

INTERNATIONAL PROCEDURES FOR PROTECTING THE HUMAN RIGHTS OF NON-CITIZENS

SHARRYN AIKEN AND TOM CLARK *

RÉSUMÉ

Dans cet article, les auteurs explorent trois avenues internationales qui sont disponibles pour refuser une demande de statut de réfugié : l'*United Nations Human Rights Committee*, le Comité sur la torture et la Commission interaméricaine des droits de l'homme. Ils décrivent le mandat de chacun de ces organismes de même que la façon détaillée de soumettre une demande à l'un d'eux. De plus, on y discute de leur jurisprudence en abordant tout spécialement les décisions concernant le Canada. Les auteurs espèrent que les procédures décrites dans l'article «faciliteront la tâche de tenir le gouvernement imputable d'obligations qu'il a lui-même énoncé comme des valeurs universelles».

It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law ...

Universal Declaration of Human Rights

INTRODUCTION

The objectives of Canada's immigration program, as stated in the Immigration Act, include family reunification and the fulfilment of Canada's international legal obligations and humanitarian traditions with respect to refugees, the displaced and the persecuted.¹

* Copyright © 1994 Sharryn Aiken and Tom Clark. Sharryn Aiken is Staff Lawyer of South Etobicoke Community Legal Services; Tom Clark is Coordinator of the Inter-Church Committee for Refugees based in Toronto. The authors would like to thank Barbara Jackman, Barrister & Solicitor, Toronto, for her valuable comments on an earlier draft of this paper. In addition, the research assistance of Natalie Guriel and Ari Slatkoff is gratefully acknowledged.

1. *Immigration Act*, R.S.C. 1985, c. 1-2, s. 3(c) and (g).

Yet all too often, the lawyer or community worker is contacted by a refused refugee claimant for whom the system has failed. It may be a young man who has legitimate fears about returning to his country of origin, where conditions have been steadily deteriorating. Or it may be a woman who has been refused "humanitarian and compassionate" consideration to remain in Canada³ despite the presence of her Canadian born children and extended family network in Toronto. After exhausting all avenues of legal appeal, nothing but the prospect of extra-legal sanctuary appears to stand between these people and the certainty of deportation. At this stage, consideration should be given to submitting a petition to one of the international human rights organizations. Canada has adopted and ratified three treaties which provide mechanisms for the review of "communications" or complaints in relation to, *inter alia*, violations of the rights of non-citizens facing deportation from Canada.

The United Nations Human Rights Committee, the Committee Against Torture and the Inter-American Commission on Human Rights [IACHR] are mandated to accept petitions by individuals, alleging violations of any of the rights recognized in the International Covenant on Civil and Political Rights (for petitions to the Human Rights Committee), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (for petitions to the Committee Against Torture) or the American Declaration of the Rights and Duties of Man (for petitions to the IACHR). Decisions of these international bodies are not legally binding on governments.⁴ There is no power to undertake direct enforcement activity in regard to individual cases or to order that compensation be paid to victims of human rights violations. In addition, all the international procedures share a serious problem of delay. It is not uncommon for it to take four years for a case to be finally decided. However, despite the absence of enforcement mechanisms and the backlog of pending cases, the international bodies have often succeeded in convincing member states to bring their practices into conformity with international human rights standards. As noted by a leading human rights scholar, Hurst Hannum, the distinction between legally binding and advisory opinions may not always have great practical significance.⁵ Many governments are willing to take the

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3. Section 114(2) of the *Immigration Act* states that the Governor in Council may, by regulation, authorize the Minister to facilitate the admission into Canada of any person owing to "compassionate or humanitarian considerations".
 4. Formally the IACHR is considered to be a "regional" organization and the United Nations Committees are considered to be "international". For the purpose of brevity, both the IACHR and the UN bodies have been referenced throughout this paper as "international" organizations. Note also that the words "communication", "petition" and "complaint" are used interchangeably throughout this paper.
 5. H. Hannum, "Implementing Human Rights: An Overview of Strategies and Proce-

action recommended by an international body even if the recommendation is not obligatory. A combination of moral suasion as well as the threat and impact of adverse publicity for the government in question are often effective in encouraging governments to take action.⁶

In his assessment of the Human Rights Committee's work, Professor Tomuschat asserts that "the views of the Committee can have a far-reaching impact at least vis-à-vis such Governments which have not outrightly broken with the international community and ceased to care anymore for concern expressed by international bodies. If such a situation arose, however, even a legally binding decision would not be likely to be respected".⁷ In this regard, it is interesting to contrast the situation of Uruguay (against which the Human Rights Committee found violations stemming from at least thirty-five cases), where virtually nothing was done by its government to address the violations, with Mauritius and Finland, both of which acted quickly to correct the single breach each had committed. To date, Canada has had an uneven record in its speed of responding to decisions—in some cases, acting very quickly to address a problem, and other times acting only after considerable delay.⁸

The objective of this paper is to provide a guide to invoking the formal international human rights procedures on behalf of refused refugee claimants and other non-citizens of Canada. Notwithstanding the shortcomings of these mechanisms and the procedural hurdles that must be overcome, the international human rights bodies are becoming increasingly significant fora for challenging the most egregious aspects of Canadian immigration law and practice. The treaty provisions upon which petitions before the Human Rights Committee and the

dures", pp. 19-38 in H. Hannum (ed.) *Guide to International Human Rights Practice*, Second Edition, (Philadelphia: University of Pennsylvania Press, 1992).

6. For a critical evaluation of the Committee's role in protecting human rights, see M. Lippman, "Human Rights Revisited: The Protection of Human Rights Under the International Covenant on Civil and Political Rights" (1980) 10 Cal. West. ILJ 450.
7. C. Tomuschat, "Evolving Procedural Rules: The United Nations Human Rights Committee's First Two Years of Dealing with Individual Communications" (1980) 1 HRLJ 249.
8. For example, the Canadian government did not amend the Indian Act until nearly four years after the Human Rights Committee's decision in the *Lovelace* case that the Act violated Article 27 of the International Covenant on Civil and Political Rights. [Selected Decisions of the Human Rights Committee Under the Optional Protocol (hereinafter cited as S.D.), Vol. 1, p. 83, A/36/40 (1981), p. 166]. On the other hand, the Quebec government acted quickly to address the Human Rights Committee's decision in the *McIntyre* case that a controversial provincial language law, violated Article 19(2) of the International Covenant on Civil and Political Rights. In 1993, within one month after the Committee rendered its decision, the offending law was repealed.

IACHR may be based will be reviewed and the procedures followed by each organization will be described in detail. The Committee Against Torture, which operates along similar lines as the Human Rights Committee in the consideration of individual communications, will be explored more briefly. In addition, the relevant international jurisprudence, including a selection of recent Canadian cases, will be highlighted to assist the complainant or advocate in the preparation of a petition to one of the international bodies.

At the outset it should be noted that while each of the international bodies will be considered sequentially in this paper, in drafting a petition for any of the bodies, reference should be made to the relevant jurisprudence of the other organizations as well as to decisions of the European Court of Human Rights and the Inter-American Court of Human Rights. All the international bodies, including the Courts which do not have jurisdiction over Canada, have rendered decisions on similar substantive and procedural issues and their determinations on individual cases can lend support to arguments being advanced in a petition to any of the international human rights fora.

It should also be stated that while there are no direct costs involved in filing a complaint with any of the international bodies (apart from the stamp to send the petition by airmail to Geneva or Washington, D.C.), some skill and knowledge is required in order to draft a complaint that complies with each organization's requirements. Currently there are no provisions for free legal assistance. For most cases in Canada, funding through provincial legal aid plans would be unlikely but assistance may be available through community groups and religious institutions.

THE HUMAN RIGHTS COMMITTEE

The Human Rights Committee was established in 1976 pursuant to Article 28 of the International Covenant on Civil and Political Rights. The Committee consists of eighteen members who are experts of "high moral character and recognized competence in the field of human rights"⁹ elected from State Parties to the Covenant. In the election process consideration is given to equitable geographical distribution and to the representation of different forms of civilization, as well as the principal legal systems.¹⁰ Committee members are elected

9. *International Covenant on Civil and Political Rights*, 1966, UNGA Res. 2200 (XXI), CTS 1976/46 (Article 28(2)).

10. A.F. Bayefsky, *International Human Rights Law* (Toronto: Butterworths Canada Ltd., 1992) pp. 619-620. For a comprehensive study of the Human Rights Committee and its work, see D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991). See also Ton J. M. Zuijdwick, "The Right to Petition the United Nations

for a four-year term and serve in their personal capacities, which means they are not agents or representatives of governments. The Committee normally meets three times per year for three weeks; twice in Geneva and once in New York.

Who Has The Right of Petition?

Submissions may be made to the Committee only by individuals who are situated in states that have signed both the International Covenant on Civil and Political Rights and its Optional Protocol. Canada has signed them both and has formally recognized the competence of the Human Rights Committee to receive and consider applications from individuals within its jurisdiction. It is important to note that the individual need not be within the territory of the State concerned when the petition is submitted. According to Article 1 of the Optional Protocol, the moment at which the alleged violation took place is determinative, not the moment at which the petition is submitted. This means that refugees living in Canada may petition the Committee concerning violations to which they were subject in their country of origin (as long as that country has ratified the Optional Protocol) and that non-status refugees and other non-citizens who already have been deported from Canada may still file a complaint concerning violations of their Covenant rights perpetrated by the Canadian government.¹¹

Communications may be submitted by the victim of an alleged violation of one of the rights guaranteed by the Covenant or by his or her representative. In practice victims have been represented by lawyers, law professors and non-governmental organizations. In circumstances in which the victim is unable to submit an application (for example, in cases where the person has disappeared or simply cannot write) communications may be submitted by a close relative on behalf of the victim.¹² The Committee requires evidence that the representative has been duly authorized. No appearance by the individual or his or her representative before the Human Rights Committee is required. Consideration of all communications from individuals and governments is done by the Committee in closed meetings. Formal communication between the Committee and the parties is entirely in written form.

Because of Alleged Violations of Human Rights" (1981) 59 Can. Bar Rev. 103.

11. L.F. Zwaak, *International Human Rights Procedures: Petitioning the ECHR, CCPR and CERD* (Nijmegen: Ars Aequi Libri, 1991) p. 81. For an example of a complaint filed by a refugee outside of his country of origin, see *Mbenge v. Zaire*, Communication No. 16/1977, S.D. Vo. 2, p. 76; A/38/40 (1983), p. 134.
12. The case of *Almeida Quinteros v. Uruguay* [Communication No. 107/1981, S.D. Vol. 2, p. 138; A/38/40 (1983), p. 216] is an example of a petition submitted by a woman on behalf of her daughter, and on her own behalf, in relation to her daughter's detention and disappearance in Uruguay.

Subject Matter of Petitions

The International Covenant on Civil and Political Rights constitutes a catalogue of basic civil and political rights in treaty form. All complaints submitted to the Human Rights Committee must be based on a violation of one or more of the rights contained in Parts II and III of the Covenant. The Committee does not require the complainant to specify accurately, or even at all, the particular rights in the Covenant which he or she alleges have been violated. The Committee will conduct its own examination of the articles of the Covenant that appear to be engaged based on the submissions of the parties. Nevertheless, familiarity with the Covenant and its interpretation by the Committee can assist in ensuring that a petition is properly drafted, that the Committee has the jurisdiction to address the substance of the complaint and that procedural requirements have been met. In considering communications from individuals, Committee members tend to base their reasoning upon principles elaborated in earlier decisions. For this reason, it is important to be aware of the Committee's "views" (decisions related to individual cases) and "comments" (general opinions on the interpretation of the Covenant).

The provisions of the Covenant which may be relevant to the case of a non-citizen facing deportation from Canada include the right not to be discriminated against [Article 2]; the right to life [Article 6]; the right not to be tortured or subjected to cruel, inhuman treatment [Article 7]; the right to liberty and security of the person [Article 9]; the right of aliens to be expelled only pursuant to a decision reached in accordance with law and, except where compelling reasons of national security, the right to submit reasons against expulsion and have one's case reviewed by, and be represented before the competent authority [Article 13]; the rights to equality before courts and tribunals and to a fair and public hearing without delay [Article 14]; the right not to be subjected to arbitrary interference with privacy, family and home [Article 17]; the right of the family to protection as the "natural and fundamental group unit of society"; the right of the child to protection as "required by his status as a minor" [Article 24]; and the right to equality before the law and equal protection of the law [Article 26].

Some of the substantive rights outlined above, including Article 13 rights in regard to the expulsion of aliens, may be temporarily limited if a state derogates from certain provisions pursuant to Article 4 of the Covenant. The Committee will determine whether or not a particular restriction on a right is "strongly required by the exigencies of the situation", as outlined in Article 4(2). While terms of the Covenant permit states to distinguish between citizens and aliens in certain circumstances, there can be no derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18.¹³

13. Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press,

The views of the Human Rights Committee are published in the *Annual Reports of the Human Rights Committee to the UN General Assembly*. Somewhat dated records of the Committee's work are also available in several volumes of the *Yearbook of the Human Rights Committee* and in two volumes of *Selected Decisions under the Optional Protocol*.¹⁴ Since its inception, the Committee has registered more than 400 communications and its views in relation to these communications have established a number of important precedents. Its jurisprudence is still evolving, particularly in the area of the rights of non-citizens or "aliens", which to date has generated a relatively smaller number of communications to the Committee. While a comprehensive review of all the leading decisions addressing the interpretation of the rights enunciated in the Covenant is beyond the scope of this paper,¹⁵ a few key views and comments dealing directly with the expulsion of aliens will be examined.

The rights of aliens under the International Covenant on Civil and Political Rights were clarified in General Comment 15 of the Human Rights Committee. The Committee noted that while the Covenant does not recognize a right of aliens to enter or remain in a state, aliens within a state jurisdiction may enjoy

1983) at pp. 137-38. See also McDougal, Lasswell, Chen, "The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights" (1976) 70 Am. J. Int'l. L. 432. Note that Canada has ratified a number of other multilateral treaties which may lend further support to some petitions before the Human Rights Committee. These treaties include: Convention on the Rights of the Child [UNGA Nov. 20, 1989, CTS 1992/3], International Convention on the Elimination of All Forms of Racial Discrimination [UNGA Dec. 21, 1965, CTS 1970/28], Convention on the Elimination of All Forms of Discrimination Against Women [UNGA Dec. 18, 1979, CTS 1982/31], Convention on the Reduction of Statelessness [1975 B.T.S. 158, CTS 1978/32]. Other relevant documents include the Declaration on the Protection of All Persons from Enforced Disappearance [UNGA Resolution 47/133, Dec. 18, 1992] and The Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions [UNGA Resolution 44/162, Dec. 15, 1989].

14. Report of the Human Rights Committee, UN General Assembly Official Records: A/.../40. A selection of the decisions of the Human Rights Committee from 1982-1988 has been published in S.D. Volumes 1 and 2: UN Doc. CCPR/C/OP/1 and CCPR/C/OP/2. These publications are available in many university libraries across Canada and may be purchased through the Publications Division of the United Nations Secretariat in New York. Human Rights Internet and the National Library of Canada in Ottawa are reliable sources for obtaining up-to-date copies of United Nations documentation. Research requests to Human Rights Internet can be sent to P.O. Box 20147, Ottawa, Ontario, K1N 9P4 or by fax at (613) 730-2320.
15. See A.F. Bayefsky, *International Human Rights Law*, *supra*, note 5 for a list of the Committee's leading decisions indexed by article of the International Covenant on Civil and Political Rights as well as a list of the Committee's "General Comments" related to the interpretation of the Covenant.

the protection of the Covenant even in relation to entry or residence, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.¹⁶ Specifically addressing the issue of expulsion, the Committee stated that,

... if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with Article 13...An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all circumstances of his case be an effective one. The principles of Article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when "compelling reasons of national security" so require. Discrimination may not be made between different categories of aliens in the application of Article 13.¹⁷

Other opinions of the Committee that are relevant to the rights of non-citizens facing deportation from Canada include General Comments 8¹⁸ and 9¹⁹ which address the interpretation of Articles 9 and 10 of the Covenant respectively. In General Comment 8 the Committee noted that the right to liberty and security of the person enunciated in Article 9 is applicable to all deprivations of liberty including cases involving "immigration control". General Comments 7 and 20 address the interpretation of Article 7 on the prohibition against torture.²⁰ In General Comment 20 the Committee noted that torture and cruel treatment extends "to acts that cause mental suffering".²¹ The Committee also emphasized the obligation of governments not to expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.²² General Comments 16²³ and 19²⁴ address the interpretation of Articles 17 and 23 with respect

16. General Comment 15 (A/41/40, 1986), p. 117.

17. *Ibid.* 117-118, at paras. 9 and 10.

18. Report of the Human Rights Committee, General Comment 8 (article 9) (A/37/40, 1982), p. 95.

19. Report of the Human Rights Committee, General Comment 9 (article 10) (A/37/40, 1982), p. 96.

20. Report of the Human Rights Committee, General Comment 7 (article 7) (A/37/40, 1982), p. 96; and General Comment 20 (article 7) (CCPR/C/21/Rev. 1/Add.3).

21. General Comment 20, *Ibid.* at para. 5.

22. *Ibid.* at para. 9.

23. General Comment 16, (CCPR/C/21/Rev. 1, May 19, 1989).

24. General Comment 19 (article 23) (CCPR/C/21/Rev. 1/Add. 2, 19 September 1990).

to protection of the family and General Comment 17²⁵ addresses the interpretation of Article 24 and the rights of children.

In one of the early communications considered by the Human Rights Committee, *Aumeeruddy-Cziffra v. Mauritius*,²⁶ the Committee found violations of Articles 17 and 23 of the Covenant where state legislation subjected the foreign spouses of Mauritian women to the possibility of deportation at any time. The Committee adopted the view that

“... the common residence of husband and wife has to be considered as the normal behaviour of the family. Hence ... the exclusion of a person from a country where close members of his family are living can amount to interference within the meaning of Article 17. In principle, article 17(1) applies also when one of the spouses is an alien”. The Committee noted that each of the couples named in the communication constituted a “family” within the meaning of article 23(1) and as such were “entitled to protection by society and the state.”

Addressing the case of a Greek citizen who was expelled from Sweden as a potential terrorist in *Maroufidou v. Sweden*, the Committee interpreted the provisions of Article 13 of the Covenant and noted that it “required compliance with both the substantive and the procedural requirements of the law.”²⁷ The Committee further remarked that it was not within its powers to evaluate whether the competent state authorities have interpreted and applied the domestic law correctly unless there was evidence of bad faith or abuse of power. In *Hammel v. Madagascar*, the alleged victim was a French citizen who was expelled from Madagascar after residing there for 19 years as a practising attorney. The Committee found that the circumstances of his case, including the fact that he was held in incommunicado detention, and subsequently deported

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25. General Comment 17 (article 24) (A/44/40, 1989), p. 173. In addressing the question of family protection in relation to an “alien” family member, the jurisprudence of the European Court on Human Rights is particularly helpful. The Court has recognized that there are instances in which maintaining the integrity of a family unit overrides a legitimate state interest in enforcing immigration legislation. See, *Berrehab* (3/1987/126/177), ECHR, Strasbourg, June 21, 1988; *Djeroud* (34/1990/225/289), ECHR, Strasbourg, January 23, 1991; *Mostaquim* (31/1989/191/291), ECHR, Strasbourg, February 18, 1991; *Beljoudi* (55/1990/246), ECHR, Strasbourg, March 26, 1992. See also Inter-American Declaration on Family Rights; Resolution adopted by the OAS General Assembly Nov. 18, 1983; OAS. AG/Res. 678 (XIII-0/83); OAS. Doc., OEA/Ser.P., AG/doc. 1731/83 rev. 1, 7 December 1983, 89-90.
 26. *Aumeeruddy-Cziffra v. Mauritius*, Communication No. 35/1978, S.D. Vol. 1, p. 67, at p. 70. See however, the more recent case of *Abdulaziz, Cabales and Balkandali v. U.K.* (15/1983/71/107-9) Series A, Vol. 94.
 27. Communication No. 58/1979, S.D. Vol. 1, p. 80; See also *Pinkney v. Canada*, Communication No. 27/1978, S.D. Vol. 1, p. 95 and *Giry v. Dominican Republic*, Communication No. 193/1985 A/45/40 (1990) Vol. 2, p. 38.

without being afforded an opportunity to challenge his expulsion order prior to his expulsion, disclosed violations of Articles 9 and 13 of the Covenant.

In *Torres v. Finland* the Committee found a violation of Article 9 where legislation in Finland provided for an immediate appeal of a detention order to the Ministry of the Interior but not to a Court. The Committee emphasized that Article 9(4) required that the legality of detention must be determined without delay by a Court "so as to ensure a higher degree of objectivity and independence in such control."²⁸ In circumstances where a refugee claimant is entitled to seek a review before a Court of law only when, after seven days, his detention is confirmed by order of the Minister, the Committee found that the requirements of the Covenant were not met.

In contrast to *Torres v. Finland*, the Committee found that the Canadian government had not violated provisions of the Covenant in the case of *V.M.R.B. v. Canada*. This petition was submitted by a citizen of El Salvador who claimed refugee status upon entry to Canada at Blackpool on the United States border. V.M.R.B. was detained pursuant to provisions of the Immigration Act on the ground that he represented a "danger to the public" and was likely to stay in Canada and not appear for his deportation hearing. With regard to an alleged violation of Article 9, the Committee noted that "this article prohibits unlawful arrest and detention, whereas the author was lawfully arrested in connection with his unauthorized entry into Canada, and the decision to detain him was not made arbitrarily, especially in view of his insistence not to leave the territory of Canada." In declaring the communication inadmissible, the Committee noted that a right of asylum was not protected by the Covenant and, with respect to Article 13, observed that "...the State party has pleaded reasons of national security in connection with the proceedings to deport him. It is not for the Committee to test a sovereign State's evaluation of an alien's security rating; moreover, on the basis of the information before the Committee, the procedures to deport Mr. R. have respected the safeguards provided for in Article 13."²⁹

In the past year a number of communications have been submitted to the Committee alleging violations of the Covenant by the Canadian government. Confidentiality rules adopted by the Committee this year prohibit publicity in regard to individual communications currently pending with the Committee. Although human rights advocates have expressed concern that the Committee's "gag rule", may itself be a breach of the guarantees of freedom of expression contained in the Covenant, caution would appear to require that the details of

28. *Torres v. Finland*, Communication No. 291/1988, A/45/40 (1990) Vol. 2, p. 96.

29. *V.M.R.B. v. Canada*, Communication No. 236/1987, A/43/40 (1988), p. 258.

individuals cases not be discussed until the Committee has considered the communications and rendered decisions of a final nature. It can be stated, however, that a number of the recent complaints lodged with the Committee concern the rights of permanent residents facing deportation from Canada because of criminal convictions.³⁰ One case, already reported in the Canadian media, relates to the situation of a 33-year-old man, who was born in Scotland and came to Canada at age 7. With all his extended family members living in Canada, it was only when immigration officials knocked on his door after a series of criminal convictions that the man realized he was not a Canadian citizen. A major portion of his petition concerns the absence of any clear legislative requirement that family interests should be addressed in deportation proceedings.

Procedure

The Optional Protocol sets out the basic requirements for submitting communications to the Human Rights Committee. The Committee has developed rules of procedure which further elaborate the procedural requirements for submitting individual petitions to it.³¹ In addition, the Committee has produced a model communication to assist complainants, but it is not compulsory to use the model form. (The model communication has been reproduced as Appendix "A" to this article).

The communication forwarded by an individual to the Committee must clearly set out his or her name, address, nationality, profession, date and place of birth, as well as information concerning the author of the communication, if different, and the justification for acting on behalf of the victim. The communication must then name the State Party against which the communication is directed (CANADA), set out the articles of the Covenant which have allegedly been violated and the steps taken by the individual to exhaust domestic remedies. Copies of all relevant judicial or administrative decisions should be enclosed. There should be a statement as to whether or not the same matter is being dealt with

30. See A. Thompson, "The Deportation Dilemma", in *The Toronto Star* (25 June 1994) C1 and C5; and also: "Canada's deportation rules face human-rights challenge", in *The Globe and Mail* (12 August 1994) A6.

31. The Committee's revised rules of procedure are contained in UN Doc. CCPR/C/3/Rev. 2 (1989) and are reprinted in the Committee's Annual Report to the General Assembly, U.N. Doc. A/44/40 (1989), at 179-82. Copies of the rules may be ordered, free of charge, from the United Nations Centre for Human Rights in New York, Tel. (212) 963-5930. Requests for copies of the new rules in regard to confidentiality can be directed to the attention of Mr. Jakob Möller, Chief, Communications Branch, Centre for Human Rights in Geneva, Tel 001 41 22 917 1234. These rules will be published in the forthcoming Annual Report of the Human Rights Committee.

by another procedure of international investigation or settlement. The subsequent sections of the petition should clearly set out the facts of the claim and, in preliminary form, the nature and basis of the complaint as well as an outline of the points at issue and the relevant jurisprudence. The individual should attempt to provide as much evidence as possible to substantiate their complaint, including relevant dates. The more complete the information given in the original application, the faster it will be processed. The communication must not be anonymous, but the Committee may be requested not to reveal the name of the author and/or victim when it publishes its decision. All documents relating to the consideration of communications must be signed and dated. There is no time limit for the submission of communications but it is generally advisable to submit a petition as soon as possible after the alleged violation occurs.

When a communication has been received by the Human Rights Committee, it is screened by a member of the Secretariat of the UN Centre for Human Rights, who may contact the author for additional information. The Secretariat registers applications and transmits them to the Committee's Special Rapporteur on New Applications. The rapporteur is a member of the Committee designated to act on communications received between sessions. The rapporteur's first task is to ensure that sufficient information has been provided by the parties to enable the Committee to rule on the question of admissibility.

At this early stage, even when the Committee requires further information from the parties on the question of admissibility, requests for "interim measures" pursuant to Rule 86 may be considered in order "to avoid irreparable damage to the victim of the alleged violation". The Complainant may request, for example, that the Committee urge the Canadian government to refrain from executing a deportation order so that he or she may remain in Canada pending the processing and final determination of the complaint. In this regard, direct telephone contact with the UN Centre for Human Rights in Geneva can be very beneficial. In cases where deportation may be imminent, it is important that the Secretariat be advised so as to make a ruling as quickly as possible and transmit the request to the appropriate personnel in the Canadian government.³²

Preliminary admissibility requirements stipulate that the communication must not be anonymous [Rule 90(a)], an abuse of the right of submission [Rule 90(c)], incompatible with the provisions of the Covenant [Rule 90(d)], or under examination by another international procedure [Rule 90(e)]. Article 5(2)(a) of the Protocol states that the Committee cannot consider a communication if the same

32. The UN Centre for Human Rights may be accessed by telephone at 011 41 22 734 6011 and by fax at 011 41 22 733 9879.

matter is simultaneously being examined in another forum. Unless a state has entered a reservation to the contrary (Canada has not), it is permissible for a complainant to invoke another international procedure first and then, upon termination of those proceedings, bring the case before the Human Rights Committee.

Once the rapporteur is satisfied that the communication complies with the preliminary admissibility requirements, then he or she forwards the communication to the state concerned, with a request for observations as to its admissibility. The state is usually given two months in which to respond, and the author is given an opportunity to comment on the state's response.

After this exchange of information, the Committee proceeds with the examination of the admissibility of the case. At this stage, a critical procedural hurdle is the requirement in Article 5(2)(b) of the Protocol that the complainant exhaust all available remedies. Article 5(2)(b) also states that this rule shall not apply "where the application of the remedies is unreasonably prolonged". Regardless of which international human rights forum is selected, failure to exhaust domestic remedies is one of the most common grounds for complaints to be declared inadmissible. What constitutes a "remedy", when it is deemed to be exhausted, and the circumstances under which an applicant may be excused from exhaustion because a remedy is "inadequate and ineffective" have all been the subject of numerous rulings by the Committee as well as other international bodies.³³ This jurisprudence should be studied carefully in order to plan an effective strategy in terms of pursuing domestic appeals and setting up one's case to proceed internationally.

As noted by Leo Zwaack, a legal researcher with the Netherlands Institute of Human Rights, the general approach of the Committee to the question of exhaustion of domestic remedies has been that a communication would not be considered inadmissible for failure to exhaust domestic remedies unless the State party gave details of the particular remedies available in the circumstances of the case together with evidence that such measures had a reasonable prospect of being effective.³⁴ The onus is on the State party to prove the effectiveness of remedies it deems are still available and that the availability of the alleged

33. In addressing the question of exhaustion of domestic remedies, the jurisprudence of the European Court of Human Rights is an important reference. A good starting point is the text: P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd edition (Kluwer, Deventer, Boston, 1990).

34. L.F. Zwaack, *supra*, note 10, at 88. See *Ramirez v. Uruguay*, UN Doc. A/3540, p. 121; and M.E. Tardu, *Human Rights: The International Petition System* (Dobbs Ferry, N.Y.: Oceana Publications Inc., 1985), Binder 2, Part One, pp. 48-55.

remedy is reasonably evident.³⁵ The essential principle followed by the Committee is that only those remedies which are available and effective need to be exhausted. With reference to the Canadian context, the Committee deemed a communication to be admissible where the complainant had not personally exhausted all available domestic remedies but where the Supreme Court of Canada had substantially decided the question at issue in a previous case.³⁶ Discretionary remedies which provide for a benefit ("humanitarian and compassionate" applications might be characterized as such), as opposed to the fulfilment of a right, need not be invoked. In addition, advocates should note that it is important to frame cases before domestic courts in terms of the human rights engaged prior to submitting an international petition.

Once a case has been declared admissible, the Committee proceeds to a consideration of the merits of the complaint. The state concerned is allowed six months in which to submit a written explanation clarifying its position on the matter and the remedy, if any, that may have been taken. Again, the onus is placed upon the government to provide the necessary information and explanations of the circumstances giving rise to the complaint. Any statement received is communicated to the author who, in turn, is usually given six weeks in which to add to, or refute, what the government has submitted. The Committee holds a closed meeting to consider the petition and formulates its final views, which are then forwarded to the state and the individual.

There has been a great deal of debate over the extent of the Committee's powers once its views have been transmitted to the State concerned.³⁷ Since 1982, the practice of the Committee has been to send a letter setting out its views and inviting the state to inform the Committee of any action taken in light of those views. As a result of pressure from victims, the Committee finally adopted a series of measures in 1990 to monitor compliance with its views. Under the new measures, whenever the Committee finds a violation of the Covenant, it now asks the State concerned to report on any action it has taken in relation to the case, within a period of up to 180 days. Beginning in 1991, the Committee's Annual Reports indicate those states which fail to respond to the request or fail to provide a remedy, as well as those states which have cooperated with the Committee's requests. Information concerning measures taken to redress a

35. See for example, the case of *Croes v. Netherlands*, UN Doc. A/44/40, p. 259 at para. 10 where the Committee found that "remedies, the availability of which is not evident, cannot be invoked by the State Party to the detriment of the author".

36. *Lovelace v. Canada*, *supra*, note 7.

37. Siân Lewis-Anthony, "Treaty-based Procedures for Making Human Rights Complaints Within the UN System", in H. Hannum(ed.), *supra*, note 4, pp. 41-59 at p. 48.

violation must also be given by states when submitting their periodic reports as required by Article 40 of the Covenant. In addition, the Committee has instituted a "Special Rapporteur for the Follow-Up of Views" to recommend action which might be taken in respect to victims who claim that no appropriate remedy has been provided. The rapporteur may communicate directly with governments and victims, which may prove to be significant. An officer with the UN Centre for Human Rights has commented that the first responses from states to requests from the rapporteur have been encouraging but at the same time, "they display a certain reticence on the part of States parties to accept the Committee's decisions as legally binding...".³⁸ It is likely that further amendments to the Optional Protocol will be necessary in order to enhance the effectiveness of the Committee's existing follow-up mechanisms.³⁹

THE COMMITTEE AGAINST TORTURE

The adoption in 1984 by the United Nations General Assembly of the Convention Against Torture codified universally applicable standards to combat the practice of torture in the world. The Committee Against Torture was established pursuant to Article 17 of the Convention to monitor implementation of the Convention.⁴⁰ Anyone, including non-governmental organizations, may submit information relating to the practice of torture within a state. Unlike the Human Rights Committee, the Committee against Torture has the power to initiate its own investigation if it receives "reliable information which appears to it to contain well-founded indications that torture is being systematically practiced in the territory of a State Party".⁴¹ The optional procedure which gives the Committee against Torture jurisdiction over individual complaints is contained in article 22 of the Convention. Canada ratified the Convention in 1987 and in 1989, made the Article 22 declaration, recognizing the Committee's competence to receive and consider communications on behalf of individuals.

The Committee consists of ten experts elected by States Parties to the Convention from among their nations. The Convention specifically mentions the "usefulness" of selecting persons who are also members of the Human Rights Committee, suggesting that the jurisprudence of the Human Rights Committee

38. Markus G. Schmidt, "Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform" (1992) 41 ICLQ 645 at 650.

39. *Ibid.* 650.

40. Convention Against Torture, art. 17(2). See also Siân Lewis-Anthony, *supra*, note 4, pp. 41-59, at p. 53.

41. Convention against Torture, art. 20(1).

will be drawn upon in the course of consideration of individual communications. Like the Human Rights Committee, members are elected for a four-year term and serve in their personal capacity. The Committee normally holds two regular sessions each year.

Who Has The Right of Petition?

A communication may be submitted by any private individual who claims to be the victim of a violation of the Convention by a State Party which has accepted the competence of the Committee under Article 22 and which is subject to its jurisdiction. If the alleged victim is not in a position to submit the communication, relatives or representatives may act on his or her behalf.

Subject Matter of Petitions

The Convention imposes a number of specific obligations upon states, which if violated, may constitute an appropriate basis for a petition by an individual to the Committee Against Torture.

The provisions of the Convention which may be relevant to the case of a non-citizen facing deportation from Canada include the obligation of states not to expel, return or extradite a person to another state where there are substantial grounds for believing that the person would be in danger of being subjected to torture [Article 3], and the obligation of states to prevent in any territory under their jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture, when such acts are committed or acquiesced to by a public official [Article 16]. Other articles set out, *inter alia*, the obligations of states to provide appropriate training to public officials [Article 10], systematically review interrogation practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest or detention [Article 11], provide for a prompt and impartial investigation of any act of torture or cruel treatment committed in their territory [Article 12], provide for the impartial examination of complaints by any individual subjected to torture or cruel treatment in its territory [Article 13] and ensure that their legal systems provide torture victims with an enforceable right to fair and adequate compensation [Article 14].

Torture is defined in Article 1 of the Convention; the other forms of ill-treatment covered by the Convention are not defined. There is no right to derogate from the prohibition against torture. Article 2(2) of the Convention states that "no exceptional circumstances whatsoever...may be invoked as a justification of torture". No mention is made of the possibility of derogation with respect to lesser forms of ill-treatment. For this reason, human rights scholars have observed that the protection afforded by the Convention in relation to torture is

greater than that afforded in relation to cruel, inhuman or degrading treatment or punishment.⁴² In contrast, under the International Covenant on Civil and Political Rights, there may be no derogation from the prohibition against torture or the lesser forms of ill-treatment.

A summary of the communications examined by the Committee and its final views in relation to communications submitted by individuals are published in the Annual Reports of the Committee Against Torture to the UN General Assembly.⁴³ As the newest of the treaty-based mechanisms for making human rights complaints within the United Nations system, its case load is still relatively light. It is anticipated that the Committee will play an increasingly significant role as the international community becomes better informed of the Committee's mandate and activities.

The obligation of states, pursuant to Article 3 of the Convention, not to expel a person to another state where there are substantial grounds for believing that the person would be in danger of being subjected to torture, was considered by the Committee in the case of *Balabou Mutombo v. Switzerland*.⁴⁴

Mr. Mutombo is a Zairian citizen whose claim for asylum was rejected by Switzerland. Despite medical evidence that scars on his body corresponded with the torture he alleged to have suffered during detention in Zaire, the Federal Refugee Office ordered Mr. Mutombo's removal from Switzerland. After an unsuccessful appeal of this decision, Mr. Mutombo submitted a complaint to the Committee Against Torture. In its final views on Mr. Mutombo's complaint, adopted in April 1994, the Committee found that in the circumstances of his case, expulsion of Mr. Mutombo to Zaire would constitute a violation of Article 3 of the Convention. The Committee concluded that Switzerland had an obligation to refrain from expelling Mr. Mutombo to Zaire, or to any other country where he was at real risk of being expelled or returned to Zaire. In its observations, the Committee noted that Mr. Mutombo's

“... return to Zaire would have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured. Moreover, the belief that “substantial grounds” exist within the meaning of Article 3, paragraph 1, is strengthened by “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”, within the meaning of Article 3, paragraph 2”.

42. Siân Lewis-Anthony, *supra*, note 4, p. 54.

43. The citation for the Annual Reports is Report of the Committee Against Torture, UN General Assembly Official Records: A/.../44.

44. Communication No. 13/1993, CAT/C/12/D/13/1993.

The fact that Zaire was not a party to the Convention and that Mr. Mutombo would be in danger, in the event of expulsion to Zaire, not only of being subjected to torture but of no longer having the legal possibility of applying to the Committee for protection was also highlighted by the Committee.

It is likely that the Committee's views in the *Mutombo* case will be referenced in the consideration of future cases dealing with the rights of non-citizens facing deportation to countries where they are likely to be subjected to torture. In the past two years three communications have been submitted to the Committee alleging violations of Article 3 of the Convention by the Canadian government.⁴⁵ In all three cases the Committee requested Canada not to deport the individuals pending final consideration of their petitions by the Committee and Canada has acceded to the Committee's requests. In *Victor Hugo Rodriguez Garces v. Canada*, the Canadian government ordered that Mr. Garces be deported to Mexico despite evidence that he had been tortured there as a result of his membership and active participation in the opposition party. In the case of *J.S. v. Canada*, the Canadian government ordered the removal of J.S. despite evidence that he would be in danger of being subjected to torture by the Peruvian National Police as a result of his cooperation with the Shining Path. Similarly, in *Tahir Hussain Khan v. Canada*, the Canadian government sought to deport Mr. Khan, despite compelling evidence that Mr. Khan, a leader in the Kashmiri independence movement, had been brutally tortured by Pakistani authorities and was likely to be arrested and subjected to further abuse if returned to Pakistan.

Procedure

At their first meeting held in Geneva in 1988, the members of the Committee against Torture adopted their own rules of procedure and defined the Committee's working methods, in conformity with the provisions of the Convention.⁴⁶

A model communication, very similar to the one in use by the Human Rights Committee, has been produced by the Committee. The criteria for admissibility and the methods of responding to an individual communication are similar to those under the Optional Protocol. One distinction is that the Convention

45. The authors of all three of these communications were represented by Stewart Istvanffy, a lawyer in Montreal who also has extensive experience in the submission of petitions to the Human Rights Committee and the IACHR. Mr. Istvanffy may be contacted at 1087-A, Rue St-Denis, Montreal, Quebec, H2X 3J3.

46. The Committee's rules of procedures are contained in UN Doc. CAT/C/3/Rev. 1 (1989) and are reprinted in the Committee's Annual Report to the General Assembly, UN Doc. A/44/46 (1989), at 50.

expressly states that the Committee is not competent to entertain a communication that is or has been examined under another procedure of international settlement.⁴⁷ In this regard, its jurisdiction is narrower than the Human Rights Committee.

A case that has been declared inadmissible on the ground that domestic remedies have not been exhausted can be re-submitted at a later date by or on behalf of the individual concerned. In order to obtain a review, evidence must be provided to show that all domestic remedies actually have been exhausted.

Once a case has been declared admissible, that decision and any submissions received from the complainant are sent to the state, which has six months in which to respond in writing. The Committee may establish a working group of up to five members to assist it in considering individual complaints.

The Committee examines the merits of each communication in light of all the information available to it by the parties. Unlike the Human Rights Committee, the Committee against Torture may invite the parties to attend a meeting in order to provide further clarification or answer questions concerning a communication. All proceedings considering individual communications are confidential.

At any time during the proceedings, the Committee may request a state to take interim measures to avoid possible irreparable damage to an alleged victim. In the recent communications submitted to the Committee concerning alleged breaches by the Canadian government, all three alleged victims asked the Committee to urge the Canadian government to refrain from deporting them pending final consideration of their complaints. The Committee agreed to their requests and it would appear that Canada has acquiesced to stay the execution of the deportation orders until the Committee has formulated its final views on these cases.

The consideration proceedings conclude with the transmission of the final views to the author of the communication and the State concerned. The state is invited to inform the Committee "in due course" of the action it takes in conformity with the Committee's views.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Inter-American system of human rights protection is a comprehensive system of substantive norms, supervisory institutions, and petition procedures. The constitutional text of the Organization of American States [OAS] is its Charter. Other normative regional instruments include the American Declara-

47. Article 22(5)(a).

tion of the Rights and Duties of Man and the American Convention on Human Rights.⁴⁸ The IACHR was established in 1960, although it became a formal organ of the OAS only in 1970. The Commission's functions under the OAS Charter include, *inter alia*, receiving and acting on individual complaints of violations of the American Declaration. The IACHR consists of seven independent experts elected to four-year terms by the OAS General Assembly.⁴⁹ Since 1990, when Canada joined the OAS, the possibility has existed for anyone in Canada or another OAS member state to submit a complaint to the IACHR in Washington D.C. Canada has not ratified the American Convention and for this reason is not yet subject to the jurisdiction of the Inter-American Court of Human Rights.⁵⁰

Who Has The Right of Petition?

Any person or group of persons or non-governmental organization legally recognized in one or more of the OAS member states may submit a petition to the IACHR. In contrast to the rules adopted by the United Nations bodies, the IACHR Regulations provide for the right of non-governmental organizations to submit petitions on their own behalf as well as on behalf of third persons with or without the alleged victim's knowledge or authorization.⁵¹ It is possible to submit a collective petition involving numerous victims of a specific incident or practice or a general petition, alleging the existence of widespread human rights violations not limited to a specific group or event. Both general and collective petitions should refer to specific victims, although none of the victims need personally submit or approve the petition.

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48. The OAS documents are reproduced in: Organization of American States: *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser. L. V/11.82 Doc.6 rev. 1 (1992). This publication, as well as the IACHR's annual reports to the OAS General Assembly and country reports are available from the General Secretariat of OAS, Sales and Promotion of Publications Unit, Department of Public Information, 1889 F. Street, N.W., Washington, D.C. 20006.
 49. D.L. Shelton, "The Inter-American Human Rights System" in H. Hannum(ed.), *supra*, note 4, pp. 119-132 at p. 120.
 50. Note, however, that Article 64 of the American Convention permits any OAS member state (not individual) to request an advisory opinion from the Court regarding the interpretation of the American Convention or other treaties concerning the protection of human rights in the American states. A Member State may also seek an opinion regarding the compatibility of any of its domestic laws with any such international instruments.
 51. Regulations of the Inter-American Commission on Human Rights, Article 26(1) in *Basic Documents*, *supra*, note 47 at 103-132.

Subject Matter of Petitions

The American Declaration protects a range of civil and political rights as well as numerous economic, social and cultural rights. Many of its provisions in regard to civil and political rights contain similar language to the guarantees set out in the International Covenant on Civil and Political Rights. A critical distinction is Article XXVII of the American Declaration, which provides that "Every person has the right...to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements".

Unlike the Refugee Convention and the Covenant, the right to seek and enjoy asylum from persecution in the American Declaration does not limit the right to seek and enjoy asylum to those who have already been determined to be refugees⁵² or are "lawfully in the territory".⁵³ To the extent that the right extends to everyone, *refoulement*, or the return of a person to a country where he or she may face persecution, must be in accordance with both domestic and international law.

Other rights protected by the American Declaration which may be relevant to the case of a non-citizen facing deportation from Canada include the right to life, liberty and security of the person [Article I], the right to equality before the law [Article II], the right to protection of private and family life [Article V], the right to establish a family, the "basic element of society" [Article VI], the right to special protection for mothers and children [Article VII], the right to work [Article XIV], the right to a fair trial and to a simple, brief procedure to protect from acts of authority [Article XVIII], the right to submit respectful petitions to any competent authority...and to obtain a prompt decision [Article XXIV], the right to protection from arbitrary arrest [Article XXV], the right to due process of law [Article XXVI].

States are obliged not only to respect the observance of rights and freedoms, but also to guarantee their existence and the exercise of all of them. Thus, as noted by Professor Shelton, any act or *omission* by any public authority which impairs the guaranteed rights may violate a state's obligations under the Declaration.⁵⁴ The rights recognized in the American Declaration may be limited or suspended under certain circumstances. The American Declaration contains a general limitation clause which provides that the rights of each person are limited by

52. 1951 Convention and 1967 Protocol relating to the Status of Refugees, 28 July 1951, - 16 December 1966, Article 33.

53. International Covenant on Civil and Political Rights, Article 13.

54. D.L. Shelton, *supra*, note 4 at 121.

the rights of others, by the security of all, and by the just demands of the general welfare in a democratic society.

The Commission deals with approximately twenty individual petitions per year, only a few of which are under the American Declaration, the rest under the American Convention. In the past individual cases were often lost in a system better equipped to deal with country studies and wide-spread violations.⁵⁵ Many of the decisions taken on individual petitions were never published, particularly in cases where the state concerned acted on the measures recommended by the Commission. For these reasons, much of the jurisprudence of the Commission in relation to the interpretation of American Declaration rights is not yet well-developed. Reference should be made, however to interpretations by both the Commission and the Court of the very similar substantive rights contained in the American Convention⁵⁶ as well as to interpretations of other human rights treaties by the United Nations bodies.

To date, the Commission has published very few cases which directly address the rights of people facing deportation. In a communication to the IACHR in 1969 a Costa Rican citizen of Polish origin challenged his arbitrary deportation from the United States. His claim was found inadmissible.⁵⁷ Another case related to a petition by a Haitian citizen who was arrested and deported from his own country. The Commission found that his right to freedom of movement and residence as guaranteed by Article 22 of the American Convention had been violated.⁵⁸ The Commission also noted that there had been serious violations of the petitioner's rights to protection against arbitrary arrest and to a fair trial,

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55. D.L. Shelton, "Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and Inter-American Court of Human Rights" (1988) 3 Am. U.J. Int'l L. & Pol'y 323 at pp. 327-28. See also D.J. Padilla, "The Inter-American Commission on Human Rights of the Organization of American States: A Case Study" (1993) 9 Am. U.J. Int'l. & Pol'y 95 for a discussion of recent developments within the Commission.
 56. An important reference tool is T. Buergenthal and R. Norris, *Human Rights: The Inter-American System* (Dobbs Ferry, New York: Oceana Publications, 1993). This publication is a series of six binders containing all the basic documents of the OAS, legislative history, special resolutions, the full text of the IACHR's country reports as well as published reports on individual petitions, advisory opinions and case decisions of the Court. The binders are available at the Law Library, York University in Downsview, Ontario.
 57. Communication No. 1593 (United States of America), OEA/Ser. L./V/11.21, Doc. 27, (February 20, 1970) in T. Burgenthal and R. Norris, *Ibid.* Vol. 3, Booklet 19, p. 5.
 58. Case 2653 (Haiti), OEA/Ser. L./V/11.55, Doc. 67, (March 9, 1982) in T. Burgenthal and R. Norris, *Ibid.* Vol 3; pp. 122-124.

findings which are of greater assistance to non-citizens who may be seeking to challenge deportation practices.

In 1979 a collective petition was lodged with the IACHR by the National Council of Churches charging that the United States had violated the prohibition against *refoulement* by arbitrarily returning thousands of Haitian nationals under the guise of "voluntary departure", that it had summarily dismissed many claims to refugee status without adequate consideration, that access to counsel had been denied and that Haitians seeking political asylum in the United States had been detained without just cause.⁵⁹ As an interim measure in this case, the Commission sent a telegram to Cyrus Vance, then the Secretary of State, requesting that "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".⁶⁰ The United States agreed to delay deportation of refugees already in its territory pursuant to the Commission's request. A subsequent class-action suit brought in the domestic courts succeeded in achieving the release of the majority of Haitians in detention. Unfortunately no trace of the petition can be found in the official reports of the IACHR. While the United States may have addressed the violations at issue in that particular petition, there can be no doubt that serious problems remain in the interdiction practices that have been endorsed by the United States Supreme Court and adopted by the Clinton administration in regard to asylum seekers who have not yet reached American soil.⁶¹

A number of petitions involving the rights of non-citizens in Canada have been lodged with the IACHR quite recently.⁶² One case was resolved successfully

59. For a detailed discussion of *Haitian Refugees v. United States*, see A. Young-Anawaty, "International Human Rights Forums: A Means of Recourse for Refugees" (1985) M.Y.I.L.S. 451 and also C. Cerna, "The Inter-American System for the Protection of Human Rights: An Example of International Human Rights Procedures" (1984) 31 Federal Bar News & Journal 215.

60. The full text of the telegram is reproduced in A. Young-Anawaty, *Supra*, note 58 at 464-65.

61. The routine practice by the United States Coast Guard of intercepting boats on the high seas and forcing their return without making any effort to determine whether claims by the passengers to refugee status were *bona fide* was challenged by the Haitian Centers Council. In 1993 the United States Supreme Court held that "although gathering fleeing refugees and returning them to the one country they had desparately sought to escape may violate the spirit of Article 33 (of the Refugee Convention), general humanitarian intent cannot impose un contemplated obligations on treaty signatories." [*Sale, Acting Commissioner, Immigration and Naturalization Service et al. v. Haitian Centers Council, Inc., et al.* (June 21, 1993), No. 92-344 at 3 (U.S.S.C.)[unreported].

62. In the case of *C.M.J. v. Canada*, Case No. 11.092 (Canada), OEA/Ser.L/V/11.84, Doc. 28 (October 8, 1993), the complainant alleged that the provisions of the "Refugee

between the parties subsequent to the filing of the petition and an oral hearing (which underscores the extent to which lodging a well documented complaint can encourage the government to reconsider an earlier decision). In another case, *R. v. Canada*, the Canadian government ordered the deportation of an Iranian national. R. had deserted from the military under the Khomeni regime. In 1987 he came to Canada and claimed refugee status based on his fear that he would be executed for his desertion if forced to return to Iran. At R.'s "credible basis" hearing (the first screening stage under the refugee determination scheme in place at that time), the adjudicator found R.'s testimony "incredible" and "implausible". A number of humanitarian and compassionate applications were denied as were R.'s attempts to seek a review of these decisions in the Federal Court. In the face of imminent removal, R. sought a constitutional declaration in the Ontario Court that his removal to Iran would violate his right to be free from cruel and unusual treatment or punishment as guaranteed by section 12 of the Canadian Charter of Rights and Freedoms. R. also submitted that provisions of the Immigration Act, including the requirement for leave in order to seek judicial review and the prohibition of an appeal from a Federal Court refusal to grant leave, resulted in arbitrary procedures that failed to comply with the principles of fundamental justice. In 1994 the Supreme Court of Canada indicated that it was improper for R. to seek redress in the provincial superior court and that he should go back to the Federal Court, the same court that had already refused to review his case two times. Within weeks of the release of the Supreme Court's decision, R. initiated a petition with the IACHR, claiming that he had been denied adequate access to appellate review for constitutional violations and that his treatment by the Canadian authorities contravened, *inter alia*, Article II of the American Declaration. As a result of a request by the IACHR, the Canadian government has acquiesced to stay R.'s deportation order pending final determination of his case by the Commission.

The case of *M.B.M. v. Canada* is a petition by an unsuccessful refugee claimant who also was denied humanitarian and compassionate consideration to remain in Canada despite medical evidence that she was suffering psychological problems related to the serious civil strife in Zaire and the situation of her family there, and the fact that she was engaged to be married to a permanent resident of Canada who was willing to sponsor her and their

Backlog Clearance Process" to which she had been subjected violated her rights pursuant to Articles XVIII, XXVII, V, VI, and VII of the American Declaration. The Commission received extensive submissions on the issue of family protection. Unfortunately, the IACHR found the petition inadmissible because C.M.J. had not demonstrated that the domestic remedies available to her in Canada were "inadequate and ineffective".

unborn child (she was pregnant) to stay in Canada. Ms. M. was detained and sedated on three occasions against her will by immigration officials so that she could be deported. (The applicable provincial law required sedations to be performed by physicians and imposed only with authorization of a court). Ms. M. alleges violations of Articles I, II, VI, VII, XVIII and XXVII of the American Declaration and her case is still pending before the Commission.

The case of *G.A.F. v. Canada* is another petition by an unsuccessful refugee claimant who was denied repeated requests for humanitarian and compassionate consideration. Despite a number of compelling factors, including evidence that she was a victim of torture in the Seychelles and would be at risk if returned there, as well as the presence, in Canada, of an extended family network, the Canadian government ordered her deportation. Ms. F. alleges violations of Articles I, II, VI, XVIII and XXVII of the American Declaration. In regard to violations of her equality rights (Article II), she states that as an African woman she is the victim of discriminatory treatment by Canadian immigration officials. She cites the fact that the acceptance rates of African nationals as refugees is much lower than that of their European counterparts. In regard to violations of her legal rights (Article XVIII), she cites, *inter alia*, the absence of a right of appeal for refused refugee claimants under the current Immigration Act.

Procedure

Articles 25 to 30, 32 to 43 and 51 to 59 of the IACHR Regulations set out the specific requirements for the presentation and processing of petitions to the Commission. The Commission has produced its own model complaint form (reproduced as Appendix "B" to this article). The information to be included in petitions is set out in Article 32 of the IACHR Regulations and is largely the same as requirements for communications to the United Nations bodies. The petitioner's identity is not disclosed to the government concerned, unless the petitioner gives express written authorization for the Commission to do so.

Article 37 of the Regulations requires, like the UN Committees that "the remedies under domestic jurisdiction must have been invoked and exhausted...". The requirement of the exhaustion of domestic remedies is waived (a) where due process is not afforded by the state, (b) where the petitioner has been denied access to domestic remedies, or (c) where there has been unwarranted delay in rendering a final judgment.

Qualifications on this requirement were defined in an important decision of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case.⁶³ In

63. Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Preliminary Objections, Judgment of June 26, 1987, Judgment of 29 July 1988, Ser. C. No. 4. For a case

addressing the issue of the domestic remedies available to a Honduran student who had been detained and subsequently disappeared, the Court held that under generally accepted principles of international law, domestic remedies are to be judged not only by their formal existence, but also by their adequacy and effectiveness. The Court stated that a remedy is adequate if it is "suitable to address an infringement of a legal right". It is effective if under the circumstances it can achieve the result for which it was designed.⁶⁴ A recent advisory opinion of the Court further elaborated on the exhaustion of remedies requirement and expanded the traditional exceptions to the rule. The Court suggested that remedies need not be exhausted if a complainant has been prevented from obtaining adequate legal representation, due to indigence or because of a general fear in the legal community, and is thus unable to pursue the remedies that would be necessary to protect a guaranteed right.⁶⁵ Once the petition is filed, the onus is on the government to state what remedies were available and to show that these were plausible. The burden is then on the petitioner to prove that the remedies were not accessible or that it would have been futile to pursue them.

Whereas the rules of the United Nations bodies do not impose a time limit within which petitions must be submitted, the IACHR Regulations stipulate that where domestic remedies have been pursued and exhausted, the petition must be filed within six months of the date on which the party whose rights have been violated was notified of the final ruling.⁶⁶ This deadline may be extended if the state has interfered with the petitioner's ability to file the complaint within the time period. In "serious or urgent" cases, the Commission may extend the limit to a "reasonable period of time". If a third party is filing a petition for a victim unable to do so, the reasonableness criterion rather than the strict six-month rule may apply.⁶⁷

Petitions will not be considered where the subject of the petition is pending settlement in another international governmental organization or where it duplicates a petition pending or already examined and settled by the Commission or by another international organization (with limited exceptions as outlined in Article 39(2)(a) and (b) of the Regulations).

comment, see S.M. Witten, "Velásquez Rodríguez Case" (1989) 83 AJIL 361.

64. *Ibid. Velásquez Rodríguez Case*, Preliminary Objections, paras. 63-64.

65. Inter-American Court of Human Rights, Exhaustion of Domestic Remedies, (Art. 46(1)(a) and 46(2), American Convention on Human Rights), Advisory Opinion OC-11/90 of 10 Aug. 1990, Ser. A. No. 11.

66. IACHR Regulations, Article 38.

67. D.L. Shelton, *supra*, note 4, p. 125.

Once the Commission receives the petition, it may make an initial ruling on admissibility and will request further information from the petitioner if it considers the petition inadmissible or incomplete. If admissibility criteria appear satisfied, a file is opened; the case is given a number, and the pertinent parts of the petition are transmitted to the government concerned with a request for information. At the same time, the petitioner is informed that the petition has been received. The requested information is supposed to be supplied by the government within 90 days but extensions up to a total of 180 days may be granted if the government can justify such a request.

In serious or urgent cases, the Commission can request "the promptest reply from the government, using for this purpose the means it considers most expeditious".⁶⁸ At any stage in the proceedings the Commission may request that "provisional measures" be taken to avoid irreparable damage to the complainant or others.⁶⁹ In this regard, and throughout the proceedings, contact with the Commission's legal staff, either by telephone or in writing, can be very helpful. As staff members are normally assigned responsibility for certain countries in the region, the petitioner should determine who has been assigned responsibility for Canada and then maintain contact with that person throughout the processing of the complaint.⁷⁰

After the Commission receives the government's reply, it forwards the relevant documentation to the petitioner who is given 30 days to submit additional observations and any available evidence. The Commission then forwards the information back to the government which is permitted to submit its final observations within 30 days. Following the initial series of information exchanges, the Commission proceeds to examine the merits of the case and may conduct an oral hearing to receive additional written and oral evidence. As noted by the Assistant Executive Secretary to the Commission, Commission hearings have become "formal confrontations at which petitioners and their advocates make oral presentations on specific claims in the presence of diplomats and attorneys for the denounced government. These face-to-face proceedings allow the government's representatives to hear firsthand the charges made against the government".⁷¹ The Commission always invites government representatives to reply and ask questions. Commission members then ask both parties questions. Once the Commission exercises

68. IACHR Regulations, Article 34(2).

69. *Ibid.* Article 29.

70. See D.L. Shelton, *supra*, note 4, at p. 127.

71. D.J. Padilla, *supra*, note 54 at 101-102.

its discretion to conduct a hearing, the decision to hold a face-to-face hearing is in the hands of the petitioner. Complainants and witnesses have the option of giving their testimony in private *ex parte* hearings. The Commission's final decision on the petition is issued by way of a report that states the facts and conclusions as well as recommendations and a deadline for their implementation. That decision is transmitted to the State in question or the petitioner. In cases where the State does not adopt the measures recommended by the Commission within the prescribed deadline, the Commission will usually publish the decision. There are provisions for reconsideration of the case for new facts or legal arguments which have not been previously considered, prior to the expiration of the 90 day deadline.⁷²

CONCLUSION

Democracy does not always guarantee respect for human rights. Canada has achieved a democratic, participatory political culture in which pluralism, tolerance and the rule of law are considered to be core values of society. Nevertheless, the history of Canadian immigration policy bears witness to how frequently we have closed our borders and adopted deportation practices to remove would-be immigrants and refugees in desperate need of our protection.⁷³

It must be recognized that resort to the international human rights fora will not, alone, ensure that Canada's immigration program remains consistent with its stated objectives, in terms of policy, law and practice. The ongoing work of promoting public discourse on human rights, exposing and publicizing abuses and violations as they arise and actively contributing to initiatives for reform remains with local communities. Yet, there can be no doubt that individual petitions to the international human rights bodies have succeeded in ensuring that many people receive the protection they were unjustly denied under the auspices of the Canadian administrative and judicial system. In his study of the international petition system, Maxime Tardu remarked that the creation of international complaints procedures for individuals required a "heroic frame of mind, a Promethean resolve to defy the Gods of the City".⁷⁴ He wrote of the importance of standing up to the gods of the city while keeping faith in the rule

72. IACHR Regulations, Article 54.

73. For a discussion of the barriers faced by successive waves of immigrants from pre-Confederation to the present, see Ninette Kelly, "History of Canadian Immigration and Refugee Policy", (Toronto: n.d.), Reprinted and available at the Jesuit Refugee Service, Jesuit Centre for Social Faith and Justice, 947 Queen Street East, Toronto, Ontario, M4M 1J9.

74. M.E. Tardu, *supra*, note 33, Binder 1, Part Two, Section VIII, p. 7.

APPENDIX "A"

Model Communication

Date:

Communication to:

The Human Rights Committee
c/o Centre for Human Rights
United Nations Office
8-14 avenue de la Paix
1211 Geneva 10, Switzerland

submitted for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights.

I. Information concerning the author of the communication

Name First name(s)

Nationality Profession

Date and place of birth

Present address

Address for exchange of confidential correspondence (if other than present address)

.....
.....

Submitting the communication as:

(a) Victim of the violation or violations set forth below.
.....

(b) Appointed representative/legal counsel of the alleged victim(s)
.....

(c) Other
.....

If box (c) is marked, the author should explain:

(i) In what capacity he is acting on behalf of the victim(s) (e.g. family relationship or other personal links with the alleged victim(s));

.....

(ii)

Why the victim(s) is (are) unable to submit the communication himself (themselves):

.....

An unrelated third party having no link to the victim(s) cannot submit a communication on his (their) behalf.

II. Information concerning the alleged victim(s) (if other than author)

Name First name(s)

Nationality Profession

Date and place of birth

Present address or whereabouts

.....

III. State concerned/articles violated/domestic remedies

Name of the State party (country) to the International Covenant and the Optional Protocol against which the communication is directed:

.....

Articles of the International Covenant on Civil and Political Rights allegedly violated:

.....

Steps taken by or on behalf of the alleged victim(s) to exhaust domestic remedies-recourse to the courts or other public authorities, when and with what results (if possible, enclose copies of all relevant judicial or administrative decisions):

.....

If domestic remedies have not been exhausted, explain why:

.....

IV. Other international procedures

Has the same matter been submitted for examination under another procedure of international investigation or settlement (e.g. the Inter-American Commission on Human Rights, the European Commission on Human Rights)? If so, when and with what results?

.....

APPENDIX "B"

COMPLAINT FORM

Instructions: The following complaint form has been prepared to facilitate the work of human rights organizations and others in assisting victims and family members of victims in the presentation of complaints to the Inter-American Commission on Human Rights.

Please read the instructions and this form carefully before proceeding. It is very important that as much factual detail be supplied as possible. Of course, in cases of emergency, where the alleged victim's life or health might be in danger, do not hesitate to file the complaint even if certain non-essential information may be lacking. Complaints may be filed either by letter, phone or by telex. Incomplete complaints may be supplemented at a later time. In the event that particular information is simply not available or does not exist, write "not applicable" or "none" as appropriate.

Complaints may only be brought against member states of the Organization of American States and should be drafted in a simple and straightforward manner, free of political rhetoric.

Complaints should be sent to:

Dra. Edith Márquez Rodríguez
Executive Secretary
Inter-American Commission on Human Rights
1889 F Street, N.W.
Washington, D.C. 20006
Telex number: 641281
Telephone number: (202) 458-6002
Fax number: (202) 458-3992

Article 32 of the Commission's Rules and Procedure states:

Petitions addressed to the Commission shall include:

- a. the name, nationality, profession or occupation, postal address, or domicile and signature of the person or persons making the denunciation; or in cases where the petitioner is a non-governmental entity, its legal domicile or postal address, and the name and signature of its legal representative or representatives;
- b. an account of the act or situation that is denounced, specifying the place and date of the alleged violations and, if possible, the name of the victims of such violations as well as that of any official that might have been appraised of the act or situation that was denounced;
- c. an indication of the state in question which the petitioner considers responsible, by commission or omission, for the violation of a human right recognized in the

American Convention on Human Rights in the case of States Parties thereto, even if no specific reference is made to the article alleged to have been violated;

- d. information on whether the remedies under domestic law have been exhausted or whether it has been impossible to do so.

Victim:

Name Age

Nationality Occupation

Marital status I.D. No

Address

Telephone No

Number of children

Government accused of violation

Alleged Human Rights violation. Explain what happened in as great a factual detail as possible, specifying place and date of the violation:

.....

The article(s) of the Declaration or Convention which have been violated:

.....

Names and titles of persons (authorities) who committed the violation:

.....

Witnesses to the violation:

.....

Addresses and telephone numbers of witnesses:

.....

Documents/proofs (for example, letters, legal documents, photos, autopsies, tape recordings, etc.):

.....

Domestic legal remedies pursued (e.g. copies of writs of Habeas Corpus or Amparo):

.....

Domestic legal remedies yet to be pursued:

.....

I (do) (do not) want my name used by the Commission.

Complainant:

Name

Address

Telephone No Telex No Fax No

I.D. No./Social Security No

Legal Representative, if any

Is your legal representative a lawyer? Yes No

Address

Telephone No Telex No Fax No

Attach power of attorney designating legal representative

.....

Signature

Date