



INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

REPORT Nº 109/99

CASE 10.951

COARD ET AL.

UNITED STATES¹

September 29, 1999

I. SUMMARY

A. The Petition

1. The petition on behalf of the seventeen claimants was filed before the Commission on July 25, 1991, and processed in accordance with its Regulations. As a general matter, the petitioners alleged that the military action led by the armed forces of the United States of America (hereinafter "United States" or "State") in Grenada in October of 1983 violated a series of international norms regulating the use of force by states. With regard to their specific situation, they alleged having been detained by United States forces in the first days of the military operation, held incommunicado for many days, and mistreated. They contended that the United States 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. The petitioners claimed that the United States violated its obligations under the American Declaration of the Rights and Duties of Man, specifically: Article I, the right to life, liberty and personal security; Article II, the right to equality before the law; Article XXV, the right to protection from arbitrary arrest; Article XVII, the right to recognition of juridical personality and civil rights; Article XVIII, the right to a fair trial; and Article XXVI, the right to due process of law.

B. Background

2. On October 19, 1983, the Prime Minister of Grenada, Maurice Bishop, and a number of associates were murdered pursuant to a power struggle within the New Jewel Movement, the ruling political party since 1979. Following the violent overthrow of the Bishop administration, the rival faction within the New Jewel Movement established a Revolutionary Military Council. On October 25, 1983, United States and Caribbean armed forces invaded Grenada, deposing the revolutionary government.

3. During the first days of the military operation, a number of individuals, including the seventeen petitioners -- Callistus Bernard, Lester Redhead, Christopher Stroude, Hudson Austin, Bernard Coard, Liam James, Leon Cornwall, John Anthony Ventour, Dave Bartholomew, Ewart Layne, Colville McBarnette, Selwyn Strachan, Phyllis Coard, Cecil Prime, Vincent Joseph, Cosmos Richardson and Andy Mitchell -- were arrested and detained by United States forces.

4. United States forces turned the petitioners over to Grenadian authorities at Richmond Hill

Prison on or about November 5, 1983. Thereafter, the petitioners were tried and convicted of bearing responsibility for the October 19, 1983 murder of Bishop and others. Fourteen of the seventeen were sentenced to death, while the remaining three were sentenced to lengthy prison terms. The death sentences were commuted to sentences of life in prison in 1991, pursuant to the appeals for clemency, including by the IACHR.²

C. Overview of Proceedings

5. The State contested the admissibility of the case before the Commission, asserting that the petitioners' factual allegations were incorrect and/or unsupported, that it was not the proper respondent, and 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-party to the American Convention.

6. The Commission adopted admissibility Report 14/94 on February 7, 1994, finding the claims concerning the arrest and detention of the petitioners admissible, and the other claims inadmissible. Pursuant to its consideration of additional submissions from the parties, the Commission adopted confidential Report 13/95 on September 21, 1995, setting forth its findings and recommendations. That report was transmitted to the State on September 26, 1995. On December 27, 1995, the State requested that the Commission reconsider its report. Having considered that request, as well as the additional information it deemed necessary to gather before finalizing its analysis, the Commission modified certain portions of that report, and approved the adoption of its final report.

II. PROCEEDINGS BEFORE THE COMMISSION

A. Initial Proceedings

7. The petitioners' initial complaint of July 25, 1991 was supplemented with additional information on August 4, 1991. Case 10.951 was opened, and the pertinent parts of the petition transmitted to the State on October 1, 1991, with information in response requested within 90 days. A brief "interim response" was filed on October 22, 1991. The petitioners' response thereto was filed on October 31, 1991, and submitted to the Government on November 26, 1991. The petitioners submitted additional information on February 14, 1992, which was transmitted to the State on March 3, 1992, with a response requested within 60 days. The Commission reiterated this request on July 27, 1992.

8. The United States filed its substantive response to the petition on September 10, 1992, limited to contesting the admissibility of the case. On October 20, 1992, the Commission invited both parties to present their views on the issue of admissibility before its next period of sessions. The petitioners provided brief observations on the State's response on January 27, 1993, the pertinent parts of which were transmitted to the State on February 10, 1993. Both parties appeared before the Commission to express their views on admissibility during a hearing held on February 25, 1993. By a note of April 16, 1993, the Commission requested that the United States Government furnish information on the substantive aspects of the case within 60 days. This request was reiterated on June 21, 1993.

B. Admissibility Report 14/94

9. The Commission adopted Report 14/94 concerning the admissibility of the case on February 7, 1994. With respect to its jurisdiction, the Commission reiterated that the American Declaration is a source of international obligation for members states not party to the American Convention, and that its Statute authorizes it to examine complaints under the Declaration and requires it to pay special attention to certain core rights. As the petitioners

had submitted claims alleging the violation of rights protected under the Declaration, the Commission declared that those that met the applicable requirements would be examined. The Commission found no procedural bar to admissibility.

10. With respect to the factual and legal foundation laid in support of the petitioners' allegations, the Commission determined that the petitioners had alleged or shown "a sufficient causal nexus on which to base considerations of possible violations" "only as to the claims concerning their arrest, and presumed detention incommunicado" in United States custody. The Commission admitted those claims for consideration, and declared that the other claims raised by the petitioners were inadmissible. The report was approved for transmission to the parties, with the recommendation that the State submit information on the merits of the claims deemed admissible within 90 days.

11. In accordance with those findings, the remainder of the present report deals only with the allegations found admissible.

C. Proceedings on the Merits

12. Report 14/94 was transmitted to the State on February 11, 1994. The request that it provide information on the merits of the pending claims was reiterated on May 10, 1994, and again on September 29, 1994. The United States provided information on the merits on October 19, 1994. This information was transmitted to the petitioners for their observations on November 29, 1994.

13. The petitioners' response was received on January 17, 1995. They reiterated previously stated positions, and raised further assertions only with respect to issues beyond the scope of the pending claims. The pertinent parts of this submission were transmitted to the State by means of a note dated March 20, 1995.

14. On February 8, 1995, the Commission informed the State that it would be disposed to facilitate a friendly settlement if the latter wished to invoke this procedure. This measure was taken at the Commission's initiative; as indicated by Article 52 of the Commission's Regulations, it is not required in the processing of cases concerning non-parties to the American Convention. This communication was not acknowledged.

15. Pursuant to Article 53 of its Regulations, the Commission adopted Report 13/95 on September 21, 1995. The report was transmitted to the State on September 26, 1995, with a request that it inform the Commission within three months of the measures taken to comply with the recommendations set forth to resolve the violations established.

16. By means of a note dated December 27, 1995, the United States submitted its response to Report 13/95, requesting that the Commission reconsider its findings and recommendations. That request, and the final proceedings pursuant thereto are described in section IV of the present report.

III. POSITION OF THE PARTIES

A. The Position of the Petitioners

17. In their initial complaint, the petitioners claimed that: United States forces arrested them during the period in which it consolidated control over Grenada; that they were held incommunicado for many days; and that months passed before they were taken before a magistrate, or allowed to consult with counsel. "During this period petitioners were threatened, interrogated, beaten, deprived of sleep and food and constantly harassed."

18. The petitioners alleged that their whereabouts were kept secret, and that requests by lawyers and others to meet with them were rejected. They alleged that, more than a week after the invasion, the commanding officer for United States armed forces in Grenada, Admiral Joseph Metcalf, III, denied knowledge of the whereabouts of petitioners Hudson Austin and Bernard Coard to a group of United States Congressmen, when in fact the two men were confined aboard a ship under his command.

19. The petitioners alleged that United States forces subjected them to threats and physical abuse. The supplemental petition of August 4, 1991 indicated that petitioner Leon Cornwall had attested at trial, before the High Court of Grenada, that United States officials had attempted to obtain his testimony through the use of threats and physical coercion:

... it is very interesting to note that on 4th November 1983 while I was held captive by US invading forces on [the USS] Saipan two Yankee officials came to me and said Cornwall we want you to tell us about Coard and we want you to be key witness. They tried sweet talk and threats that they would hand me over to Caribbean people.... On 6th March 1984 they put me in hand of Caribbean people one Isaac and three Barbadian. They had me softened. Beating me in private part....

The petitioners alleged that, even after they were turned over to the custody of Grenadian and Caribbean Peacekeeping Force (hereinafter "CPF") authorities at Richmond Hill Prison, on or about November 5, 1983, United States forces continued to play a role in their detention, interrogation and mistreatment.

20. The petition alleged that the United States had no legal justification for the actions taken against the petitioners, and is thus responsible for violations of their "human rights to liberty, freedom from arbitrary arrest, notification of charges, physical and mental integrity, freedom from cruel, inhuman and degrading punishment and punishment only after conviction in violation of Articles I, II, XVII, XVIII, XXV and XXVI of the American Declaration.

B. The Position of the State

21. In its initial response, the State indicated that "[t]he treatment by US armed forces of all Grenadian or other nationals who were either temporarily detained or arrested for security or other lawful reasons" accorded fully with "applicable international rules concerning the law of armed conflict, including the rules governing the treatment of civilian detainees and military prisoners." In view of its position that the case was inadmissible, it declined at that time to address the international legal validity of claims concerning United States military actions in Grenada.

22. Pursuant to the Commission's adoption of Report 14/94, the State submitted information with respect to the arrest and detention of the petitioners. It fully acknowledged "that during the initial stage of the US military operation in Grenada, the petitioners and other Grenadian nationals were arrested, detained by US military forces for several days and interrogated while the United States suppressed further armed resistance to its military operation." Citing contemporaneous records, the State asserted that all of the petitioners were detained in United States custody for a period of less than three weeks. The State maintained that the period of the petitioners' detention "coincided with ... the `hostilities phase' of the operation (i.e., from 25 October to 2 November) when the US military was engaged in putting down armed resistance from enemy forces." Although the petitioners were not prisoners of war, they were "detained and accorded protection equivalent to that given prisoners of war," and were "thus were accorded the highest protections ... [available] under the laws of armed conflict."

23. Citing an October 31, 1983 message from the Joint Chiefs of Staff to the military command in Grenada, the State specified that its military authorities had been directed to: "continue to safeguard and detain Bernard Coard, Hudson Austin, and other Grenadian nationals in your custody until arrangements can be made to turn them over to an interim government in Grenada which can assume responsibility for their security and rights." Six of the petitioners: Bernard Coard, Phyllis Coard, Hudson Austin, Ewart Layne, Liam James, and Leon Cornwall:

were kept aboard US naval vessels until 5 Nov 83, when they were transferred under CPF direct control to Richmond Hill prison. Another four, who were also key members of the group which overthrew Bishop, were kept in the POW [Prisoner of War] compound until 2 Nov 83, at which time the CPF transferred them to Richmond Hill Prison. [Citing a December 4, 1983 cable sent by the Commander of US Forces in Grenada to the Secretary of State.]

24. The United States reported that by November 5, 1983, all of the petitioners had been transferred from United States custody to the CPF and Grenadian authorities. The State asserted that "in view of their relatively brief periods of detention in US military custody from on/about October 25 to November 5, at the latest, petitioners' claim that the United States subjected them to prolonged detention is patently exaggerated and unconvincing." Further:

Considering that petitioners were detained during the course of a complex military operation involving hostilities whose purpose was to restore essential civic order throughout the island of Grenada, it is hardly surprising that petitioners were kept in detention until such time as they could be turned over to the appropriate Grenadian authorities to answer for charges relating to the overthrow and murder of Grenada's Prime Minister and his key advisors.

25. The State denied the allegation that Commanding Officer Metcalf had misled a congressional delegation about the whereabouts of petitioners Austin and Coard. It presented a declaration, signed by the now-retired officer, setting forth his recollection that petitioners Austin and Coard were taken prisoner in the early days of the operation. "To ensure their safety, they were held in protective custody onboard several ships of the Task Force for several days." He indicated that their whereabouts had never been misrepresented, and that no such delegation as that described had visited the USS Guam.

26. The State denied allegations that, during their detention at the hands of its forces, the petitioners were "threatened, interrogated, beaten, deprived of sleep and food and constantly harassed." The State excepted only that it did interrogate the petitioners, citing a report that:

During hostilities US forces captured ... approximately 60 Peoples Revolutionary Army members.... The Grenadian personnel were interrogated for tactical value and after the fighting ceased (on about 27 Oct) were turned over to the Caribbean Peacekeeping Force (CPF)." (Emphasis in original.)

Citing another document, the State reported that "personnel were interrogated for the purpose of securing tactical information essential to the effective conduct of ongoing military operations and the security of US forces' personnel." The State asserted that interrogation "of POW's for tactical and security purposes during hostilities is a right clearly recognized and provided for in Article 17" of the Geneva Convention Relative to the Treatment of Prisoners of War.

27. The United States submitted that the treatment accorded to petitioners accorded fully with the standards of the American Declaration and applicable international humanitarian law. In response to the Commission's recommendation in admissibility Report 14/94 that the State provide information on the claims concerning the arrest and detention of the petitioners, the Office of the Judge Advocate General, Department of the Army, had prepared a memorandum indicating that the petitioners "were not beaten or mistreated." The United States characterized the allegations of ill treatment as "baseless and unsubstantiated." The State maintained that the petitioners had provided no specific information to substantiate their claims that they were subjected to threats during their interrogation, and reiterated its contention that the claims concerning their arrest and detention should be found inadmissible based on the lack of credibility and foundation of their allegations.

IV. PROCESSING OF REPORT NO. 13/95 PREPARED PURSUANT TO ARTICLE 53 OF THE REGULATIONS OF THE COMMISSION

28. On September 21, 1995, the Commission adopted Report 13/95 pursuant to Article 53 of its Regulations, setting forth its analysis of the record, findings, and recommendations to the State designed to repair violations of Articles I, XVII and XXV the American Declaration related to the deprivation of the petitioners' liberty by United States forces. The Commission found that the detention of the petitioners had been carried out under conditions which did not ensure the full observance of the minimum safeguards required under the American Declaration. Most pertinently, the Commission found that the petitioners had no access to any form of review of the legality of their detention at the hands of United States forces. The Commission consequently resolved:

1. To declare that in the case of Bernard Coard and sixteen other petitioners, the United States has failed to uphold the standards set forth in the American Declaration of the Rights and Duties of Man insofar as the arrest and incommunicado detention of the petitioners are concerned.
2. To declare that the United States is responsible for the violation of the right to liberty, Article I; to protection from arbitrary deprivation of liberty, Article XXV; to be presumed innocent until proven guilty, Article XXVI; and to recognition of juridical personality and civil rights, Article XVII.

The Commission recommended that the State conduct a further investigation to attribute responsibility for the violations, and take the measures necessary to repair the consequences thereof. Report 13/95 was transmitted to the State on September 26, 1995, with a request that it inform the Commission within three months of that date of the measures that it had taken in compliance with the recommendations set forth to resolve the violations established.

29. By means of a note dated December 27, 1995, the United States submitted a response to Report 13/95, in which it requested that the Commission reconsider and rescind that report pursuant to the procedure set forth in Article 54 of its Regulations. This Article provides that, where either party "invokes new facts or legal arguments" within the deadline established in a report, the Commission shall decide during its next session whether to maintain or modify its decision. This procedure may only be invoked once.

30. Although the request for reconsideration was submitted extemporaneously, on December

27, 1995, when it should have been received no later than December 26, 1995, the Commission decided to review the information presented during its next period of sessions. The Commission determined that the State had raised two issues that required additional clarification. The first issue concerned the legal status of the petitioners. In the December 27, 1995 submission, the State indicated that: "the petitioners' detention and treatment were justified under the 1949 Geneva Convention III, Relative to the Treatment of Prisoners of War ... as in furtherance of lawful military objectives." At the same time, the State contended that the "[p]etitioners could also be considered civilian detainees whose detention and treatment were fully in accord with governing standards under the Fourth Geneva Convention" [Relative to the Protection of Civilians in Time of War]. In its October 19, 1994 response, the State had indicated that the petitioners were accorded protections equivalent to those given to POW's "even though they were not themselves POWs." The second issue concerned the claim that the petitioners had been held incommunicado, the State having reported for the first time in its December 27, 1995 submission that the petitioners had enjoyed a right of access to the International Committee of the Red Cross.

31. Because the classifications of civilian and prisoner of war are mutually exclusive and carry legal consequences, the Commission found it necessary to request that the State clarify its position on this issue. In a note of March 11, 1996, the Commission asked the State to provide information as to which of the petitioners had been accorded status as prisoners of war, and which had been deemed civilians, as well as the basis for those determinations. The Commission also requested information as to whether, and if so, on what dates, ICRC representatives had been present in the locations where the petitioners were held. A response was requested within 45 days. This request was reiterated on July 9, 1996, with a response requested within 30 days.

32. The State's response, dated August 30, 1996, indicated that the petitioners "were civilian detainees held briefly for reasons of military necessity," and "were treated *de facto* to the highest legally available standard of protection." The information provided as to the presence of the ICRC indicated only that, at the time of the military operation, the United States had supplied that organization with a list of names of those detained, and that ICRC representatives "had the normal rights of access to those individuals in detention." The Government indicated that it had been unable to locate any reports of such ICRC visits, although it had confirmed by telephone that visits to detainees -- whom the ICRC did not identify -- had been carried out during the period in question.³ The Government further affirmed that the petitioners had been permitted to communicate with their next-of-kin, in writing, within seven days of their detention, as required by Article 70 of the Fourth Geneva Convention.

33. Having received the request for reconsideration, and having attempted to clarify certain inconsistencies in the position of the State with respect to the status of the petitioners at the time they were detained, the Commission reviewed the findings and recommendations issued in Report 13/95 and made certain modifications. The Commission adopted final Report 82/99 on May 7, 1999.

V. ANALYSIS

34. In its decision to admit Case 10.951, the Commission determined that a sufficient causal nexus through which to assess possible violations had been established only as to the claims concerning the petitioners' arrest, and presumed detention incommunicado. Such claims were found, at the threshold level, to implicate Article I, the right to life, liberty and personal security; Article XVII, the right to recognition of juridical personality and civil rights; and Article XXV, the right of protection from arbitrary arrest.

35. The factual predicate before the Commission, which is undisputed, is that on or about October 25, 1983, members of the armed forces of the United States arrested the 17 petitioners while participating in the military operation then being conducted in Grenada. The petitioners were detained for periods of 9 to 12 days, and were then turned over to Grenadian authorities. 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.

A. Jurisdictional Considerations and Applicable Law

36. As the Commission stated in its decision on admissibility, its competence to review the claims before it derives from the terms of 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.⁴ The Commission is directed by its Statute to pay special attention to the observance of Articles I, II, III, IV, XVIII, XXV and XXVI of the Declaration in exercising jurisdiction with respect to such non-parties.

37. 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."⁵ 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.⁶ 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.⁷

38. In terms of the law applicable to the present case, the petitioners invoked the provisions of the American Declaration as governing their claims. The United States argued that the situation denounced was governed wholly by international humanitarian law, a body of law which the Commission lacks the jurisdiction or specialized expertise to apply. In accordance with the normative framework of the system, when examining individual cases concerning non-parties to the American Convention, the Commission looks to the American Declaration as the primary source of international obligation and applicable law.⁸ This does not mean, as the United States argued, that the Commission may not make reference to other sources of law in effectuating its mandate, including international humanitarian law.⁹

39. First, while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity,"¹⁰ and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict,¹¹ and this is reflected, *inter alia*, in the designation of certain protections pertaining to the person as peremptory norms (*ius*

cogens) and obligations *erga omnes*, in a vast body of treaty law, in principles of customary international law, and in the doctrine and practice of international human rights bodies such as this Commission.¹² Both normative systems may be thus be applicable to the situation under study.

40. Second, it would be inconsistent with general principles of law for the Commission to construe and exercise its Charter-based mandate without taking into account other international obligations of member states which may be relevant.¹³ "[A]n international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation."¹⁴

41. Third, the State's assertion that the application of humanitarian law would wholly displace the application of the Declaration is also inconsistent with the doctrine and practice of the system. The Commission has encountered situations requiring reference to Article XXVIII of the Declaration, which specifies that "[t]he rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy" since the inception of its case system. The Declaration was not designed to apply in absolute terms or in a vacuum,¹⁵ and the Commission has necessarily monitored the observance of its terms with reference to its doctrine on permissible and non-permissible limitations, and to other relevant obligations which bear on that question, including humanitarian law.¹⁶

42. Fourth, in a situation of armed conflict, the test for assessing the observance of a particular right, such as the right to liberty, may, under given circumstances, be distinct from that applicable in a time of peace. For that reason, the standard to be applied must be deduced by reference to the applicable *lex specialis*.¹⁷ The American Declaration is drawn in general terms, and does not include specific provisions relating to its applicability in conflict situations. As will be seen in the analysis which follows, the Commission determined that the analysis of the petitioners' claims under the Declaration within their factual and legal context requires reference to international humanitarian law, which is a source of authoritative guidance and provides the specific normative standards which apply to conflict situations. In the present case, the standards of humanitarian law help to define whether the detention of the petitioners was "arbitrary" or not under the terms of Articles I and XXV of the American Declaration. As a general matter, while the Commission may find it necessary to look to the applicable rules of international humanitarian law when interpreting and applying the norms of the inter-American human rights system, where those bodies of law provide levels of protection which are distinct, the Commission is bound by its Charter-based mandate to give effect to the normative standard which best safeguards the rights of the individual.

43. The Commission is mandated by its Statute to examine claims alleging the violation of a right protected under the Declaration. The fact that the resolution of such a claim may require reference to another treaty is no bar to jurisdiction, and the Inter-American Court has affirmed the Commission's practice of invoking "other treaties concerning the protection of human rights" in its resolutions and reports.¹⁸ Were the Commission to decline to exercise jurisdiction in such a case, it would risk leaving fundamental rights unprotected, in contravention of the mandate with which it is charged.

44. The parties do not dispute that the situation under study originated in the context of an international armed conflict as defined in common Article 2 of the Geneva Conventions.¹⁹ The information in the case file and the public record is consistent with that conclusion.

B. The Legality of the Arrest and Detention of the Petitioners

45. Article I of the American Declaration sets forth that every human being has the right to liberty. Article XXV provides that no person may be deprived of that right, except in accordance with the norms and procedures established by pre-existing law. This Article specifies, in pertinent part, that any person deprived of liberty "has the right to have the legality of his detention ascertained without delay by a court ... [and] the right to humane treatment during the time he is in custody." The text of Article XXV thus specifies three fundamental requirements: first, preventive detention, for any reason of public security, must be based on the grounds and procedures set forth in law; second, it may not be arbitrary; and third, supervisory judicial control must be available without delay. Consequently, in the present case the Commission must establish the basis in law for the detentions, ascertain that they were neither illegal nor arbitrary, and assess the safeguards and verify the existence of judicial control without delay.

46. The United States has invoked several legal bases for the detention of the petitioners. In its October 19, 1994 submission, the State indicated that the petitioners had been detained for security and tactical reasons, and so that they could be turned over to Grenadian authorities to stand trial for the murder of Maurice Bishop and others. Although the United States did not consider the petitioners prisoners of war, the State indicated they had been accorded the protections corresponding to that status. Pursuant to receipt of Commission Report 13/95, the State indicated that, given their "prominent political position in Grenada, and their status in the command and control structure of the armed opposition to US and Caribbean forces" the detention of the petitioners had been justified under the Third Geneva Convention Relative to the Treatment of Prisoners of War. They could "also be considered civilian detainees" under the terms of the Fourth Geneva Convention. The State clarified that the petitioners had not been "arrested in the exercise of criminal justice authority," while reiterating that it had been necessary to detain them until they could be turned over to the Grenadian authorities for eventual trial. "Whether as POWs or civilian detainees" the United States invoked the Geneva Conventions of 1949 as the legal basis for detaining the petitioners.

47. The State is party to the Geneva Conventions of 1949, which are, as one of its submissions indicates, "part of the supreme law of the land."²⁰ The Geneva Conventions – which provide a wider range of justifications for the deprivation of liberty than does the American Declaration -- do authorize deprivation of liberty under certain circumstances. Determining which provisions apply requires determining the status of the petitioners under that body of law.

48. The parties' submissions are equivocal with respect to whether the petitioners were civilians entitled to protection under the Third Geneva Convention, or prisoners of war entitled to status under the Fourth Geneva Convention. The petitioners identified some of their number as "civilians," although without further identification or explanation. As noted, having referred to the petitioners as both civilians and POW's, the State indicated as its final position that the petitioners "were civilian detainees held briefly for reasons of military necessity," and were "accorded the rights and privileges of those who might have held the status of prisoners of war because that standard ensures a higher degree of protection." The State asserted that, "as a technical matter, whether they were being held as civilian detainees or as prisoners of war does not matter for purposes of deciding this petition. They were treated *de facto* to the highest legally available standard of protection that can be accorded to persons in such status."

49. As a factual matter, reports issued at the time of the events under study indicate that certain petitioners were then members of an entity known as the Revolutionary Military Council (hereinafter "RMC"), and had previously been officers in the People's Revolutionary Army. According to the information available from contemporaneous sources, these were Commander Hudson Austin, Lt. Col. Liam James, Lt. Col. Ewart Layne, Major Leon Cornwall,

Major Dave Bartholomew, Major Christopher Stroud, Captain Lester Redhead and Lt. Cecil Prime.

50. Notwithstanding the membership of those petitioners in the RMC, the State considers that they did not meet the terms of Article 4 of the Third Geneva Convention which define POW status, and maintains that the petitioners were civilians briefly detained for reasons of military necessity. The petitioners themselves took no position on the question. The petitioners named in the previous paragraph were involved in the command and control structure of an armed force. However, neither party briefed whether that armed force met the requisites to fall within the coverage of the Third Geneva Convention or not.²¹ As neither party has provided information on this point, the Commission decided to proceed with its analysis based primarily on the situation of the petitioners who were definitively not members of any armed force and fell under the terms of the Fourth Geneva Convention in any case. (While most or all of these held political positions, there is no information on record indicating that they took part in hostilities.) The analysis is based only secondarily on the extent to which the others had the status of civilians, as the United States has sustained and the petitioners have not contested.²²

51. It should be noted that the protections of the Fourth Geneva Convention begin to apply "from the outset of any conflict or occupation mentioned in Article 2." Relations between advancing troops and civilians are governed by the Convention (whether that advance includes hostilities or not), and there is no gap in the application of the provisions "between what might be termed the invasion phase and the inauguration of a stable regime of occupation."²³

52. Under exceptional circumstances, international humanitarian law provides for the internment of civilians as a protective measure.²⁴ It may only be undertaken pursuant to specific provisions,²⁵ and may be authorized when: security concerns require it; less restrictive measure could not accomplish the objective sought; and the action is taken in compliance with the grounds and procedures established in pre-existing law. Article 78 of the Fourth Geneva Convention establishes in pertinent part:

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review....²⁶

53. The applicable provisions of the Fourth Geneva Convention provide the authorities substantial discretion in making the initial determination, on a case by case basis, that a protected person poses a threat to its security, and the record provides no basis to controvert the security rationale asserted in this case. However, the record does not disclose to what extent the decision to detain each petitioner was made pursuant to a "regular procedure." Government submissions have indicated that the petitioners were detained for security reasons, but have provided little information as to the specific procedures followed by the United States forces who initiated and maintained custody.

54. As set forth, the applicable rules of international humanitarian law relative to the detention

of civilians provide that the "regular procedure" by which such decisions are taken shall include the right of the detainee to be heard and to appeal the decision.²⁷ "Appeals shall be decided with the least possible delay." This right to be heard ensures the detainee that the decision is taken with at least a minimal establishment of the need to detain under the circumstances of the particular case. These are minimum safeguards against arbitrary detention.

55. The requirement that detention not be left to the sole discretion of the state agent(s) responsible for carrying it out is so fundamental that it cannot be overlooked in any context. The terms of the American Declaration and of applicable humanitarian law are largely in accord in this regard. Article 78 of the Fourth Geneva Convention provides a recourse which, implemented according to its object and purpose, is generally consistent with the supervisory control required under Article XXV of the American Declaration. Supervisory control over detention is an essential safeguard, because it provides effective assurance that the detainee is not exclusively at the mercy of the detaining authority.²⁸ This is an essential rationale of the right to *habeas corpus*, a protection which is not susceptible to abrogation.²⁹

56. In the instant case, on the basis of the record before it, the Commission is unable to identify the existence of safeguards in effect to ensure that the detention of the petitioners was not left to the sole discretion of the United States forces responsible for carrying it out. There is no indication in the record that the petitioners were heard as to their internment, or that they had access to an appeal "with the least possible delay" before an authority with competence to order release if that were required.

57. Under normal circumstances, review of the legality of detention must be carried out without delay, which generally means as soon as practicable.³⁰ Article 78 of the Fourth Geneva Convention indicates that review is to be carried out "with the least possible delay." While the United States has referred to various phases of its military operations in Grenada, including a "hostilities phase" from October 25 to November 2, 1983, its own records indicate that fighting ceased on or about October 27, 1983.³¹ The petitioners were held in United States custody for a total of nine to twelve days prior to being transferred to Grenadian and CPF custody, which means they were held for six to nine days after the cessation of hostilities without access to any review of the legality of their detention. This delay, which is not attributable to a situation of active hostilities or explained by other information on the record, was incompatible with the terms of the American Declaration of the Rights and Duties of Man as understood with reference to Article 78 of the Fourth Geneva Convention.

58. The United States has argued that it would have been impracticable to present the petitioners before the Grenadian courts. Regardless of whether it was practicable or not (the United States offered no evidence to sustain its argument), the review at issue need not have required access to the Grenadian court system.³² Rather, pursuant to the terms of the Fourth Geneva Convention and the American Declaration, it could have been accomplished through the establishment of an expeditious judicial or board (quasi-judicial) review process carried out by United States agents with the power to order the production of the person concerned, and release in the event the detention contravened applicable norms or was otherwise unjustified. What is required when an armed force detains civilians is the establishment of a procedure to ensure that the legality of the detention can be reviewed without delay and is subject to supervisory control.

59. While the need to protect the rights of others may provide a basis for the limitation of certain rights under the Declaration, any such restriction must flow from and be governed by law. Even under extreme circumstances, the Commission has consistently found that resort to restrictive measures under the American Declaration may not be such as to leave "the rights of the individual without legal protection."³³ "[C]ertain fundamental rights may never be suspended, as is the case, among others, of the right to life, the right to personal safety, or

the right to due process.... under no circumstances may governments employ ... the denial of certain minimum conditions of justice as the means to restore public order.³⁴ While international human rights and humanitarian law allow for some balancing between public security and individual liberty interests, this equilibrium does not permit that control over a detention rests exclusively with the agents charged with carrying it out.³⁵

VI. CONCLUSIONS

60. Internment of civilians for imperative reasons of security may be permissible where the required basis is established in the particular case, and the Commission has found nothing in the record to refute the security justification presented by the United States. However, the same rules which authorize this as an exceptional security measure require that it be implemented pursuant to a regular procedure which enables the detainee to be heard and to appeal the decision "with the least possible delay." That regular procedure ensures that the decision to maintain a person in detention does not rest with the agents who effectuated the deprivation of liberty, and ensures a minimal level of oversight by an entity with the authority to order release if warranted. This is a fundamental safeguard against arbitrary or abusive detention, and the relevant provisions of the American Declaration and Fourth Geneva Convention analyzed above establish that this protection is to be afforded with the least possible delay. Taking into account that the petitioners were, according to the foregoing analysis, civilians detained for security reasons, and that they were held in the custody of United States forces for approximately nine to twelve days, including six to nine days after the effective cessation of fighting, the Commission observes that the petitioners were not afforded access to a review of the legality of their detention with the least possible delay.

61. Accordingly, the Commission finds that the deprivation of the petitioners' liberty effectuated by United States forces did not comply with the terms of Articles I, XVII and XXV of the American Declaration of the Rights and Duties of Man.

VII. RECOMMENDATIONS

62. On the basis of the analysis and conclusions of the present report, the Commission recommends to the United States that it:

1. Conduct a complete, impartial and effective investigation into the facts denounced in order to determine and attribute responsibility to those accountable for the violations concerned, and repair the consequences;
2. Review its procedures and practices to ensure that, in any instance where its armed forces may be responsible for detaining civilians, there are adequate safeguards in effect, in accordance with the applicable norms of the American Declaration and international humanitarian law, most specifically, so that such persons shall be heard with the least possible delay by a competent judicial authority with the power to order release should detention be deemed unlawful or arbitrary.

VIII. PUBLICATION

63. On July 1, 1999, the Commission transmitted Report 82/99 (the text of which is set forth in sections I – VII above), adopted on May 7, 1999 pursuant to Article 54 of its Regulations, to the State and the petitioners. Pursuant to the terms of that Report, the State was granted an additional period of one month to take all necessary measures to comply with the Commission's recommendations. The State was requested to provide information in that respect within that time period, and was notified that the Commission would then review the extent to which the former had adopted the measures recommended, and decide whether to publish its decision.

64. On July 30, 1999, the United States submitted information in response to Report 82/99 and the recommendations set forth therein. With respect to recommendation 1, requiring the State to conduct a "complete, impartial and effective investigation into the facts denounced in order to determine and attribute responsibility to those accountable for the violations concerned, and repair the consequences," the State indicated that, pursuant to the processing of the present case, it had investigated the circumstances surrounding the detention and treatment of the petitioners. This had been addressed in the State's August 30, 1996 communication to the Commission. Consequently, the State indicated that, in its view, it had "conducted as complete, as impartial, and as effective an investigation ... as can reasonably be done." It indicated that, in its view, further investigation was unlikely to produce material information and would therefore be unwarranted. Further, the communication indicated that, "in view of the circumstances faced by military personnel in Grenada between October 25-November 5, 1983 the United States Government believes there are no consequences vis-à-vis the petitioners to `repair.'"

65. With respect to recommendation 2, requiring the State to review its procedures and practices to ensure that where its armed forces detain civilians there are adequate safeguards in place, in accordance with applicable law, so that such persons are heard with the least possible delay by a judicial authority competent to order release should detention be deemed unlawful or arbitrary – the State reported that it "conducts regular reviews and appraisals of its procedures and practices described by the Commission." The State further indicated that it "follows procedures and practices that either adhere to or exceed the legally required minimum due process safeguards in the limited instances when our armed forces detain civilians in the course of armed conflict."

66. As a general matter, the State reiterated its view that, at all times during the events in question it fully complied with its international legal obligations, including the law of armed conflict, and that its personnel followed applicable U.S. law, policies and practices. The State also reiterated its "vigorous exception" to the Commission's conclusions that: (a) the petitioners had been subjected to "excessive detention;" (b) 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. Finally, the State repeated 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."

67. The July 30, 1999 communication of the United States was transmitted to the petitioners on September 1, 1999, with any observations requested within 30 days. None were received within that time period.

68. The Commission has taken due note of the State's timely response. With respect to the information provided concerning its first recommendation, while the Commission considers

that measures of investigation taken during the processing of an individual case have the potential to provide an essential contribution to its clarification, the State's July 30, 1999 response does not reflect full compliance. The measures of investigation recommended are aimed both at establishing the facts and holding those responsible accountable. The State's response fails to demonstrate that these objectives have been accomplished. Further, it is evident from that response that the State has failed to take any measures to repair the violations of the American Declaration established.

69. With respect to the information provided concerning its second recommendation, the Commission considers generally that the "regular reviews and appraisals of procedures and practices" reported by the State provide an important potential mechanism for oversight. However, the State has provided no specific information as to any review of the procedures and practices at issue in this case in light of the violations of the American Declaration established, and the conclusions and recommendations set forth above. The other general considerations raised by the State have been fully addressed in the preceding sections of this report.

70. As set forth above, the rules which permit the internment of civilians as an exceptional security measure require that any such deprivation of liberty be carried out pursuant to a regular procedure enabling the detainee to be heard and to appeal the decision "with the least possible delay." This ensures that the decision to maintain a person in detention does not rest with the agents who effectuated the deprivation of liberty, and ensures a minimal level of oversight by an authority competent to order release if warranted. It cannot be overemphasized that this procedure constitutes a fundamental safeguard against arbitrary or abusive detention. As established, that safeguard was not afforded to the petitioners in the instant case with the least possible delay as required by applicable law.

71. Based on the foregoing considerations, and in conformity with Article 54(5) of its Regulations, the Commission decides to reiterate its conclusions and recommendations set forth in paragraphs 60 – 62 above, to make this Report public and to include it in its Annual Report to the General Assembly of the OAS. The Commission, pursuant to its mandate, shall continue evaluating measures taken by the United States with respect to the recommendations set forth until full compliance has been demonstrated.

Done and signed at the headquarters of the Inter-American Commission on Human Rights (IACHR), in the city of Washington, D.C., on the 29th day of the month of September in the year 1999. (Signed): Hélio Bicudo, First Vice President, and Commissioners Alvaro Tirado Mejía, Carlos Ayala and Jean Joseph Exumé.

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1 Commission members Robert Goldman, a national of the United States of America, and Claudio Grossman, a resident of the United States, did not participate in the consideration and vote on this report pursuant to Article 19(2) of the Regulations of the Commission.

2 This request was made in connection with Case 9.239 before the Commission, which concerns claims submitted by the petitioners against the State of Grenada. The Commission had requested that the execution of the petitioners be stayed to enable it to complete its examination of the case, and that clemency be considered for humanitarian reasons.

3 The Commission has established that the ICRC carried out certain supervisory activities in Grenada, commencing on approximately October 28, 1983. See, ICRC, Annual Report 1983, 33-34 (Geneva, 1984); *Resumen de las Actividades de*

Comité Internacional de la Cruz-Roja 1983, 9 (Geneva, 1984). However, in accordance with its standard procedures, that organization does not generally indicate specific facilities or persons visited in its public reports. According to ICRC practice, specific reports prepared pursuant to such visits are provided to the Government concerned, which then decides whether to make them public.

4 IACtHR, Advisory Opinion OC-10/89, July 14, 1989, "Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights," Ser. A N° 10, paras. 43 - 46.

5 OAS Charter, as amended, Art. 3(l); see American Declaration, Art. II; see also, Inter-American Conference on Problems of War and Peace, Reso. XL (1945)(indicating that one goal in initiating regional human rights system was elimination of violations of principle of "equality between nationals and aliens").

6 For example: "Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction or *de facto* jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues." Theodor Meron, "Extraterritoriality of Human Rights Treaties," 89 A.J.I.L. (1995) 78, 81; see also, *id.*, at p. 79, n. 7, citing Thomas Buergenthal, "To Respect and Ensure: State Obligations and Permissible Derogations," in *The International Bill of Rights: The Covenant on Civil and Political Rights* 72, 74 (Louis Henkin ed. 1981).

7 For instances of the Commission's treatment of state conduct with an extraterritorial *locus* under the terms of its Statute and the American Declaration, see, e.g., IACHR, Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, doc. 17, 1985 (referring to Letelier assassination in Washington, D.C.); Second Report on the Situation of Human Rights in Suriname, OEA/Ser.L/V/II.66, doc. 21, rev. 1, 1985 (addressing allegations that Surinamese citizens residing in Holland had been harassed and/or attacked by agents of Suriname); Case 1983 (opened on basis of allegations of extraterritorial acts; archived for other reasons); Report on Case 9239, United States, published in Annual Report of the IACHR 1986-87, OEA/Ser.L/V/II.71, Doc. 9 rev. 1, 22 Sept. 1987, at 184 (admitting case concerning actions of United States forces in Grenada; case settled, see Report 3/96, published in Annual Report of the IACHR 1995, OEA/Ser.L/V/II.91, Doc. 7 rev., Feb 28, 1996, at 201); Report 31/93, Case 10.573, United States, published in Annual Report of the IACHR 1993, OEA/Ser.L/V/II.85, Doc. 9 rev., Feb. 11, 1994, at 312 (admitting case concerning actions of United States forces in Panama).

8 See n. 4, *supra* (affirming Declaration as source of international obligation).

9 See IACtHR, Advisory Opinion OC-1/82, "Other Treaties' Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Ser. A No. 1, para. 46.

10 See generally, IACHR, Report No. 55/97 (Case 11.137, *Abella v. Argentina*), in Annual Report of the CIDH 1997, OEA/Ser.L/V/II.98, doc. 7 rev., April 13, 1998, at 307. See also, A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. I, 1st ed. (Sérgio A. Fabris ed. 1997) at 269-80 (examining the normative, interpretive and operative relationship between human rights, humanitarian, refugee law). The American Declaration had its genesis in the recognition that the atrocities of World War II had demonstrated the linkage between respect for human rights and peace, the threat to fundamental rights in times of war, and the need to develop protections independent of the reciprocal undertakings of states. See, Act of the Inter-American Conference on Problems of War and Peace (the resolution which led to the adoption of the Declaration).

11 See, e.g., United Nations Resolution 2675 (XXV)(1970)(reflecting recognition that fundamental rights "apply fully in situations of armed conflict"); Security Council Resolution 237 (1967)(indicating that essential and inalienable rights must be respected even in times of war) and General Assembly Resolution 2252 (ES-V)(1967); Eur. Comm. H.R., *Cyprus v. Turkey*, 4 E.H.R.R. 482, at paras. 509-10 (citing applicability of European human rights regime to conflict situations, citing Resolution 2675).

12 See e.g., Report of the IACHR on its Activities in the Dominican Republic, OEA/Ser.L/V/II.15, doc. 6, 1966; Report on the Situation of Human Rights in El Salvador and Honduras, OEA/Ser.L/V/II.23, doc. 9, rev. 1, 1970; Report on the Situation of Human Rights in Uruguay, OEA/Ser.L/V/II.43, doc. 10 corr. 1, 1978; Report on the Situation of Human Rights in Nicaragua, OEA/Ser.L/V/II.45, doc. 16 rev. 1, 1978; Report on the Situation of Human Rights in Argentina, OEA/Ser.L/V/II.49, doc. 19, 1980.

13 See generally, Vienna Convention on the Law of Treaties Article 31(3)(c). While the Declaration is not a treaty, the Commission construes its terms by virtue of its treaty-based competence under the Charter.

14 IACtHR, OC-10/89, *supra*, para. 37, quoting ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, pp. 16, 31.

15 "[A] rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part." ICJ, *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, 1980 I.C.J. 73, 76.

16 See e.g., IACHR, Report on the Situation of Human Rights in Uruguay, OEA/Ser.L/V/II.43, doc. 10 corr. 1, 1978, at 8

(referring to Geneva Conventions of 1949); Report on the Situation of Human Rights in Nicaragua, OEA/Ser.L/V/II.45, doc. 16 rev. 1, 1978, at 33, 77 (applying Geneva Conventions to conflict-related casualties, reporting on obstruction of ICRC work); Report on the Situation of Human Rights in Argentina, OEA/Ser.L/V/II.49, doc. 19, 1980 (referring to Standard Minimum Rules for the Protection of Prisoners, humanitarian law).

17 See ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, para. 25.

18 "[T]he need for the regional system to be complemented by the universal" has found expression in the Commission's practice of invoking other treaties concerning human rights in the Americas, both bilateral and multilateral, "consistent with the object and purpose of the Convention, the American Declaration and its Statute." Advisory Opinion OC-1/82, *supra*, para. 43 (citing with approval Commission's practice in this regard under the American Declaration, for example with respect to its 1980 Report on the Situation of Human Rights in Argentina, as well as under the Convention). For treatment of this question in the context of the American Convention, see *generally*, IACHR, Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 Feb. 1999, at Ch. IV, paras. 10-16, Report No. 55/97 Abella, *supra* n. 10.

19 That Article provides, in pertinent part, that the Convention "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" and "shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

20 See United States Submission of October 19, 1994, p. 6, and tab B p. 1.

21 Article 4 specifies that the Third Geneva Convention applies to "members of the armed forces of a Party to the conflict, and to militias or volunteer forces forming part thereof; members of militias meeting four additional criteria including "being commanded by a person responsible for his subordinates" and "conducting their operations in accordance with the laws and customs of war;" and "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." The foregoing criteria require, in any case, an organized hierarchy and knowledge and respect for the laws and customs of war, factors with respect to which the record before the Commission is insufficient to make a finding.

22 With respect to the alternative status of POW, assuming that certain of the petitioners had met the standards to have been deemed prisoners of war, Article 5 of the Third Geneva Convention could, in principle, have authorized their internment for the purpose of preventing further participation in combat. Such internment may extend only until "the cessation of active hostilities," at which time POW's must be "released and repatriated without delay." Article 12 of the Third Geneva Convention stipulates that the Detaining Power is responsible for the treatment accorded POW's, which, accordingly, may not be arbitrary. In terms of safeguards, if there is doubt as to the status of a person who, "having committed a belligerent act" has "fallen into the hands of the enemy," Article 5 of the Third Convention provides that he or she must be accorded the protections of that Convention "until such time as their status has been determined by a competent tribunal." It is not the case, however, that civilians who fall into the hands of the enemy may be treated as POW's. It may be noted that the Third Geneva Convention provides that POW's may address complaints concerning any aspect of the conditions of their detention to the detaining military authorities as well as to representatives of the Protecting Powers. However, as the question of POW status is not before the Commission in this case, these general considerations need be developed no further.

23 Commentary, *supra*, p. 60. This covers even the case of a patrol which penetrates enemy territory with no intention of remaining. *Id.*

24 With respect to the competence of an occupying power to carry out law enforcement activities involving civilians, reference may be made, in particular to Article 70 of the Fourth Geneva Convention, which stipulates in pertinent part that "[p]rotected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation ... with the exception of breaches of the laws or customs of war." In its response to Report 13/95, the State clarified that the petitioners had not been "arrested in the exercise of criminal justice authority."

25 See *generally*, Article 27, Fourth Geneva Convention (establishing that parties to a conflict may take measures of control and security necessary as a result of the war); Article 79 (establishing that a party "shall not intern protected persons, except in accordance with the provisions or Articles 41, 42, 43, 68 and 78"). Articles 41, 42 and 43 pertain to Section II of the Fourth Convention ("aliens within the territory of a party to the conflict"), and, except for the procedures set forth in Article 43 insofar as they relate to Article 78, are not directly relevant to the present case. Article 68 concerns detention as a penal measure, which, as noted in the preceding footnote, is not at issue. Article 78, which is at issue, permits an occupying power to utilize internment of civilians only for "imperative reasons of security."

26 "In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict.... That is why Article 78 speaks of imperative reasons of security ... [and] each case must be decided separately." Commentaries, *supra*, p. 367.

27 While the State is accorded discretion in deciding on the procedure, it must comply with the terms of Article 43. The latter specifies that "[t]he State may act through the courts or through administrative channels" where the latter is a "board offering the necessary guarantees of independence and impartiality." Commentaries, *supra*, p. 260. In either case, this requirement is intended to ensure that the decision is taken jointly rather than by one individual. *Id.* p. 369.

28 The application of *habeas corpus* and similar remedies plays a fundamental role in, *inter alia*, protecting against arbitrary arrest and unlawful detention, and clarifying the situation of missing persons. Such remedies, moreover, may "forestall opportunities for persons exercising power over detainees to engage in torture or other cruel, inhuman or degrading treatment or punishment." UN General Assembly Resolution 34/178 (1979)(commemorating 300th anniversary of act giving writ of *habeas corpus* statutory force).

29 See material at n. 34 *infra*. See also, Erica-Irene Daes [UN Special Rapporteur] "Freedom of the Individual under Law," (1990) at 179 (observing role of *habeas corpus* as basic required protection under Universal Declaration).

30 No violation arises "if the arrested person is released 'promptly' before any judicial control of his detention would have been feasible." Brogan et al., Ser. A Vol. 145 (1988). See also Eur. Ct. H.R., De Jong, Baljet and van den Brink, Ser. A Vol. 77 (1984). Under normal circumstances, the UN Human Rights Committee has found detention for 48 hours without judicial review to be questionable. See UN, Human Rights and Pre-trial Detention (1994), at 12, citing UNGAOR, 45th Sess., Supp. 4C (A/45/40), vol. I, para. 333 (report of Federal Republic of Germany). Delays of four and five days in the presentation of a detainee before a judicial authority have been held violative. See Brogan, *supra*; Koster v. The Netherlands, Ser. A Vol. 221 (1991).

31 See, October 19, 1994 submission of the United States Government, at p. 6 and at Tab B, para. 3. It was at that time that the United States reportedly began interrogating detainees. *Id.* This is consistent with contemporaneous reports which indicated that all significant military objectives had been brought under United States control by October 27 or 28, 1983. The President of the United States gave a national television address on November 27, 1983, in which he indicated that U.S. forces were in the "mopping-up phase." N.Y. Times, Oct. 28, 1983, at A10, cols. 5-6. See generally, Major Bruce Pirnie, Operation Urgent Fury: The United States Army in Joint Operations (1986) [declassified document], at 133-68, and at 165 (noting that organized resistance had ended on October 26, 1983).

32 What the Commission is referring to is the right of the individual to be heard with respect to the legality of his or her detention, not arraignment, as was suggested by the United States in its submission of December 27, 1995.

33 IACHR, Report on the Situation of Human Rights in Paraguay, OEA/Ser.L/V/II.43 Doc. 13 corr. 1, p. 18, 31 Jan. 1978.

34 IACHR, Report on the Situation of Human Rights in Argentina, OEA/Ser. L/V/II.49 Doc. 19, p. 26-27, 11 April 1980. See, e.g., IACHR, Colombia Report, pp. 15-18; IACHR, Ten Years of Activities, 341-42; IACHR, Resolution on the Protection of Human Rights in Connection with the Suspension of Guarantees or 'State of Seige,' 12 Sept. 1968.

35 The importance of such safeguards cannot be overestimated. Under the current norms of humanitarian law, the internment of civilians "both in the territory of the Parties to the conflict and in occupied territory is subject to rules which would have provided millions of human beings with protection if they could have been applied during the Second World War." Commentaries, *supra*, p. 372.

CONCURRING VOTE OF COMMISSIONER DR. HELIO BICUDO

Commission member Helio Bicudo voted in favor of Report 82/99, and in accordance with the terms of Articles 21 and 47(4) of the Regulations of the Commission, presents the following additional views with respect to that Report:

SUMMARY: United States occupation of Grenada. Allegedly illegal deprivation of liberty of the petitioners. Concurrent applicability of the Third and Fourth Geneva Conventions and the American Declaration of the Rights and Duties of Man. Uncertainty as to the status of the petitioners under international humanitarian law. The system for the protection of human rights now requires that human rights be observed even in cases of war. Detentions must be effectuated in accordance with the provisions of humanitarian law and, insofar as is possible, be legally and operationally consistent with the American Declaration. In the present case (report), the two systems of protection are not applied harmoniously.

1. This is a complaint filed with the Inter-American Commission of Human Rights by Calistus Bernard *et al.* against the Government of the United States for allegedly illegal actions in the arrest of the petitioners during the United States occupation of Grenada.
2. The questions of fact presented by the parties were narrowed down over the years in which Case 10.951 was considered, and are now limited to the legality of the petitioners' imprisonment on Grenadian soil by United States forces.
3. The questions of law have to do with the following issues: (a) the concurrent or subsidiary applicability of the conventions on international human rights law and international humanitarian law; (b) the juridical classification of the detainees/petitioners; and (c) the existence of *habeas corpus* in exceptional circumstances such as the occupation of territory by a foreign force.
4. The allegations of the petitioners may be assessed on the basis of the possible responses to these three questions.
5. It should be said at the outset that the Commission is not formally competent to assess the political motives of the United States occupation of Grenada although there are times --as will be seen later-- in which the issue is relevant.

I. THE FACTS

6. On October 13, 1983, Maurice Bishop, the Prime Minister of Grenada, was overthrown and, on October 19, he and other authorities of his government were executed by members of a rival faction of the "New Jewel" movement.
7. On October 25, 1983, United States and Caribbean forces invaded the island of Grenada and put an end to the revolutionary government. During the invasion, seventeen members of this government were taken prisoner and held by the United States armed forces until the end of hostilities.
8. The petitioners were turned over to the new Grenadian government on November 5, 1983. Fourteen of the seventeen prisoners were subsequently sentenced to death by the courts of Grenada. These sentences were commuted to life imprisonment on August 14, 1991, thanks largely to the efforts of the IACHR.
9. The petitioners alleged that their imprisonment violated Article I (right to life, liberty, and security), Article II (right to equality before the law), Article XVII (right to recognition of juridical personality and civil rights), Article XVIII (right to a fair trial), Article XXV (right to protection from arbitrary arrest), and XXVI (right to due process of law) of the American Declaration of the Rights and Duties of Man, as well as Article 5 (right to humane treatment) and Article 7 (right to personal liberty) of the American Convention on Human Rights.
10. The complaint was filed on July 24, 1991. In its Report N° 14/94 of February 7, 1994, the Commission admitted only the part of the complaint pertaining to the question of arbitrary arrest and granted the United States Government a period in which to furnish information.
11. In Report N° 13/95 of September 21, 1995, the Commission examined the response of the United States Government as well as the additional information furnished by the petitioners and concluded that the arrest was illegal on the following grounds:

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
RESOLVES:

1. To declare that in the case of Bernard Coard and sixteen other petitioners, the United States has failed to uphold the standards set forth in the American Declaration of the Rights and Duties of Man insofar as the arrest and incommunicado detention of the petitioners are concerned.

2. To declare that the United States is responsible for the violation of the right to liberty, Article I; to protection from arbitrary deprivation of liberty, Article XXV; to be presumed innocent until proven guilty, Article XXVI, and to recognition of juridical personality and civil rights, Article XVII.1 (Emphasis added.)

12. The complaints of violations of the rights to fair trial, due process of law (the presumption of innocence), and equality before the law (Articles XVIII, XXVI and II) were considered inadmissible, however, because they related solely to proceedings against the petitioners by the Grenadian Government.

13. Also, the complaints based on Articles 5 and 7 of the American Convention on Human Rights, which it should be mentioned the United States has not ratified, were not admitted.

14. In the "Response of the United States Government to Report 13/95", the State disputed the Commission's findings, alleging that the imprisonment was lawful under international humanitarian law, averring that human rights did not apply in a situation of military conflict, that it was materially impossible to have recourse to judicial authorities in Grenada during the conflict, and that the transfer of the prisoners to the Richmond Hill prison after the cessation of hostilities was legal.

15. In this same response, the United States Government requested that the Commission reconsider its findings.

16. The opinion expressed in the preliminary Report submitted for the conclusion in case 10.951 modified some of the findings contained in Report 13/95. It maintained the finding that, while the arrest of the petitioners initially conformed to international humanitarian law, the absence of any possibility for a review of the detention, as required in the Fourth Geneva Convention, made the imprisonment illegal:

the deprivation of the petitioners' liberty effectuated by United States forces **did not comply with the terms of Articles I, XVII and XXV** of the American Declaration of the Rights and Duties of Man.**2** (Emphasis added.)

II. THE LAW

17. The first question of law to be considered is the concurrent validity of the humanitarian and human rights conventions. It is well known that the IACHR is competent to "promote the observance and defense of human rights and to serve as an advisory body to the Organization

[of American States] in this area."³

18. However, a review of the documents in case 10.951 clearly shows that the question could be taken exclusively from the humanitarian perspective, whereby the validity of the petitioners' arrest would essentially be examined in accordance with humanitarian law (Geneva Conventions).

19. In the present case, from a formal standpoint, the Commission would be going beyond its competence since it is not authorized to supervise fulfillment of these conventions.

20. This formalist view overlooks the fact that the human rights conventions do not provide for exceptions or breaches, and are applicable, in theory, even in situations of a clear rupture such as war or civil insurrection.

21. As A.A. Cançado Trindade⁴ has clearly indicated, despite the different origins, there exists today a regulatory, interpretive, and operational approximation between the three thrusts of international protection of the individual, i.e. human rights, humanitarian law, and the rights of refugees.

22. This doctrinal understanding is supported by various decisions taken by regional and global organizations. The clearest example of this inseparable quality of the various subsystems of human rights protection is Resolution 237 adopted by the UN Security Council on June 14, 1967, in which it was established that basic and inalienable human rights needed to be observed even during the turmoil of war (the case concerned a request to the Government of Israel to permit the return of Palestine refugees).

23. As will be seen below, an acceptable result is one that integrates humanitarian law (particularly the four Geneva Conventions) with the legal system of human rights (as exemplified in the present case by the American Declaration), leading to the application of the latter, and permitting indirect control of the former.

24. Certainly the IACHR is competent to monitor fulfillment of the American Declaration and the American Convention on Human Rights. Among the precepts contained in the multilateral agreement is Article XXV, which states that "no person may be deprived of his liberty, except in the cases and according to the procedures established by pre-existing law."

25. In international relations, the obligations assumed by States are revoked by denunciation. If there is no denunciation, the agreements are considered to be valid and inalienable and the revocation of a multilateral treaty by another agreement of the same level is therefore considered inconceivable;⁵ i.e., it cannot be assumed that the application of the Fourth Geneva Convention overrides application of the American Declaration of the Rights and Duties of Man.

26. In fulfilling its mandate in extreme circumstances, such as the partial or total occupation of a territory by a foreign power, the IACHR must ascertain whether or not the acts of either party to the conflict are in accordance with human rights.

27. Since any legitimate arrest must be in accordance with the cases and procedures provided for in pre-existing legislation, the IACHR must determine, in the course of its investigations, which body of relevant law to take as a basis in assessing the legality of a specific arrest.

28. In the case of armed conflict between states, the legal structures generally considered are those of the system of humanitarian law. War is a perfect example of an exception or breach in normal relations between states, and between one state and its citizens.

29. In the case in question, in order to verify compliance with Article XXV of the American Declaration, the IACHR will need to use international humanitarian law as a subsidiary source. However, this was not the view expressed by the Commission in Report 13/95:

"5.(...) Article XXV specifies that in any case where a state deprives a person of liberty, the action must issue from and be executed by a competent authority, must arise pursuant to pre-established law, and must be promptly subject to judicial review.

6. The pre-established law referred to is the applicable domestic law-- which must in turn comply with the standards of the American Declaration." [6](#) (Emphasis added.)

30. The view expressed in Report 13/95 disputes one of the three reasons given by the United States Government in justification of its military action in Grenada, and the subsequent arrest of the petitioners. This question will be looked into more fully below.

31. Regardless of the Commission's legal interpretation, the imprisonment clearly ensued from a military action by United States and Caribbean forces and not from criminal proceedings of any kind.

32. As there was armed conflict between Grenadian nationals and United States military forces, this is doubtless a case in which the Geneva Conventions apply. [7](#) For this reason, the concurrent application of the two systems of protection is inevitable, to the extent permitted by law. [8](#)

33. Hence, if it is true that humanitarian law should be observed by the occupation forces in Grenada, it is also true that any detention effectuated should, insofar as possible, conform to the provisions of the American Declaration.

34. It may thus be concluded that both systems of international law --humanitarian law and human rights-- are applicable and that the Inter-American Commission is competent therefore to investigate the procedures taken by the parties involved in the conflict.

35. The second question of law that is relevant to Case 10.951 concerns the type of protection that should have been offered to the petitioners during their imprisonment by the United States authorities.

36. In the processing of the case, the United States Government affirmed that the petitioners were detained on three legal grounds:

First, the Government stated that the petitioners were arrested and held, under suspicion of bearing responsibility for the October 19, 1983 murder of Maurice Bishop and other individuals, until they could be turned over to Grenadian authorities. Second, the U.S. asserted that their actions in Grenada generally arose incident to the invitation of then-Governor General Sir Paul Scoon, perhaps implying that these arrests and detentions arose in relation to this solicitation. Third, the Government implied that the petitioners, along with a substantial number of other Grenadians, were held during the initial armed hostilities for "tactical" reasons in order to protect the security of U.S. armed forces. [9](#)

37. Report 13/95 disputes the alleged legality of each of the three reasons cited for the

arrests. Basically, it was denied that the United States had the authority to carry out a criminal investigation on Grenadian soil, or that the alleged secret request for help could be construed as authorization by the Grenadian Government for any foreign power to take its nationals prisoner in its own name.[10](#)

38. With respect to the third reason, the Commission was of the view that the petitioners' arrest for tactical reasons was justifiable to the extent strictly necessary for operational reasons, but that it must in any case conform to the provisions of the American Declaration.

39. The Commission found, however, that the imprisonment did not conform to the terms of the American Declaration for the following reasons: (a) the duration of the captives' internment exceeded what was a reasonable duration (extending beyond the period of hostilities); (b) for purposes of internment, the forced transfer of the petitioners to the Richmond Hill Penitentiary was an arbitrary deprivation of their liberty; and (c) their arrest, without right to review by a judicial authority, is considered arbitrary (denial of the possibility of *habeas corpus*).

40. In its response, the United States Government affirmed that "The petitioners were not arrested in the exercise of criminal justice authority but rather pursuant to international law applicable to armed forces engaged in an international armed forces. (...) Given petitioners' Central Committee party and other prominent political position in Grenada, and their status in the command and control structure of the armed opposition to U.S. and Caribbean forces, the petitioners' detention and treatment were justified under the 1949 Geneva Convention III, Relative to Treatment of Prisoners of War ("Geneva Convention III"), as in furtherance of lawful military objectives."[11](#)

41. In the following paragraph, however, the United States Government affirms that the prisoners could also be classified as civilians, covered by the Fourth Geneva Convention.

42. In the view of the United States, whether or not the petitioners were civilians or prisoners of war, they were not offered the right to judicial review, as this was considered a materially impossible expectation in the theater of operations.

43. With respect to their forced transfer to the Richmond Hill Penitentiary, it was affirmed that this was an obligation of international humanitarian law, which could in fact be a valid interpretation of the following sections of the Third Convention:

Article 118

Prisoners of war shall be released and repatriated without delay after the cessation of hostilities.

In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, **each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation** in conformity with the principle laid down in the foregoing paragraph.[12](#) (Emphasis added.)

44. With respect to the excessively long internment of the petitioners, the Government affirmed that the duration coincided with the period of hostilities.

45. As to humanitarian law, the petitioners could in fact be considered prisoners of war or civilians depending on the interpretation given to the following sections of the Third Geneva

Convention:

Article 4

A. Prisoner of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. **Members of the armed forces of a Party** to the conflict **as well as members of militias or volunteer corps** forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, **including those of organized resistance movements**, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

....

6. **Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces**, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war. (Emphasis added.)

or, for classification as civilians, from the interpretation given to the following sections of the Fourth Geneva Convention:

Article 4

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

....

Persons protected by the (...) Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.

46. If, as the United States Government alleges, many of the petitioners were military members of the Revolutionary Committee, they should be classified as prisoners of war or as

civilians who were volunteers or militia members in semi-permanent paramilitary divisions.

47. According to the information contained in the unnumbered report from 1998, however, the United States Government finally acknowledged that the prisoners were classified as civilians (see p. 8, paragraph 28).

48. Now that this controversy has been clarified, let us turn to the third and final question of law relevant to the case.

49. The question of a possible appeal against arbitrary arrest, within the scope of international humanitarian law, follows from the definition given above on the applicability of human rights even during armed conflicts.

50. In light of the fact that the United States Government considered -- and therefore classified -- the petitioners as civilian prisoners, they necessarily fell within the protection offered by the Fourth Geneva Convention.

51. This Convention establishes, among other things, that:

Article 78

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. **This procedure shall include the right of appeal for the parties concerned.** Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by said Power. (Emphasis added.)

52. Now, the American Declaration affirms categorically that no person shall be taken prisoner, except in the cases and according to the procedures, established in pre-existing law. In applying this rule to the exceptional situation in which the State of Grenada found itself in that period, the minimum standards demanded would be those set out in paragraph two of the above cited Article 78.

53. It is true that the prisoners were detained without any possibility of appealing their detention. This was not a question of lodging an appeal with the Judicial Authority in Grenada but with the authority designated by the United States for review of the appeals.

54. In denying any possibility for review of the detentions, the Occupying Power, in this case, the United States, contravened in fact and in law the provisions of the American Declaration of the Rights and Duties of Man, in disregard of the minimum conditions set out in the Fourth Geneva Convention.

55. What is called for here is a recommendation of some kind to the effect that the United States Government make every effort to ensure that its military actions abroad conform to the standards of the international system for the protection of the individual.

III. CONCLUSION

56. For obvious reasons, recognized in doctrine and in the numerous precedents set by bodies for security and protection of human rights in different international organizations, the supervision of human rights covers acts occurring in situations of armed conflict between nations or between one nation and its nationals.

57. The arrest of the petitioners was theoretically justified by international humanitarian law. However, the uncertainty of the United States Government itself as to how the petitioners should be classified, and its refusal to offer them a right of appeal, to which they were entitled under the Fourth Geneva Convention (Article 78, paragraph 2), makes the procedures followed incompatible with the provisions of the American Declaration of Rights.

58. Given these circumstances, and having heard the request for reconsideration, it is necessary to recommend, in accordance with Articles 53 and 54 of the Regulations of the IACHR, that the United States Government review its practices to ensure observance of the pertinent provisions of humanitarian law, particularly by granting the right of appeal to civilians interned in occupied territories.

Done and signed at the headquarters of the Inter-American Commission on Human Rights (IACHR), in the city of Washington, D.C., on the 29th day of the month of September in the year 1999. (Signed): Hélio Bicudo, First Vice President.

1* Report Nº 13/95, of September 21, 1995, p. 19.

2* Preliminary unnumbered report (1998), p.13 paragraph 41.

3* Article 1, Regulations of the IACHR.

4* Trindade, A.A.C. (1997) *Tratado de Direito Internacional dos Direitos Humanos*, volume 1, 1st edition. Porto Alegre: Sergio A. Fabris ed. pp 269-280.

5* Unlike what happens in the national sphere, where the principle of "lex posterior derogat legi prior" (a later statute takes away the effect of a prior one) normally prevails.

6* Report 13/95 of IACHR, p.7, paragraphs 5 and 6.

7* See Geneva Convention Relative to the Treatment of Prisoners of War, Article 2:

In addition to the provisions which shall be implemented in peace time, **the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.** (Emphasis added.)

8* Robert Alexy, an eminent German constitutional expert, discusses the existence of an interpretative criterion which is considered relevant to the present case, although not directly applicable. For Alexy, constitutional laws differ from infraconstitutional ones in that the former are valid in all circumstances and it would be contradictory to say that a certain principle of constitutional law was "revoked" by another. However, conflicts are known to exist between constitutional principles, which, according to the author, may only be resolved by means of a "law of conflict," drawn up judicially for each specific case. It does not involve an interpretation of principles, but establishing rules of preference for each specific case. Here, too, what is happening is that two equally valid principles (or systems of principles) are harmonized by means of a specific "law of conflict." For a more detailed study, see Alexy, R. (1993). *Teoría de los derechos fundamentales*. Centro de Estudios Constitucionales, Madrid, pp 86-87.

9* Report 13/95, p. 9, paragraph 9.

10* In fact, the Government of Grenada did not delegate police powers to the occupation forces until after the cessation of hostilities, pursuant to Ordinance 1 of 1983.

11* "Response of the United States Government to Report 13/95 on Case 10.951 (Grenada)," p. 4.

12* Geneva Convention Relative to the Treatment of Prisoners of War.