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Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 121/06; Petition 554-04
Session:	Hundred Twenty-Sixth Regular Session (16 – 27 October 2006)
Title/Style of Cause:	John Doe 1, John Doe 2 and John Doe 3 v. Canada
Doc. Type:	Decision
Decided by:	President: Evelio Fernandez Arevalos; First Vice-President: Paulo Sergio Pinheiro; Second Vice-President: Florentin Melendez; Commissioners: Freddy Gutierrez, Paolo G. Carozza, Victor E. Abramovich.
Dated:	27 October 2006
Citation:	Doe v. Canada, Petition 554-04, Inter-Am. C.H.R., Report No. 121/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006)
Represented by:	APPLICANTS: the Canadian Council for Refugees, Vermont Refugee Assistance, Amnesty International Canada, Freedom House, Global Justice Center, Harvard Immigration and Refugee Clinic, and Harvard Law School Advocates for Human Rights

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I. SUMMARY

1. On April 1, 2004, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission or "the Commission") received a complaint filed against the State of Canada (hereinafter "Canada") by the Canadian Council for Refugees, Vermont Refugee Assistance, Amnesty International Canada, Freedom House (Detroit, MI), Global Justice Center, Harvard Immigration and Refugee Clinic, and Harvard Law School Advocates for Human Rights (hereinafter "the Petitioners"), on behalf of three unnamed persons known as John Doe 1, John Doe 2 and John Doe 3, respectively hereinafter referred to collectively as "the John Does" or "the alleged victims"). The Petitioners maintain that they have been unable to ascertain the names of the alleged victims, but identify them as nationals of Malaysia, Pakistan and Albania, respectively.

2. The petition states that in January 2003, Canada implemented a new immigration policy (known as a "direct back" policy), under which refugee claimants arriving through USA/Canada border points are directed back to the USA without any immediate consideration of their claims. Before their departure, refugee claimants are given dates to return to Canada for eligibility determination interviews. Under such a policy, refugee claims were required to remain outside of Canada until their interview dates, without any assurances sought or obtained by the Canadian government from the US government that the claimants would be permitted to return for their interviews.

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3. According to the petition, the alleged victims were all returned to the United States of America after arriving at Windsor, Canada, a border point between both countries. They arrived in April, January, and August 2003, respectively. After being given dates to return to Canada they were returned to the USA, where they were arrested by US immigration authorities and subsequently deported to their countries of origin.

4. The Petitioners contend that the direct policy has the effect of: a) violating the alleged victims right to seek asylum under Article XXVII of the American Declaration of the Rights and Duties of Man; b) violating the prohibitions against refoulement contained in Article 33 of the 1951 Convention Relating to the Status of Refugees; and, c) violating the victims right to due process under Article XVIII, to the extent that they were deprived of access to judicial processes to challenge their forced return to the USA without a determination of their asylum claims.

5. The State contends that its "direct back" policy is not in violation of the American Declaration or international law generally, but is merely an administrative measure used exceptionally by immigration officials to cope with excessive numbers of refugee claimants arriving from the USA. The State argues that the petition is inadmissible for failure to exhaust domestic remedies for extemporaneity. Additionally, the State contends that the Commission lacks competence ratione personae having regard for the absence of an explanation (from the Petitioners) why the alleged victims are unnamed; or why these alleged victims did not submit the petition on their own behalf. The State further contends that Petitioners have not established that they have the authority to submit a petition on behalf of the alleged petitioners; accordingly, the petition constitutes an impermissible actio popularis. Finally, the State argues that the petition fails to disclose any violations of the American Declaration and is manifestly unfounded.

6. As set forth in this Report, having examined the contentions of the parties on the question of admissibility, and without prejudging the merits of the matter, the Commission has decided to: (a) admit the claims in the present petition pertaining to Articles XXVII and XVIII of the Declaration; (b) transmit this Report to the parties; (c) continue with the analysis of the merits of the case and; (d) publish this Report and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BY THE COMMISSION

7. Following receipt of the petition on April 01, 2004, the Commission received a letter from sixteen individuals/NGOs expressing their wish to be co-petitioners.

8. By communication of July 26, 2004 the Commission transmitted the pertinent parts of the petition to the State and requested the State to respond within two months.

9. By letter of September 01, 2004, the Petitioners requested a hearing at the Commission's 121st regular period of sessions taking place in October 2004.

10. By communication to the Commission of September 23, 2004, the State responded the petition on the pertinent parts of which were transmitted to the Petitioners by communication of June 27th, 2005. The Commission granted a month to the Petitioners to reply.

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11. By letter of July 11 2005, the petitioners were granted an extension until August 8th, 2005, to submit its observations, which was granted by the Commission by letter of July 14, 2005. The Commission subsequently received these observations from the Petitioners on August 12, 2005, accompanied by a request for a hearing during the Commission's 123rd regular period of sessions taking place in October 2005.

12. By note of August 17, 2005, the Commission transmitted the pertinent parts of the Petitioners' observations of August 12, 2005 to the State, with a request for response within a month. By communication of September 09, 2005, the State requested an extension of one month to respond, which was granted by the Commission by letter of September 15, 2005.

13. By communications of September 19, 2005 to the parties, the Commission advised that it had granted a hearing during its 123rd regular period of sessions, to be convened on October 17, 2005. In response, the State and the Petitioners confirmed their participation by letters of October 4, 2005, and October 12, 2005, respectively.

14. By note of October 13, 2005, the State submitted its supplemental response to the Petitioners observations of August 12, 2005. The Commission transmitted the pertinent parts of the State's supplemental response to the Petitioners by letter of October 20th, 2005. In a response of November 18, 2005, the Petitioners submitted further information, the pertinent parts of which were transmitted to the State by note of December 19, 2005.

15. The Commission duly convened a hearing on October 17, 2005, during its 123rd period of sessions at which the parties were both made representations to the Commission on the admissibility and merits of the petition.

16. By note of January 17, 2006, the State requested an extension of a month to respond, followed by a further letter of February 23, 2006, requesting a further extension of time to submit further observations.

17. By communication of March 02, 2006, the Commission advised the State that the provisions of Article 30(3) of its Rules of Procedure precluded the grant of an extension beyond March 19; 2006. By note received by the Commission on March 15th, 2006 the State submitted its second supplemental response to the petition.

18. By letter of March 14, 2006, the petitioners transmitted further submissions on the State's supplemental response of October 13, 2005. By communication of March 24th, 2006 the Commission acknowledged receipt of the Petitioners' further submissions and transmitted the pertinent parts of the State's second supplemental response of March 15, 2006. By letter of the same date, the Commission transmitted to the State the pertinent parts of the further submissions of the Petitioners (of March 14, 2005).

19. By note received by the Commission on April 20, 2006, the State acknowledged receipt of the Commission's note of March 24, 2006, requesting an extension of 30 days from the date of receipt by the Petitioners of the State's second supplemental response, so as to facilitate a

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comprehensive response to Petitioners' observations of March 14, 2006, and any later observations that the Petitioners may have to the State's second supplemental response By letter of April 13th, 2006, the Petitioners replied to the second supplemental response of the State. By note of June 12, 2006, the Commission forwarded the pertinent parts of the Petitioners' submission to the State, requesting a response within a month.

III. POSITIONS OF THE PARTIES ON ADMISSIBILITY

A. The petitioners

20. The Petitioners generally contend that the Commission is competent ratione materiae, ratione personae, ratione temporis and ratione loci to consider the petition, and that the petition satisfies all the other requirements of admissibility.

21. According to the Petitioners, Canada operates a 'direct back' policy for the processing of refugee claimants arriving from border points of entry from the USA. This policy operates under Regulation 41 of the Canadian Immigration and Refugee Protection Regulations. This regulation states that:

…an officer who examines a foreign national who is seeking to enter Canada from the United State shall direct them [sic] to return temporarily to the United States if (a) no officer is available to complete an examination; (b) the Minister is not available to consider…a report prepared with respect to the person; or (c) an admissibility hearing cannot be held by the Immigration Division.

22. The Petitioners further argue that prior to January 2003, the direct-back policy was not applied to refugee claimants arriving from the US, unless the US had confirmed to Canada that it would permit such claimants to return to Canada to be processed. In this respect, Canada's immigration agency, Citizenship Immigration Canada (CIC) had issued a directive (in October 2001), instructing its officers that "direct-backs" may be applied to refugee claimants arriving from the United States, but only on a case by case basis, whether, in the view of the port or area manager, pressures are so great that it is either impossible or impracticable to process them on arrival; and only where the officer is satisfied that the applicant will be able to return to Canada to pursue his claim." The directive further mandated that "In each case, confirmation must be obtained from [the United States Immigration and Naturalization Service (USINS)] that the client will be made available for further examination on the date and time specified in the appointment letter", and that that "In the absence of positive confirmation, return to the United States cannot be effected."

23. According to the Petitioners, the CIC changed this policy on January 27, 2003, as documented in a new set of guidelines entitled Instructions for Front-end Processing of Refugee Protection Claims (Instructions). In reversal of the earlier policy, the Petitioners claim that these Instructions "eliminated the fundamental safeguard in the direct-back policy: the requirement that CIC obtain an assurance from the United States Bureau of Citizenship and Immigration Services (BCIS, formerly the USNIS) that the refugee claimant would be able to return to Canada for his or her eligibility determination."[FN1]

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[FN1] Petitioners' petition of March 31, 2004, page 2. According to the Petitioners, the new Instructions expressly states that "[c]onfirmation from USNIS that the claimant will be made available for the future examination on the date and time specified is not required."

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24. Against this background, the Petitioners allege that during 2003, three unidentified refugee claimants known as John Doe 1, John Doe 2 and John Doe 3 all entered Canada at the CIC Windsor office at different times. John Doe 1, a national of Malaysia entered Canada in early April 2003; John Doe 2, a national of Pakistan entered Canada in January 2003; and John Doe 3, a national of Albania entered Canada in August 2003, with his wife and two children. All of them were issued interview dates and instructed to return immediately to the USA until the arrival of these dates. On their return to the USA, the alleged victims were arrested by US immigration authorities for being present in the US without proper documentation. According to the Petitioners, the alleged victims were deported to their countries of origin by US authorities, without being afforded the chance to return to Canada for their eligibility interviews. John Doe 1 was deported to Malaysia in July or August 2003; John Doe 2 was deported to Pakistan in August 2003; and John Doe 3 was deported to Albania in late October or early November 2003. In the case of John Doe 3, the Petitioners submit that his wife and children were not arrested by US authorities upon re-entry to the USA. According to the Petitioners they managed to re-enter Canada where they currently reside. With reference to the State's contention that they have failed to comply with Article 28(e) of the Commission's Rules of Procedure, the Petitioners contend that Article 28(e) requires the names of alleged victims not as a mandatory requirement, but only "if possible".

1. Arguments on ratione personae

25. The Petitioners submit further that the Commission's Rules of Procedure permit the withholding of names of alleged victims. The Petitioners claim that the Commission is competent ratione personae to examine the petition, given that Article 23 of the Commission's Rules of Procedure on the basis that the alleged victims were subject to the jurisdiction of Canada at the time of the alleged violations and that the Petitioners are non-governmental organizations recognized in Canada and the United States. The Petitioners further contend that although the Commission's Rules of Procedure provide for the withholding the identity of alleged victims, that the Petitioners have in good faith supplied all information available to them regarding John Doe 1, John Doe 2, and John Doe 3. The Petitioners contend that it is not possible for them to provide the names of the alleged victims at this time, given the circumstances of the alleged violations.[FN2] In response to the State's contention that the petition is inadmissible, ratione personae,[FN3] the Petitioners argue that "nowhere in the Inter-American system is there any suggestion, let alone requirement, that victims of alleged violations present their own case, or that third-party petitioners explain why petitioners are unable to bring petitions themselves.[FN4] The Petitioners repudiate the State's contention that the failure to provide names prejudices its ability to verify or refute the Petitioners' claims. In this regard, the Petitioners claim that the information provided is sufficiently detailed for Canada to identify the alleged victims or refute the Petitioners' claims, and that Canada has acknowledged that it has records of refugee claimants directed back, particularly those who did not return for their

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scheduled interviews.[FN5] The Petitioners contend that this information is in the control of the State and that it has an obligation to make this information available to the Commission. The Petitioners rely on inter-American jurisprudence[FN6] to demonstrate that petitions have been permitted on behalf of unidentified groups of alleged victims. In the premises, the Petitioners contend that the Commission has the jurisdiction ratione personae to entertain the petition.

[FN2] At paragraphs 5-11 of their response (received by the Commission on August 15, 2005) to Canada's official response, the Petitioners identify a number of factors inhibiting the identification of the alleged victims, including: (a) individuals (like the John Does) who are directed back and detained had limited ability to contact family members or to seek legal representation; (b) after their detention, the John Does (and an unknown number of others) were returned to their countries of origin by US immigration authorities, making it unlikely that these victims would (assuming that they are aware such recourse is possible) request the petitioners to bring their case before the Commission; (c) the petitioners assist a high volume of refugee claimants seeking asylum in Canada, including those entering from the United States and individuals in detention; in the circumstances, where refugee claimants were able to contact the Petitioners prior to being directed back, the Petitioners were generally able to assist with processing appointments and avoid such claimants being directed back; (d) during the period in question, the Petitioners could not anticipate when a particular crossing post would direct back refugee claimants, nor did they have the resources to station advocates at each crossing to provide assistance.

[FN3] With reference to Article 28(e) of the Commission's Rules of Procedure, the State contends that the Petitioners have not explained the absence of the names of the alleged victims, nor why these alleged victims could not submit the petition on their on behalf, having regard to an affidavit submitted by the Petitioners in support of their petition. According to the State, this affidavit submitted by the Petitioners ("Witness One") indicates that one of the Petitioners (Freedom House) represented or had contact with all three John Does prior to their alleged deportation from the United States. The State contends that its ability to address the allegations is "severely prejudiced by the anonymity of the alleged victims". The State further argues that the Petitioners have not established that they have the authority or mandate to bring this petition on behalf of the alleged victims.

[FN4] Id. paragraph 12.

[FN5] In this regard, the Petitioners rely on paragraphs 14-15 of the State's Response.

[FN6] IACHR Report Nº 6/02, Case 12.071, 120 Cuban Nationals and Eight Haitians Nationals Detained in the Bahamas; February 27, 2002; I/A H.R, Urso Branco Prison Case, Provisional Measures, June 18, 2002; IACHR Report N° 28/93, Case 10.675, Haitian Interdiction Case, United States of America, October 13, 1993.

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26. The Petitioners also dismiss the State's argument that the petition constitutes an actio popularis, arguing, inter alia, that (a) the petition does not contend that the existence of the direct back policy in and of itself constitutes a violation of the American Declaration, but that the Petitioners appear on behalf of known and putative victims of this policy; and (b) John Does 1-3 are natural persons, not fictitious legal constructs, who presented themselves at Canada's borders

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as refugees, but were directed back by Canada, detained by U.S. authorities, and ultimately returned to countries in which they fear persecution.

27. In the premises, the Petitioners contend that the State's 'direct-back' policy violates the rights of the alleged victims with respect to their right to:

(a) seek asylum under Article XXVII of the American Declaration of the Rights and Duties of Man, together with prohibitions against refoulement contained in Article 33 of the 1951 Convention Relating to the Status of Refugees;
(b) due process under Article XVIII of the American Declaration, by failing to provide any access to judicial processes to challenge their return to the USA without a determination of their asylum claims.

28. On the issue of exhaustion of domestic remedies, the Petitioners argue that the petition is admissible on three grounds, namely: (a) Canada has not afforded domestic remedies for the rights violated, and thus the alleged victims are excused from the exhaustion requirement under Article 31(2)(a) of the Commission's Rules of Procedure; (b) even if the Commission find that domestic remedies are available, the exhaustion requirement is still inapplicable because the remedies provided are inadequate and ineffective; and (c) as an alternative to the second ground, the victims are excused from exhausting any available remedies, because the victims have been denied access to Canada's domestic remedies under the exception of Article 31(2)(b).

29. Under the first ground, the Petitioners contend that there are no existing domestic remedies in Canada to context a 'direct-back', alleging that when John Doe 2 wrote to the Canadian authorities from the United States requesting assistance, these authorities conceded that no domestic remedy exists and that he should return to Pakistan and apply from there. With respect to the third ground, relying on jurisprudence from the Inter-American Court and the Commission, the Petitioners contend, the alleged victims were denied access to any domestic remedies in Canada. The Petitioners further contend that upon being directed back to the USA, the alleged victims were deprived of the opportunity, the legal knowledge and resources to effectively contest the issuance of the direct-back decisions. On return to the USA, the Petitioners maintain that the alleged victims were detained without any practical access to the Canadian legal system. Accordingly, even if judicial review or other domestic remedies existed in Canada, the victims were effectively denied access to them by the original direct-back decisions.

30. With respect to the second ground, the Petitioners rely on the Velasquez Rodriguez Case to argue that judicial review (of the 'direct-back' decisions), even if accessible by the alleged victims, would be inadequate and ineffective to protect the right of asylum because

a. direct-back decisions are implemented immediately, depriving refugee claims of sufficient opportunity to make applications for judicial review to the Canadian Federal Court;
b. there is no automatic stay on deportation while a judicial review application is pending, thus a refugee claimant may be forced to leave Canada even if he or she is able to file a case; once a refugee claimant has been removed from Canada, the Canadian Federal Court loses jurisdiction over him or her;

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c. refugee claimants being sent back usually have no knowledge of possible domestic remedies, or how to invoke them; usually they have limited resources and limited access to legal representation, particularly if they have been detained upon re-entry into the USA.

31. In response to the State's contentions that the alleged victims have failed to exhaust domestic remedies, the Petitioners maintain that the exception to the exhaustion of domestic remedies applies, as neither of the remedies suggested by Canada (judicial review and public interest litigation) are capable of providing effective relief in the instant case.[FN7] In this respect, the Petitioners argue that under Article 31(2) (a) of the Commission's Rules of Procedure an exception to the exhaustion of domestic remedies applies 'when the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have been allegedly violated.' The Petitioners submit that "the relevant 'result' to be obtained through domestic legal recourse…would entail, at a minimum, ensuring the return of the victims to Canada to pursue their asylum applications", and that "the proper measure of the effectiveness of the alleged remedies suggested by Canada is whether or not they would be capable of producing this result for the victims in this case."

[FN7] See Petitioners' submission of March 14, 2006, paras. 18-19, page 14.

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32. Having regard for the foregoing criterion, the Petitioners maintain that neither of Canada's suggested modes of legal recourse fulfill the Inter-American system's requirements for an effective remedy. In particular, the Petitioners argue that no form of relief available through judicial review is capable of ensuring the return to Canada of the alleged victims of this case, as these individuals were in detention in the United States at the time when such relief was most relevant, and were subsequently removed to their countries of origin. In addition, the Petitioners contend that public interest litigation is not an applicable remedy because it cannot provide effective individual relief for past violations of victims' rights.[FN8]

[FN8] Id. Para.21.

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33. The Petitioners dismiss judicial review as an effective remedy, arguing that the process of judicial review is incapable of ensuring the return of the alleged victims from the United States to Canada. The Petitioners argue that even if a return order were issued by the Canadian courts, the Canadian government would have lacked the extraterritorial jurisdiction to remove individuals from detention in the United States and return them to Canada. Regarding the case cited by Canada (El Jechi v Canada), the Petitioners contend that "far from supporting the effectiveness of judicial review, the El Jechi case exemplifies a striking failure by the Federal Court to provide meaningful relief to directed back refugee claimants[FN9], because in that case the Court declined to issue any orders to ensure that the appellants would be permitted re-entry into Canada.

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[FN9] Id. Para.25; The Petitioners argue that while the Court found that the immigration officer was wrong in issuing a direct back order, but that the annulment was of no practical benefit to the applicants since the Court refused to issue an accompanying writ of prohibition to prevent the family from being directed back a second time if they attempted once more to cross the Canadian border, or a writ of injunction to guarantee them permission to return to Canada to await their scheduled admissibility inquiry. The family was left without any assurance of permission to re-enter Canada.

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34. The Petitioners dismiss public interest litigation as a remedy, claiming that it is unlikely to be available to the alleged victims, and that such litigation is ineffective due to its inability to provide effective individual relief for past violations of the victims' rights. With respect to availability, the Petitioner contends that public interest litigation is likely to be inaccessible to them as a matter of standing (locus standi). In this respect, the Petitioners agree with Canada's submission that public interest standing will be granted "only if there are no directly affected private litigants available or capable of initiating constitutional challenge to secure their rights" (Canada's Official Response, para. 49;). According to the Petitioners, Canada has asserted that the individual asylum seekers have access to judicial review of their direct back orders (Canada's Response, paras. 30-46; supplemental response, para. 9), which ipso facto would disqualify for them from access to public interest litigation. The Petitioners further contend that "regardless of whether or not public interest litigation would be available, such remedy is inapplicable in the instant case because it does not provide relief to individuals of past violations. (para. 33). At paragraph 34, the Petitioners argue that "public interest litigation is not designed to provide relief to individual victims of past rights violations; rather this form of litigation allows applicants (such as NGOs) to seek prospective relief, that is, that invalidation of a policy or law [see Canadian Council of Churches v R and Minister of Employment and Immigration (1992 16 Imm. L.R. (2d) 161]. As Canada affirms in its Response (paras. 50-51), only declaratory and injunctive relief is available: declaration of the invalidity of a policy and a prospective interlocutory injunction to prevent the policy's application in the future, neither of which remotely addresses the situation of individuals whose rights have been directly violated already by the direct back policy's application.

35. Having regard for the foregoing, the Petitioners "reaffirm that an exception to the exhaustion of domestic remedies requirements applies in this case, as Canada has failed to afford any avenue of legal recourse that has the potential to provide effective relief to the individuals whose rights were violated.

36. In the alternative, the Petitioners urge the Commission defer its consideration of the exhaustion issue until its decision on the merits because there exists a close connection between the question of exhaustion of domestic remedies and the violations alleged on the merits of the petition pertaining to the non-availability of processes to the alleged victims. Specifically, the petitioners allege violations of refugee claimants' right to a fair trial under Article XVIII of the American Declaration. In this respect, the Petitioners rely on previous Inter-American jurisprudence[FN10] to ground the proposition that when there is an interplay between the effective availability to the petitioner of domestic procedures and one of the substantive human

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rights violations alleged in the merits of the case", the question of prior exhaustion of domestic remedies may be considered with the merits.

[FN10] The Petitioners cite IACHR, Report Nº 61/03, Case 10.301, Roberto Moreno Ramos (United States), October 10, 2003, para. 63, citing Velasquez Rodriguez Case at para. 94, and also IACHR, Report Nº 6/02, Case 12.071, 120 Cuban Nationals and 8 Haitian Nationals Detained in the Bahamas (Bahamas), Feb. 27, 2002, para. 50.

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2. Timeliness

37. On the issue of timeliness, the Petitioners acknowledge that Article 31(1) of the Commission's Rules of Procedure prescribes a six-month deadline for lodging a petition following the date upon which the alleged victim has been notified of the decision that exhausted the domestic remedies. In the instant case, the petition was lodged in March 2004, after the alleged victims were 'directed back' to the United States in early April 2003 (John Doe 1); in January 2003 (John Doe 2); and in August 2003 (John Doe 3). The Petitioners also refer to Article 32(2) of the Commission's Rules of Procedure, which prescribes that "In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case." Having regard to the Petitioners' preceding arguments on domestic remedies, the Petitioners contend that an exception to the requirement of domestic remedies applies, and that the petition has been presented within a reasonable period of time, as prescribed by Article 32(2) of the Commission's Rules of Procedure. The Petitioners contend that the lapse of time between the 'direct-backs' and the presentation of the petition is attributable to difficulties in identifying victims of Canada's direct back policy, locating them, communicating with them and learning that they have been removed by U.S. immigration authorities.[FN11] Having regard to these factors, the Petitioners maintain that the petition was filed within a reasonable time. The Petitioners further argue that the lapse of time between the direct backs and the filing of the petition is not attributable to lack of efforts on their part, but is due to lack of transparency by the Canadian authorities conferencing the implementation of the direct back policy.

[FN11] See Petitioners' submissions received by the Commission on August 15, 2005, para. 41, page 20.

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38. In the alternative, the Petitioners argue that should the Commission join the issue of exhaustion of domestic remedies with the merits of the case, that the issue of timeliness be similarly joined to the merits of the case. The Petitioners contend that the issue of timeliness is dependent on the Commission's determination regarding the exhaustion requirement. The Petitioners add that when the Commission has previously joined the issue of exhaustion to the

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merits and such an exception is at issue, that the Commission has also deferred the issue of timeliness.[FN12]

[FN12] The Petitioners cite IACHR Report N° 6/02, Case 12.071, 120 Cuban Nationals and 8 Haitian Nationals Detained in the Bahamas (Bahamas), February 27, 2002, para. 50.

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3. Colorable violation

39. The Petitioners contend that the petition discloses facts that tend to state facts that tend to establish a violation of the rights enshrined in the American Declaration, in conformity with Article 34 of the Commission's Rules of Procedure[FN13]. The Petitioners reject the State's contrary contention that the petition is manifestly groundless or out of order, citing the Commission's decision in Ruben Luis Godoy (Argentina). In this decision, the Commission stated that

The criterion for assessing these points these points is different from that which must be followed in deciding the merits of a complaint. The Commission's duty at this stage is to conduct a prima facie assessment to determine whether the complaint demonstrates an apparent or potential violation of a right protected by the Convention, but not to decide whether such a violation occurred. This examination amounts to a summary analysis, which does not imply any prejudgment or opinion as to the merits of the case. The distinction between the examination required for declaring admissibility and that required for determining a violation is reflected in the IACHR's own Rules of Procedure, which clearly differentiate the stages of admissibility and merits.[FN14]

[FN13] See Petitioners' petition of March 31, 2004, page 12 and Petitioners submission to the Commission received on August 15, 2005, paras. 44-45.
[FN14] IACHR, Report N° 4/04, Case 12.324, Ruben Luis Godoy (Argentina), February 24, 2004, para. 43.

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40. The Petitioners further argue that they have stated their claims using the best available evidence, and that the nature of Canada's alleged violation and the circumstances under which the direct back policy operates prevented the petitioners from collecting further evidence. Finally, the Petitioners contend that the Commission has previously found that where a petition requires an "in-depth analysis of the substance of the matter in order to be resolved" that it is considered to be "manifestly groundless" or obviously out of order".[FN15] In the premises, the Petitioners argue that their allegations and facts as set forth warrant further consideration by the Commission and satisfy the requirement of a prima facie case.

[FN15] IACHR, Report N° 32/03, Case 12,281, Gilda Rosario Pizarrro Jiménez et al, (Chile), March 07, 2003, para. 46.

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B. The State

41. By way of background, the State explains that "the 'direct back' policy is "an administrative measure used exceptionally, when Canadian border officials are so overwhelmed with the number of refugee claimants arriving from the United States that they unable to properly initially (sic) process the claims, having regard to the need to be able to make informed decisions regarding each claimant's identity, admissibility to Canada, eligibility to make a refugee claim, and whether the claimant may be a security risk, a serious criminal, or a war criminal." Given this context, the State contends that the 'direct back' is "neither a decision denying asylum, nor denying access to the Canadian refugee determination system, nor denying a refugee determination hearing."[FN16]

[FN16] See page 2 of State's Response to Petition of September 23, 2004.

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42. The State impugns the admissibility of the petition on the following grounds:

a. lack of competence ratione personae, on the part of the Commission, given the anonymity of the alleged victims and the failure of the petitioners to demonstrate that they are authorized to act for these alleged victims;
b. failure to exhaust domestic remedies;
c. failure to establish any exception to the requirement to exhaust domestic remedies;
d. failure to submit petition in a timely manner;
e. failure to disclose any violation of the American Declaration; or to establish prima facie that the direct-back policy constitutes direct refoulement by Canada or indirect refoulement by the USA, contrary to the Refugee Convention.

1. Ratione personae

43. With reference to Article 28(e) of the Commission's Rules of Procedure, the State contends that the Petitioners have not explained the absence of the names of the alleged victims, nor why these alleged victims could not submit the petition on their own behalf, having regard to an affidavit submitted by the Petitioners in support of their petition. According to the State, this affidavit submitted by the Petitioners ("Witness One") indicates that one of the Petitioners (Freedom House) represented or had contact with all three John Does prior to their alleged deportation from the United States. The State contends that its ability to address the allegations is "severely prejudiced by the anonymity of the alleged victims". The State further argues that the Petitioners have not established that they have the authority or mandate to bring this petition on behalf of the alleged victims; as such, the State contends that the petition constitutes an impermissible actio popularis. In the premises, the State argues that the Commission lacks jurisdiction ratione personae.

2. Failure to exhaust domestic remedies

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44. The State contends that the alleged victims or petitioners could have applied for judicial review (of the direct back decisions), “coupled with an urgent stay application to prevent their being directed back to the United States”. The State further contends that the Petitioners, as “public interest litigants”, could have sought declaratory or injunctive relief pursuant to the Canadian Chart of Rights. The State further contends that it is not essential for an individual to be present in Canada to challenge a direct back decision. According to the State, even if an individual has been removed to the US after initiating proceedings, such proceedings would continue, even in the absence of the claimant. The State contends that Canadian Courts have “been willing to order, in the event of a successful judicial review application brought by a person who is no longer in Canada that the government bring the individual back to Canada at the government’s expense.”[FN17]

[FN17] See State’s official response of September 23, 2004, paragraph 38, footnote 35. In support of its position, the State cites the cases of San Vicente Freitas v. Canada (Minister of Citizenship and Immigration), [1999] 2 F.C. 432 (T.D.); Cassells v. Canada (Minister of Citizenship and Immigration), [1999] F.C.J. No. 936, at para.11 (T.D.).

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3. Failure to establish exceptions to domestic remedies exhaustion requirement

45. In response to the Petitioners’ argument that the alleged victims lacked the resources or legal knowledge to exhaust any available domestic remedies, the State contends that this argument is not supported by the Petitioners’ own evidence, particularly the affidavit of Witness One. The State contends that according to this affidavit, two of the alleged victims (John Doe 1 and John Doe 2) both spoke good English and had previously worked in the USA, and that at least one of the alleged victims (John Doe 1) had received the assistance of lawyers from Freedom House (one of the petitioners). The State argues that this evidence shows that the alleged victims did have access to legal assistance and could have pursued remedies in the Canadian domestic courts, and that the Petitioners have provided no explanation why they did not assist the alleged victims in pursuing domestic remedies on their behalf.

4. Timeliness

46. Under Article 32(1) of the Commission’s Rules of Procedure, the State contends that the Commission shall consider petitions that are lodged with six months of the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies. The State notes that the Petitioners argue that Article 32(2) obliges them only to submit within a ”reasonable period of time”, because the exceptions to exhaustion of domestic remedies applies. On the basis that the Petitioners have failed to establish the applicability of the exceptions to the requirement to exhaust domestic remedies, the State contends that the six-month deadline for submitting petitions to the Commission applies, rather than ‘a reasonable period’. In this regard the State argues:

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a. that the impugned direct back policy was issued on January 27, 2003, and that if this is considered to be the operative date, then the Petitioners ought to have lodged their petition no later than July 27, 2003 instead of nine months later on April 01, 2004;
b. alternatively, if operative dates are when the alleged victims were directed back, the State contends that the Petitioners are still out of time, given that John Doe 1 was directed back in or around April 2003; John Doe 2 in January 2003; and John Doe 3 in August 2003.

5. Colorable violations

47. The State argues that the petition fails to present facts or evidence that tend to establish a violation of the rights referred to in the American Declaration, pursuant to Articles 34(a) and (b) of the Commission's Rules of Procedure. In this regard, the State contends that there is insufficient evidence to substantiate the claims that the direct back policy violated the victims' rights to asylum or due process. In support of this contention, the State submits that:

a. The Petitioners have failed to satisfy the dual criteria of Article XXVII of the American Declaration both which must be satisfied for the right to asylum to exist: the right to asylum must be in accordance with the laws of the country in which asylum is sought and must be in accordance with international agreements. According to the State, the effect of the dual cumulative criteria in Article XXVII is that if the right is established in international law, but not in domestic law, it is not a right, which is recognized by Article XXVII.
b. Canada's direct back policy is expressly authorized by Canadian law relating to refugee protection, and that the right to seek asylum in domestic law included the possibility that a claim will not be processed immediately and that a claimant will be asked to temporarily return to the United States pending his appointment for an immigration examination.
c. While international agreements (primarily the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol) prohibit refoulement of an individual to a place where he will be persecuted, international law does not require that a refugee claim be processed at the time and place of the claimant's choosing, and further, does not prohibit measure such as "direct-back". Direct back does not constitute refoulement.

IV. ANALYSIS

A. Competence of the Inter-American Commission ratione personae, ratione materiae, ratione temporis and ratione loci

48. The Petitioners claim that the State violated the rights of John Doe 1, John Doe 2 and John Doe 3 under Articles XVIII and XXVII of the American Declaration of the Rights and Duties of Man. The State is a Member of the Organization of American States but is not a party to the American Convention on Human Rights. The Declaration became the source of legal norms for application by the Commission[FN18] upon Canada becoming a member State of the Organization of American States January 8, 1990.[FN19] In addition, the Commission has authority under the Charter of the Organization of American States, Article 20 of the Commission's Statute,[FN20] and the Commission's Rules of Procedure to entertain the alleged violations of the Declaration raised by the Petitioners against the State, which relate to acts or omissions that transpired after the State joined the Organization of American States.

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[FN18] I/A Court H.R., Advisory Opinion OC-10/89 (Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights), 14 July 1989.

[FN19] The Inter-American Court and the Commission have previously determined that the American Declaration of the Rights and Duties of Man is a source of international obligation for the OAS Member States that are not parties to the American Convention on Human Rights, as a consequence of Articles 3, 16, 112 and 150 of the OAS Charter. See Charter of the Organization of American States, Arts. 3, 16, 51, 112, 150; Statute of the Inter-American Commission on Human Rights, Arts. 1, 20; Rules of Procedure of the Inter-American Commission on Human Rights, Arts. 23, 27, 28-43, 45-47, 49-50; I/A Court H.R., Advisory Opinion OC-10/89 "Interpretation of the Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights", July 14, 1989, Ser. A No. 19 (1989), paras. 35-45; I/A Comm. H.R., James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, IACHR ANNUAL REPORT 1986-1987, paras. 46-49.

[FN20] Article 20 of the Commission's Statute provides as follows:

In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in article 18:

(a) To pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the rights and Duties of Man;

(b) To examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights; and,

(c) To verify, as a prior condition to the exercise of the powers granted under subparagraph b. above, whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.

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49. Given that the petition alleges violations of rights protected under the American Declaration of the Rights and Duties of Man that have taken place in the territory of a State Party, the Commission concludes that it has the competence ratione loci to take cognizance of it.

50. Further, the Commission has the competence ratione temporis to examine this matter. The petition is based on facts alleged to have occurred beginning in 2003, at which time the obligations undertaken by the State under the American Declaration were in effect.

51. Inasmuch as the Petitioners have filed complaints alleging violations of Articles XVIII and XXVII of the American Declaration, the Commission is competent ratione materiae to examine the substance of the complaints.

52. The State contends that the Commission lacks jurisdiction, ratione personae because the Petitioners have not explained the absence of the names of the alleged victims, nor why these alleged victims could not submit the petition on their own behalf, and that petition is an

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impermissible actio popularis in the absence of any clear authority or mandate to bring this petition on behalf of the alleged victims.

53. Article 23 of the Commission's Rules of Procedure, provides that:

Any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure. The petitioner may designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in another writing.

54. Article 28 of the Commission's Rules of Procedure provide that petitions addressed to the Commission shall contain the name, nationality and signature of the person or persons making the denunciation; or in cases where the petitioner is a nongovernmental entity, the name and signature of its legal representative(s); and if possible, the name of the victim and of any public authority who has taken cognizance of the fact or situation alleged.

55. Having regard for foregoing, the Commission does not consider that the absence of the names of the alleged victims inhibits it from assuming jurisdiction ratione personae. The Commission's Rules of Procedure allow for petitions to be brought on behalf of alleged victims; there is requirement for alleged victims to bring petitions on their own behalf or for petitioners to secure a particular mandate or authority for so doing. Accordingly, the Commission considers that it is competent ratione personae to consider the petition.

1. Exhaustion of domestic remedies

56. Article 31 of the Commission's Rules of Procedure provides that the admissibility of a petition submitted to the Inter-American Commission pursuant to Article 23 of the Commission's Rules of Procedure is subject to the requirement that remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to enable national authorities to have the opportunity to address the alleged violation of a protected right, and where appropriate resolve it, prior to any submission before an international mechanism.

57. The requirement of prior exhaustion applies when domestic remedies are available in practice within the national system, and would be adequate and effective in providing a remedy for the alleged violation. In this sense, Article 31(2) specifies that the requirement is not applicable when the domestic legislation does not afford due process for the protection of the right in question; or if the alleged victim did not have access to domestic remedies; or if there

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was unwarranted delay in reaching a final judgment in response to the invocation of those remedies. As indicated by Article 31 of the Commission's Rules of Procedure, when a petitioner alleges one of these exceptions, it then falls to the State to demonstrate that domestic remedies have not been exhausted, unless that is clearly evident from the record.

58. According to the principles of international law as reflected in the precedents established by the Inter-American Commission and Court, it may first be noted that the State in question may expressly or tacitly waive the invocation of this rule. Second, in order to be considered timely, the objection that domestic remedies have not been exhausted must be raised during the first stages of the proceeding; otherwise, it will be presumed that the interested State has tacitly waived its use. Finally, the State that alleges non-exhaustion of domestic remedies must indicate which remedies should have been exhausted, as well as provide evidence of their effectiveness. Consequently, if the State in question does not provide timely arguments with respect to this requirement, it will be understood to have waived its right to argue the non-exhaustion of domestic remedies and thereby discharge the burden of proof that would correspond to it.

59. In the present case, the Petitioners contend that; (a) Canada has not afforded domestic remedies for the rights allegedly violated, and thus the alleged victims are excused from the exhaustion requirement under Article 31(2)(a) of the Commission's Rules of Procedure; (b) even if the Commission finds that domestic remedies are available, the exhaustion requirement is still inapplicable because the remedies provided are inadequate and ineffective; and (c) as an alternative to the second ground, the victims are excused from exhausting any available remedies, because the victims have been denied access to Canada's domestic remedies under the exception of Article 31(2)(b).

60. On the other hand, the State contends that there were available and effective domestic remedies that the Petitioners failed to exercise. The State contends that the alleged victims or petitioners could have applied for judicial review (of the direct back decisions), "coupled with an urgent stay application to prevent their being directed back to the United States". The State further contends that the Petitioners, as "public interest litigants", could have sought declaratory or injunctive relief pursuant to the Canadian Chart of Rights. The State further contends that it is not essential for an individual to be present in Canada to challenge a direct back decision. According to the State, even if an individual has been removed to the US after initiating proceedings, such proceedings would continue, even in the absence of the claimant. The State contends that Canadian Courts have "been willing to order, in the event of a successful judicial review application brought by a person who is no longer in Canada that the government bring the individual back to Canada at the government's expense."[FN21]

[FN21] See State's official response of September 23, 2004, paragraph 38, footnote 35, In support of its position, the State cites the cases of San Vicente Freitas v Canada (Minister of Citizenship and Immigration), [1999] 2 F.C. 432 (T.D.); Cassells v. Canada (Minister of Citizenship and Immigration), [1999] F.C.J. No. 936, at para.11 (T.D.).

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61. In response to the Petitioners' argument that the alleged victims lacked the resources or legal knowledge to exhaust any available domestic remedies, the State contends that this argument is not supported by the Petitioners' own evidence, particularly the affidavit of Witness One. The State contends that according to this affidavit, two of the alleged victims (John Doe 1 and John Doe 2) both spoke good English and had previously worked in the USA, and that at least one of the alleged victims (John Doe 1) had received the assistance of lawyers from Freedom House (one of the petitioners). The State argues that this evidence shows that the alleged victims did have access to legal assistance and could have pursued remedies in the Canadian domestic courts, and that the Petitioners have provided no explanation why they did not assist the alleged victims in pursuing domestic remedies on their behalf.

62. The Commission has previously held that when there is an "interplay between the effective availability to [the petitioner of domestic procedures and one of the substantive human rights violations alleged in the merits of the case", the question of prior exhaustion of domestic remedies may be considered with the merits [cites IACHR, Report N° 61/03, Case 10.301, Roberto Moreno Ramos (United States), October 10, 2003, para. 63, citing Velasquez Rodriguez Case at para. 94. See also IACHR, Report N° 6/02, Case 12.071, 120 Cuban Nationals and 8 Haitian Nationals Detained in the Bahamas (Bahamas), Feb. 27, 2002, para. 50]. As with previous cases in which the issue of domestic remedies has been joined with the merits, there exists in this case a "close connection between the question of exhaustion of domestic remedies and the violations alleged on the merits of the petition pertaining to the non-availability of processes to the victims. Specifically, the petitioners allege violations of refugee claimants' right to a fair trial under Article XVIII of the American Declaration.

63. Having considered the arguments of both parties, the Commission considers that the issue of exhaustion of domestic remedies is inextricably bound up with the alleged violations of the American Declaration the question of exhaustion of domestic remedies and the violations alleged on the merits of the petition pertaining to the non-availability of processes to the victims to assert their claims of refugee status and the right to access judicial processes to challenge the sending back of the alleged victims to the United States to await interview eligibility dates.

2. Timeliness

64. In accordance with Article 32(1) of the Commission's Rules of Procedure, a petition must be presented in a timely manner to be admitted, namely, within six months from the date on which the complaining party was notified of the final judgment at the domestic level. The six-month rule ensures legal certainty and stability once a decision has been taken. However, in those cases in which an exception to the requirement of prior exhaustion applies, Article 32(2) of the Commission's Rules of Procedure provides that petitions must be presented within a reasonable period of time, as determined by the Commission. In the instant case, the Commission, having considered the arguments of the parties finds that there is a close connection between the question of exhaustion of domestic remedies; the timeliness of the petition's submission; and the violations alleged on the merits of the petition pertaining to the non-availability of processes to the victims to assert their claims of refugee status. Indeed, the Commission considers that the issue of timeliness is ultimately contingent on its determination regarding the exhaustion of domestic remedies. Accordingly, the Commission decides to join not

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only the issue of exhaustion of domestic remedies, and the timeliness of the petition to the merits of the case.

B. Duplication of Procedures

1. Duplication of proceedings and res judicata

65. The Petitioners have indicated that their petition does not essentially duplicate a petition pending or already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member. The State has not contested the issue of duplication of procedures. The Commission therefore finds no bar to the admissibility of the Petitioner's claims under Article 33 of the Commissions Rules of Procedure.

2. Colorable claim

66. The parties have joined issue on the question of whether the petition discloses a colorable claim. Articles 34(a) and (b) of the Commission's Rules of Procedure require the Commission to consider a petition to be inadmissible if the petition does not state facts that tend to establish a violation of the rights guaranteed by the Convention or other applicable instruments, or if the statements of the petitioner or of the state indicate that the petition is manifestly groundless or obviously out of order.

67. The State requested the Commission to reject the complaint because the Petitioners have failed to satisfy the dual criteria of Article XXVII of the American Declaration and that Canada's direct policy is authorized by Canadian law. The State also contended that international law does not require that a refugee claim be processed at the time and place of the claimant's choosing, and further, that international law does not prohibit measures such as "direct-back". Finally, the State contended that direct back does not constitute refoulement.

68. The Commission is of the view that it is not necessary at this stage of the proceeding to resolve these questions of law to determine the existence of prima facie claim. For the purposes of admissibility, the Commission must decide if the acts alleged tend to establish a violation, as provided for in Article 34(a) of the Commission's Rules of Procedure and whether the petition is "manifestly groundless" or "obviously out of order", in accordance with Article 34(b).

69. With respect to the present petition, the Commission considers that the arguments presented by both parties require an in-depth analysis of the substance of the matter in order to be resolved. The IACHR therefore does not find that the petition is "manifestly groundless" or "obviously out of order". On the other hand, the Commission considers that, prima facie, the petitioners have fulfilled the requirements set out in Articles 34(a) and (b) of the Commission's Rules of Procedure.

70. Based on the arguments of fact and of law set out above and without prejudice to the substance of the question,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, DECIDES:

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1. To declare the petition under consideration admissible under Articles XXVII and XVIII of the American Declaration;
2. To join the issue of exhaustion of domestic remedies and the timeliness of the petition to the merits of the case.
3. To transmit this Report to the State of Canada and to the Petitioners.
4. Proceed with the examination of the merits of the case.
5. To publish this decision and to include it in the annual report to be submitted to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 27th day of the month of October, 2006. (Signed): Evelio Fernández Arévalos, President; Paulo Sérgio Pinheiro, First Vice-President; Florentín Meléndez, Second Vice-President; Freddy Gutiérrez, Paolo G. Carozza and Víctor E. Abramovich, Commissioners.