INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

REPORT Nº 51/01
CASE 9903
RAFAEL FERRER-MAZORRA *ET AL.*
UNITED STATES **(*)**
April 4, 2001

I. SUMMARY

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

2. The petition was filed on behalf of nationals of the Republic of Cuba who were part of the Mariel "Freedom Flotilla" to the United States in 1980 (hereinafter the "Mariel Cubans"). At the time of the filing of the petition in April 1987, approximately 3,000 Cubans were said to have been detained in the United States due to their irregular entry into the country. In their original petition, the petitioners' representatives purported to lodge the petition on behalf of approximately 335 of these Cubans, named as Rafael Ferrer-Mazorra and others, who were at that time detained at 10 federal, state or local detention centers across the United States (hereinafter the "petitioners").[1] In their initial petition and subsequent observations, the petitioners alleged violations of Articles I, II, XVII, XVIII, XXV and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter the "American Declaration" or the "Declaration"), in connection with the length of time for which the petitioners had been detained in the United States, as well as the alleged absence of proper mechanisms to review the legality of the petitioners' detentions.

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

II. PROCEEDINGS BEFORE THE COMMISSION

A. Written Observations

4. By note dated April 15, 1987, the Commission transmitted the pertinent parts of the petitioners' petition to the State, and requested that the State deliver

information that it considered pertinent to the complaint within 90 days as prescribed by the Commission's Regulations. By communication dated July 21, 1987, the Commission subsequently granted the State an extension of time until October 12, 1987 within which to respond to the petitioners' petition.

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

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

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

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

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

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

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

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

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

14. By communication dated January 10, 1989, the petitioners delivered additional observations to the Commission in this case, and the Commission, by note dated February 6, 1989, transmitted the pertinent parts of the petitioners' observations to the

State, with a response requested within 60 days.

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

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

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

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

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

a) a Report by the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Court, Liberties and the Administration of Justice, on the Atlanta Federal Penitentiary, 99th Congress, 2nd Session (April 1986);

b) a copy of a 29 May 1986 communication under ECOSOC Resolutions 728F (XXVIII) and 1503 (XLVIII) relating to the Mariel Cubans;

c) copies of various legal decisions by U.S. courts, disposing of petitions for writs of habeas corpus brought by or on behalf of Mariel Cubans in relation to their detentions. These decisions included in particular: *Garcia-Mir v. Smith* 766 F.2d 1478 (11th Cir., 1985), cert. Denied 106 S. Ct. 1213 (1986); *In re Mariel Cuban Habeas Corpus petitions*, 822 F. Supp. 192 (7 May 1993) (U.S. Dist. Ct. - Penn); and *Barerra-Echavarria v. Rison*, 44 F.3d (9th Cir. En banc, 1985);

d) Report of the Minnesota Lawyers International Human Rights Committee on "The Freedom Flotilla Six Years Later: From Mariel to Minnesota", dated November 1986;

e) an analysis of the Cuban Review Plan prepared by the Coalition to Support Cuban Detainees, dated 29 June 1987;

f) Report of the Minnesota Lawyers International Human Rights Committee on the First Year of Operation of the Oakdale Detention Center, dated July 1987;

g) I.N.S. Ruling 59 FR 13868-01 of 24 March 1994 regarding Mariel Cuban Parole Determinations, clarifying and expanding the discretionary authority of the I.N.S. under the Cuban Review Plan to withdraw parole approval for excludable Mariel Cubans.

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

a) U.S. Code of Federal Regulations, Title 8 (8 C.F.R.), sections 212.12, 212.13;

b) Attorney General's Status Review Plan and Procedures, dated 28 April 1983;

c) Cuban Review Plan, adopted May 1987;

d) I.N.S. Ruling 52 FR 48799 dated 28 December 1987, establishing a separate immigration parole review process for Mariel Cubans

e) Copy of a 6 June 1988 memorandum attaching "Special Instructions Regarding Information Availability to Representatives of Mariel Cubans in the Parole and Repatriation Programs";

f) State's "Information Availability Policy", provided with the State's Second Supplementary Submissions of July 2, 1988;

g) Sample "Letter of Intent to Deny Parole" to Mariel Cuban, in English and in Spanish;

h) Sample I.N.S. Parole Denial in English and in Spanish issued in respect of a 13 November 1987 panel review hearing, providing a summary of facts and reasons for denial;

i) lists of Mariel Cuban detainees held at certain federal facilities that were visited by the Commission during its on-site visits, described in Part II.C of this Report;

j) A Report to the U.S. Attorney General on the Disturbances at the Federal Detention Center, Oakdale, Louisiana and the U.S. Penitentiary, Atlanta, Georgia, U.S. Department of Justice, Federal Bureau of Prisons (1 February 1988);

k) U.S. Department of Justice, Federal Bureau of Prisons, Report on the Federal Detention of Mariel Cubans, dated January 1995.

B. Hearings before the Commission

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

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

Commission subsequently held a hearing in the case on March 22, 1988.

23. By letter dated November 25, 1998, the petitioners requested a further hearing before the Commission in the matter. By letters dated February 2, 1999 to the petitioners and to the State, the Commission informed the parties that a further hearing on the admissibility and merits of the matter had been scheduled for March 5, 1999, during the Commission's 102nd Period of Sessions.

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

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

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

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

C. On-Site Visits

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

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

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

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

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

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

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

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

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

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

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

39. In the course of its on-site visits, the Commission observed in particular that Mariel Cubans are, as a consequence of their status as administrative detainees, at a significant disadvantage in several respects compared to detainees who are serving criminal

sentences. As administrative detainees, the Mariel Cubans are not, for example, entitled to the benefits of programs of reform and rehabilitation, such as continuing education and work experience, that characterize the criminal incarceration process. As a consequence, many Mariel Cubans expressed frustration with having few constructive endeavors to fill their time, which was amplified by the uncertainty over the length of their periods of detention.

40. Also in connection with the conditions of detention of the Mariel Cubans in the United States, information provided by the parties, as well as reports in the public media, indicate that several major disturbances have occurred at various institutions in which Mariel Cubans have been incarcerated since their arrival in the United States. In particular, between November 21 and December 4, 1987, two major disturbances occurred at the Oakdale, Louisiana and Atlanta, Georgia facilities of the Federal Bureau of Prisons. In these disturbances, rioting inmates, largely Mariel Cubans, took substantial control of the facilities, held hostages, and destroyed property. Other disturbances included an incident in May 1986 in which 125 Mariel Cubans rioted at the Krome Detention center in Florida, which is said to have been the fourth major disturbance in one year at that facility, and an incident in August 1991 at FCI Talladega, in which hostages were held for 10 days.[2] In addition to these disturbances, there have been several "hunger strikes" convened by Mariel Cubans at various facilities, including a hunger strike in December 1999 and January 2000 by Mariel Cubans held at the detention facility at New Roads, Louisiana.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

1. Admissibility

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

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

43. The petitioners have also contended that they have exhausted all domestic remedies in relation to their complaints before the Commission. The petitioners claim in this regard that they have pursued challenges to their detentions in the U.S. District Court, the U.S. Court of Appeals,[3] and, finally, a petition to the U.S. Supreme Court for a writ of certiorari, which was ultimately denied by that Court in an order dated October 14, 1986.[4]

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

45. Finally, with respect to duplicity, the petitioners claim in their original petition that the matters raised therein were not at that time barred from consideration by the Commission under Article 39 of the Commission's Regulations as pending before another international forum for settlement. The petitioners recognized in this respect that a communication had been filed under U.N. ECOSOC Resolution 1502 in May 1986 in relation to

the detention of the Mariel Cubans. They contended, however, that this did not preclude consideration of the petitioners' claim by the Commission, for three reasons: the U.N. procedure did not examine the specific facts of the petition submitted to the Commission; the U.N. procedure would not lead to an effective settlement of the violations denounced; and the U.N. communication was filed by human rights and religious organizations other than the petitioners' representatives and on behalf of a broader population of the Mariel Cubans than the petition before the Commission.

2. Merits

a. Original Petition

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

47. The petitioners further claim that prior to the arrival of the Mariel Cubans, aliens seeking admission into the United States had been liberally granted parole.[5] Mariel Cubans, on the other hand, were detained upon their arrival in the U.S., and the sheer number of Mariel Cubans led to procedural difficulties with the U.S. Immigration and Naturalization Service (hereinafter the "INS"), the federal authority principally responsible for immigration and naturalization matters. Subsequently, some of the Mariel Cubans were released from detention on parole, although they were still considered to be excludable aliens subject to INS proceedings as to whether they should be granted asylum or otherwise permanently admitted into the United States.

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

49. In addition, the petitioners claim that many Mariel Cubans who were initially released on parole were returned to detention, in most cases for parole violations, such as contravening the rules at halfway houses, as well as for offenses such as driving under the influence of alcohol. The petitioners also indicate that some Mariel Cubans were detained simply for having been charged with a crime, even though they had not been convicted. Moreover, the petitioners allege that parole was revoked for some Mariel Cubans because they pleaded guilty to lesser drug offenses based on assurances given by lawyers, often public defenders, that this would result in probationary sentences, but apparently without realizing that a guilty plea could lead to further detention by the INS.

50. As a consequence of this continued or renewed detention of the Mariel Cubans, the petitioners claim that the Mariel Cubans face indefinite detention in the United States, without adequate evaluation in each individual case of the necessity for their continued imprisonment. This class of detainees includes those Mariel Cubans who were

never released based upon their known or suspected criminal records in Cuba or their mental health, or who were initially released on parole but were subsequently detained for both serious and minor parole violations.

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

52. The petitioners also claim that no procedures for review of individual cases had been put into place since 1985 by the legislative or executive branches or granted by the Courts in the United States, as a consequence of which the State had failed to review in any meaningful way the status of the Mariel Cubans. According to the petitioners, the State's policy provided that Cuban detainees could be released only to halfway houses preliminary to their full parole in to the community, despite the fact that sufficient positions were not available in halfway houses.[6] Consequently, the petitioners claim that at best the State conducted only sporadic and inconsistent reviews of individual cases of incarcerated Mariel Cubans, and any criteria applied by the INS in releasing some detainees and not others were not clear.

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

54. In addition, the petitioners claim that the U.S. courts have considered Cuban detainees, as excludable aliens, to have never entered U.S. territory and therefore that they do not enjoy the same due process guarantees available to others in the U.S. According to the petitioners, the Courts have also held that international law has been displaced by controlling acts of the executive and judicial branches and therefore may not be relied upon by the Mariel Cubans in challenging their detentions.

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

56. In respect of detention conditions, the petitioners claim that the tensions in federal facilities were high, due to the "futile" situation in which Mariel Cubans considered themselves as well as overcrowding and outdated facilities in the federal penitentiaries. Such

conditions led to a riot in the U.S. penitentiary in Atlanta in 1984, and according to a 1986 Congressional Report on the incident, the living conditions of Mariel Cubans at the Atlanta penitentiary were "intolerable considering even the most minimal correctional standards".

57. Based upon their description of the Mariel Cubans' detention, the petitioners claim that the State is responsible for violations of Articles I, XVII, XXV and XXVI of the American Declaration. In particular, the petitioners argue that these articles, and international law more generally, recognizes the right of an individual not be deprived of his or her liberty without due process to determine the reasonableness of the deprivation.[7]

58. The petitioners also rely upon past reports of the Inter-American Commission, in which the Commission has criticized deprivations of liberty for prolonged or indefinite periods of time without due process or formal charges, including detentions that are carried out under executive authority and are not subject to judicial review.[8]

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

60. The petitioners also contend that the State cannot rely upon the uncertain immigration status of detainees to justify their continue detention. To the contrary, they argue that international authorities which speak to the detention of aliens seeking to enter the territory of a state make such detention provisional and temporary in nature, and in support of this proposition cite, *inter alia*, Article 5(1)(g) of the European Convention on Human Rights.[9] In the present case, the petitioners argue that a seven-year detention with no foreseeable termination is no longer proportionate to the limited government interests that justify it and constitutes a failure to respect the rights to liberty of the detainees. They also claim that such detention cannot be justified under international law pursuant to the authority of states to control illegal immigration, but rather that hearings are necessary to resolve each detainee's case.

61. In this regard, the petitioners note that Article XVII of the Declaration guarantees every individual the right to be recognized everywhere as a person having rights and obligations and to enjoy basic civil rights, and that the preamble to the Declaration provides that the essential rights of man are derived from the attributes of his personality and not the fact that he is a national of a certain state. Accordingly, given that all of the Mariel Cubans are in fact in the United States, the petitioners argue that "irrespective of the failure of domestic United States law to afford the Cuban detainees fundamental protections and irrespective of the uncertain immigration status of the Cuban detainees, the United States Government is obligated by the American Declaration to afford the Cuban detainees their rights to due process."

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

63. The petitioners therefore request that the Commission find violations of

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

b. petitioners' Subsequent Observations

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

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

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

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

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

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

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

71. In particular, according to the petitioners, the U.S. courts have held that detainees are not entitled to habeas relief from administrative detention based upon violation

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

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

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

74. Further, the petitioners argue that their petition is not premature in light of the fact that their cases may be reviewed under the Cuban Review Plan, because the procedures under that Plan fall below the minimum requirements of due process under the Declaration and under international law. Consequently, they claim that there is a ripe issue as to whether the Mariel Cubans' rights to due process have been violated.

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

76. On the merits of their claim, the petitioners reiterate their position that the indefinite detention of the Mariel Cubans violates the Declaration. In this regard, the petitioners claim that they accept that the U.S. is a sovereign nation possessing the right to protect its borders and determine those people who may enter its territory, and also accept that they and other Mariel Cubans are classified as "excludable aliens". They argue, however, that the detention of the Mariel Cubans constitutes a violation of the Declaration, for two principal reasons. First, they claim that the Cubans have been subjected to administrative detention, which in turn cannot be more than a very short time and certainly not indefinite.[10] They therefore complain that they have been the subject of indefinite detention under poor conditions in violation of the Declaration.

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

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

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

80. Finally, the petitioners argue that the detention of the Mariel Cubans is indefinite and that the U.S. courts have recognized this reality.[11] Correspondingly, the petitioners contend that the rights under the American Declaration "do not allow indefinite detention regardless of the alien status of an individual", and that the United States may not "shift the blame" to the failure of the Republic of Cuba to accept the Mariel Cubans into their territory. In this regard, the petitioners note that the U.S., and not Cuba, caused the Mariel Cubans to be detained in prisons over the past 18 years.

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

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

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

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

85. Finally, the petitioners emphasize that the standards under the Declaration should be considered to apply to all persons equally, and should not be considered to create a double standard, one for persons who have never committed a crime and one for persons who have been accused of crimes. Nor, say the petitioners, should basic human rights standards be considered different for those who are considered excludable aliens rather than citizens, and therefore administrative detention should not be considered permissible merely for these categories of persons.

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

B. Position of the State

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

1. Background to the Mariel Cuban Situation

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

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

90. The State claims, however, that the orderly transport of these individuals by air was halted almost immediately by the Cuban government, which, on April 20, 1980, announced that all Cubans wishing to go to the United States were free to board boats at the port of Mariel. Consequently, individuals in Miami at once began to shuttle back and forth between Florida and Cuba to transport the Cubans waiting at Mariel to the United States. According to the State, the U.S. government called for the immediate cessation of this activity, and on April 23, 1980 the U.S. Coast Guard and Customs Service began issuing warnings in English and Spanish that participation in the growing flotilla was illegal and that the INS would act to stop those who were attempting to bring Cubans into the U.S. without valid visas. Similarly, between April 23 and 27, 1980 the U.S. Department of State, the U.S. Interest Section in Havana and the Vice-President of the U.S. reiterated publicly the illegality of bringing undocumented aliens into the U.S., urged a halt to the boat lift, and called for compliance with U.S. immigration law.

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

92. The State claims further that, in the midst of these events, it became known that the Cuban government had intermingled common criminals and persons with

serious mental health problems with those who were leaving Cuba. As a consequence, the White House announced that very careful screening of arrivals would be conducted, and that individuals with records of criminal activity who represented a threat to the country or whose presence would not be in the best interests of the United States would be subject to arrest, detention and deportation to their countries.

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

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

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

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

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

98. In its October 9, 1987 observations, the State also confirmed that some of those Mariel Cubans who were initially released began committing crimes in the United States, and some of their sponsorship arrangements broke down. Consequently, on November 12, 1980, the INS issued parole revocation guidelines, providing for revocation of parole in sponsorship breakdown cases "if the alien has no means of support, no fixed address and no sponsor" and, in criminal cases, if "an alien is convicted of a serious misdemeanor or felony." According to the State, these guidelines were twice revised, so that

in March 1983 parole of any Mariel Cuban would be revoked if he had been "convicted in the United States of a felony or a serious misdemeanor and … completed the imprisonment portion of [his] sentence" or if he "presents a clear and imminent danger to the community or himself."

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

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

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

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

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

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

105. At that time, independent of the migration agreement, the U.S. Attorney General decided that every Mariel Cuban destined for return under the agreement would have his or her case reviewed by a special Justice Department review panel before a final decision of return was made.

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

> 2. For almost two decades, the United States has been discussing with Cuban authorities the issue of return of excludable Cubans. In 1984, the United States and Cuba reached an agreement for the return of 2,746 criminal Cubans who had arrived in the United States during the Mariel outflow. Almost 1,400 of those Cubans named on the 1984 list have been returned to Cuba. At the time the 1984 agreement was reached, it was clear that the names did not constitute a definitive list and that additional excludables would be identified in the future
>
> 3. Over the past several years U.S. officials have met periodically with the Government of Cuba to discuss pending immigration matters, including the return of Cuban nationals who have been convicted of serious crimes and ordered excluded, deported or removed from the United States.
>
> 4. In an effort to normalize the migration relationship between the two countries, the United States and Cuba concluded further agreements on September 9, 1994 and May 2, 1995, respectively, to promote safe, legal and orderly migration and to deter dangerous boat voyages across the Florida Straits. In addition, the September 1994 agreement expressly stated that the United States and Cuba "agreed to continue to discuss the return of Cuban nationals excludable from the United States."
>
> 5. Delegations from the two countries have continued to meet periodically to discuss migration issues, including this subject. The latest round of talks took place on December 4, 1998 in Havana. The U.S. delegation is led by the Department of State and includes officials of the Immigration and Naturalization Service. I cannot go onto the substance of the sensitive diplomatic exchanges in a public forum. I can confirm that the return of Cuban

nationals excludable from the United States for conviction of serious crimes and orders excluded, deported or removed remains under discussion between the two governments.

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

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

a. *Immigration and Naturalization Act* and Related Jurisprudence

108. Under U.S. immigration and naturalization law, which is governed principally by the U.S. Immigration and Naturalization Act ("INA"), "excludable aliens" are those who fall into one of thirty-three specific classes of aliens "excluded from admission into the United States."[12] under section 212(a) of the U.S. *Immigration and Nationality Act* ("INA"), 8 U.S.C. §1182(a). These categories pertain to, *inter alia*, health-related grounds, criminal and related grounds, security and related grounds, and the absence of required documentation. Excludable aliens are normally required to depart immediately and are detained for immigration control purposes, at the border if possible, until they do.[13] Such aliens are entitled to have the legality of their detention reviewed upon writ of habeas corpus to the federal judiciary, but the INA does not limit the period that they may be detained.[14]

109. The Attorney General releases excludable aliens from immigration detention and permits their physical presence in the United States through the use of its "parole" authority.[15] The use of this authority is limited by statute, however, to cases where there are "emergent reasons" or where release is "strictly in the public interest".[16] In addition, the authority to parole is discretionary and gives an excludable alien no legal entitlement.[17]

110. The parole authority can be used not only to release an excludable alien from immigration detention pending his return to his country, but also to allow an excludable alien to remain in the United States indefinitely for compelling humanitarian reasons, such as to ensure family unity. Where the purposes of the grant of parole have been served, however, the grant of parole is revoked and the alien is returned to custody and treated like any other applicant for admission to the United States.[18] Grants of parole are also typically conditioned upon, for example, the alien's good behavior or the posting of bond, and are regularly terminated when the conditions are broken.[19]

111. As a legal matter, parolees are not considered to be "admitted" to the United States. Rather, "[c]onceptually, they stand always at the border, seeking admission, and their physical presence within the United States does not change their status as excludable aliens."[20] According to the State, this doctrine and its implications are important for the flexible and humanitarian administration of the immigration laws because, "by allowing the Attorney General to grant an alien's request for parole without giving up his authority to exclude the alien, it facilitates a more generous parole policy."[21]

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

INS or the federal Bureau of Prisons.[22]

113. With respect to the situation of the Mariel Cubans in particular, the State indicated in its January 19, 1988 observations that virtually all of the Cubans who arrived in the Mariel boatlift were excludable under section 212(a) of the INA for lack of proper documentation, and that some of the Mariel Cubans who were detained also had histories of criminal behavior or serious mental illnesses.[23]

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

115. Finally, the State notes that in general, parolees are unable to become permanent resident aliens or United States citizens. It also claims, however, that the vast majority of the 125,000 Mariel Cubans who arrived in 1980 are able to become permanent residents or citizens of the U.S. because of a special law passed in 1966, and which remains in effect, that permits Cuban nationals physically present in the United States for two years or more to adjust their status.[24] The State notes further that this law generally does not permit adjustment of status by those Cubans who are excludable because of serious mental health problems or because they have committee crimes. Thus, according to the State, many Mariel Cuban detainees who are paroled out of detention will in all probability remain in parole status for as long as they are permitted to remain in the United States, assuming that they do not again violate the conditions of their parole, and that as they will remain excludable, they will as a legal matter always remain subject to return to Cuba.[25]

b. Status Review Plan

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

117. Under the Status Review Plan, release was recommended only if the panel agreed that: 1. The detainee was presently a non-violent person; 2. The detainee was likely to remain non-violent; and 3. The detainee was unlikely to commit any criminal offense following his release.[26] The Status Review Plan also provided that "[d]isturbing doubts are … to be resolved against the detainee as he has the burden to convince review participants that he qualified for release…".[27] Further, actual parole of a detainee required both approval by the Commissioner of the INS or his representative,[28] and sponsorship to a halfway house.[29] Moreover, parole could be revoked if the alien violated parole conditions, such as possession of weapons or drugs, halfway house curfew violations or failures to participate in treatment programs, or if the Panel "discovers adverse information pertaining to the detainee which was not available to the Panel during its review process."[30]

c. Cuban Review Plan

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

Plan.

119. In December 28, 1987, the U.S. Department of Justice issued Regulations on Mariel Cuban Parole Determinations[31] that set out the framework of the Cuban Review Plan. According to the Plan, in case of a detainee whose parole has been revoked, the review process is ordinarily to begin within three months of revocation of his or her previous parole. For those detainees whose cases have previously been reviewed and who have remained in detention, a subsequent review is to commence within one year of a refusal to grant parole. In addition, the Director of the Cuban Review Plan may schedule a review of a detainee at any time he deems such a review to be warranted.[32]

120. With respect to the procedure followed under the Cuban Review Plan, the parole review begins with a review of the detainee's file by the Director or by a panel consisting of two ISN officers.[33] If the director or the INS panel recommends that the detainee be released on parole following the file review, a written recommendation, including a brief statement of the factors which were deemed material to the recommendation, is transmitted to the Associate Commissioner for Enforcement or his designee, who then decides whether to exercise his or her discretion to grant parole.[34] Prior to recommending release, the panel must conclude that: (i) the detainee is presently a non-violent person; (ii) the detainee is likely to remain nonviolent; (iii) the detainee is not likely to pose a threat to the community following his release; and (iv) the detainee is not likely to violate the conditions of his parole.[35]

121. In reaching their conclusions, panels are directed to weigh such factors relating to the detainee as disciplinary infractions committed while in detention, past history of criminal behavior, psychiatric and psychological reports, participation in work, educational and vocational programs while in detention, ties to the United States, the likelihood the detainee will abscond, and "any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole."[36]

122. If the Director or the Panel recommends against parole based upon the record review, the detainee is, at the discretion of the Director, scheduled for a personal interview before the panel.[37] During the interview, the detainee may be accompanied by a person of his or her choice who is able to attend at the time of the scheduled interview, to assist in answering any questions.[38] Thirty days in advance of the scheduled interview, the detainee is given notice specifying the date and time for the interview and explaining the interview process. The notice also asks the detainee to specify whether he or she wishes to have a representative assist at the hearing. In the case of detainees who indicate that they do wish such representation but do not specify a name, the Director provides them with a list of attorneys willing to assist the detainees *pro bono*, at least two weeks in advance of the interview.

123. The INS "instructions" on the Cuban Review Plan, which were provided by the State with its July 2, 1988 observations, provide that a detainee's file should be made available to him and his personal representative in a timely fashion, no later than five days prior to the interview. All of the information in the file may be inspected, subject to some exceptions, including information, which would reveal the name or identity of informants, which pertains to an ongoing law enforcement investigation, or which the investigative agency has requested not be released. An interpreter must be present for each interview.[39]

124. During the interview, the INS panel asks the detainee questions about his criminal record, his prison record, his ties to the United States, and other factors relevant to deciding whether to recommend the detainee for parole according to the standards under the Cuban Review Plan. A recommendation for or against release is then made to the Associate

Commissioner for Enforcement or his designee, who decides whether to grant parole in the exercise of discretion. Those detainees who are denied release are first given a notice of intent to deny, and then a longer and more specific statement of the reasons for the denial.[40]

125. Detainees who receive denials and who were in INS detention as of December 28, 1987 are automatically given a one-time review of the denial by a Departmental Panel established by the U.S. Associate Attorney General, which is comprised of three persons within the Department of Justice, one of whom is an attorney, and one of whom is from the Community Relations Service.[41] INS employees are not to be represented on the Departmental Panels, and these Panels have the power to grant parole in their discretion. In the case of such reviews, the detainee is given a notice that he is about to receive further review by the Departmental Panel and has 30 days to submit a written statement setting forth any factors he believes relevant to the parole consideration.[42] The Departmental Panels may decide on the paper record, or may schedule an interview with the detainee.

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* Commission Member Professor Robert Goldman did not take part in the discussion and voting on this cas pursuant to Article 19(2) of the Commission's Regulations.

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

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

[3] In this respect, the petitioners cite the U.S. Court of Appeals for the Eleventh Circuit as finally disposing of the petitioners' claims in 1986 as follows:

> As both the government and the appellees concede, with today's decision we have reached the point in this longstanding controversy where we have rejected all legal theories, constitutional and otherwise, advanced by the appellees. They have exhausted all claims for relief available in the federal court system at all levels save that of the Supreme Court. Accordingly, it is our judgment that, unless the appellees elect to seek, and the United States Supreme Court elects to grant, a petition for a writ of certiorari, these cases have reached the terminal point and shall be dismissed.

petitioners' 10 April 1987 petition, pp. 6-7, *citing Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Circuit 1986).

[4] *Id*., p. 7, citing *Ferrer-Mazorra v. Meese*, 107 Sup. Ct. 289 (1986).

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

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

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

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

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

> 5.(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> a. the lawful detention of a person after conviction by a competent court;
>
> b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
>
> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> **f. the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition**. [emphasis added]

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

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

[12] State's January 19, 1988, pp. 2-4, *citing* 8 U.S.C. 1182(a).

[13] *Id*., *citing* 8 U.S.C. §1225(b), 1227.

[14] *Id*., *citing* 8 U.S.C. § 1225(b), 1227, Mayet Palma v. Verdeyen, 676 F.2d 100, 104 (4th Cir., 1982), 8 U.S.C. § 1182(d)(5)(A), cf. 8 U.S.C. § 1252(c), (d).

[15] *Id*., p. 20, *citing* 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5

[16] *Id*., *citing* 8 U.S.C. § 1182(d)(5)(A).

[17] *Id*., p. 3, *citing Singh v. Nelson*, 623 F.Supp. 545, 552-54, 558 (S.D.N.Y., 1985).

[18] *Id*., *citing* 8 U.S.C. § 1182(d)(5)(A).

[19] Id., *citing* 8 U.S.C. § 1182(d)(6), 8 C.F.R. § 212.5(c).

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

[21] *Id*.

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

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

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

[25] *Id*.

[26] Status Review Plan, July 1981, Part II.C.2.

[27] *Id*., Part III.C.2.e.

[28] *Id*., Part III.E.2.

[29] *Id*., Part III.E.3.

[30] *Id.,* Part III.E.4.

[31] 52 F.R. 48799. 8 C.F.R. 212.12, 212.13.

[32] *Id*., Section 212.12(g).

[33] *Id*., Section 212.12(d)(4)(i).

[34] *Id*., Section 212.12(b)(1), (d)(1)

[35] *Id*., Section 212.12(d)(2)

[36] *Id*., Section 212.12(d)(3).

[37] *Id*., Section 212.12(d)(4)(ii).

[38] *Id*.

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

[40] *Id*.

[41] *Id*., Section 212.13(a), (b), (c).

[42] *Id*., Section 212.13(e).