, the "effective control" category comprises the largest number of examples. The third category, involving "no questioning" of extraterritorial application involves an admissibility decision. The merits of this case have not yet been decided.

Since Article II of the American Declaration contains no explicit limitation of jurisdiction, the US has not alleged the inappropriate exercise of extraterritorial jurisdiction in its defense in these cases.[24]

1) **THE SOERING LINE OF CASES: Interference by the US with Haitians on the high seas;**

The Commission has exercised extraterritorial jurisdiction in connection with violations of human rights involving ostensibly lawful acts committed within the territory of a state were likely to give rise to actual violations outside the state's territory. This example involves attempts by the United States to prevent fleeing Haitians from landing on its shores and thereby acquiring certain procedural rights to apply for asylum. The Commission also found that seizing fleeing Haitians on the high seas interfered with their attempt to seek a safe haven in countries other than the United States,

This Haitian interdiction case follows the rationale of the European Court's *Soering case*, in that the violation will be consummated if the respondent State extradites or deports the petitioner to another OAS member State where he has probable cause to believe that he will suffer harm. Unlike *Soering*, where the extradition involved sending the petitioner to a non-member State of the Council of Europe, the case decided by the Commission involves deportation or *refoulement* to an OAS member State. It is the involvement of a State, outside the territory of

[23] *Id.* at 98.

[24] In *Bankovic*, the European Court distinguished the *Coard* case, stating that Article II of the American Declaration" contains no explicit limitation of jurisdiction."

the extraditing or deporting State that triggers the exercise of the Commission's extraterritorial jurisdiction. Unlike Soering, who was a German national who had allegedly committed a crime in the United States, the US was sending the fleeing Haitians back to the state of their nationality.

**a) US interdiction of Haitians on the high seas (Report No. 51/96, Case No. 10.675, United States, March 13, 1997; Report No. 8699);**

On October 1, 1990, the Commission received a petition filed by a number of NGOs on behalf of fleeing Haitian boat people, primarily, for the "temporary suspension of the Haitian Migrant interdiction program" and the deportation of interdicted Haitians to Haiti (para. 11). The petition alleged that these boat people had a reasonable fear that they would be persecuted if returned to Haiti and that they were denied a proper forum and processing procedures for resolution of their asylum claims. The further alleged violation of the right to equality before the law in that the US authorities discriminated against them as compared with fleeing Cubans. The petitioners presented witnesses to testify to the violence and persecution he faced before leaving Haiti to emigrate to the United States as well as the brutality he was subject to upon being returned to Haiti. Another witness testified as to why "in-country processing was not working" and a third witness, a leader of a US Congressional Delegation mission to Haiti testified on his most recent visit to Haiti and urged that the Commission apply the human rights principles enunciated in the American Declaration in the resolution of the petition (para.15).

The US responded that the interdiction process was "consistent with the human rights standards of the American Declaration" and that the US had a "sovereign right to prevent illegal immigration to the United States." It alleged that: "Since no other country in the region has been willing to accept significant numbers of Haitians departing by sea, the only relevant options are return or admission to the United States. There is no legal duty, however, on the United States or any other nation to accept fleeing Haitians, including those with legitimate refugee claims. In light of the firm belief that bringing all interdicted Haitians to the United States would likely precipitate a massive and dangerous outflow, the United States has chosen to return Haitians to Haiti. Nonetheless, the United Stats has undertaken extensive efforts to afford Haitian nationals the opportunity to pursue refugee claims in a safe alternative to boat departures, through the in-country refugee processing program"(para. 51).

The US further claimed humanitarian motives as grounds for continuing the interdiction program: "Although the interdiction program was established in 1981 as part of an effort to halt the illegal entry of undocumented migrants into the United States by sea, the program has served to rescue tens of thousands of Haitians who set out from Haiti in unseaworthy vessels for a long and perilous journey to the United States" (para. 53). "But for the efforts of the US Coast Guard, it is estimated conservatively that since December of 1982, approximately 435 Haitians have drowned en route to the US shores. Suspending interdiction would be tantamount to adopting a policy of promoting an exodus at the cost of potentially large losses of life (para. 54). In addition, the US noted that during the period 1981 through 1991, more than 185,000 Haitians were granted legal permanent residence in the US, fifth after Mexico, the Philippines, the former Soviet Union and Vietnam (para. 63).

As regards jurisdictional competence, the US notes that "[T]he issue for consideration here is not whether there are human rights abuses occurring in Haiti" but rather "whether the action of the United States in interdicting Haitian nationals on the high seas and repatriating them to Haiti violates" specific articles of the American Declaration (para. 52). The US reiterated its position expressed in earlier cases that it "rejects the petitioners' contention that the American Declaration has acquired legally binding force by virtue of US membership in the OAS and

ratification of the Charter of the OAS. Because the United States has previously noted, the Declaration is not a treaty and has not acquired binding legal force" (para.66).[25]

The US argued that the *non-refoulement* obligation of article 33 of the UN Refugee Convention only protects a refugee who has reached the territory of a contracting stating and does not apply to person interdicted on the high seas (para. 71). This interpretation is not supported by UNHCR, which maintains "the guarantees of *non-refoulement* for refugees is a specific and fundamental protection, independent from the question of admission or the grant of asylum" (para. 147).[26] Furthermore, the US maintained that the 1951 Refugee Convention contains no obligation on states to provide asylum (para. 72).

The US argued "aliens outside the US have no general rights under US law to be admitted to the US except as provided in US Immigration law. More specifically, aliens outside the US have not rights to alleged procedural protections in the consideration of their claims to asylum, or to avoid repatriation to their homes, even in the face of persecution at the hands of their governments" (para. 110). Further, no other OAS member state interprets Article XVIII (right to a fair trial) as requiring their authorities to admit non-nationals for the purpose of pursuing asylum claims or to provide extraterritorial procedures (para. 111).

In the 1980s, the Commission had failed to reach consensus on petitions involving fleeing Haitians, Dominicans, Cubans, Salvadorans or Nicaraguans, who were seeking refuge in the United States, since it interpreted the right in question, the right to seek and receive asylum, set forth in Article XXVII (the right to asylum) of the American Declaration, to be conditioned on the phrase "in accordance with the laws in each country." In this Haitian interdiction case, the Commission could just as easily have rejected the petitioners' pretensions, based on the extensive and convincing arguments of the State.

As regards the extraterritorial application of the Declaration, the petitioners noted that: [I]nternational law prohibits State action beyond a State's border that violates other rights regarded as fundamental" and cited to the UN Human Rights Committee, holding States responsible for violations committed by its agents in the territory of another State. It noted that what was crucial was not *where* the violation occurred but the relationship between the individual and the State concerned. The petitioners also cited the European Commission which has concluded that States' obligations extend to all persons under their actual authority and responsibility, whether within their own territory or abroad (para. 141).

The petitioners argued that the US justified its interdiction program on the ground that Article 33 did not extend to refugees located outside the United States. And then rather ingenuously suggested that: "Even if it is true, as the United States Supreme Court decided, that the President possesses inherent constitutional authority to turn back from the USG's gates any alien, such a power does not authorize the interdiction and summary return of refugees who are far from, and by no means necessarily heading for, the United States. The US interdiction program has the effect of prohibiting the Haitians from gaining entry into the Bahamas, Jamaica, Cuba, Mexico, the Cayman Islands, or any other country in which they might seek safe haven (para. 146)." If the fleeing Haitians were seeking entry into the Bahamas or Jamaica or any other

[25] The US cites Res. 23/81 in Case No. 2141, Res. 3/87 in Case No. 9647 and the Advisory Opinion OC-10/89 of the Inter-American Court of July 14, 1989, all of which purport to substantiate the exercise of jurisdiction by the Commission under the American Declaration.

[26] There is no consensus as to whether the definitive interpretation of provisions of refugee law is made by the States Parties to the refugee conventions or by UNHCR. Clearly UNHCR advocates a more expansive and progressive interpretation of the provisions of these treaties than States Parties.

country, it is more true than not that they were doing so only as a stop-over to seeking entry into the US. This argument would have been easy to refute, in light of the fact that these neighboring countries were also refusing to receive Haitian asylum seekers, but the Commission adopted the view of UNHCR that Article 33 had no geographical limitations.

The Commission found the US in violation of multiple provisions of the Declaration. It concluded that by means of the interdiction and repatriation policy the US was exposing "the Haitian refugees to the genuine and foreseeable risk of death," in violation of their right to life protected by Article 1. The Commission cited to the European Court's ***Soering*** case and to the Human Rights Committee's case, *Ng v. Canada*, as authority for the proposition that a State may be held in violation of a human rights obligation by subjecting an individual to risk in another jurisdiction:

> The Commission has also noted the international case law which provides that if a State party extradites a person within its jurisdiction in circumstances, and if, as a result, there is a real risk that his or her rights under the covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant (para. 167).

The US rejected the Commission's interpretation of the non-refoulement provision of the 1967 Refugee Protocol, stating that "there is no basis in law to hold the US liable for acts and omissions of another government with respect to that government's own citizens (para. 182)." It also rejected the Commissions recommendation that it provide adequate compensation to the victims for the breaches.

### 2) EFFECTIVE CONTROL: US military intervention in another OAS member State

The earliest cases that raised issues of the extraterritorial application of the American Declaration to OAS member States, involved the US military intervention in Grenada in 1983 and then the US military intervention in Panama in 1989. Two petitions were filed regarding the military intervention in Grenada. One was filed by Disabled Peoples' International on November 5, 1983, alleging that the US military had bombed an insane asylum, killing sixteen persons and injuring six others. That case was concluded by means of a friendly settlement and published as Report No. 3/96, (Disabled People International), United States, March 1, 1996. The other case, *Coard et al*,. arose out of the military intervention in Grenada, and involved seventeen Grenadian claimants who had been involved in the overthrow of the Government.

#### (a) US military intervention in Grenada --Report No. 109/99, Case No. 10.951, United States, September 29, 1999

The US military action in Grenada occurred in October 1983. On October 19, 1983, rival members of Bishop's party, called the New Jewel Movement, murdered the Prime Minister of Grenada, Maurice Bishop, and some members of his Government. Following the violent overthrow of the Bishop Government, the rival faction established the Revolutionary Military Council. On October 25, 1983, the United States and Caribbean Armed Forces invaded Grenada and deposed the Revolutionary government. During the first days of the military operation, a number of individuals, including Bernard Coard, head of the Revolutionary Council, were arrested and detained by US Forces. The 17 Grenadian claimants filed a petition before the Commission on July 25, 1991 claiming that US forces had detained them for periods of 9 to 12 in the first days of the military operation, that they had been held incommunicado and mistreated before being turned over to the Grenadian authorities. They contended that the US corrupted the

Grenadian judicial system by influencing the selection of judicial personnel prior to their trial, financing the judiciary during their trial, and turning over testimonial and documentary evidence to Grenadian authorities, thereby depriving them of their right to a fair trial by an independent and impartial tribunal previously established by law.(para. 1).

The US contested the admissibility of the case, asserting that the Commission lacked the competence to examine the legal validity of its military actions in Grenada as this fell beyond the scope of its mandate, particularly with regard to a non-State party to the American Convention (para.5). On February 4, 1994, the Commission dismissed the objections raised by the US and adopted its admissibility report on the case (unpublished), and reiterated that the American Declaration "is a source of international obligation for member States not party to the American Convention," and that its Statute authorizes it to examine complaints under the Declaration (para.9).

On September 21, 1995, the Commission adopted Report 13/95 on the merits of the case. In that Report, the Commission declared that US had failed to uphold the standards set forth in the American Declaration as regards Bernard Coard and the sixteen other petitioners. The Commission communicated the Report to the State, on a confidential basis, pursuant to its normal procedure, and on December 27, 1995, the State requested reconsideration of the Commission's Report. The US based its request for reconsideration on two issues that required additional clarification. The first involved the legal status of the petitioners. The US had argued that the petitioners' detention and treatment were justified under the Third Geneva Convention relative to Prisoners of War. At the same time, it contended that the petitioners could also be considered civilian detainees, whose detention and treatment were fully in accord with the standards established in the Fourth Geneva Convention. It had also argued that the petitioners were accorded protections equivalent to those given to POWs "even though they were not themselves POWs"(para. 30). Since the classification of the prisoners as civilians and POWs are mutually exclusive, the Commission requested a clarification. The US responded that the petitioners "were civilian detainees, held briefly for reasons of military necessity, and were treated *de facto* pursuant to the highest legally available standard of protection (para. 32). Having received the request for reconsideration and having attempted to clarify the inconsistencies in the State's response, the Commission adopted its final report on the case on May 7, 1999, 16 years after the events.

Presaging the issues that would arise in the 2002 request for precautionary measures on behalf of the Guantanamo detainees, the Commission noted that what is in dispute "is the legal characterization of the treatment accorded to the petitioners once arrested and detained. The petitioners alleged that their arrest and detention violated, *inter alia*, Articles I, XVIII and XXV of the American Declaration. The State maintained that the matter was wholly and exclusively governed by the law of international armed conflict, which the Commission has no mandate to apply, and that the conduct in question was, in any case, fully justified as a matter of law and fact"(para. 35).

The Commission reiterated the bases of its competence, which it stated, "derives from the OAS Charter, its Statute and Regulations. Pursuant to the Charter, all member states undertake to uphold the fundamental rights of the individual, which, in the case of non-parties to the Convention, are those set forth in the American Declaration, which constitutes a source of international obligation"(para. 36).

The US did not challenge the extraterritorial application of the American Declaration, however, the Commission chose to address this issue all the same:

> While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination –"without distinction as to race, nationality, creed or sex." Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. ***While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter's agents abroad***. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to *its authority and control*. (emphasis added)

The Inter-American Commission on Human Rights, in its decision on the merits, held that the petitioners had been subjected to the *extraterritorial authority and control* of the US authorities and held the US in violation of Articles I, XVII and XXV of the American Declaration. The Commission concluded that the petitioners were civilians detained for security reasons and held in the custody of US forces for approximately 9 to 12 days, including 6-9 days after the termination of the fighting. This 9-12 day period was considered violative of the American Declaration and the Fourth Geneva Convention in that the petitioners were not afforded access to a review procedure regarding the legality of their detention "with the least possible delay" (para 60). The United States expressed its "vigorous exception" to the Commission's conclusions that (a) the petitioners had been subjected to "excessive detention"; (b) that it had violated any provision of the American Declaration; (c) "the American Declaration constitutes a source of international legal obligation upon the United States"; and (d) that aspects of the law of armed conflict, including the Geneva Conventions, are within the scope of the Commission's jurisdiction. The US noted further that it was the commission of acts of murder, a gross human rights violation for which the petitioners were later convicted, "in combination with the collapse of governmental institutions in Grenada, which precipitated the joint intervention … [and] ultimately led to the[ir] brief but lawful detention" (para. 66). The United States also indicated that it would not comply with the Commission's recommendation to "repair" the consequences of the violations.

**(b) Cuban military intervention in international airspace --Report No. 86/99, Case No. 11.589, Cuba, September 29, 1999**

On February 25, 1996, the Commission received a petition against Cuba on behalf of Armando Alejandre Jr. and three others, for violating the right to life and the right to a fair trial under the American Declaration. The facts alleged that a Cuban MIG-29 military aircraft shot down two unarmed civilian light airplanes belonging to the "Brothers to the Rescue" organization resulting in the death of the four persons on board. Two of the four were US born, one was a naturalized US citizen and the fourth was a Cuban who had fled Cuba in 1992.

In declaring the case admissible, the Commission noted that:

> In terms of its competence *ratione loci*, clearly the Commission is competent with respect to human rights violations that occur within the territory of OAS member states, whether or not they are parties to the Convention. It should be specified, however, that under certain circumstances the Commission is competent to consider reports alleging that agents of an OAS member state have violated human rights protected in the inter-American system, even when the events take place outside the territory of that state. In fact, the Commission would point out that, in certain cases, the exercise of its jurisdiction over extraterritorial events is not only consistent with but required by the

> applicable rules. The essential rights of the individual are proclaimed in the Americas on the basis of equality and nondiscrimination, "without distinction as to race, nationality, creed, or sex." Because individual rights are inherent to the human being, all the American States are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control (para.23).

The Commission cited as authority the European Commission's decision in the *Cyprus v Turkey* case, cited six months earlier in *Saldaño* (*supra*), for the proposition that its jurisdiction could be exercised over acts under the authority and control of the State, even when committed outside the State's territory. The Commission then revealed its conclusion, while still formally considering the admissibility of the petition:

> In the case *sub lite*, the petitioners stated that their allegations were guided by the provisions of the American Declaration of the Rights and Duties of Man. The Commission has examined the evidence and finds that the victims died as a consequence of direct actions taken by agents of the Cuban State in international airspace. The fact that the events took place outside Cuban jurisdiction does not limit the Commission's competence *ratione loci*, because, as previously stated, when agents of a state, whether military or civilian, exercise power and authority over persons outside the national territory, the state's obligation to respect human rights continues –in this case the rights enshrined in the American Declaration. The Commission finds conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the "Brothers to the Rescue" organization under their authority. Consequently, the Commission is competent *ratione loci* to apply the American Convention extraterritorially to the Cuban State in connection with the events that took place in international airspace on February 24, 1996 (para. 25).

**c) The indefinite detention of aliens by the US in camps outside the US, in Guantanamo Bay, Cuba** (Report No. 51/01, Case No. 9903, Rafael Ferrer-Mazorra et al., United States, April 4, 2001; Precautionary Measures for the Guantanamo detainees, March 12, 2002).

This last group of cases in which the Commission has exercised extraterritorial jurisdiction falls under the "effective control" category but is distinguished from the two cases discussed above insofar as the violations involve the indefinite detention outside the territory of the respondent State, but within the territory of another OAS member State. In these two cases, the respondent State is responsible for removing the alleged victim from the United States or countries outside the inter-American system, to an area under the authority and control of the United States, but where fewer, or no rights, are available. The first case involves the "Marielito" Cubans who were transferred to Guantanamo Bay in Cuba, and were indefinitely detained there, and the second, involves a petition filed on behalf of some 300 persons who had been transferred to Guantanamo Bay from Afghanistan and other parts, and are currently being held there as "unlawful combatants," as a consequence of President Bush's "war on terrorism."

**(i) US detention of "Marielito" Cubans (Report No. 51/01, Case No. 9903, Rafael Ferrer-Mazorra et al., United States, April 4, 2001)**

This petition was filed in April 1987, at a time when approximately 3,000 Cubans were said to have been detained in the United States due to their irregular entry into the US. The petition charged a number of violations of the American Declaration as a result of the derivation of the petitioners' liberty. The situation developed after an incident in April 1980 when a group of Cubans sought refuge in the Peruvian Embassy in Havana, Cuba. Cuban President Fidel Castro allowed the emigration to the US of some of the members of this group and then

announced on April 20, 1980 that any Cubans wishing to leave the country could depart through the port of Mariel. The US President, Jimmy Carter, stated that the Cubans would be welcomed in the United States "with open hearts and open arms." The result was an influx of approximately 125,000 Cubans who fled to the US in 1980.

For a number of reasons, approximately 300 Mariel Cubans had been placed in continuous detention since their arrival in the United States. The US responded to the petition stating that the Cuban government had intermingled common criminals and persons with serious mental health problems with those who were leaving Cuba. Of the approximately 125,000 Mariel Cubans over 23,000 admitted to having a prior criminal record in Cuba. When the initial screening process ended in August 1981, approximately 1, 800 remained in detention because of suspected or admitted criminal background that would make them ineligible for admission to the US and possibly a danger to the community. The petitioners alleged that these Cubans faced indefinite detention without adequate evaluation in each individual case of the necessity for their continued imprisonment. This class of detainees included persons who had criminal records in Cuba or for reasons of their mental health or who were initially released on parole but were subsequently detained for both serious and minor violations.

The US argued once again that the Commission was not competent to examine the issue of the detention of these individuals since it was sovereign as regards the entry and removal of aliens to and from its territory (para. 172). The respondent State contended that: " the petitioners, and aliens generally, who are "excludable" under US law, have no substantive rights under international law to be at liberty in US territory pending their deportation and correspondingly cannot be said to have a right to be free from detention, nor can they be said to have any procedural rights respecting their detention, under the American Declaration or otherwise (para. 176)."

In examining whether it had competence *ratione materiae*, the Commission accepted that "states have historically been afforded considerable discretion under international law to control the entry of aliens into their territory. This does not mean , however, that this discretion need not be exercised in conformity with states' international human rights obligations (para. 177)."

The Commission stated that the American Declaration, as a modern human rights instrument, must be interpreted and applied in such a way "as to protect the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other States for which the instrument constitutes a source of international obligation. This basic precept in turn is based upon the fundamental premise that human rights protections are derived from the attributes of a person's personality and by virtue of the fact that he or she is a human being, and not because he or she is the citizen of a particular State (para. 178)." The Commission stated that:

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

> territory notwithstanding that the individual may in fact be present in the territory of or otherwise under the authority and control of that state (para. 179).
>
> The Commission considers, however, that the language of the Declaration as well as prevailing international human rights principles, compel the opposite conclusion: that OAS Member States are obliged to guarantee the rights under the Declaration to all individuals falling within their authority and control, with the onus falling upon the State to prove the existence of a provision or permissible reservation explicitly limiting or excluding the application of some or all of the provisions of the instrument to a particular class of individuals, such as excludable aliens. No such provision or reservation has been identified or proved by the State in the present case (para. 180).

The Commission in effect, decided the merits of the petition in reviewing the admissibility. It held that the US is obliged to afford the petitioners the rights provided under the American Declaration, including those rights regulating when and under what conditions the State may deprive persons of their liberty. The Commission concluded that the State "became the guarantor of those rights when the petitioners came within the State's authority and control in 1980" (para. 183).

#### (ii) Precautionary Measures for the Guantanamo detainees, March 12, 2002

On February 25, 2002, the Commission received a request for precautionary measures, pursuant to article 25 of the Commission's Rules of Procedure, on behalf of approximately 300 individuals captured by the US authorities in Afghanistan and other places, who are now being detained by the US at its naval base at Guantanamo Bay, Cuba. These individuals, who have not been individually identified, are known collectively as the "Guantanamo detainees." The petitioners requested precautionary measures "to protect the detainees' rights to be treated as prisoners-of-war, to be free from arbitrary, incommunicado and prolonged detention, unlawful interrogations and trials by military commissions in which they could be sentenced to death. The alleged violations of several articles of the American Declaration, which they alleged impose binding international obligations on the United States.

.

### (b) US military intervention in Panama --Report No. 31/93, Case No. 10.573, United States, October 14, 1993

The Commission was again faced with a complaint that derived from another US military operation, this time in Panama. On December 19, 1989, the US landed approximately 24,000 troops in Panama in order to remove the regime of General Manuel Noriega from power. On December 20, 1989, the coalition Government of Guillermo Endara, believed to have won the May 1989 elections, was sworn in and announced the formation of a new Government. General Noriega surrendered to the US authorities on January 4, 1990 and was taken to the US for trial on drug trafficking and money-laundering charges.

On May 10, 1990, the petitioners submitted sixty petitions on behalf of named victims and on behalf of all other Panamanians who had been harmed by the invasion. The victims were civilians who suffered the death of family members, personal injury and destruction to their homes and property as a result of the military action. Subsequently, these petitions were supplemented by further petitions and in total, some 2,884 petitioners claimed US$ 372,706,376 in compensation from the US.

Petitioners claimed that the US military forces had acted in "an indiscriminate manner with reckless disregard for the safety of Panamanian civilians during the US military operations in Panama" in gross violation of articles I, VII, IX, XIV, XXIII, XXVIII of the American Declaration and they should be compensated for their losses (para.9).

The US denied that it engaged in the human rights violations alleged and asserted that President-elect Endara had welcomed the intervention when advised of it before the additional deployment of US troops landed in Panama (para. 19). It reiterated its position in the earlier case involving the invasion of Grenada, stating that the petition "seeks to draw the Commission into areas that exceed the scope of its competence as it has been spelled out in Article 111 of the OAS Charter and Articles 1, 18 and 20 of the Commission's Statute" (para. 20). Petitioners also alleged violations of international law including provision of the UN and OAS Charters and of the Geneva Conventions and Additional Protocol I.

The US stated that the petitioners were asking the Commission to determine "two issues clearly beyond its mandate and purpose: (i) whether the United States was justified under the OAS and UN Charters in using military force in Panama for the purposes stated, and (ii) whether, in undertaking those actions, the United States properly complied with international legal instruments and customary international law governing the treatment of non-combatants during times of armed conflict" (para. 22).

As in the earlier case, the Commission did not contest the exercise of extraterritorial jurisdiction, but rather the lack of competence of the Commission to deal with issues involving the use of armed force and the lack of consent to the Commission applying international humanitarian law:

> The US Government considers that the petitioners' claims "are wholly dependent upon proof of alleged violations of the Fourth Geneva Convention of 1949 and other international instruments governing the use of force and the law of armed conflict." The OAS member States did not expressly or implicitly consent to the competence of the Commission through its Statute to adjudicate matters concerning that complex and discrete body of law. In the view of the respondent Government those legal authorities are "extraneous to and fall outside the scope of the Commission's jurisdiction to interpret or apply"(para. 24)
>
> The respondent Government maintains that the Commission is not an appropriate organ to apply the provisions of the Fourth Geneva Convention to the United States since the US has not given "express authority" to the Commission to do so. The Fourth Geneva Convention "provides a wholly separate series of internal procedures and remedies for its enforcement, including the use of protecting powers, the activities of the International Red Cross and its national counterparts, and the conducting of inquiries. There is no basis in the Commission's mandate to preempt, disregard to attempt to enforce these procedures and remedies"(para. 25)
>
> Further, the American Declaration was adopted in 1948 , predating the existence of the Fourth Geneva Convention signed in 1949. Thus it cannot be asserted that the Declaration was adopted with the intention to encompass the principles of the Fourth Geneva Convention" (para. 26)

The petitioners responded to these defenses by arguing that "the Commission must protect human rights in all situations, including armed conflict. [T] he most fundamental of all rights, the right to life, represents a norm of *jus cogens*" (para. 53), that "the Commission's mandate contains no provision restricting its jurisdiction to peacetime" (para. 54), that "common article 3 of the Geneva Conventions applies to this case (…) it provides the minimum standard of protection to be observed in all types of armed conflict. Common Article 2 provides that the Conventions apply to all armed conflicts" (para. 56), and " [A]lthough the United States has not

ratified the Additional Protocols, the provisions of Protocol I applicable to this case are recognized as customary law" (para. 57).

The Commission could have found in favor of a margin of appreciation as regards the US position that the subject matter of this case, the use of armed force by the US military, and a claim for compensation involving hundreds of millions of dollars, was simply too political or delicate a matter to be addressed. The US is, in fact, the major contributor to the OAS budget, and alienating the largest donor is a consideration that is usefully borne in mind.

The Commission did not retreat, however, and in a sweeping assertion of its jurisdiction over the case, again pushing the envelope of its jurisdiction, declared:

> Where it is asserted that a use of military force has resulted in noncombatant deaths, personal injury, and property loss, the human rights of the noncombatants are implicated. In the context of the present case, the guarantees set forth in the American Declaration are implicated. This case set forth allegations cognizable within the framework of the Declaration. Thus the Commission is authorized to consider the subject matter of the case[27]

The case was declared admissible in 1993 but is still pending a decision on the merits.

[27] Report No. 31/93, Case No. 10.573, United States, October 14, 1993, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993 at 329.