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# International Human Rights Forums: A Means of Recourse for Refugees

Amy Young-Anawaty\*

## INTRODUCTION

In November 1980, the United States Coast Guard spotted a large group of Haitians who apparently had been marooned for weeks on a tiny Bahamian island called Cayo Lobos. The world watched with morbid fascination as 108 Haitian refugees, starving after weeks of insufficient food, water, and shelter, attacked their Bahamian rescuers. Preferring to die on Cayo Lobos rather than be returned to Haiti where they feared persecution, the Haitians finally were forced onto rescue ships by club-wielding Bahamian police. Unlike the 20,000 to 40,000 illegal Haitian aliens who over the years have successfully entered the Bahamas, this group was sent back to an uncertain fate in Haiti.<sup>1</sup>

Cayo Lobos, while certainly not a unique event in our times,<sup>2</sup> vividly conveys the posture of the person seeking asylum *vis à vis* the state of entrance. While the rights of individuals seeking asylum, including the right not to be returned, are found in more than a dozen treaties,<sup>3</sup> most notably the Convention relating to the Status of Refugees<sup>4</sup> and its subsequent Protocol,<sup>5</sup> these rights are rather fragile and have lacked the means for enforcement.<sup>6</sup> In each of these international instruments, states have agreed to limit to some extent their absolute competence over who enters and leaves their territory. Under the Convention and Protocol, however, it is the state and only the state which finally determines whether to admit or expel an alien seeking asylum.<sup>7</sup> While the Convention provides that the determination be made "in pursuance of a decision reached in accordance with due process of law,"<sup>8</sup> no international mechanism has existed for

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ensuring the fairness of such procedures.<sup>9</sup> Without further review, the state's decision to expel an individual, even to a place of certain persecution, is final.

This article explores the possibility of using some of the other international agreements to secure the rights of asylum seekers. These treaties belong to the relatively new body of international law—human rights law<sup>10</sup>—which gives broad protection to individuals everywhere regardless of status.<sup>11</sup> In a significant development for international law,<sup>12</sup> institutions and procedures have been established internationally and regionally to monitor the enforcement of these human rights agreements.<sup>13</sup> Several of these institutions, by virtue of treaty or statute, even possess the competence to hear complaints about states' violations of human rights.<sup>14</sup> Insofar as the claims of refugees fall within their jurisdiction, these bodies may address the question of refugees' rights, the state's obligations to grant them, and appropriate measures to ensure their enforcement.

This article analyzes one such complaint brought before a regional human rights forum, the Inter-American Commission on Human Rights,<sup>15</sup> in which Haitians seeking asylum in the United States claim that their human rights as refugees are being violated. This case, unique in the Western Hemisphere, tests the hypothesis that international human rights forums may be used to enforce the right of refugees not to be returned or expelled to a place of persecution. The case demonstrates that while international human rights forums cannot create the right of entry, which has been assiduously withheld by the international community,<sup>16</sup> they can enforce other obligations which protect the rights of refugees.

Before examining in depth the case of the *Haitian Refugees v. United States*,<sup>17</sup> a brief description of the Inter-American Commission on Human Rights and its procedures is in order, as well as a review of the rights particular to refugees, to determine their place in such procedures.

## RIGHTS OF REFUGEES FOUND IN INTERNATIONAL CONVENTIONS

The Refugee Convention and Protocol obligate states to observe numerous rights for "refugees"<sup>18</sup> once a determination of that status has been made. Only three Convention articles address the duties of the state toward the individual seeking asylum prior to such determination.<sup>19</sup> As a breach of these duties may form the basis of a complaint before an international human rights forum, they deserve more than cursory attention.

Article 33(1) provides the greatest protection for the refugee in its blanket prohibition against expulsion of any refugee to a place of persecution; Article 32 governs expulsion generally of refugees lawfully in the territory

of contracting states. Article 33(2) and Article 32(1) carve out the only allowable exceptions to the prohibitions: a refugee lawfully in the country may be expelled if he or she poses a threat to national security and public order, and a refugee in any status may be expelled to a place of persecution if he or she is a danger to security or if, by virtue of being convicted of a particularly serious crime, he or she is a danger to the community. The right of a state to expel a refugee on national security grounds is unquestionable if such a determination is made "in accordance with due process of law;"<sup>20</sup> what remains ambiguous is who is included as a refugee "lawfully" in the territory. Arguably, the protection and permissible exceptions apply to aliens who have entered the territory illegally and who have failed to "present themselves to the authorities without delay"<sup>21</sup> if they can at a later time prove they were refugees within the Convention's definition.

Article 31 of the Convention further states that a party "shall not impose penalties, on account of their illegal entry or presence, on refugees, who . . . enter or are present in their territory without authorization, *provided* they present themselves without delay to the authorities and show good cause of their illegal entry or presence."<sup>22</sup> This article again offers protection to those whose refugee status is still prospective, but its qualification that they "present themselves . . . to the authorities" renders it inapplicable in the majority of cases.

A fair statutory scheme to determine refugee status is a state obligation implied by the requirement that such procedures be "in accordance with due process of law."<sup>23</sup> A duty not to return a refugee until a final determination of the claim for asylum is made, at least within the limits of that domestic statutory scheme, is further implied by this interpretation. Even prior to a determination of status, asylum seekers, as persons within the territory of a state, are entitled to basic human rights and fundamental freedoms under emerging and accepted standards of international human rights law. Certain human rights agreements contain, in addition to the basic rights to life and freedom of thought and religion, particular provisions which bear directly on the right of refugees not to be returned to a place of persecution. Of the specific provisions contained in major international instruments, the most notable are the Universal Declaration on Human Rights<sup>24</sup> Articles 13 and 14 relating to the right to leave one's country and to seek asylum,<sup>25</sup> and Article 12 of the International Covenant on Civil and Political Rights, which read with Article 13 states that aliens lawfully in the territory may be expelled only pursuant to a decision in accordance with law.<sup>26</sup>

Instruments of two regional human rights systems—the Inter-American<sup>27</sup> and the European<sup>28</sup>—have several provisions of particular relevance to refugees. Article XXVII of the American Declaration of the Rights and Duties of Man<sup>29</sup> states "every person has the right, in case of pursuit not

resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country, and with international agreements." Sections of Article 22 of the legally binding American Convention on Human Rights<sup>30</sup> more closely parallel the 1954 Refugee Convention and add an additional prohibition against collective expulsion:

6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.
7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.
8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.
9. The collective expulsion of aliens is prohibited.<sup>31</sup>

A second regional instrument, the European Convention on Human Rights,<sup>32</sup> omits any similar right to seek or to receive asylum. Only in Protocol No. 4 of the European Convention<sup>33</sup> is there any reference to refugees and that is in a prohibition against the collective expulsion of aliens.<sup>34</sup> However, all of the rights included in the European Convention and Protocols are available to any person seeking asylum in the territory of a state party.<sup>35</sup>

Rights under the Refugee Convention and Protocol may be incorporated by reference in other international human rights treaties as part of the obligations to be observed by State parties.<sup>36</sup> Thus the Refugee Convention and Protocol can become a package of rights justiciable by an appropriate human rights organization.

#### **INTERNATIONAL FORUMS: THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

International human rights agreements have proliferated internationally and regionally since the ratification of the United Nations Charter.<sup>37</sup> These agreements perform two significant functions: (1) they obligate a state party to accord universally recognized norms of human rights to everyone within its territory "without distinction of any kind"<sup>38</sup> including, within certain specific restrictions, the status of citizenship, and (2) they arguably

grant basic human rights and fundamental freedoms to all individuals directly, not merely through the state.<sup>39</sup> The norms, then, are of universal application, and may be asserted against any government with jurisdiction over an individual. This is significant both for the refugee who has no basis for invoking any rights other than his or her physical presence in a country,<sup>40</sup> and for the government, as physical presence for purposes of these agreements implies jurisdiction.<sup>41</sup>

International human rights forums have developed over recent decades to monitor the implementation of these agreements, many of which are legally binding in character. To do so, many of these forums have established, through statute,<sup>42</sup> resolution,<sup>43</sup> or treaty,<sup>44</sup> procedures for receiving reports or hearing complaints of a government's failure to observe its obligations under a particular agreement. A few of these forums admit complaints by individuals;<sup>45</sup> the Inter-American Commission on Human Rights (Commission) is one of these.

Under the Charter of the Organization of American States,<sup>46</sup> "[t]he American states proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex."<sup>47</sup> In 1960, to fulfill that proclamation, the Council of the Organization of American States adopted the Statute of the Inter-American Commission,<sup>48</sup> a new regional organization, which would "promote respect for human rights."<sup>49</sup>

Under this broad mandate, the Inter-American Commission on Human Rights developed procedures to admit individual petitions alleging violations of human rights.<sup>50</sup> The procedures are rather simple and quite similar to requirements for domestic pleadings: to be admitted for consideration a petition must bear the name, address, and signature of the petitioners,<sup>51</sup> and an account of the alleged acts in violation of human rights;<sup>52</sup> it must not be anonymous,<sup>53</sup> or obviously unfounded;<sup>54</sup> all communications must be timely,<sup>55</sup> and domestic remedies must have been exhausted.<sup>56</sup>

Once the Inter-American Commission admits a communication, it may gather information<sup>57</sup> and may conduct an on-site investigation<sup>58</sup> to document the complaint while still placing itself at the disposal of the parties to effect a friendly settlement.<sup>59</sup> If the disputants fail to conclude such an agreement, the Commission is empowered to prepare a report and may make certain recommendations to the government concerned.<sup>60</sup> The report and recommendations may be published and are included in the Commission's annual report to the Organization of American States General Assembly.<sup>61</sup> Furthermore, under the American Convention, the Commission or the state concerned may submit the matter to the newly established Inter-American Court on Human Rights.<sup>62</sup> The Court is competent to determine the existence of violations under the Convention,<sup>63</sup> to order that the injured party be "ensured the enjoyment of his rights,"<sup>64</sup> and to

rule on fair compensation.<sup>65</sup> Judgments of the Inter-American Court are to be final and binding.<sup>66</sup>

The refugee's position in bringing a complaint to the Inter-American Commission differs in one significant way from that of any other victim of a human rights violation. The paramount right a refugee seeks is the right to remain, to avoid *refoulement*, return to a place of persecution. The slow and lengthy deliberations of international organizations may delay the admissibility review of his claim beyond the date of expulsion.<sup>67</sup> On the other hand, if the refugee submits a complaint before exhausting all administrative and judicial proceedings and appeals, the claim will be inadmissible for failure to exhaust domestic remedies. This Catch-22 is a crucial issue in *Haitian Refugees v. United States*.

## U.S. FAILURE TO OBSERVE THE HUMAN RIGHTS OF REFUGEES ALLEGED BEFORE AN INTERNATIONAL FORUM

The *Haitian Refugee* case tests for the first time in the Western Hemisphere the use of an international forum for protecting the rights of refugees.<sup>68</sup> The complaint alleges not only violations of the right of *nonrefoulement*, but violations of other basic rights essential for a fair determination of refugee status in compliance with international law, and stands as a challenge to the refugee policy and practices of the country currently receiving the highest number of refugees in the world.<sup>69</sup> Since this is a novel case, each step is analyzed separately to facilitate discussion of the issues and procedures involved.

### Factual Background

In the fall of 1978, the National Council of Churches (the Council) contacted the International Human Rights Law Group<sup>70</sup> (Law Group) to discuss filing a complaint against the United States in the Inter-American Commission on Human Rights. For several years, the Council had been monitoring both the continued violations of human rights in Haiti<sup>71</sup> as well as the treatment of Haitians arriving in the United States, and had become increasingly concerned about accelerated efforts by the Immigration and Naturalization Service (INS) to deport Haitians.

Between 1972 and 1977, an estimated 3,500 Haitians arrived in the United States, many of whom applied for political asylum.<sup>72</sup> Most of these Haitians became absorbed into the colorful fabric of Miami and New York while awaiting asylum hearings. However, in 1978, the INS noted a dramatic rise in the number of Haitians residing in the United States, which

promoted an administrative reassessment of the processing of Haitian asylum cases.

Two circumstances engendered the sudden increase in numbers of Haitians. A decision by the Bahamas in 1978 resulted in the expulsion of numerous Haitians who headed for the United States.<sup>73</sup> Secondly, a large number of Haitians who had been living for years as undocumented aliens in Florida surfaced at the prospect of obtaining INS work authorizations pursuant to an agreement between the INS and the National Council of Churches.<sup>74</sup> In return for the Council's keeping track of the whereabouts of Haitian aliens in Miami, the INS agreed to release 120 Haitians held in detention and to issue long awaited work permits to all Haitians with pending asylum claims. When that number reached four to five thousand within a period of several months—a figure which far exceeded the agency's own calculations—the INS breached the work authorization agreement with the Council<sup>75</sup> and then used all the names and addresses obtained through the aborted work permit program to serve notice of deportation proceedings.<sup>76</sup> This sudden reversal signaled the formulation of a new administrative policy designed not only to expel all Haitian aliens seeking asylum, but to deter and discourage any newly arriving Haitians from applying for asylum.

U.S. immigration statutes, it should be noted, distinguish between two classes of aliens: those seeking admission into the country are excludable aliens,<sup>77</sup> and those aliens who have already entered the territory of the United States, whether lawfully or not, are deportable aliens.<sup>78</sup> Although an excludable alien may be picked up at the coastline, as many of the Haitian boat people were, and brought by the authorities into U.S. territory, he or she is not entitled, by virtue of this physical entry, to the same constitutional protections enjoyed by a deportable alien.<sup>79</sup> The statutory distinction thus becomes a legal fiction under which the United States can arrest and imprison persons to whom "entry" is denied. Excludable aliens, however, are entitled to claim asylum under U.S. law<sup>80</sup> and to enjoy all the rights of the Convention and Protocol, as well as other international human rights agreements.

Shortly after the inception of the new policy, INS officials tried to threaten the newly arrived Haitians into accepting so-called "voluntary departure" and immediate return to Haiti. Reports from the Haitian community in Miami<sup>81</sup> indicated that intimidation occurred through coercive interrogations, misleading advice, and threats of reprisals in Haiti if political asylum was claimed in the United States. Particularly disturbing was the agency's use of a Haitian interpreter, Tony Heider, who was identified by Haitian refugees as a personal friend of Haitian President Jean-Claude Duvalier.<sup>82</sup>

The INS employed other tactics in dealing with deportable Haitians



who had asylum claims pending or who could raise such claims within expulsion proceedings. By August 1978, the INS had increased the rate of hearings from a usual average of five to fifteen per day to an average of sixty per day.<sup>83</sup> By mid-September, the daily average was over 100 and occasionally peaked at 150 hearings per day. This accelerated scheduling of hearings meant that individual attorneys had to represent clients at as many as fifteen hearings simultaneously.<sup>84</sup>

An on-site investigation undertaken by the Law Group, the Lawyers Committee for International Human Rights,<sup>85</sup> and the Alien Rights Law Project of the Lawyers Committee for Civil Rights Under Law<sup>86</sup> in October 1978 in Miami revealed that these figures and reports were merely the tip of the iceberg. Procedural irregularities abounded, including unrecorded interviews with INS investigators, interviewee responses not fully translated or transcribed, and harassment of individual attorneys.<sup>87</sup> The situation clearly indicated that U.S. authorities were engaged in a twofold plan: to use intimidation and coercion to exclude Haitians newly arriving on United States shores, and to truncate asylum procedures to expedite the claims of Haitians already involved in deportation proceedings.<sup>88</sup>

In addition to abridging constitutional guarantees, federal statutes, and administrative regulations, the United States was clearly acting contrary to its obligations under the Convention and Protocol.<sup>89</sup> While suit might be brought in federal court on behalf of deportable Haitians alleging such violations, total reliance on civil litigation appeared imprudent. First, the administrative scheme adopted to process Haitian claims had already hopelessly contaminated each asylum seeker's application. Were the court to order a review of asylum claims, the same procedural flaws would be on the record and would prejudice the applications.<sup>90</sup> Unless the court ordered a *de novo* hearing of thousands of claims—hardly a likely possibility—the claims would still be reviewed on the basis of false and misleading evidence. Furthermore, court proceedings would undoubtedly be lengthy and protracted. At this point, Haitians seeking asylum had no authorizations to work and thus could not endure a long court battle. Finally, there was no immediate judicial remedy available for the second group, the excludable Haitians, most of whom were being forcibly returned to Haiti daily as "voluntary departures." Thus on June 22, 1979, the International Human Rights Law Group, representing the National Council of Churches, brought a complaint to the Inter-American Commission on Human Rights alleging the violations by the United States of America of the human rights of over 8,000 Haitians seeking asylum.

## Admissibility

### *Standing*

The Regulations of the Inter-American Commission on Human Rights which govern petition procedures require that a complaint or communication include the name, address, and signature of the petitioners.<sup>91</sup> This complaint was signed by petitioners, the Law Group and the Council, on behalf of both groups of Haitians: the excludable aliens who, even at the time of filing, were being harassed, intimidated, deprived of the right to seek asylum, and returned to Haiti; and those already involved in deportation proceedings who had pending asylum claims.

### *Jurisdiction*

Under its Statute adopted in 1971, the Inter-American Commission on Human Rights (Commission) has competence with regard to all members of the Organization of American States on matters concerning human rights.<sup>92</sup> In particular, the Commission administers the provisions of the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights.<sup>93</sup>

The Inter-American Commission on Human Rights, the Law Group communication asserted, had jurisdiction over the Haitian case because the United States, as a member of the Organization of American States, is bound to respect the rights enumerated in the American Declaration on the Rights and Duties of Man.<sup>94</sup> While not legally binding alone, the American Declaration, as the Universal Declaration on Human Rights, is evidence of customary international law, which the United States does incorporate into domestic law.<sup>95</sup> In addition to the substantive and procedural rights guaranteed therein, the American Declaration, in Article XXVII, incorporates by reference all legally binding instruments relating to asylum to which the United States is a party: "Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and within international agreements." Thus, the 1967 Protocol relating to the Status of Refugees is part of the bundle of rights embraced by the American Declaration.

The communication further noted that as a signatory of the legally binding American Convention on Human Rights which came into force several months earlier,<sup>96</sup> the United States was bound to act in conformity with its provisions.<sup>97</sup> The Commission thus has jurisdiction to review U.S. action on the basis of its Statute and on the basis of obligations imposed by the American Declaration, the Refugee Protocol, and the American Convention on Human Rights.

*Exhaustion of Domestic Remedies*

Chief among the barriers to admissibility of a communication is the requirement that domestic remedies be exhausted.<sup>98</sup> Under international law, however, the rule regarding domestic remedies applies only when such remedies are adequate and effective.<sup>99</sup> The Law Group alleged that U.S. courts and agency proceedings did not offer the possibility for effective redress due to the *de facto* denials of due process and right to counsel and the discriminatory manner in which Haitian deportation and exclusion cases were being handled.<sup>100</sup> More importantly, as a practical matter, the Law Group asserted that once domestic remedies were exhausted for the Haitians under deportation proceedings they would be subject to immediate deportation. Thus the right to seek redress from the Commission would be forever precluded.<sup>101</sup>

**Specific Violations Alleged**

Based principally on the Law Group's on-site investigation and on the affidavits of Haitians and their attorneys, the complaint alleged that the United States, through its agents, the INS:

1. In violation of the basic humanitarian principles underlying the prohibition against "refoulement" contained in Article 33 of the Convention relating to the Status of Refugees, arbitrarily returned Haitian nationals to Haiti under the guise of "voluntary departure" by means of threat, intimidation, and the employment of Haitian translators believed to be informers for the Haitian Government.
2. Employed a procedural scheme which a) arbitrarily dismissed an overwhelming percentage of asylum applications as clearly lacking in substance, stating that the applicant has failed to identify "any dates, places, or occurrences that can be independently identified by the Service" and b) hampered or discouraged any realistic effort to substantiate the facts alleged.
3. Denied Haitian refugees the effective assistance of counsel by denying lawyers the right to ask clarifying questions at interviews, to challenge the typed record of the proceedings, or otherwise to participate actively in the interviews; by simultaneously scheduling interviews and hearings in buildings which are several blocks apart; and by increasing the frequency of hearings so as to severely limit the time available to counsel for adequate effective representation.
4. Harassed attorneys and others who represented Haitians, thereby undermining their work and impeding their ability to provide effective representation.

5. Arbitrarily arrested and imprisoned, without reasonable or sufficient basis for such imprisonment, Haitians seeking refuge in the United States.<sup>102</sup>

### U.S. Government Response

Under Article 42 of the Commission's Regulations,<sup>103</sup> the United States Government, after having received a copy of the communication, was obligated to cooperate with the Commission's request to obtain pertinent information. Significantly, Commission procedures require a government to respond to the Commission's request within 180 days.<sup>104</sup> Failure to respond within that time period may allow the allegations to stand unless the Commission is in possession of information which otherwise proves the charges false.<sup>105</sup>

The U.S. Government response, although submitted after a brief extension of the time limit, was timely.<sup>106</sup> Basically it asserted that the Commission lacked jurisdiction to hear the case and that the case was inadmissible because plaintiffs had failed to fulfill the requirement of exhaustion of domestic remedies.<sup>107</sup> By the time the United States had come forward with this response, the Miami Haitian Refugee Center had filed suit in federal court in Florida alleging both intentional discrimination in the processing of asylum claims of Haitian applicants and systematic violations of Haitian aliens' rights to due process.<sup>108</sup> Plaintiffs sought mandamus, declaratory, and injunctive relief against the INS to ensure proper processing of plaintiffs' asylum claims.<sup>109</sup> The United States pointed out that the charges before the Commission were "serious allegations which can be raised within the U.S. legal system,"<sup>110</sup> and advised the Commission not to take jurisdiction before that domestic legal process had run its course.

Without specifying the nature of such actions, petitioners had requested that the Commission take "immediate interim action to ensure that Haitian nationals presently within the U.S. and seeking asylum are not returned to Haiti. . . ." <sup>111</sup> The United States challenged the Commission's competence to take any interim measures before admitting the case, asserting lack of competence under either the Statute or Commission Regulations.<sup>112</sup> The United States also noted that the district court in Miami was considering a request for a preliminary injunction.<sup>113</sup> The United States also contested the legal basis for an on-site investigation, reiterating that the Commission could take no action before domestic remedies had been exhausted. Citing Secretary of State Cyrus Vance's open invitation for the Commission to visit the United States at any time,<sup>114</sup> the government assured the Commission that if it did choose to conduct an investigation

“for whatever reason,” the government would do everything “to facilitate its accomplishing that objective.”<sup>115</sup>

Although the first line of defense of the government was lack of jurisdiction for failure to exhaust domestic remedies, arguing in the alternative, the United States disputed the exceptions to that requirement proffered by petitioners.<sup>116</sup> The United States Government argued that general principles of international law, as codified in Article 46 of the American Convention on Human Rights,<sup>117</sup> are the sole determinant of the circumstances under which nonexhaustion may be excused. Thus, petitioners would have to show either that:

- (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.<sup>118</sup>

Petitioners had requested a waiver of the exhaustion requirement on the theory that the laws of the United States *as applied* failed to provide the possibility of effective redress; the United States countered that the laws themselves must fail to afford due process. The United States complained that petitioners, by asserting that the INS application of the laws denied due process, had prejudged the issue for the Commission and were urging the Commission to consider the case on the basis of a judgment which only the Commission should make after admitting the case. The United States argued that petitioners' theory begged the initial question of admissibility and thus the waiver should be denied.<sup>119</sup>

Petitioners also argued that aliens involved in exclusion proceedings who “voluntarily” returned to Haiti had no further domestic remedies to pursue. After conceding that aliens excluded or deported from the United States indeed have no further right to judicial review, the United States argued that the evidence failed to prove that all voluntary departures had been coerced, and that petitioners should not be permitted to bootstrap *all* cases into the Commission's jurisdiction. Finally, the United States countered that not all Haitians who were returned to Haiti were subject to persecution there; the Commission was invited to examine such allegations on a case-by-case basis.<sup>120</sup>

The complaint's assertion that no opportunity to seek redress remained once domestic remedies were exhausted in court received the most disingenuous government response. Citing provisions of U.S. law and interna-

tional obligations, the United States argued that a finding by the court in Miami would provide justice in that it would determine the refugee status of Haitians. The presumption clearly underlying such a bold assertion was that if the court found them to be refugees, they would not be returned to Haiti and thus their due process violations would become moot; if the court determined that they were *not* refugees and they were then deported, it would not be a violation of their rights to expel them as illegal aliens. This conclusion ignores the competence of the Commission to adjudicate violations of the rights of Haitian nationals in the United States regardless of their status as aliens or refugees. The United States could still be held accountable for violating the rights of Haitians seeking asylum whether or not the district court found their allegations to be without merit or whether circumstances rendered the issue moot before the Miami tribunal.

Petitioners, invoking their right to file "observations" on the government's response,<sup>121</sup> took the opportunity to rebut with two key points: the United States still had not contested the merits of the claim, and exhaustion of domestic remedies in this particular case could not be a bar to admitting the complaint. Under Article 46 of the American Convention on Human Rights, the Law Group argued, domestic remedies had been exhausted "in accordance with generally recognized principles of international law;"<sup>122</sup> the statutory provisions cited by the United States under Article 46 were not meant to be all-inclusive; the recognized principle of international law that applied was that remedies had to be adequate and effective. The claims alleged showed clearly that those remedies now offered by the United States Government were illusory. The solution proposed was for the Commission to join the issue of admissibility to the merits of the claim<sup>123</sup> since a factual determination of the adequacy of domestic remedies was a threshold question for admitting the claim. If the Commission examined the alleged situation and agreed that the pending civil suit did not remedy the due process violations permanently affecting Haitians seeking asylum, it would concur that domestic remedies being pursued were futile and admit the claim.

While acknowledging that existing civil proceedings in Florida might appear to be a possible domestic remedy, petitioners pointed out that the complaint before the Commission differed substantively from the pending law suit. For example, rights invoked by petitioners under the Refugee Convention and Protocol, central to the Commission's case, were not being invoked in domestic court.<sup>124</sup> Petitioners further alleged bad faith on the part of the United States Government, which argued to the Commission that domestic courts were about to give petitioners the relief they seek,<sup>125</sup> while it appealed U.S. court decisions favorable to the plaintiffs on the grounds that the court had no competence to hear the case and that the "entire law suit should be dismissed."<sup>126</sup>

Petitioners reminded the Commission that the case also concerned a group of excludable Haitians whose deportation orders were final and who were immediately deportable. This group had in fact exhausted domestic remedies. While the United States conceded exhaustion of domestic remedies on the part of these Haitians, it questioned whether the evidence presented on behalf of the excludable aliens was representative and again denied United States responsibility for the ultimate fate of Haitians returned to Haiti.<sup>127</sup>

Finally, petitioners' observations noted that Haitians arrive daily and are still deprived of the right to claim political asylum because of threats and intimidation by United States authorities. Petitioners noted that the Commission, even if it rejected the claim, was competent to address this situation under the broad powers delineated in Article 18 of its Statute,<sup>128</sup> and could ask the newly established Inter-American Court on Human Rights<sup>129</sup> to provide interim measures of injunctive relief to prevent the deportation of Haitians.

The Commission, where warranted, may agree to an oral presentation of new or compelling evidence by petitioners in a case under consideration. On April 3, 1980, the Law Group arranged to appear before the Commission to present oral testimony by Ira Kurzban, the lead attorney representing Haitians in deportation proceedings in Miami, Rev. Gerard Jean-Juste, the head of the Haitian Refugee Center, and Mr. Hurst Hannum, the attorney representing the Law Group. Mr. Kurzban and Rev. Jean-Juste reviewed and updated in detail the compelling evidence concerning the continuing mistreatment of Haitians arriving in the United States as well as those awaiting final deportation orders. Four days after hearing oral testimony, the Commission sent the United States Government the following telegram:

His Excellency  
Cyrus R. Vance  
Secretary of State  
Washington, D.C.  
United States of America

The Inter-American Commission on Human Rights has been informed that the case of Haitian Refugee v. Civiletti (Case No. 79-2036-CIV-JLK, U.S. District Court for Southern District of Florida) is about to go to trial and that pending the outcome of the litigation a preliminary injunction had been granted in that case, suspending the deportation of Haitian citizens who had been denied asylum as political refugees in the United States.

As your Excellency is aware, the Commission has before it Case No. 3228, in which it is alleged that due process guarantees are violated in the granting or denial of political asylum to Haitian refugees and that many of these "boat

people" are coerced into immediately returning to Haiti before they can even present their claims. For humanitarian reasons, the Commission respectfully requests, that, even should the decision of the District Court be adverse to the plaintiff, the Government of the United States cooperate with the Commission by refraining from any action which would result in the deportation of Haitian citizens seeking political asylum while the case is under study by the Commission. We wish to emphasize that this request does not constitute in and of itself any judgment in advance of the admissibility or merits of the case.

Edmundo Vargas Carreno  
Executive Secretary

Luis Demetrio Tinoco Castro  
Chairman<sup>130</sup>

Several aspects of this missive merit analysis. The telegram was clearly intended to function as an interim measure, forestalling any precipitous deportation of Haitians. It is uncertain why the Commission chose to base its request on humanitarian grounds rather than invoking its broad statutory mandate.<sup>131</sup> Perhaps, since the United States had already challenged the Commission's authority to take interim measures, the Commission considered the humanitarian appeal less confrontational. This interim measure was, however, an unambiguous request to refrain from deporting Haitian citizens seeking asylum. While the Commission in taking note of the pending civil suit in Florida did not comment on the adequacy and effectiveness of such domestic remedies, it did seek to ensure that a speedy decision in that forum would not preempt consideration by the Commission. More significant is the inclusion of the protective request of the Haitian exclusion cases not party to the civil suit. Although the immediate referent of the Commission's request is the decision of the district court, the cable's language clearly supports a reading that the United States should also refrain from deporting those "boat people [who] are coerced into immediately returning to Haiti before they can even present their claims."<sup>132</sup> In effect, the Commission was asking the INS to desist from its current practices of forcing newly arriving Haitians to "voluntarily depart." Such a request by an international organization directly affecting United States behavior is unprecedented in U.S. history.

What was the effect of such a telegram? The official response forwarded to the Commission by the United States ambassador to the Organization of American States relied exclusively on the issue of exhaustion of remedies as a bar to the Commission's further consideration of the question. At the same time, the United States promised forbearance in deporting Haitians during the period of the Commission's "study." The response letter did not address the more compelling issue of United States deportation of "boat people" forced to "voluntarily depart." Either the United States



conveniently misread the Commission's artful phrasing, or, being unable or unwilling to comply, it merely finessed the point.

Much water has passed under the proverbial bridge since that cable was received by the U.S. Department of State. Notably, the U.S. district court in Florida decided the case of *Haitian Refugee Center v. Civiletti* on July 2, 1980,<sup>133</sup> enjoining the INS "from expelling or deporting any members of the plaintiff class, from initiating, continuing, or otherwise proceeding with deportation hearings for members of the plaintiff class, and from further processing asylum applications . . . until such time as the court has approved the defendants' plan for reprocessing the plaintiffs' applications."<sup>134</sup> The United States, denying INS misconduct, has appealed the district court's decision on the grounds that, *inter alia*, the court improperly interjected itself into the administrative process. No date has been set for the appeal as of this writing.

The Cuban flotilla which began in April 1980 helped contrast the treatment given white aliens fleeing a Communist dictatorship as opposed to black aliens fleeing a right-wing ally,<sup>135</sup> but overall the Cuban exodus compounded the problems of Haitians. Growing public sympathy for Haitians was quickly replaced by indiscriminate alarm at the growing numbers of refugees in the United States. The INS proposed to relocate Haitians and Cubans to unsavory detention camps.<sup>136</sup> Finally, in October 1980, the INS decided to grant a special status as "Cuban-Haitian Entrants (Status Pending)" to those Cubans and Haitians who had arrived in Florida between June 20 and October 10, 1980 and who were in INS proceedings as of October 10, 1980.<sup>137</sup> Approximately 5,500 Haitians within this class will not yet be subject to deportation or exclusion orders. However, for the 4,000 Haitians caught entering the United States after October 10, 1980, or otherwise not within INS proceedings as of October 10, 1980, the INS will institute exclusion proceedings.

Alerting the Commission to this new administrative decision taken in light of the foregoing events, the Law Group in February 1981 asked the Commission to retain jurisdiction over the case, to request assurances from the United States that procedural safeguards will be observed, and to reiterate its request of April 7, 1980 that the United States refrain from deporting any Haitian nationals.<sup>138</sup> The Commission is currently meeting in Washington, D.C. and is not expected to take further action on the case at this time.

## CONCLUSION

Should the Commission find the *Haitian Refugee* case admissible, either because appeals having been exhausted, larger numbers of Haitian plain-

tiffs are deportable, or because the INS reinstates the practice of immediate *refoulement* or "voluntary departure," several actions could ensue. The Commission could request an on-site investigation in Miami to observe the practices of the INS District Director. It could, even without such an investigation, draft a report and recommendations on U.S. practices with regard to Haitians seeking asylum which would then be incorporated into the Commission's annual report to the Organization of American States General Assembly.

These actions, relatively tame compared to the power of domestic courts, are the sum total of any intergovernmental human rights bodies' arsenal of effective remedies.<sup>139</sup> Measured in terms of most governments' resistance to such actions being taken against them, however, they are serious sanctions indeed. The prospect of exposure of governmental misdeeds is an unwelcome one, as is the uncertain retribution of the international community's moral outrage. Thus even the threat of a well-documented report on human rights violations often convinces an errant government to modify its course of action.<sup>140</sup>

Public exposure of this nature would prove particularly embarrassing for the Government of the United States not only because of its emphasis on human rights but because of its rather pompous invitation extended by Secretary of State Cyrus Vance in the heyday of the Carter Administration human rights policy to have the Commission visit the United States at any time. Surely these factors contributed significant external pressures to persuade the government to cease even temporarily illegal INS practices.

While the current status of the Haitian case allows only speculation on the full potential of the Commission to deal with refugee cases, some general conclusions are possible. International human rights law, because of its broad coverage of individuals regardless of status, greatly enhances the rights of the refugee seeking asylum. While not creating new rights, particularly not the right of entry into a country of asylum, human rights agreements do cloak the refugee with basic rights which may be enforceable. Mechanisms such as those the Commission has established to implement international and regional instruments facilitate review of the behavior of states, specifically their adherence to obligations to which they voluntarily subscribe. Where states abridge these obligations in the treatment of any individual, including illegal aliens seeking asylum, they are susceptible to international scrutiny by the appropriate forum. The competence of the international human rights forums to review a state's compliance with its international obligations thus may limit the state's almost total discretion over entrance and expulsion of aliens. By ensuring the fairness of the determination process, international human rights forums collaterally protect the right of *nonrefoulement*.

Refugee movements frequently are attributable to gross deprivations of

civil, political, and economic rights, and often international human rights forums have before them evidence of such human rights violations in the country from which the refugee flees. Therefore, it is not inconceivable that someday these tribunals could play a greater role in determining refugee status, perhaps even enforcing the Refugee Convention and Protocol directly.<sup>141</sup>

## NOTES

<sup>1</sup> The Miami Herald, Nov. 12, 1980, at 1, col. 1.

<sup>2</sup> In 1950 alone, the number of refugees and displaced persons totaled 15,965,250. UNITED STATES COMMITTEE FOR REFUGEES, 1980 WORLD REFUGEE SURVEY 33 (1980).

<sup>3</sup> The COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES (2d ed. 1979) published by the United Nations High Commissioner for Refugees lists no less than 24 international and 18 regional agreements, including two devoted exclusively to refugee problems.

<sup>4</sup> Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

<sup>5</sup> Protocol relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force for United States Nov. 1, 1968).

<sup>6</sup> The Refugee Protocol, *supra* note 5, provides in Article IV that disputes over interpretation or application will be settled by the International Court of Justice at the request of any one of the parties; similarly, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, September 10, 1969, U.N.T.S. No. 14691 (1974), provides in Article IX for settlement of disputes between signatories by the Commission for Mediation, Conciliation and Arbitration of the OAU. No provision is made in any international agreement specifically protecting refugees for individual refugees to invoke rights under the treaties. See Appendix I(D), this volume, for the text of the OAU Convention.

<sup>7</sup> A leading American Scholar on refugees notes that: "[w]hile the growing practice of the great majority of states is to grant asylum to refugees, states have in the main steadfastly adhered to the traditional legal doctrine that the right of asylum is the right of states to grant asylum at their discretion." 1 L. HOLBORN, REFUGEES: A PROBLEM OF OUR TIMES 162 (1973). But see G. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES (1978) who comments, at 141, "It may be affirmed that the prohibition on the return of refugees to countries of persecution has established itself as a general principle of international law, binding on states automatically and independently of any specific assent."

<sup>8</sup> Refugee Convention, *supra* note 4, art. 32 (2).

<sup>9</sup> The mandate of the United Nations High Commissioner for Refugees is limited to guiding governments on ways to determine refugee status in compliance with international obligations. See OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979). See generally HOLBORN, *supra* note 7, at 55-143.

<sup>10</sup> Although the term "human rights" has long been in use, the body of international law known as human rights is generally acknowledged to date back to the incorporation of that term in no less than seven articles of the UN Charter (Articles 1, 13, 55, 56, 62, 68 and 76). These articles obligate states to respect and promote human rights, and empower organs of the UN to carry out activities to protect human rights. See generally Sohn, *A Short History of United Nations Documents in Human Rights* in COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 43-58 (Eighteenth Report, 1968).

<sup>11</sup> Article 2 of the Universal Declaration of Human Rights, the first instrument by the UN

to state explicitly what are "human rights," provides: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." G.A. Res. 217 A, U.N. Doc. A/810, at 71 (1948).

<sup>12</sup> As a well known commentator has noted, "It is after all a commonplace of international law that States assume duties of a legal character which are not enforceable by international organs." Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 648 (1951).

<sup>13</sup> See generally, R. LILICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 316-87, 546-613 (1979); L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 739-873, 999-1314 (1973).

<sup>14</sup> See G. DA FONSECA, HOW TO FILE COMPLAINTS OF HUMAN RIGHTS VIOLATIONS (1975); 1-3 M. TARDU, HUMAN RIGHTS, THE INTERNATIONAL PETITION SYSTEM (1979); THE INTERNATIONAL HUMAN RIGHTS PRACTICE MANUAL (International Human Rights Law Group ed. 1981).

<sup>15</sup> The Inter-American Commission on Human Rights was established in 1959 as one of the principal organs of the Organization of American States. See Goldman, *The Protection of Human Rights in the Americas: Past, Present and Future*, 5 N.Y.U. CENTER FOR INT'L STUD. NO. 2 (1972).

<sup>16</sup> HOLBORN, *supra* note 7, at 162-63.

<sup>17</sup> Complaint alleging a Violation of Human Rights, Haitian Refugees v. United States, Case 3228 (Inter-American Commission on Human Rights filed June 22, 1979) (copy on file with the *Michigan Yearbook of International Legal Studies*) [hereinafter cited as Haitian Refugees Complaint].

<sup>18</sup> As amended by the Protocol, the Convention defines the term "refugee" as a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former residence is unable or, owing to such fear, is unwilling to return to it." Refugee Convention, *supra* note 4, art. 1(A)(2), as amended by art. I(2) of the 1967 Protocol, *supra* note 5. See generally, HOLBORN, *supra* note 7, at 160-82.

<sup>19</sup> Refugee Convention, *supra* note 4, arts. 31, 32, 33. See GOODWIN-GILL, *supra* note 7, at 139-42.

<sup>20</sup> Refugee Convention, *supra* note 4, art. 32(2).

<sup>21</sup> *Id.*, art. 31(1).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, art. 32(2).

<sup>24</sup> Universal Declaration of Human Rights, *supra* note 11. See Kunz, *The United Nations Declaration of Human Rights*, 43 AM. J. INT'L L. 316 (1949).

<sup>25</sup> These provisions state:

#### Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

#### Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of persecutions genuinely arising from

non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Universal Declaration on Human Rights, *supra* note 11, arts. 13, 14.

<sup>26</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200 A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966):

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority of a person or persons especially designated by the competent authority.

<sup>27</sup> The Charter of the OAS, like the UN Charter, lays the basis for regional agreements on the treatment of individuals and for building institutions within the region to protect and to enforce human rights. Article 3(j), for example, reaffirms the principle that "the American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex." Article 112 establishes an Inter-American Commission on Human Rights through an inter-American convention. Charter of the Organization of American States, *entered into force* Dec. 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361, *as amended by* the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847. *See generally* SOHN & BUERGENTHAL, *supra* note 13, at 1267-70.

<sup>28</sup> The Council of Europe after World War II established a system for promoting human rights throughout Western Europe including a Convention and institutions to monitor its implementation. *See generally* SOHN & BUERGENTHAL, *supra* note 7, at 999-1265.

<sup>29</sup> American Declaration of Rights and Duties of Man, May 2, 1948, O.A.S. Official Records, OEA/Ser.L./V/II.50 doc. 6 (1980) [hereinafter cited as American Declaration].

<sup>30</sup> American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, at 1; O.A.S. Official Records, OEA/Ser.L./V/II.50, doc. 6 (1968) [hereinafter cited as American Convention].

<sup>31</sup> *Id.*, art. 22 (6)-(9).

<sup>32</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter cited as European Convention].

<sup>33</sup> Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* May 2, 1968, Europ. T.S. No. 46 (1963).

<sup>34</sup> Article 4 of Protocol No. 4, *id.*, states, "Collective expulsion of aliens is prohibited."

<sup>35</sup> *See* GOODWIN-GILL, *supra* note 7, at 161-67, 221-22.

<sup>36</sup> Many international agreements refer specifically to other international obligations as the standard by which duties shall be executed. For example, the Final Act of the Conference on Security and Cooperation in Europe (Helsinki Accord), Aug. 1, 1975, 73 DEP'T STATE BULL. 323, 326 (1975) in Principle X states that "The participating States will fulfill in good faith their obligations under international law, both those obligations arising from the generally

recognized principles and rules of international law and those obligations arising from treaties or other agreements, in conformity with international law, to which they are parties."

<sup>37</sup> United Nations Charter, June 26, 1945, 59 Stat. 1031, T.S. No. 993, *reprinted in* 3 BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 1153 (1969).

<sup>38</sup> Universal Declaration, *supra* note 11, art. 2.

<sup>39</sup> See SOHN & BUERGENTHAL, *supra* note 13, at 19-21, for a bibliographic note on the status of individuals in international law.

<sup>40</sup> Even in the United States where constitutional guarantees extend to illegal aliens, persons seeking asylum who are deemed to be excludable aliens and who are physically within the United States are not protected by the Constitution or federal law. *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (an alien's continued exclusion on Ellis Island did not deprive him of any statutory or constitutional right). See also text at note 79 *infra*.

<sup>41</sup> "The physical fact of an individual's presence within a state has been the major basis from which the state exerts its power to protect the individual. . . ." INTERNATIONAL LEGAL SYSTEM 519 (N. Leech, C. Oliver, J. Sweeney eds. 1973).

<sup>42</sup> See, e.g., Article 24 of the Constitution of the International Labor Organization, under which representations may be made by any association of workers or employers charging the failure of a state party to fulfill its obligations under any of the ILO conventions.

<sup>43</sup> See, e.g., E.S.C. Res. 1503, 48 U.N. ESCOR, Supp. (No. 1A) 8, U.N. Doc. E/4832/Add. 1 (1970), establishing procedures for the UN Commission on Human Rights to receive and address complaints of human rights violations.

<sup>44</sup> See, e.g., the provisions of the International Covenant on Civil and Political Rights, *supra* note 26, arts. 28-45, which established the Human Rights Committee.

<sup>45</sup> See 1 TARDU, *supra* note 14, part II, § VII, 12-13.

<sup>46</sup> Charter of the Organization of American States, *supra* note 27.

<sup>47</sup> *Id.*, art. 3(j).

<sup>48</sup> Statute of the Inter-American Commission on Human Rights, *adopted* Nov. 2, 1971, OEA/Ser.L/V/II.26, doc. 10, *reprinted in* ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS 23-28 (1978) [hereinafter cited as 1971 Statute]. Although the American Convention on Human Rights, *supra* note 30, provides for the establishment of the Inter-American Commission on Human Rights under Chapter VII, the slow progress of ratifications of that Convention prompted the OAS General Assembly to create by statute that body and to empower it to fulfill the original mandate. See generally Goldman, *supra* note 15. When the American Commission on Human Rights came into force on July 18, 1978, a new statute and new regulations had to be adopted. Statute of the Inter-American Commission on Human Rights, *adopted* Oct. 1979, OEA/Ser.L/V/II.50 *reprinted in* ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS 94-104 (1980) [hereinafter cited as 1980 Statute]; Regulations of the Inter-American Commission on Human Rights, *approved* April 8, 1980, OEA/Ser.L/V/II.50, *reprinted in* ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS 117-41 (1980) [hereinafter cited as 1980 Regulations]. In drafting the new Statute and Regulations, no provision was made for processing cases which were submitted under the 1971 Statute and 1967 Regulations, see note 50 *infra*. Thus it is not known whether the Haitian case is being considered under the old procedures or the new. Where old and new procedures differ substantially, both rules are cited in this article.

<sup>49</sup> 1971 Statute, *supra* note 48, art. 1.

<sup>50</sup> Procedures governing communications adopted by the Inter-American Commission can be found in articles 37-58 of the Regulations of the Inter-American Commission on

Human Rights, adopted May 2, 1967, OEA/Ser.L/V/II.17, doc. 26, reprinted in ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS 34-38 (1978) [hereinafter cited as 1967 Regulations].

51 1967 Regulations, *supra* note 50, art. 38(1)(a).

52 *Id.*, art. 38(1)(b).

53 *Id.*, art. 39(a).

54 *Id.*, art. 39(c).

55 *Id.*, art. 40. The 1967 Regulations merely require "a reasonable period of time, in the judgment of the Commission, from the date of occurrence of the supposed violation of those rights."

56 *Id.*, art. 54.

57 The 1971 Statute gives the Commission the power "to address the government of any American state for information deemed pertinent by the Commission." 1971 Statute, *supra* note 48, art. 9 (bis)(b). Furthermore, the 1967 Regulations state that "The Commission shall examine the evidence adduced by the Government concerned or by the person making the denunciation, or the evidence taken from witnesses to the facts, or that obtained from documents, records or official publications, or through observation *in loco*." 1967 Regulations, *supra* note 50, art. 50.

58 Article 11 of the 1971 Statute, *supra* note 48, states that "The Commission may move to the territory of any American state when it so decides by an absolute majority of votes and with the consent of the government concerned." This authority has been used to conduct on-site observations. The 1980 Statute states explicitly that the Commission has the power "to conduct on-site observations in a state, with the consent or at the invitation of the government in question." 1980 Statute, *supra* note 48, art. 18(g).

59 1980 Regulations, *supra* note 48, art. 42.

60 1971 Statute, *supra* note 48, art. 9 (bis)(b); 1980 Statute, *supra* note 48, arts. 43, 44.

61 If the government concerned does not adopt measures recommended by the Commission, the report may be published and submitted to the OAS General Assembly. 1967 Regulations, *supra* note 50, art. 57; 1980 Regulations, *supra* note 48, art. 45.

62 1980 Regulations, *supra* note 48, art. 47. See generally American Convention, *supra* note 30, arts. 52-69.

63 American Convention, *supra* note 30, art. 62(3).

64 *Id.*, art. 63(1).

65 *Id.*

66 *Id.*, arts. 67, 68.

67 The 1980 Regulations of the Inter-American Commission of Human Rights now contain a provision to expedite cases in such situations. 1980 Regulations, *supra* note 48, art. 31(2).

68 The European Commission on Human Rights, *supra* note 32, has heard numerous cases involving various rights of refugees under the European Convention. See Nance, *The Individual Right to Asylum Under Article 3 of the European Convention on Human Rights*, this volume.

69 Between spring of 1975 and May 31, 1980, the total number of refugees resettled in the U.S. reached 595,000. This is the greatest absolute number of refugees received by any single country. Canada received within that same period 74,000, but ranked first in ratio of refugees to population (1:324), and Australia ranked second with 44,000 refugees, and a ratio of 1:332. The U.S. ranked third with a ratio of 1:374. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 24 (March 1, 1981) [hereinafter cited as Select Commission Report].

70 A private, nonprofit legal organization, the International Human Rights Law Group was established by the Procedural Aspects of International Law Institute in September 1978 with funding assistance from The Ford Foundation and the Rockefeller Brothers Fund. The

Law Group offers professional assistance to help remedy human rights violations through the practice of international human rights law and procedures. This expertise is provided on a *pro bono* basis to nongovernmental organizations and to individuals.

<sup>71</sup> After an on-site observation visit in Haiti from August 16 through August 25, 1978, the OAS Inter-American Commission on Human Rights published the Report on the Situation of Human Rights in Haiti, OEA/Ser.L./V/II.46, doc. 66, rev. 1 (1979). See also *Haitian Refugee Center v. Civiletti*, No. 79-2086-Civ-JLK, at 40-122 (S.D. Fla. July 2, 1980) [hereinafter cited as *Haitian Refugee Center*].

<sup>72</sup> LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, THE INTERNATIONAL HUMAN RIGHTS LAW GROUP, & THE WASHINGTON LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW—ALIEN RIGHTS LAW PROJECT, *HAITIANS IN MIAMI: CURRENT IMMIGRATION PRACTICES IN THE UNITED STATES* 3 (1978) [hereinafter cited as *JOINT REPORT ON HAITIANS IN MIAMI*]. See also *Haitian Refugee Center*, slip op. at 124-25.

<sup>73</sup> *JOINT REPORT ON HAITIANS IN MIAMI*, *supra* note 72, at 4. See also *Haitian Refugee Center*, slip op. at 126 n. 91.

<sup>74</sup> Letter from INS General Counsel David Crosland to the National Council of Churches (Nov. 8, 1977). See also *JOINT REPORT ON HAITIANS IN MIAMI*, *supra* note 72, at 4; *Haitian Refugee Center*, slip op. at 124, 128.

<sup>75</sup> In November 1980, an order approving a settlement between the National Council of Churches and the INS provided that work authorizations be granted to each Haitian alien adult seeking political asylum who underwent initial processing by the INS on or before August 1, 1980. The National Council of Churches of Christ in the U.S. v. Shepfield, No. 79-2959-Civ-ALH (S.D. Fla. Nov. 3, 1980).

<sup>76</sup> *JOINT REPORT ON HAITIANS IN MIAMI*, *supra* note 72, at 4.

<sup>77</sup> General classes of excludable aliens are listed at 8 U.S.C. § 1182(a) (1)-(32) (1976), as amended by Act of Oct. 22, 1976, Pub. L. No. 94-571, 90 Stat. 2705.

<sup>78</sup> General classes of deportable aliens are outlined in 8 U.S.C. § 1251 (1976), as amended by Act of Oct. 20, 1976, Pub. L. No. 94-571, § 7(e), 90 Stat. 2706.

<sup>79</sup> See generally Note, *Due Process Rights for Excludable Aliens Under United States Immigration Law and the United Nations Protocol relating to the Status of Refugees: Haitian Aliens, a Case in Point*, 10 N.Y.U. J. INT'L L. & POL. 203 (1977).

<sup>80</sup> Immigration and Nationality Act of 1952, 8 U.S.C. § 1126, as amended by Refugee Act of 1980, Pub. L. No. 96-212, § 208, 94 Stat. 109.

<sup>81</sup> These reports came mainly through the Haitian Refugee Center in Miami which had been established by several voluntary agencies to aid newly-arrived Haitians.

<sup>82</sup> Affidavits of Accus Serant and Lucien Calixte, filed with Haitian Refugees Complaint, *supra* note 17.

<sup>83</sup> *JOINT REPORT ON HAITIANS IN MIAMI*, *supra* note 72, at 5. See also *Haitian Refugee Center*, slip op. at 146-50.

<sup>84</sup> *Haitian Refugee Center*, slip op. at 147.

<sup>85</sup> The Lawyers Committee for International Human Rights is a nonprofit, nongovernmental organization founded by the International League for Human Rights and the Council of New York Law Associates and was established as a legal resource center for human rights organizations.

<sup>86</sup> Alien Rights Law Project of the Lawyers Committee for Civil Rights Under Law is a private, nonprofit civil rights organization which provides legal and public policy representation to a wide range of impoverished groups.

<sup>87</sup> Affidavits of Ira Kurzban, Esq., Frank Murray, Esq. and Steve Levine, filed with Haitian Refugees Complaint, *supra* note 17. See *JOINT REPORT ON HAITIANS IN MIAMI*, *supra* note 72, at 5-18. See also *Haitian Refugee Center*, slip op. at 124.



<sup>88</sup> These indications were later confirmed by evidence introduced in *Haitian Refugee Center*, slip op. at 124.

<sup>89</sup> Refugee Convention, *supra* note 4, art. 33. The Immigration and Nationality Act of 1952 has recently been amended by the Refugee Act of 1980, Pub. L. No. 96-212 94 Stat. 102 (1980) to comply more fully with the United States international obligations under the Refugee Protocol. *See generally* *Hearings on the Refugee Act of 1979 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979). *See also* Note, *Immigration Law and the Refugee—A Recommendation to Harmonize the Statutes with the Treaties*, 6 CAL. W. INT'L L. J. 129 (1975).

<sup>90</sup> The court in *Haitian Refugee Center* asked the INS to submit a "detailed plan providing for the orderly, case-by-case, nondiscriminatory and procedurally fair reprocessing" of Haitian asylum claims. Slip op. at 163.

<sup>91</sup> 1967 Regulations, *supra* note 50, art. 38(1)(b).

<sup>92</sup> 1971 Statute, *supra* note 48, art. 9; 1980 Statute, *supra* note 48, art. 18.

<sup>93</sup> 1971 Statute, *supra* note 48, arts. 1-2; 1980 Statute, *supra* note 48, art. 1.

<sup>94</sup> *Id.* *See also* notes 27 and 29 *supra*; Farer & Rowles, *The Inter-American Commission on Human Rights* in AMERICAN BAR ASSOCIATION, INTERNATIONAL HUMAN RIGHTS, LAW AND PRACTICE 52-54 (1978).

<sup>95</sup> Much has been written by scholars arguing that the Universal Declaration of Human Rights, in defining the broader terms of the UN Charter's human rights provision, articulates international standards and thus is evidence of customary international law. Important indications that a law-making consensus on that subject is evolving are the: (1) Montreal Statement of the Assembly for Human Rights, *reprinted in* 9 J. INT'L COMM. JUR. 94, 95 (1968); (2) Declaration of Teheran in Final Act of the International Conference on Human Rights, UN Doc. A/C A/CONF./32/41, para. 2 (1968). *See* Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 529 (1976). U.S. courts have also found provisions of the Universal Declaration to be part of customary international law. *Filartiga v. Peña-Irala*, 630 F.2d 876, 883 (2d Cir. 1980); *Rodriguez-Fernandez v. Wilkinson*, No. 80-3183 (D. Kan., filed Dec. 31, 1980). It is well established that customary international law is part of United States law. *The Paquete Habana*, 175 U.S. 677, 700 (1900). *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 221 (1972).

The American Declaration on the Rights and Duties of Man parallels in part the Universal Declaration and is similarly one of the "major interpretational human rights instruments" which evidences customary international law. Buergethal, *Codification and Implementation of International Human Rights*, in HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS 15 (A. Henkin ed. 1979).

<sup>96</sup> *See* note 30 *supra*.

<sup>97</sup> Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, *opened for signature* May 23, 1969, U.N. Doc. A/CONF./39/27, at 289, *reprinted in* 8 I.L.M. 679 (1969).

<sup>98</sup> 1967 Regulations, *supra* note 48, art. 54. Under the 1967 Regulations, the Commission distinguished between communications submitted alleging violations of certain American Declaration articles enumerated in Article 9 (bis) and other communications. The former category of communications were considered under the "special procedures" outlined in Article 9 (bis) and were subject to the requirement of exhaustion of domestic remedies. The latter category were considered under the "general procedures" and thus were not subject to that requirement. *See* Case No. 1684 *reported in* OAS, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 16-20 (1972); Farer & Rowles, *supra* note 94, at 59-60. The Haitian case, raising broad policy and factual questions concerning the administration of U.S. statutes and regulations, was submitted under the general procedures with a request for a waiver of the exhaustion requirement. The United States rejected that distinction. U.S. Government Response, at 3-5, *Haitian Refugees v. United States*, Case 3228 (Inter-American Commission on

Human Rights, filed June 22, 1979) [hereinafter cited as U.S. Government Response, Case 3228] (copy on file with *Michigan Yearbook of International Legal Studies*). Under the new regulations the distinction between procedures no longer exists and all petitioners must have exhausted domestic remedies. 1980 Regulations, *supra* note 48, art. 34.

99 See 1967 Regulations, *supra* note 50, art. 55; 1980 Regulations, *supra* note 48, art. 34.

100 See JOINT REPORT ON HAITIANS IN MIAMI, *supra* note 72. *Haitian Refugee Center*, slip op. at 123-58.

101 The European Commission on Human Rights in this regard requires that domestic remedies still to be exhausted have a "suspensive effect" in order to be considered effective. See, e.g., *Becker v. Denmark*, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 416, 450 (Eur. Comm. on Human Rights).

102 Haitian Refugees Complaint, *supra* note 17, at 7-8.

103 1967 Regulations, *supra* note 50, art. 42.

104 *Id.*, art. 51(1). Under the 1980 Regulations, that period for response by the government has been reduced to 120 days with provision for one extension for 30 days but not to exceed a total of 180 days. 1980 Regulations, *supra* note 48, art. 31(5) and (6).

105 1967 Regulations, *supra* note 50, art. 51(1).

106 The U.S. Government response was filed with the Commission on Feb. 1, 1980, 232 days after the Commission received petitioner's communication.

107 See note 98 *supra* and accompanying text.

108 See note 77 *supra*.

109 See *Haitian Refugee Center*, slip op. at 163.

110 U.S. Government Response, Case 3228, *supra* note 98, at 2.

111 Haitian Refugees Complaint, *supra* note 17, at 11.

112 The U.S. Government apparently was relying on a narrow construction of the Commission's broad statutory mandate under Article 18 of the 1980 Statute, *supra* note 48.

113 *Haitian Refugee Center v. Civiletti*, No. 79-3690-Civ-JLK (S.D. Fla. July 23, 1979).

114 Speech by Secretary of State Cyrus R. Vance before the General Assembly of the Organization of American States (June 14, 1977).

115 U.S. Government Response, Case 3228, *supra* note 98, at 3.

116 *Id.* at 6-9.

117 American Convention on Human Rights, *supra* note 30, art. 46(2).

118 *Id.*

119 U.S. Government Response, Case 3228, *supra* note 98, at 7.

120 In May 1979 the Department of State sent a study team to Haiti to investigate charges that Haitians voluntarily returned to Haiti were being persecuted. The reported concluded that

We found no evidence of a pattern or policy of mistreatment or punishment of those who have been to the U.S. except that trip organizers are subject to criminal penalties, a practice that would not ordinarily give rise to a claim of persecution within the meaning of the Protocol. Moreover, the interviews indicated that most Haitian migrants come to the U.S. drawn by the prospect of economic opportunity and not fleeing political persecution.

U.S. Department of State, Memorandum by Study Team on Haitian Returnees, 13-14, June 19, 1979 (unclassified).

This report was criticized both for its findings and methodology by the court in the *Haitian Refugee Center* case as well as by many lawyers in the international human rights legal community and by Amnesty International spokesmen. See *Haitian Refugee Center*, slip op. at 57-80.

121 This informal procedure now appears in Article 31(7) of the 1980 Regulations, *supra* note 48.

122 American Convention on Human Rights, *supra* note 30, art. 46(1)(a).

123 This tactic had been utilized in a case before the European Commission, *Donnelly v. United Kingdom*, [1973] Y.B. EUR. CONV. ON HUMAN RIGHTS 212 (Eur. Comm. on Human Rights). See Hannum & Boyle, *The Donnelly Case, Administrative Practice and Domestic Remedies Under the European Convention: One Step Forward and Two Steps Back*, 71 AM. J. INT'L L. 316 (1977).

124 Brief for Appellees, *Haitian Refugee Center v. Civiletti*, No. 79-3690 (S.D. Fla. July 23, 1979).

125 See U.S. Government Response, Case 3228, *supra* note 98, at 3.

126 Brief for Appellants at 18, *Haitian Refugee Center v. Civiletti*, No. 79-3690 (S.D. Fla. July 29, 1979).

127 See note 120 *supra*.

128 The 1980 Statute of the Inter-American Commission on Human Rights had been adopted by the time petitioners filed observations on the U.S. Government Response.

129 1980 Statute, *supra* note 48, art. 19(c).

130 Telegram of the Inter-American Commission on Human Rights to the U.S. Department of State (Apr. 7, 1980) (on file with the *Michigan Yearbook of International Legal Studies*).

131 1980 Statute, *supra* note 48, art. 18.

132 Telegram of the Inter-American Commission on Human Rights to U.S. Department of State (Apr. 7, 1980), *supra* note 130.

133 No. 79-2086-Civ-JLK (S.D. Fla. July 2, 1980).

134 *Id.* at 163-64.

135 See generally *Caribbean Refugee Crisis: Cubans and Haitians: Hearings before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 1980).

136 Both Haitians and Cubans, for example, were scheduled for transfer to a detention camp, Fort Allen, in Puerto Rico. Conditions in Fort Allen so violated health standards that the governor of Puerto Rico filed a motion for a preliminary injunction which enjoined the federal government from sending any refugees there. *Commonwealth of Puerto Rico v. Muskie*, No. 80-2117 (D.P.R. Jan. 5, 1981).

137 INS Press Release, Cuban-Haitian Task Force, Office of Public Affairs (Oct. 21, 1980); Bureau of Public Affairs, Dep't of State, Cuban-Haitian Arrivals in the U.S., Current Policy No. 193 (1980).

138 Memorandum from the International Human Rights Law Group to the Inter-American Commission on Human Rights (Feb. 19, 1981).

139 See, e.g., provisions concerning the authority of the European Commission on Human Rights, *supra* note 32, arts. 20-37; the authority of the UN Commission on Human Rights to address petitions under Res. 1503, *adopted* May 27, 1970, 48 U.N. ESCOR, Supp. (No. 1A) 8, U.N. Doc. E/4832/Add. 1 (1970); the authority of the Human Rights Committee to hear complaints under the Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200A, 21 GAOR, Supp. (No. 16) 59, U.N. Doc. A/3616 (1966).

140 See Shelton, *International Enforcement of Human Rights: Effectiveness and Alternatives*, [1980] AM. SOC'Y INT'L L. PROC.

141 In March 1981, the U.S. Select Commission on Immigration and Refugee Policy recommended in its Final Report the creation of regional mechanisms to address the problems of refugee influx, settlement and undocumented entry of aliens. Noting that these were "immediate hemispheric problems" and that "regions have economic, political and other ties which make them possible units of cooperation" the Select Commission supports efforts on a regional level to develop mechanisms to promote mutual cooperation. Select Commission Report, *supra* note 69, at 30-31.