REPORT Nº 78/11
CASE 12.586
MERITS
JOHN DOE *ET AL*.[*]
CANADA
July 21, 2011

I. SUMMARY

1. On April 1, 2004 the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the IACHR") received a complaint filed against the State of Canada ("Canada" or "the State") 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 ("the petitioners"), on behalf of three unnamed persons known as John Doe 1, John Doe 2 and John Doe 3 (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 changes to an immigration policy, known as the "direct-back policy", under which refugee claimants arriving to Canada through a border entry with the United States of America ("United States" or "U.S.") were directed back to the United States if Canada could not process their claims and without any immediate consideration of their claims. Before their departure, refugee claimants were given dates to return to Canada for refugee eligibility determination interviews. Under the direct-back policy, refugee claimants were required to remain outside of Canada until their interview dates. Once directed back to the United States, the petitioners alleged these refugee claimants are often taken into U.S. immigration custody and consequently must pursue their refugee claim in the United States. Under the "direct-back policy", the petitioners contend Canadian officials did not seek or obtain assurances from the US authorities that claimants "directed back" would be permitted to return for their eligibility interviews, be permitted to seek asylum in Canada before deportation to their home countries, or conduct an individualized assessment of a refugee claimant's ability to seek asylum or be protected from *refoulement* in the United States.

3. According to the petition, the alleged victims sought to apply for asylum in Canada after arrival at Windsor, Canada, a border entry point from the United States. They arrived in approximately April, January, and August 2003, respectively. After being given interview dates to return to Canada, they were returned to the United States, where they were arrested by immigration authorities and subsequently deported to their countries of origin.

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[*] Commissioner Dinah Shelton, a national of the United States, did not participate in the deliberations or vote in this case in accordance with Article 17(2)(a) and 17(3) of the Rules of Procedure of the IACHR. Commissioner Shelton withdrew from participation in consideration of the case and submitted her written explanation with a request that it be published with the report:

> Having reviewed the parties' submissions in this case, it appears that the matter cannot be decided without bringing in the United States as a necessary party, because any determination that Canada has breached its obligation regarding the right to asylum is dependant on a finding that the United States is engaged in refoulement in violation of international law. That being so, I cannot participate in deciding the merits of the petition and withdraw from any further participation in the matter.

4. The petitioners contend that the direct-back policy had the effect of violating the alleged victims' right to seek asylum under Article XXVII of the American Declaration of the Rights and Duties of Man ("the American Declaration"); additionally violating Article XXVII of the American Declaration for failing to protect the alleged victims from the risk of *refoulement*, as articulated under international refugee law particularly Article 33 of the 1951 Convention Relating to the Status of Refugees [hereinafter "Refugee Convention"]; and violating the victims' right to due process under Article XVIII of the American Declaration, to the extent that they were deprived of access to judicial processes to challenge their forced return to the United States without a determination on their asylum claims.

5. The State contends that its direct-back policy is a seldom-used administrative measure to facilitate the processing of refugee claims at the Canada-U.S. border. The State also submits that this policy does not constitute *refoulement*, nor does it violate Article XXVII of the American Declaration or international law generally. The State contends that no violation of Article XVIII of the American Declaration has been shown and, moreover, that the petitioners have failed to exhaust domestic remedies.

6. In Report N° 121/06, adopted on October 27, 2006 during its 126th regular period of sessions, the IACHR, having examined the contentions of the parties on the question of admissibility, and without prejudging the merits of the matter, decided to admit the claims in the present petition pertaining to Articles XXVII and XVIII of the Declaration; join the issue of exhaustion of domestic remedies and the timeliness of the petition to the merits of the case; and continue with the analysis of the merits of the case.

7. As set forth in the present report, having examined the information and arguments concerning the merits of the petition, the IACHR has concluded that the alleged victims satisfy an exception from exhausting domestic remedies, that the petition was timely filed, and that the State is responsible for violating Articles XXVII and XVIII of the American Declaration with respect to the alleged victims for failing to protect their right to seek asylum in a foreign territory, failing to conduct a basic, individualized assessment with respect to the risk of *refoulement*, and failing to provide effective access to judicial review of the application of the direct back policy to the John Does.

II. PROCEEDINGS SUBSEQUENT TO ADMISSIBILITY REPORT Nº 121/06

8. The IACHR's admissibility report N° 121/06 was transmitted to the parties on November 1, 2006, and the parties were requested to submit any additional observations within two months. The IACHR also placed itself at the disposal of the parties in accordance with Article 41 of its Rules of Procedure, with a view to reaching a friendly settlement of the matter.

9. By letter of November 17, 2006 the petitioners expressed an interest in resolving this case by means of friendly settlement.

10. By note dated December 15, 2006, the State submitted a "Request for Reconsideration" of the IACHR's decision on admissibility, along with two supporting documents. The Inter-American Commission declined the State's request by letter dated April 26, 2007[1] and invited the State to present further observations on the merits of the case.

11. In a letter dated January 1, 2007, the petitioners submitted their observations on the issues of exhaustion of domestic remedies, timeliness, and the merits of the case. The IACHR transmitted the pertinent parts of the petitioners' observations to the State by note dated April 26, 2007, with a request for any additional observations within two months.

[1] In its letter to the State, the Inter-American Commission advised the State that "neither the Rules of Procedure nor the arguments propounded [by the State] would justify a reconsideration of the admissibility report."

12. By note dated June 19, 2007, the State requested a two month extension to file its submissions on the merits of the case. By letter dated June 27, 2007 the IACHR granted the State an additional 30 days to reply to the petitioners' observations on the merits. By letter dated July 27, 2007, the State presented its submissions on the merits of the case.

13. On October 29, 2008, the petitioners provided a first supplement to their submission on the merits. The IACHR transmitted the pertinent parts of the petitioners' observations to the State by note dated January 14, 2009, with a request for any additional observations within two months. By letter dated March 30, 2009, the petitioners submitted a second supplement to their observations on the merits. The IACHR transmitted the pertinent parts of the petitioners' second supplemental observations on the merits to the State on April 2, 2009.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

14. According to the petitioners, in 2003 Canada implemented a 'direct back' policy for the processing of refugee claimants arriving at border points of entry from the United States, which under certain circumstances permits Canadian border officials to send refugee claimants back to the United States to await processing of their asylum claims in Canada on a future scheduled date. This policy operates under Regulation 41 of the Canadian Immigration and Refugee Protection Regulations, which establishes the following circumstances under which a Canadian border officer can direct back an individual to the United States:

> …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.

15. The petitioners argue that, prior to January 2003, the direct-back policy was not applied to refugee claimants arriving from the United States, unless the United States Government had confirmed to Canadian officials that it would permit such claimants to return to Canada to be processed on their scheduled interview dates. 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 if, in the view of the port or area manager, pressures were so great that it would be either impossible or impracticable to process them on arrival; and only where the officer was satisfied that the applicant would be able to return to Canada to pursue his or her 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 "[i]n the absence of positive confirmation, return to the United States cannot be effected."[2] [hereinafter "2001 Directive"].

16. According to the petitioners, the CIC changed the 2001 Directive on January 27, 2003. In a reversal of the earlier policy, the petitioners claim that the new 2003 instructions "eliminated the fundamental safeguard in the direct-back policy: the requirement that CIC obtain an assurance from U.S. immigration officials that the refugee claimant would be able to return to Canada for his or her eligibility determination interview."[3] [hereinafter "2003 Instructions"]. The 2003 Instructions state: "[c]onfirmation

[2] Citizenship and Immigration Canada (CIC), *CIC Refugee Claimant Deferral and Temporary Return Policy* (Oct. 11, 2001).

[3] Petition dated Mar. 31, 2004, *citing* Citizenship and Immigration Canada (CIC), *Instructions for Front-end Processing of Refugee Protection Claims* (Jan. 27, 2003).

from USINS that the claimant will be made available for the future examination on the date and time specified is not required."[4]

17. 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 the country in January 2003; and John Doe 3, a national of Albania, entered it in August 2003, with his wife and two children. All of them were issued interview dates and instructed to return immediately to the United States until the scheduled dates. Upon return to the United States, the alleged victims were arrested by U.S. immigration authorities for being present in the country without proper documentation. According to the petitioners, the alleged victims were deported to their countries of origin by U.S. 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 U.S. authorities upon re-entry to the United States. According to the petitioners, they successfully re-entered Canada, where they currently reside. The petitioners cite to evidence submitted by the State in this case that John Doe 3 later returned to Canada from Albania and was subsequently granted asylum by the Canadian government.

18. In support of their contentions, the petitioners principally rely on the affidavit of a person known as "Witness One."[5] According to the affidavit, Witness One was a 23-year-old asylum-seeker who was directed back from Canada to the United States on April 15, 2003. He was arrested upon returning to the United States and subsequently detained in Monroe County Jail in Detroit, Michigan. Witness One states that he was eventually released in November 2003, pursuant to a judicial order. Following his release, Witness One states that he renewed his application for asylum status in Canada and due to the serious risk to the safety of his or her family in the country of origin requested that his identity not be disclosed. Witness One testifies that he met John Does 1, 2, and 3 at Monroe County Jail. According to Witness One, all of the John Does had been directed back to the United States, where they were subsequently detained by US authorities prior to their deportation to their countries of origin.

1. Alleged violation of Article XXVII of the American Declaration: right to seek asylum

19. The petitioners argue that Canada's 2003 Instructions regarding the direct-back policy violate Article XXVII of the American Declaration, by effectively prohibiting the John Does from seeking asylum protection in Canada or in any other foreign territory. Article XXVII of the American Declaration provides:

> Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.

20. The petitioners submit that the import of Article XXVII is that each State may develop its own, unique asylum procedures, provided that due process is accorded to all non-citizens, regardless of their legal status. They therefore submit that a State is not in compliance with Article XXVII if it arbitrarily excludes individuals from seeking asylum altogether, or implements policies that foreseeably have this effect.

21. The petitioners rely on the *Haitian Interdiction Case*[6] as supporting an international obligation under article XXVII of the American Declaration to afford claimants hearings to determine their

[4] Citizenship and Immigration Canada (CIC), *Instructions for Front-end Processing of Refugee Protection Claims* (Jan. 27, 2003).

[5] The affidavit of "Witness One" was submitted as an annex to the petition (Mar. 31, 2004).

[6] IACHR, *Haitian Interdiction Case*, Report Nº 51/96 (merits), Case No. 10.675, United States (March 13, 1997).

refugee status without exposing them to risk of *refoulement*, including re-directing them to another State without an assurance that they will be permitted the right to have their refugee claims heard. In the *Haitian Interdiction Case* the petitioners state that the Inter-American Commission found the United States in violation of Article XXVII when it interdicted potential Haitian refugees on the high seas and summarily *refouled* them to Haiti, without providing the opportunity to seek asylum in the United States or any other foreign territory. Analogously, the petitioners assert that Canada summarily returned the John Does to the United States before they were assured effective access to seek asylum in Canada or another foreign territory. Given the many automatic legal bars to asylum in the United States, the petitioners contend Canada exposed the John Does to the risk of *refoulement* to their country of origin before consideration of their refugee claims. Accordingly, the petitioners submit that the IACHR should find that Canada violated Article XXVII of the American Declaration for failing to provide the John Does effective access to seek asylum in Canada or another foreign territory.

2. Alleged violation of Article XXVII of the American Declaration: protection from *refoulement*

22. The petitioners further submit that Canada is in violation of Article XXVII of the American Declaration for failing to provide adequate protection to the John Does from the risk of *refoulement* when they directed them back to the United States. The petitioners contend that Canada exposed the John Does to the risk of *refoulement* by failing to take any of the following protective measures: (1) abolishing the direct back policy; (2) gaining assurances from the United States that the John Does would be permitted to return to Canada for their refugee eligibility hearings; or (3) making an individualized determination in the John Does' cases as to the risk of *refoulement* from the United States to their countries of origin in light of gaps in refugee protection under U.S. law. According to the petitioners, the determination of whether Canada violated the alleged victims' rights to protection from *refoulement* does not depend on a finding that they were actually *refouled* by the United States. Rather, the petitioners argue that Canada breached its obligations under the American Declaration and the Refugee Convention because under the 2003 Instructions it did not have adequate measures in place to protect the John Does from potential *refoulement* and arbitrarily removed them in "reckless disregard of this risk [*refoulement*]".

23. In support of these contentions, the petitioners maintain that refugees face a real risk of *refoulement* in the United States because the U.S.'s asylum policies and practices fall short of international law requirements.[7]

24. Although the petitioners maintain that Canada's violation of Article XXVII of the American Declaration, in conjunction with Article 33 of the Refugee Convention is not dependant on the subsequent deportation of the John Does by the United States, they submit that in the case of John Doe 3, the direct-back policy did in fact cause actual *refoulement*. John Doe 3, who was deported to Albania from the United States following the application of a direct back order, reportedly returned to Canada a short while later and made a successful asylum claim.

3. Alleged violation of Article XVIII of the American Declaration: due process claim

25. In addition to the alleged violations to the right to seek asylum, the petitioners allege that once Canadian border officials had decided to direct the John Does back to the United States the State

[7] In particular, the petitioners allege that the following practices are some of "the most notable ways" in which the United States asylum system fails to comply with international standards: (1) the existence of a one-year filing deadline for asylum applications; (2) an evidentiary standard higher than international law for receiving "withholding of removal" [protection from *refoulement*] for those refugee who do not qualify for asylum in the United States; (3) overly broad exclusions from refugee protection on "terrorism" and "national security" grounds, including bar for individuals who "supported" terrorist groups unknowingly or under duress; (4) overly broad exclusions from refugee protection for criminal convictions; (5) immigration judge discretion to deny asylum even if an individual meets all the requirements for asylum; (6) the requirement that an individual not only demonstrate that the reason for a victim's alleged persecution was on account of one of the five grounds contained in the Refugee Convention, but also that it was or will be a motive in the persecutor's mind (i.e., the "nexus" requirement); (7) impermissibly high evidentiary standards imposed on refugee claimants; (8) the arbitrary application of asylum law by immigration judges; (9) the high probability of detention faced by directed back claimants, particularly those from predominantly Muslim countries; and (10) limited access to legal counsel.

did not provide the John Does simple, effective access to judicial remedies to appeal the decision, in contravention of Article XVIII of the American Declaration. At the admissibility stage, the petitioners raised their allegations regarding lack of access to effective judicial remedies in the context of their contention that the John Does satisfy an exception to the requirement to exhaust domestic remedies. As noted in this report's summary, the IACHR joined the exhaustion of domestic remedies and the timeliness of the petition to the merits of the case.

26. On the issue of exhaustion of domestic remedies, the petitioners had previously argued that Canada has failed to afford domestic remedies to the alleged victims and/or denied the alleged victims access to domestic remedies, and therefore the John Does should be excused from the exhaustion requirement based on the exceptions delineated in Articles 31(2)(a) & (b) of the Inter-American Commission's Rules of Procedure. In the alternative, the petitioners contend that even if the IACHR finds that domestic remedies are available to the John Does, the exhaustion requirement is still inapplicable because the remedies provided are inadequate and ineffective.

27. The petitioners contend that there are no existing domestic remedies in Canada to appeal a 'direct-back' decision and/or the alleged victims were denied access to domestic remedies. The petitioners allege that the John Does and other directed back individuals are returned to the United States typically in a matter of hours. The petitioners reject the State's contention that an individual slated to be returned to the United States could seek a stay of removal from a Canadian federal court to stop the 'direct back' decision. The petitioners contend that even if the John Does had had attorneys and an injunction petition ready, it would not have been possible to file the petition and have it heard before they were returned to the United States. Once returned to the United States, the petitioners allege that any remedy the Canadian federal court could have provided no longer was effective because it no longer had jurisdiction over the John Does to enforce such remedies. To this point, Witness One testifies that while detained in the United States John Doe 2 wrote a letter to the Canadian Government to seek its protection from *refoulement* to Pakistan. Witness One alleges the State responded that "Canada could not protect him. It told him to go back to his country and apply for asylum in Canada from there. It said that Canada was willing to accept him but it could not do anything because he was under the control of [the] American immigration department, so they could not tell him to come to Canada."[8]

28. The petitioners further allege that the availability of a public interest action against the direct back policy is not a remedy for past violations of the John Does' right to seek asylum and be protected from *refoulement*, as public interest litigation would only provide prospective relief to future individuals directed back to the United States.

29. With respect to public interest litigation, the petitioners reject the State's contention that the domestic litigation challenging the validity of the Safe Third Country Agreement ("STCA")[9] between the United States and Canada demonstrates that there are domestic remedies available and that the petitioners have not exhausted those remedies.[10] First, as discussed above, the petitioners reiterate that to the extent that the domestic STCA litigation would impact individuals subjected to the direct back policy, the remedy would only be prospective in nature and would not provide relief to the John Does for past violations. Second, if the STCA litigation were successful for the public interest organizations, the "direct back policy" would still be in effect, as its implementation is independent from the STCA. Finally, even with the STCA in place, the "direct back policy" could still be applied to refugee claimants who fall under one of the exceptions to the STCA.

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[8] Petition dated March 31, 2004, Affidavit of Witness One, para. 34.

[9] In its submission to the Inter-American Commission of July 27, 2007, the State explains (at paragraph 13) that: "The STCA is an agreement between Canada and the U.S. designed to share responsibility and ensure the orderly processing of refugee claimants. The effect of the STCA, which applies only at Canada-U.S. land border, is that refugee claimants are required to make their claims in the first safe country (Canada or U.S.) in which they arrive, unless they come within one of the specified exceptions to the agreement."

[10] The STCA litigation was still on-going at the time of the State's last submission to the Inter-American Commission in July 2007.

30. The petitioners advise the IACHR that since the State's submission in July 2007, the domestic STCA litigation has concluded. On February 5, 2009 Canada's Supreme Court declined to hear the public interest organizations' appeal from the Federal Court of Appeals. The petitioners note that despite a favorable ruling by the district court on the merits that the United States was not a safe third county, the Federal Court of Appeals ultimately ruled that the public interest organizations did not have standing to challenge the STCA.

31. Even if the Inter-American Commission concludes that there are domestic remedies available to the John Does, the petitioners assert that the domestic remedies would be inadequate and ineffective to protect the alleged victims' right to seek asylum and thus the John Does should be exempt from exhausting domestic remedies.[11] The petitioners submit that in order for a domestic remedy to be adequate "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."

32. Having regard for the foregoing criteria, the petitioners maintain that neither of Canada's suggested modes of legal recourse fulfill the Inter-American system's requirements for an adequate and effective remedy. The petitioners assert that they are inadequate and ineffective to protect the John Does right to seek asylum for the following reasons:

- direct-back decisions are implemented immediately, depriving refugee claimants of sufficient opportunity to make applications for judicial review to the Canadian Federal Court;
- there is no automatic stay of 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;
- 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 United States;
- public interest litigation is inadequate because it would only provide prospective relief to future directed back individuals and does not remedy the past human rights violations suffered by the John Does.

33. In short, the petitioners argue that no form of relief available through judicial review is capable of ensuring the return to Canada of the alleged victims in 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. The petitioners argue that, even if a return order were issued by the Canadian courts, the Canadian government lacked the extraterritorial jurisdiction to remove individuals from detention in the United States and return them to Canada. Regarding a case cited by the State (*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"[12] because in that case the Court declined to issue any orders to ensure that the appellants would be permitted re-entry into Canada.

[11] Petitioners rely on *Velasquez Rodriguez Case* for the proposition that only adequate and effective remedies must be exhausted. *See* Inter-Am. Ct. H.R.., *Case of Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988, Series C No. 4.

[12] The petitioners argue that while the Court found that the immigration officer was wrong in issuing a direct back order 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 reportedly left without any assurance of permission to re-enter Canada.

34. The petitioners contend that public interest litigation is not an adequate remedy because it cannot provide effective individual relief for past violations of victims' rights. With respect to its availability, the petitioners contend that public interest litigation is likely to be inaccessible to them as a matter of standing (*locus standi*), as support by the Federal Court of Appeals decision in the STCA litigation. In this respect, the petitioners point to the State'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."[13] The petitioners further submit that Canada has asserted that the alleged victims have access to judicial review of their direct back orders.[14] Accordingly, the petitioners contend that this, *ipso facto*, would deprive the alleged victims of the requisite legal standing to pursue public interest litigation as a remedy. 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 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, the invalidation of a policy or law.[15] In this regard, the petitioners point to Canada's submission that only declaratory and injunctive relief is available in public interest litigation. The petitioners affirm that while such relief may restrain the future application of the direct back policy, it is incapable of redressing rights violations that have arisen from prior application of the direct back policy.

35. Accordingly, 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. The petitioners further assert that the John Does' petition was presented to the IACHR "within a reasonable time", as required under Article 32(2) of its Rules of Procedure. They also state that the petition was filed with the IACHR approximately seven months after the most recent alleged violations of the American Declaration occurred. The petitioners contend that given the difficulties with locating and communicating with alleged victims of Canada's direct back policy, the elapse of seven months between the final alleged violations and the filing of the petition is reasonable under the circumstances of the case, in accordance with Article 32(2) and the Inter-American Commission's precedents.

37. On the merits, the petitioners submit that Canada applied the direct back policy in such a way as to deny the alleged victims any form of judicial protection during the actual direct back process, particularly by obstructing access to "the only remedy capable of providing the [alleged] victims with even temporary relief (a stay of removal)." Furthermore, they argue that Canada failed to offer any remedy capable of effectively protecting the rights of the alleged victims once they had been directed back, resulting in both an unlawful exclusion from the refugee determination system and a denial of any opportunity to secure an effective remedy for such exclusion.

38. The petitioners contend that, by excluding the alleged victims from its asylum system without providing them with a hearing or another opportunity to contest their removal, Canada breached its obligations under Article XVIII of the American Declaration. The petitioners argue that such "arbitrary" removal of refugee claimants is inconsistent with international standards concerning the process due to asylum seekers which require that an applicant who is denied refugee status be given "a reasonable time to appeal for a formal reconsideration of the decision…[and] should…also be permitted to remain in the country while an appeal…is pending." The petitioners contend that the direct back decisions operated as *de facto* denials of refugee status for the alleged victims by preventing them from accessing the Canadian asylum system. They conclude that this *de facto* exclusion from Canada's asylum determination system, together with the lack of hearing or other processes in which to seek protection of rights and no realistic

[13] State's submission dated September 23, 2004, para. 49.

[14] *Id.* at paras. 30-46.

[15] In this regard, the Petitioners refer to *Canadian Council of Churches v. R and Minister of Employment and Immigration* 1992 16 Imm. L.R. (2d) 161.

opportunity to apply for a stay of removal, constitutes a breach of Canada's obligation to provide accessible, effective judicial protection under Article XVIII of the American Declaration.

39. The petitioners further submit that Canada failed to afford the alleged victims any effective means of protecting their right to seek asylum, following their re-direction to the United States. They argue that an appropriate, effective remedy would have had to have been capable of returning the alleged victims to Canada to seek asylum and to avoid *refoulement*. Given that the alleged victims were placed beyond the jurisdictional reach of the Canadian courts upon being directed back to the United States (and subsequently deported to their countries of origin), the petitioners submit that the provision of an effective judicial remedy to the alleged victims in this case became "impossible".

40. Accordingly, the petitioners request that the IACHR find that Canada breached its obligations with respect to Articles XXVII --in conjunction with Article 33 of the Refugee Convention-- and XVIII of the American Declaration with respect to the John Does and all other refugee claimants who were directed back to the United States after January 27, 2003.[16]

B. Position of the State

1. Petitioners' Failure to Satisfy Admissibility Requirements

41. The State maintains that the petition was, and remains, inadmissible because it considers the IACHR lacks competence *ratio personae* since there is no explanation as to why the John Does or "nameless others" could not bring the petition on their own behalf or why their names have not been provided, and therefore, the petition constitutes an *actio popularis*. Canada also contends that neither the alleged victims nor the petitioners have exhausted available domestic remedies; that the petition is out of time, or it was not brought within a reasonable period of time as required; that it does not present a violation of the American Declaration; and that it is manifestly unfounded.[17]

42. The State urges that the petition should be dismissed for failure to exhaust domestic remedies. The State contends that the John Does could have challenged the direct back decisions by seeking an urgent stay of removal from Canada's federal court, until such time as the court could review the underlying complaint. The State notes that, based on the information provided by the petitioners, none of John Does pursued this domestic remedy. The State notes that the John Does could have pursued domestic litigation from outside Canada, but chose not to.[18] In this context, the State asserts that a Canadian court, arguably, could rule that an individual's constitutional rights have been violated and order the Government to make best efforts to ensure the individual's re-admission to Canada.

43. Canada submits that judicial review of the decisions made by immigration officers at the border --including decisions to direct back-- is available, with leave, before the federal court. According to the State, the federal court has the authority to order a decision-maker to do any act or thing he or she has unlawfully failed to do, declare a decision invalid or unlawful, or quash a decision and refer it back for re-determination. Furthermore, the State submits that everyone physically present in Canada, including at the border, is protected by Section 7 of the Canadian Charter of Rights and Freedoms which

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[16] The petitioners cite the *Haitian Interdiction Case* for the proposition that IACHR should apply its recommendations to both named and unnamed victims. *See* IACHR, *Haitian Interdiction Case*, (United States) Report Nº 51/96 (merits), Case No. 10.675 (March 13, 1997).

[17] In its admissibility report N° 121/06, the Inter-American Commission addressed these submissions of the State when considering its competence *ratione personae* to consider the petition. With reference to Articles 23 and 28 of the Inter-American Commission's Rules of Procedure, the Inter-American Commission declared that it "does not consider that the absence of the names of the alleged victims inhibits it from assuming jurisdiction ratione personae." (para. 55) The Inter-American Commission affirmed that the Inter-American Commission's Rules of Procedure allow for petitions to be brought on behalf of alleged victims; and that there is no requirement for alleged victims to bring petitions on their own behalf or for petitioners to secure a particular mandate or authority for so doing. (*Ibid*.).

[18] The State asserts that it has evidence of at least one case in which a family was directed back to the United States and successfully brought a federal court action to quash the order.

guarantees the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." According to Canada, even actors outside of the country are protected by Section 7, so long as they can show Canada's participation in the deprivation and where the deprivation is a foreseeable consequence of such participation.

44. The State submits that the alleged victims in this case could have obtained immediate relief by applying to the federal court for an interim order staying removal pending the final determination of their applications before the Court. However, Canada does acknowledge that claimants could face the difficulty of establishing the irreparable harm in being removed to the United States, a requirement for having a stay granted. In response to arguments by the petitioners that there is simply not enough time to prepare an application to the courts, Canada submits that Federal Court Rules provide for service and filing of applications by fax and e-mail to facilitate access to the court on short notice.

45. Canada asserts that because the direct back policy was well known shortly after its use became necessary, the alleged victims could have made advance arrangements to make appointments and be met by Canadian legal counsel. The State maintains that "a reasonably diligent claimant, either independently or with assistance, could have prepared an adequate case against the direct back policy and its application in his case prior to arriving at the Canadian border." The State argues that a Canadian court could have declared that the claimant's constitutional rights had been violated by the direct back order, and ordered the government to make best efforts to ensure the claimant's re-admission to Canada.

46. In support of its submissions, Canada refers to challenges brought by individuals directed back under the STCA in the domestic courts. The State asserts that this proves the availability of effective domestic remedies. Canada emphasizes that the petitioners could have, but failed to initiate any litigation on behalf of any of the John Does.

47. In response to submissions by the petitioners that the claimants in this case ought to be excused from exhausting domestic remedies because they are "often in trauma, have few financial or social resources, may not be literate or knowledgeable about the law, and have few ties to either the U.S. or Canada," the State submits that these arguments are not supported by the petitioners' own evidence. The State refers to the testimony of "Witness One" who affirmed that the John Does all had contact with lawyers from the nongovernmental organization Freedom House; that two of the John Does spoke English; and had been in the United States for over a year. Canada submits that this evidence shows that the alleged victims did have access to legal assistance and therefore should have pursued remedies in the Canadian domestic courts.

48. Canada further argues that the petitioners could have initiated public interest litigation on behalf of the alleged victims. The State submits that an individual or a NGO may be granted "public interest standing" to purse a constitutional challenge in the domestic courts. According to the State, public interest standing may be granted in the context of refugee claimants where:

- a serious issue of constitutional invalidity has been raised;
- the NGO has demonstrated a genuine interest in the problems of refugees and immigrants; and
- there exists no other reasonable and effective way to bring the issue before the court. Canada maintains that the petitioners could have sought a declaration on the constitutional validity of the direct-back policy and that an interlocutory injunction could have been sought to restrain 'direct-backs' of the alleged victims pending resolution of the substantive constitutional action.

49. The State argues that the on-going STCA litigation demonstrates that public interest domestic remedies are available and have not been exhausted. The State contends that the petition before the IACHR is, in whole or in part, a "disguised attempt by the Petitioners to impugn the Canada-

U.S. Safe Third Party Agreement STCA", and as such is "an abuse of the Inter-American Commission's process."[19]

50. The State further urges that the IACHR to dismiss the petition for failure to submit the petition within a reasonable amount of time. The State argues that whether it was the adoption of the 2003 Instructions or the directing back of John Doe 3 that triggered the clock to file a petition with the Inter-American Commission the petitioners should not be excused from the six month time limit to file its petition with the IACHR. The State warns that if the petitioners are excused in this case, it will establish a precedent for future petitioners to evade the standard six month time limit by merely alleging that domestic remedies are inadequate and ineffective. The State notes that the petitioner, Freedom House, was active at the Monroe County detention center where allegedly many directed back claimants were held, including the John Does. The State argues that given this situation, the petitioners have not adequately justified an exception from the six month filing rule with its claim that it is difficult to locate and communicate with directed back individuals including the John Does.

51. The State underscores that the direct-back policy is neither a decision denying asylum, nor denying access to the Canadian refugee determination system, nor denying a refugee determination hearing. Rather, Canada contends that it is "an administrative measure intended to facilitate the processing of refugee claims in an orderly manner."

52. Canada submits that the direct back policy is a tool applicable only in circumstances where --in the opinion of the port or area manager-- "pressures are so great that it is either impossible or impracticable to process refugee claimants on arrival." Canada acknowledges that the application of the policy does not require confirmation from the United States authorities that the claimant will be made available for the future examination on the date and time specified. According to Canada, the revised policy eliminated the need for this confirmation. Based on its own "extensive assessment of the U.S. asylum system" conduct during the development and implementation of the STCA,[20] Canada considers that there is no credible ground for believing that the temporary return of refugee claimants to the United States constitutes direct or indirect *refoulement* in any way.

53. The State submits that it has no way of determining the reasons why directed back claimants did not appear for their scheduled appointments. However, it maintains that a number of scenarios are possible; such as:

- the claimants may have entered Canada at another border post and made a claim there; they may have entered Canada illegally and either gone "underground" or made a claim at an inland immigration office;

- they may have abandoned their intent to claim refugee protection; they may have missed their appointments but arrived at another time and undergone examination; they may have decided to voluntarily remain in the U.S.; or they may have decided to travel to another country.

54. Canada acknowledges that it is also possible that immigration authorities in the United States may have detained some claimants. However, according to the State, unofficial information received by border officials in early 2003 indicated that claimants were only detained in cases of criminality, document fraud or high security risk. The State contends that according to Professor David A. Martin, an expert in international refugee law and affiant in the STCA litigation, the United States'

[19] State's submission dated July 27, 2007, para. 24.

[20] The State reports that "[p]rior to implementation, a Parliamentary committee, the Standing Committee on Citizenship and Immigration, held public hearings and considered reports and testimony of the UNHCR, interested NGOs and experts in the U.S. system. The Committee's report is available at: http://www.parl.gc.ca/infocomdoc/Documents/37/2/parlbus/commbus/house/reports/cimmrp01/03-cov-e.htm. The Report of an acknowledged expert on the U.S. asylum system, Prof. David A. martin, is available at: http://www.parl.gc.ca/InfoComDoc/37/2/CIMM/Meetings/Minutes/CIMMmn6-E.HTM#APP2. Canada's response to the Committee's report is available at: http://www.cic.gc.ca/english/pub/safe-third.html."

detention practices are consistent with the Refugee Convention and international law. Whatever the reason for missing a scheduled appointment, government statistics indicate that the numbers of persons in such situation were relatively low.

55. The State contends that the anonymity of the John Does prevents it from either verifying or refuting the specific allegations made. Canada notes that, although it does not consider itself to have an obligation to identify the alleged victims, it has made a good faith effort to obtain further information about them. Based on the limited information provided by the petitioners in Witness One's affidavit, the State asserts that it found "no possible matches" for John Does 1 and 2 either in the national immigration database or in the paper records of the Windsor port of entry. The State, however, acknowledges that it found a likely match for John Doe 3: a 41-year old Albanian male who entered Canada through the port of entry at Windsor on August 8, 2003, only to be directed back to the United States due to an interpretation problem. His status determination interview was scheduled for August 21, 2003, but he did not appear for it. He subsequently made a refugee claim at a different port of entry on January 16, 2004 and was granted refugee status on September 10, 2004. According to the State, "[a]long with his family (4 persons) he made an application for permanent residence in March 2005…."[21] The State further reports:

> According to information obtained from the United States, a person with the exact same name, country of origin and very similar date of birth as the individual believed to be John Doe 3 made an affirmative claim for asylum and for withholding of removal with the INS . . . on December 22, 1999. He and his family were interviewed by an Asylum Officer at the Chicago Asylum Office on February 2, 2000. He claimed both past persecution and a fear of future persecution in Albania on account of his "right-wing" political opinion. On February 7, 2000, his claim was assessed and determined to be not credible in material respects because of internal and external inconsistencies in his story. As a result, the Asylum Officer did not grant his claim but instead referred him to the Immigration Court on February 11, 2000. On July 19, 2000, an Immigration Judge denied his claim for protection (for asylum, withholding of removal, and protection under the Convention Against Torture) and order him removed to Albania. That decision was affirmed by the Board of Immigration Appeals on November 26, 2002.
>
> United States governmental records also indicate that John Doe 3 and his family were apprehended by US Customs and Border Protection on August 10, 2003 after being directed back from the Canadian border.
>
> Given the existence of an outstanding US final removal order, John Doe 3 was taken into detention although his family was allowed to proceed into the U.S.
>
> It does not appear from US records that, during the period of his detention in 2003, John Doe 3 applied for protection in the US or sought to have his asylum and removal proceedings reopened before the Immigration Court. He was subsequently removed from the United States to Albania on October 15, 2003.[22]

The State alleges that this record was substantially corroborated by John Doe 3 during his Canadian asylum proceedings in 2004.[23] Canada argues that contrary to the petitioners' claims, John Doe 3 had received a full hearing on his asylum claim and request for Convention Against Torture protection but was denied because he lacked credibility---a legitimate grounds for denying protection under international refugee law—not any of the alleged shortcomings of U.S. asylum law. With respect to John Doe 1, Canada argues that, even if he had been barred from access to the United States asylum system by the one-year deadline for asylum claims, he still would have had access to withholding from removal and protection [*non-refoulement*] under the Convention against Torture and Article 33 of the Refugee Convention. Canada notes that John Doe 1 had reportedly been in the United States for several years without claiming asylum, a fact that the State interprets as suggesting that he did not have a well-founded fear of persecution. With respect to John Doe 2, Canada submits that it appears from the evidence of

[21] State's supplemental response dated October 13, 2005, para.17.

[22] State's second supplemental submission dated March 15, 2006, paras. 5-8.

[23] *Id.* at paras. 9-11.

Witness One that John Doe 2 had in fact abandoned his claim for protection. Based on this information, Canada submits that the evidence available with respect to the three alleged victims indicates that the allegations are unfounded.

56. According to the State, there have been only three cases of "direct backs" between September 2006, when the direct back policy was again revised and July 2007 when the State filed its submission on the merits of this case.[24] In addition, Canada asserts that it issued new guidelines directing that the "inability to access interpretation services should not be used as a justification to direct a refugee claimant back to the United States." Instead, border officers are urged to consider having the claimant wait at the port of entry. Canada contends that, in the absence of any unexpected surges in asylum claims at its border with the US, these guidelines are expected to further reduce the use of direct backs.

2. Alleged violation of Article XXVII of the American Declaration: right to seek asylum

57. The State contends that in accordance with the Inter-American Commission's decision in the *Haitian Interdiction Case*, Article XXVII "outlines two criteria both of which must be satisfied in order for the right to exist: the right to seek asylum must be in accordance with the laws of the country in which asylum is sought, and must be in accordance with international agreements."[25] The State argues that 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."[26] In the context of this case, because direct backs are expressly authorized by Canadian law, the right to seek asylum in Canada includes the possibility that a claim will not be processed immediately and that a claimant may be asked to temporarily return to the United States. The State argues that because the direct back policy is recognized under domestic law under the dual criteria contained in Article XXVII, the direct back policy does not run afoul of the rights protected under Article XXVII of the American Declaration. The State further submits that international law does not guarantee a right to asylum nor require that a refugee claim be processed at the time and place of the claimant's choosing, and in particular, does not prohibit administrative measures, such as direct backs. As a factual matter, Canada maintains that a decision to direct back is not a decision denying asylum in Canada, nor a decision denying access to this country's system, nor a decision denying a hearing.

3. Alleged violation of Article XXVII of the American Declaration: protection from *refoulement*

58. Canada maintains that the Refugee Convention and international practice does not create a right of asylum, but only a right of *non-refoulement* to a State of persecution.[27] Canada submits that where an asylum-seeker is denied entry into, or deported from a State, that State is responsible for ensuring that that person will not be exposed to a real risk of a violation of his right to life, or be exposed to the danger of torture or cruel, inhuman or degrading treatment or punishment upon repatriation or re-direction to another country. Canada contends that "real risk" means that the violation of an individual's rights must be the necessary and foreseeable consequence of the deportation. The State acknowledges that it would constitute a violation by the state of its international obligations to send an asylum-seeker to

[24] According to the State's July 27, 2007 submission, these direct-backs were as follows: (a) a family of five from Honduras who were directed back on September 22, 2006, with a scheduled date of return on September 24, 2006. The State indicates that the family returned for the scheduled examination of their asylum claims; (b) a family of three (mother from Haiti and two U.S. born children) who were directed back on April 20, 2007, but failed to return for their scheduled interview on April 24, 2007; (c) a claimant from Iraq who was directed back on April 22, 2007 and returned to Canada for his interview on April 23, 2007. *See* State's submission dated July 27, 2007, para. 27.

[25] State's submission dated September 23, 2004, para. 67.

[26] *Id*.

[27] State's submission dated July 27, 2007, app. 12, 13. (See para. 103, et seq of an affidavit by Kay Hailbronner (an asylum expert) of July 26, 2006 filed on behalf of the State in the matter of *Canadian Council for Refugees, et al v The Queen* (Federal Court of Canada) Court file No. IMM-7818-05. See also the affidavit of David Martin (immigration and asylum expert) also filed on behalf of the State in the same litigation, particularly paras.16-17).

a country where there was this "real risk" that he would be *refouled* in a manner inconsistent with the Refugee Convention. However, Canada submits that the United States is not a country that poses a real risk of *refoulement* to asylum-seekers. In support of its position, Canada notes that the United States is a party to the 1967 Protocol to the Refugee Convention, and is bound by several human rights instruments with a non-*refoulement* component including the American Declaration, the International Covenant on Social and Political Rights, and the United Nations Convention Against Torture. Canada argues that, on this basis its direct-back policy is consistent with Article 33 of the Refugee Convention, given that claimants are returned to the United States temporarily to await their appointment in Canada to process their asylum claims. The fact that some refugee claimants do not return to Canada to make their refugee claims does not result in the violation of the rights of the claimants because Canada is entitled to rely on the safety of the U.S. asylum system; the safety of the U.S. asylum system guarantees non-*refoulement*.

59. The State further contends:

> In order to ensure that removal to a third country does not constitute indirect refoulement, the expelling county is not required to consider individually the full merits of each applicant's claim to refugee status [] before sending him to the third country. International practice establishes that states may make more general determinations, both about risks of persecution in the third country and about the assurance of access to a fair procedure in that country for considering his claimed risk of persecution in the country of origin. If the third country offers adequate procedures for considering refugee claims, the expelling country may, in essence, rely on that procedure as a sufficient protection against indirect *refoulement*.[28]

60. The State supports its contention that the United States is a safe third country for all refugee claimants by citing to an excerpt from the Canadian representative of the UNHCR during a 2006 Canadian legislative hearing on the "safety" of the United States for asylum-seekers:

> We [UNHCR] consider the U.S. to be a safe country. Otherwise, we would not have agreed to do this monitoring [of the STCA], and we would have said so at the very outset. There are places in the world where we have clearly said that country X is not safe and therefore we would not go along with a safe third country agreement.
>
> Given the nature of the rather developed systems in Canada and the U.S., we have said from day one that both countries are safe. The key is that either one of the two countries is available to asylum-seekers for purposes of status determinations.[29]

61. In response to the petitioners' specific allegations of gaps in the United States refugee protection, as listed in paragraph 21 above, the State relies on the affidavit of Professor David A. Martin, an expert in U.S. immigration law, who provided an affidavit in the STCA litigation.[30] The state asserts that Professor Martin found the United States refugee system to be in compliance with the Refugee Convention on all the issues raised by the petitioners in this case.

62. Canada additionally submits that the petitioners have not factually established that *refoulement* by the United States was a "real risk" or a "necessary and foreseeable consequence" of the direct back policy as applied to the John Does. Moreover, even if the IACHR were to find that direct backs violated Article 33 of the Refugee Convention, the State argues this would not be sufficient to find a violation of Article XXVII of the American Declaration in light of the IACHR's decision in the *Haitian Interdiction Case*.[31]

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[28] State's submission dated July 27, 2007, para. 60. (citing the Martin and Hailbronner affidavits in the STCA litigation).

[29] State's submission dated July 27, 2007, para. 62. (citing Standing Committee on Citizenship and Immigration, Number 007, 1st Session, 39th Parliament, Evidence, Monday, May, 29, 2006, at p. 13, *available at* http://cmte.parl.gc.ca/Content/HOC/Committee/391/CIMM/Evidence/EV2225023/CIMMEV07-E.PDF).

[30] *See* State's submission dated July 27, 2007, paras. 64-94 (citing the affidavit of Professor David A. Martin, Tab 12).

[31] IACHR, *Haitian Interdiction Case*, (United States) Report Nº 51/96 (merits), Case No. 10.675, para. 158 (March 13, 1997).

4. Alleged violation of Article XVIII of the American Declaration: due process claim

63. For the same reasons argued in section III.B.1. above, the State asserts that it has not violated the John Does' rights under Article XVIII of the American Declaration. The State contends that there were multiple domestic remedies available to the alleged victims, but they chose not to pursue them. In particular, 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 also asserts that the petitioners, as "public interest litigants" could have sought declaratory or injunctive relief pursuant to the Canadian Charter of Rights. The State notes that these domestic remedies could have been pursued either by the alleged victims or the petitioners from outside the State. It is not essential for an individual to be present in Canada to challenge a direct back decision. The State contends that its 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."[32] The failure of the alleged victims to access domestic courts cannot, argues the State, establish a violation of Article XVIII.

IV. ANALYSIS

A. Established facts

64. In establishing the following facts, the Inter-American Commission has taken into account the allegations of the two parties, the declaration of "Witness One," the information provided by the State with respect to John Doe 3, the level of internal consistency of the information concerning the John Does, and the consistency between that information and the context relative to the direct-back policy at the time in question.

65. John Doe 1, a Malaysian man in his early 20s, sought asylum in Canada in early April 2003. Citizenship and Immigration Canada (hereinafter "CIC") in Windsor, Canada issued him an appointment for an eligibility determination interview for three days later and in accordance with Canada's direct back policy sent him back to the United States without gaining assurances from U.S. officials that John Doe 1 would be permitted to return for his interview. Upon his return to the United States, John Doe 1 was detained and sent to the Monroe Detention Facility. It is inconclusive whether John Doe 1 was eligible to seek asylum, withholding of removal, and/or Convention Against Torture protection in the United States. John Doe 1 was deported back to Malaysia without the opportunity to first return to Canada to seek asylum.

66. John Doe 2, a Pakistani man, sought asylum in Canada at the CIC office in Windsor, Canada in early 2003. CIC issued him a future appointment date for an eligibility determination interview and in accordance with Canada' direct back policy sent him back to the United States without gaining assurances from U.S. officials that John Doe 2 would be permitted to return for his interview. Upon his return to the United States, John Doe 2 was detained and sent to the Monroe Detention Facility. He was not permitted to return to Canada for his asylum eligibility interview. It is inconclusive whether John Doe 2 was eligible to seek asylum, withholding of removal, and/or Convention Against Torture protection in the United States. John Doe 2 was deported back to Pakistan without the opportunity to first return to Canada to seek asylum.

67. John Doe 3, an Albanian man in his forties, and his wife and two children sought asylum, withholding or removal, and Convention against Torture protection in the United States in December 1999. John Doe 3 received three stages of administrative proceedings from an asylum officer, immigration judge, and the Board of Immigration Appeals ("BIA"). Both the asylum officer and

[32] See State's submission dated September 23, 2004, para. 38, fn. 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.).

immigration judge denied Judge Doe 3's petition citing lack of credibility and inconsistencies. On November 26, 2002, the BIA affirmed the immigration judge's decision to deny John Doe 3 asylum and withholding of removal in the United States. John Doe 3 and his family subsequently sought asylum in Canada at the Windsor border crossing on August 8, 2003 but could not be processed due to the lack of an interpreter. CIC issued John Doe 3 and his family a future appointment date of August 21, 2003 for an eligibility determination interview. In accordance with the 2003 Instructions to the direct back policy, Canada sent them back to the United States without gaining assurances from U.S. officials that John Doe 3 and his family would be permitted to return for the interview. Upon return to the United States, John Doe 3 was detained and sent to the Monroe Detention Facility; however his family was not detained. He was not permitted to return to Canada for his asylum eligibility interview. John Doe 3 did not reopen his asylum proceedings and was later removed from the United States on October 15, 2003. John Doe 3 later sought asylum in Canada on January 16, 2004 at a different port. He was granted asylum on September 10, 2004 and as of March 2005 applied for permanent resident status with his family.

68. Based on these established facts, the IACHR will now analyze whether the petitioners have satisfied an exemption from exhausting domestic remedies and further whether Canada has violated the John Does rights under the American Declaration by directing them back to the United States.

B. Application and interpretation of the American Declaration

69. The petitioners have alleged that Canada is responsible for violations of the rights of John Doe 1, John Doe 2, and John Doe 3 under Articles XXVII and XVIII of the American Declaration. As has been well established by inter-American jurisprudence,[33] the American Declaration constitutes a source of international legal obligation for all Member States of the Organization of American States, including Canada.[34] Moreover, the Inter-American Commission is empowered under Article 20 of its Statute and Articles 49 and 50 of its Rules of Procedure to receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration in relation to OAS member states that are not parties to the American Convention on Human Rights.

70. According to the jurisprudence of the inter-American human rights system, the provisions of its governing instruments—including the American Declaration—should be interpreted and applied in the context of developments in the field of international human rights law since those instruments were first composed, and with due regard to other relevant rules of international law applicable to Member States against which complaints of human rights violations are properly lodged.[35]

71. In particular, the organs of the inter-American system have previously held that developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may be drawn from the provisions of other prevailing international and regional human rights instruments.[36] This includes the American Convention which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the

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[33] See for example Inter-Am. Ct. H.R., *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*, Advisory Opinion OC-10/89 of July 14, 1989, Ser. A Nº 10, paras. 37-45 (1989). [hereinafter "Advisory Opinion OC-10/89"].

[34] Canada deposited its instrument of ratification of the OAS Charter on January 8, 1990.

[35] See Advisory Opinion OC-10/89, *supra*, para. 37; Inter-Am. Ct. H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999, Ser. A Nº 16, para. 114 [hereinafter "Advisory Opinion OC-16/99"] (endorsing an interpretation of international human rights instruments that takes into account developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions); IACHR, *Case of Ramón Martinez Villareal*, Report Nº 52/02, Case 11.753, United States, para. 60 (October 10, 2002). *See also* American Convention, Article 29(b): "No provision of this Convention shall be interpreted as: [. . .] b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."

[36] See Advisory Opinion OC-10/89, *supra*, para. 37; Advisory Opinion OC-16/99, *supra*, para. 115; IACHR, *Case of Juan Raul Garza*, (United States) Report Nº 52/01, Case No. 12.243, para. 89 (April 04, 2001).

American Declaration.[37] Pertinent developments in international refugee law have also been drawn from established jurisprudence on the issue of the right to seek asylum and the obligation of *non-refoulement*, under the Refugee Convention, 1967 Protocol relating to the Status of Refugees [hereinafter "Refugee Protocol"] and the U.N. Convention Against Torture.[38]

72. In addition, Article XXVII of the American Declaration contemplates the application of future, external developments of international refugee law:

> Article XXVII. 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**. [emphasis added].

73. Accordingly, in determining the present case, the IACHR will, to the extent appropriate, interpret and apply the pertinent provisions of the American Declaration in light of current developments in the field of international human rights and refugee law, as evidenced by treaties, custom and other relevant sources of international law.

C. Preliminary considerations

74. For the sake of clarity, the IACHR must first mention that it does not propose to pronounce on the merits of the Safe Third Party Country Agreement ("STCA") between Canada and the United States. The focus of this petition is the direct-back policy under which the John Does were returned to the United States; references to the STCA and its subsequent domestic litigation are only to provide background information and analysis with regard to the elements the STCA shares with Canada's direct back policy. Moreover, the IACHR does not propose to undertake any analysis or pronounce on the merits of the asylum system in the United States. The present petition concerns only the human rights obligations of Canada. Pursuant to the terms of its admissibility report, the Inter-American Commission shall consider the allegations with respect to John Does 1, 2 and 3, and not extend them to any other persons who have been directed back under Canada's direct back policy.

75. For the purpose of its analysis, the IACHR notes that there is no dispute between the parties with respect to the State's direct-back policy, as revised in 2003 and 2006. While it notes that neither party has been able to conclusively confirm the identities of the John Does, the IACHR is prepared to find as a fact that the John Does sought asylum in Canada at the Windsor border crossing between Canada and the United States, were the subjects of the direct-back policy, and were ultimately deported to their countries of origin from the United States.

76. With respect to identifying the alleged victims, the IACHR recalls that in the admissibility report for this case it determined:

> [. . .] 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 [no] 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.[39]

In other cases, the IACHR has reasoned that under certain circumstances, where an alleged victim can be identified with sufficient detail and reliably situated at a particular time and place, it is not always

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[37] See IACHR, Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Doc. OEA/Ser.L/V/II.106, Doc. 40 rev., para. 38 (February 28, 2000); *Case of Juan Raul Garza*, Report Nº 52/01, Case 12.243, United States, para. 88-89 (April 04, 2001)(confirming that while the Inter-American Commission clearly does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

[38] Canada acceded to both the 1951 Convention and the 1967 Protocol on June 04, 1969.

[39] CIDH, *John Does, et al. v. Canada*, Report No. 121/06, admissibility, Petition No. P-554-04, para. 55 (Oct. 27, 2006).

necessary to provide the name of that person.[40] This is particularly applicable when the State should have record of the alleged victim's presence at the time and place the alleged violations occurred.[41] The Inter-American Commission observes that based on the information provided in Witness One's affidavit, the State was able to make a reliable match as to the identity of John Doe 3. Based on this corroboration between the State's records and Witness One's information, the IACHR is satisfied as to the identities of John Does 1 and 2.

D. Exhaustion of domestic remedies and timeliness of the petition

77. As the IACHR determined in its Admissibility Report N° 121/06, the issue of exhaustion of domestic remedies and the timeliness of the petition is inextricably bound up with the alleged violations of the American Declaration and decided to join them with the consideration of the merits of this case.

78. Article 31(2) of the Inter-American Commission's Rules of Procedure provides three exceptions under which an alleged victim's petition may be exempted from exhausting domestic remedies:

a. the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;

b. the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or,

c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

The IACHR has emphasized that the exceptions to the exhaustion rule demonstrate that domestic remedies must not only exist formally but also be adequate and effective.[42] In the *Ramón Martinez Villareal* case, the Inter-American Commission stated, "domestic remedies, in order to accord with generally recognized principles of international law, must be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they were designed."[43]

79. With these elements in mind, the IACHR concludes that the domestic remedies presented by the State were not adequate and effective to provide relief for the violations alleged.

80. The State first contends that the John Does could have filed urgent stays of removal with the Canadian federal court, accompanied with petitions to seek judicial review of the "direct back" orders. The State, however, does not dispute that "direct back" decisions are executed within a matter of hours, nor does it directly dispute the petitioners' contention that the filing and hearing of an urgent stay would take at a minimum 24 hours. Rather, the State indicates that the "Federal Court Rules provid[e] for service and filing of applications by fax and by e-mail facilitate[ing] access to the Court on short notice." Assuming arguendo that the John Does could make the requisite federal court filing, the State concedes that refugee claimants would have difficulties proving "the risk of irreparable harm" by being removed to the United States, a necessary requirement to be granted a stay. In the alternative, the State contends that the John Does could maintain a federal court action from outside Canada. The State concedes, however, that under this scenario, if the John Does were successful, the federal court could not order the

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[40] *See, e.g., Massacre and Forced Displacement of Montes de Maria*, Report No. 15/09 (admissibility), Petition No. 1-06, paras. 47-48 (Mar. 19, 2009); *Members of the Union of State Workers of Antioquia*, Report No. 140/09 (admissibility) Petition No. 1470-05, para. 52 (Dec. 30, 2009).

[41] *See, e.g., Massacre and Forced Displacement of Montes de Maria*, Report No. 15/09, (admissibility) Petition No. 1-06, paras. 47-48 (Mar. 19, 2009); *Members of the Union of State Workers of Antioquia*, Report No. 140/09 (admissibility) Petition No. 1470-05, para. 52 (Dec. 30, 2009).

[42] IACHR, *Case of Ramón Martinez Villarreal v. United States*, Report No. 108/00, Case No. 11,753, para. 60 (Dec. 4, 2000).

[43] *Id.*

return of the John Does but only "order the government to make best efforts to ensure the re-admission to Canada."

81. The Inter-American Commission concludes that an urgent stay of removal combined with a petition for federal review of a "direct back" order or a petition for federal review of a "direct back" order from outside Canada did not offer adequate and effective remedies for the John Does. The evidence presented by the parties demonstrates that an urgent stay of removal cannot be filed and considered by the federal court within the few hours in which a "direct back" order is executed. After the John Does were directed back, they were taken into U.S. immigration custody. Once Canadian officials relinquished custody of the John Does, the Canadian federal court could not provide an adequate and effective remedy to the John Does.

82. The IACHR also concludes that public interest litigation is not an adequate and effective remedy for the John Does. Domestic public interest litigation challenging the validity of the "direct policy" policy would only provide prospective relief for future directed back individuals and not a remedy for the alleged past violations of the rights of the John Does. Although the State alleges that the petition before the Inter-American Commission is a "disguised attempt by the Petitioners to impugn the Canada-U.S. Safe Third Party Agreement STCA", and as such is "an abuse of the IACHR's process,"[44] the Inter-American Commission has analyzed the admissibility requirements in relation to the remedies available within the legal system of Canada. The State readily conceded in its first supplemental submission that the direct back policy operates independently of the STCA: "Canada wishes to inform the IACHR that, contrary to the petitioners' suggestion that direct backs is (*sic*) no longer in use since the coming into force of the *Canada-U.S. Safe Third Country Agreement* [], direct backs continues (*sic*) to be used, although less frequently."[45] If the STCA had been repealed by the public interest litigation, the direct back policy would still have been in effect and presumably utilized. Similarly even with the STCA still in effect, the direct back policy can still be applied to individuals who would qualify for an exception under the STCA, and as the State seems to concede, is still being applied to some individuals independently of the STCA.

83. Accordingly, the IACHR concludes that the alleged victims are excused from the requirement to exhaust domestic remedies under Article 31(2)(b) of the Inter-American Commission's Rules of Procedure.

84. The IACHR next considers whether the petitioners filed the petition within a reasonable time under the circumstances of this case, as required by Article 32(2) of the Inter-American Commission's Rules of Procedure. The petition was received by the IACHR on April 1, 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). Accordingly, the petition was filed approximately seven months after John Doe 3 was directed back to the United States.

85. The State contends that a six-month deadline for the John Does to submit their petition should apply under the circumstances of this case. The State argues that the petition should be dismissed as untimely because:

- either the impugned direct back policy was issued on January 27, 2003, and that if this is considered to be the operative date, then the petition ought to have been lodged no later than July 27, 2003 instead of nine months later on April 1, 2004; or

- alternatively, if the 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.

[44] State's submission dated July 27, 2007, para. 24.

[45] State's Supplemental Response of the Government of Canada to the Petition of *John Doe Et. Al.* dated October 13, 2005, para. 3.

86. The State asserts that, given the access one of the petitioners, Freedom House, has to the Monroe County Detention Center, where the John Does were detained after being directed back to the United States, the typical six month time limit is reasonable in this case. The State warns that, if the petitioners are permitted a longer period of time, the precedent will encourage future petitioners to evade the standard six month deadline by simply alleging domestic remedies are not adequate and effective.

87. The petitioners argue that the lapse of seven months between John Doe 3's "direct back" to the United States is reasonable under the circumstances of this case. The petitioners contend that the lapse of time between the 'direct-backs' and the presentation of the petition is attributable to difficulties in identifying and communicating with victims of Canada's direct back policy and learning that they have been removed by U.S. immigration authorities. Considering 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 rather that it was due to lack of transparency by the Canadian authorities concerning the implementation of the direct back policy.

88. The IACHR concludes that, based the record before it, both parties had significant difficulties in identifying the John Does. The application of the direct-back policy to them in the particular circumstances clearly made it more onerous for the petitioners to gather the data necessary to formulate and present a petition to the Inter-American Commission. Under the circumstances, the IACHR finds that the presentation of the petition on April 1, 2004 was done within a reasonable period of time as required by Article 32(2) of the IACHR's Rules of Procedure.

E. Violation of Article XXVII

1. Right to seek asylum

89. Article XXVII of the American Declaration provides that:

> Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.

90. The Inter-American Commission has previously found that the right to seek asylum protected under Article XXVII of the American Declaration encompasses certain substantive and procedural guarantees.[46] The IACHR has held that Article XXVII ensures an asylum seeker at a minimum a hearing to determine his refugee status.[47] The Inter-American Commission has further cited to other international organs for basic due process standards relevant to a refugee determination hearing.[48]

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[46] *See* IACHR, *Cases of Michael Edwards, Omar Hall, Brian Schroeter and Jeronimo Bowleg*, (The Bahamas) Report No. 48-01 (merits), Case Nos. 12.067, 12.068, 12.086 (April 4, 2001), para. 172. [hereinafter the "Michael Edwards cases"].

[47] IACHR, *Haitian Interdiction Case*, (United States) Report Nº 51/96 (merits), Case No. 10.675 (March 13, 1997), para. 155.

[48] *See* IACHR, *Michael Edwards Cases,* (The Bahamas) Report No. 48-01 (merits), Case Nos. 12.067, 12.068, 12.086 (April 4, 2001), footnote 113, citing See e.g. Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, paras. 189-219 (prescribing basic requirements for the procedures for determining refugee status, including the right of an applicant to be given the necessary facilities for submitting his case to the authorities concerned, and that the applicant be permitted to remain in the country pending a decision on his initial request for refugee status); Council of Europe, Resolution on minimum guarantees for asylum procedures, Brussels, 21 June 1995, Articles 10, 12, 14, 15, 23 (prescribing common procedural guarantees to be provided by Member States of the European Union in processing asylum application, including the right of an asylum-seeker, at the border or otherwise, to have an opportunity to lodge his asylum application as early as possible, to remain in the territory of the state in which his application has been lodged or is being examined as long as the application has not been decided upon, to be given the opportunity of a personal interview with an official qualified under national law before a final decision is taken on the asylum application, and to have the decision on the asylum application communicated to the asylum-seeker in writing).

91. The analysis of the present case does require clarification of the scope of the rights protected and each State's obligations under Article XXVII; issues previously examined by the IACHR, including in the *Haitian Interdiction Case*. State parties, including Canada in this case, have maintained that the effect of the dual cumulative criteria in Article XXVII is that if a right is established in international but not in domestic law, it is not a right which is recognized by Article XXVII. In the context of this case, the State argues that, because Canadian law expressly authorizes direct backs, the right to seek asylum in Canada includes the possibility that a claim will not be processed immediately and that a claimant may be asked to temporarily return to the United States without the State running afoul of Article XXVII.

92. That interpretation of Article XXVII is not well founded. Article XXVII would be meaningless under such an interpretation because Member States could exclude broad classes of refugee claimants through domestic law without implementing their obligations under Article XXVII and international refugee law. The present case offers an opportunity to clarify this point from the *Haitian Interdiction Case*.[49] At the same time, as was clearly set forth in the *Haitian Interdiction* case, the Inter-American Commission "believes that international law has developed to a level at which there is recognition of a right of a person seeking refuge to a hearing in order to determine whether that person meets the criteria in the [Refugee] Convention."[50] The right to seek asylum requires that a person be heard to see if he or she is at risk of persecution[51]--it is the act of hearing the person that implements the most fundamental element of the right to seek asylum—and it was that essential procedural opportunity that was denied to the John Does.[52] Consequently, the IACHR concludes that Article XXVII provides a baseline of due process for refugee claimants to seek asylum in foreign territory.

93. The Inter-American Commission must examine, however, whether Article XXVII obligates a state to afford each refugee claimant the opportunity to seek asylum or whether that responsibility can be shared through inter-State agreements. UNHCR has urged that: "[t]he intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account." In the context of the Dublin Convention, which governs the European Union's Safe Third Country policies, UNHCR emphasizes that "the responsibility for examining an asylum request lies primarily with the State to which it has been submitted."[53]

94. Nevertheless, the right to seek asylum in a claimant's country of choice is not absolute under international refugee law. Under Article XXVII of the American Declaration, however, every Member State has the obligation to ensure that every refugee claimant has the right to seek asylum in foreign territory, whether it be in its own territory or a third country to which the Member State removes the refugee claimant. To the extent that the third country's refugee laws contain legal bars to seeking asylum for a particular claimant, the Member State may not remove that claimant to the third country. To ensure that a refugee claimant's right to seek asylum under Article XXVII is preserved, before removing a refugee claimant to a third country, the Member State must conduct an individualized assessment of a refugee claimant's case, taking into account all the known facts of the claim in light of the third country's refugee laws. If there is any doubt as to the refugee claimant's ability to seek asylum in the third country, then the Member State may not remove the refugee claimant to that third country.

95. In the *Haitian Interdiction Case*, the IACHR indicated each State's fundamental responsibilities in preserving an asylum seeker's right to seek asylum in a foreign territory. In that case, the Inter-American Commission ruled that the State could not take action that prevented potential asylum

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[49] IACHR, *Haitian Interdiction Case*, (United States) Report Nº 51/96 (merits), Case No. 10.675 (March 13, 1997), para. 153.

[50] *Id.*

[51] Based on one of the five enumerated grounds for asylum.

[52] IACHR, Second Progress Report of the Special Rapporteurship on the Rights of Migrant Workers and Their Families, Annual Report 2000, para. 99A (April 16, 2001).

[53] UNHCR, "Revisiting the Dublin Convention: Some reflections by UNHCR in response to the Commission staff working paper, p. 2 (April 2000).

seekers from seeking asylum in a foreign territory.[54] As in the *Haitian Interdiction Case,* the State's application of its direct back policy had the effect of denying the John Does their fundamental right to seek asylum in a foreign territory. The John Does each sought asylum protection from the State of Canada. Instead of immediately processing the John Does' claims, the State applied its direct back policy, which provided no assurances that the John Does could present their claims for asylum, whether in Canada or in the United States. The State concedes that under the 2003 Instructions, the State did not gain assurances from the United States that they would be permitted to return for their refugee eligibility interview. Indeed, none of the John Does were permitted to attend their refugee eligibility interviews, because they were detained by U.S. immigration authorities and not released to attend their refugee interview appointments in Canada.

96. Likewise, in accordance with the policy applied, Canada did not seek assurances or conduct a basic evaluation of whether the John Does could apply for asylum in the United States once directed back. In these three cases, the direct back policy posed a real risk of denying the three John Does the opportunity to seek asylum in a foreign territory and placed them at possible risk of harm. In the case of John Doe 3, the State was later able to confirm that he had returned to Canada, after having been deported back to Albania, and had subsequently been granted asylum. These facts demonstrate the deleterious impact the direct back policy had on John Doe 3's rights under Article XXVII and the real threat he faced in the interim period in Albania.

97. The State's failure to permit the John Does to remain in Canada until processing could be completed, to gain assurances from U.S. officials that they would permit the John Does to return for their scheduled appointments, or to ensure that the John Does could seek asylum in the United States before directing them back had the effect of violating the John Does' right to seek asylum, as protected by Article XXVII of the American Declaration.[55]

98. Accordingly, the IACHR finds that the State violated the John Does' right to seek asylum in a foreign territory as protected under Article XXVII of the American Declaration, as interpreted with reference to the Refugee Convention and Refugee Protocol.

2. Principle of non-refoulement

99. As discussed in section IV.B. above, Article XXVII of the American Declaration is to be interpreted in a manner that takes into account developments in the corpus of international refugee law. By its own terms, Article XXVII contemplates such an interpretation:

> Article XXVII. 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**. [emphasis added].

100. In addition to its obligations under the American Declaration, Canada is party to a number of international treaties with special relevance to the human rights of asylum seekers. The primary international instruments governing the status and protection of asylum seekers and others who have crossed borders and are unable or unwilling to return to their countries of origin for fear of persecution are the Refugee Convention, Refugee Protocol, and the Convention Against Torture.

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[54] IACHR, *Haitian Interdiction Case*, (United States) Report Nº 51/96 (merits), Case No. 10.675, paras. 161, 163 (March 13, 1997).

[55] The Inter-American Commission's ruling does not limit a receiving State's consideration of another country's rejection of an asylum claim as part of its evaluation of whether to grant access to its asylum process. In this case, the record demonstrates that John Doe 3 was rejected for asylum in the United States prior to petitioning for asylum in Canada. The record, however, shows that Canada did not consider John Doe 3's previous asylum petition in the United States as part of its decision to direct him back to the United States. Consequently, the State could not point to this prior adjudication of John Doe 3's asylum claim as a legitimate justification for directing him back to the United States.

101. With respect to persons who qualify for refugee status, the paramount obligation of States Parties to the Refugee Convention is that of non-return (*nonrefoulement*) as set out in Article 33(1) of the Refugee Convention:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Kay Hailbronner, an expert for the State in the STCA litigation, concurs that the "[Refugee Convention] gives to asylum seekers [] the right of non-*refoulement* to a state of persecution."[56]

102. Subsequent to the Refugee Convention, international refugee law has expanded *non-refoulement* protection to all individuals, regardless of whether the individual qualifies for asylum. Article 3(1) of the Convention Against Torture provides:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

103. The right to *non-refoulement* obligates a State not only to prevent the removal of a refugee directly to a country of persecution but also indirectly through a third country (referred to as "indirect *refoulement*" or "chain *refoulement*").[57] In its submission on the merits, the State concedes that the Article 33 protections extend to indirect *refoulement*: "[T]he protection against refoulement also covers the risk that the third country would send him to a country where he has the requisite risk of persecution on a Convention ground."[58]

104. This position is consistent with the jurisprudence of the European Court of Human Rights. In *T.I. v. United Kingdom*, the European Court found that the U.K. would not be absolved from violations of the principle of *non-refoulement* by sending a refugee claimant to another member State of the *Dublin Convention*—an agreement governing the Safe Third Country policy in the European Union. The Court explicitly stated:

> The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State [to the Dublin Convention], does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to [*refoulement*]. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution [citation omitted][59].

105. In *T.I.*, the United Nations High Commissioner for Refugees, at the invitation of the Court, provided her own analysis on the state of international law with regard to indirect *refoulement*:

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[56] State's submission dated July 27, 2007, App. 13 (Affidavit of Kay Hailbronner).

[57] *See, e.g.,* UN CCPR Human Rts. Committee, "General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States parties to the Covenant," CCPR/C/21/Rev.1/Add.13, para. 12 (May 24, 2004) (stating, "the article 2 obligation requiring that State Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel, or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm . . . either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.").

[58] State's submission dated July 27, 2007, para. 60 (citing Martin Affidavit paras. 14-16 and Hailbronner affidavit paras. 104-109).

[59] Eur. Ct. H.R., *T.I. v. the United Kingdom*, App. No. 43844/98 (Mar. 7, 2000); Eur. Ct. H.R., *K.R.S. v. the United Kingdom*, App. No. 32733/08 (Dec. 2, 2008) (affirming the principle established in *T.I. v. the United Kingdom*).

> No asylum-seeker should [] be sent to a third country without reliable assessment in his case of the available guarantees, e.g. that the person will be re-admitted, that he will enjoy effective protection against *refoulement,* that he will have the possibility to seek and enjoy asylum, and that he will be treated in accordance with accepted international standards.[60]

106. Canada, however, contends that in order to satisfy its international obligations to avoid indirect *refoulement*, it need only make generalized determinations that another State is a safe third country. In particular, the State argues:

> In order to ensure that removal to a third country does not constitute indirect refoulement the expelling country is not required to consider individually the full merits of each applicant's claim to refugee status [] before sending him to the third country. International practice establishes that states may make more general determinations, both about risks of persecution in the third country and about the assurance of access to a fair procedure in that country for considering his claimed risk of persecution in the country of origin. If the third state offers adequate procedures for considering refugee claims, the expelling state may, in essence, rely on that procedure as a sufficient protection against indirect *refoulement*.[61]

The State indicates that it performed this generalized analysis in the context of its implementation of the STCA with the United States and thus satisfied its obligations to prevent indirect *refoulement*.

107. Despite the State's contentions to the contrary, the *non-refoulement* obligations under international refugee law require that before a State may remove a refugee claimant to a third country, that State must perform an individualized assessment as to the risk of persecution in that third country and an individualized assessment as to the risk that the refugee claimant could be *refouled* to the original country of persecution. UNHCR has explicitly found:

> Indirect removal of a refugee from one county to a third country which subsequently will send the refugee onward to the place of feared persecution constitutes *refoulement*, for which both countries would bear joint responsibility. Therefore, a reliable assessment as to the risk of "chain *refoulement*" must be undertaken in each individual case, prior to removal to a third country considered to be safe.[62]

108. The evidence presented by the State in support of its contention in favor of a generalized assessment, in fact, actually demonstrates the need for individualized assessments.[63] In the Joanne van Selm 2001 paper, commissioned by UNHCR, she states:

> The UNHCR Executive Committee has concluded that no asylum-seeker should be returned to a third country for determination of the claim without sufficient guarantees, ***in each individual case***: that the person will be readmitted to that country; will enjoy there effective protection against *refoulement*; will have the possibility to seek and enjoy asylum; and will be treated in accordance with accepted international standards. [emphasis added][64]

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[60] Eur. Ct. H.R., *T.I. v. the United Kingdom*, App. No. 43844/98 (Mar. 7, 2000).

[61] State's submission dated July 27, 2007 (citing Martin affidavit paras. 16-17 and Hailbronner affidavit paras. 97-101).

[62] UNHCR, Background paper No. 2, "The application of the 'safe third country' notion and its impact on the management of flows and on the protection of refugees," (May 2001) *available at* http://www.refugeelawreader.org/457/Background_paper_no._2.pdf.

[63] State's submission dated July 27, 2007 (Martin's affidavit, para. 17 cites Joanne van Selm, "Access to Procedures 'Safe Third Countries', 'Safe Countries of Origin', and 'Time Limits'" Commissioned by UNHCR and Carnegie Endowment for International Peace (2001) and Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the principle of* Non-refoulement, UNHCR, (2001)).

[64] Joanne van Selm, "Access to Procedures 'Safe Third Countries', 'Safe Countries of Origin', and 'Time Limits'" Commissioned by UNHCR and Carnegie Endowment for International Peace (2001) (citing *Note on International Protection*, 4 June 1999 Refugee Survey Quarterly, vol. 18, No. 2 , para. 19 (1999)), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3b39a2403&query=the%20application%20of%20the%20"safe%20third%20country"%20%20background%20paper.

Likewise, Sir Elihu Lauterpacht and Daniel Bethlehem, in their piece on the principle of *non-refoulement* for UNHCR, state:

> [F]rom the information provided by UNHCR, it appears to be well accepted by States operating 'safe country' policies that the principle of *non-refoulement* requires such policies to take account of any risk that the ***individual concerned*** may face of subsequent removal to a territory of risk. [emphasis added][65]

The State's expert in the STCA litigation, Kay Hailbronner, also notes that safe third country arrangements must provide an effective mechanism to challenge removal to a third country based on individualized circumstances of a case:

> [F]ollowing the European Court of Human Rights' judgment in the *T.I.* case [addressing indirect *refoulement* under the Dublin Convention], it is recognized that with regard to safe third country arrangements, the safety of a third state may be challenged if an asylum seeker provides proof of a concrete individual danger that he would be subject to torture, cruel, inhuman or degrading treatment or punishment.[66]

109. The European Court of Human Rights in both the *T.I. case* and the *K.R.S.* case found that the United Kingdom performed this requisite individualized assessment of the risk of *refoulement* before removing the asylum claimant to another member state of the Dublin Convention.[67] In *T.I.*, the refugee claimant challenged his removal to Germany on the grounds that Germany's refugee laws and policies allegedly did not permit asylum seekers from Sri Lanka, who fear persecution by non-State actors, to seek asylum. The Court noted that before removing a refugee claimant to a third country, under U.K. law, the Secretary of State must make an individualized certification that in his opinion "the government of that country or territory would not send him to another country or territory otherwise than in accordance with the [Geneva] Convention." The Court further observed that the Secretary of State had consulted with German refugee and immigration experts on this issue, before signing the certification of removal. In establishing the petition inadmissible, the Court concluded: "Since [the Secretary of State] had taken reasonable steps to inform himself of the position in Germany . . .no more was required of him."

110. Similarly in *K.R.S.*, the European Court of Human Rights describes the necessary review required to prevent direct or indirect *refoulement*: "The assessment of the existence of a real risk must necessarily be a rigorous one [citations omitted] which implies that there must be a meaningful assessment of the applicant's claim." The Court affirmed its conclusions in *T.I.*, emphasizing that Member States to the Dublin Convention cannot automatically rely on that agreement to evade their responsibilities to conduct this individual risk assessment. In *K.R.S.*, the European Court concluded that the United Kingdom had satisfied its obligation to make an individualized assessment, as the U.K. border patrol had contacted Greek immigration authorities to gain assurances that Greece did not *refoule* asylum seekers to Iran.[68]

111. The Inter-American Commission, in its Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System ("the Canada Report"), reached the same conclusions regarding a State's obligations to ensure *non-refoulement*: "The obligation of non-return means that any person recognized or seeking recognition as a refugee can invoke this protection

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[65] Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the principle of* Non-refoulement, UNHCR, para. 119 (2001), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3b39a2403&query=the%20application%20of%20the%20"safe%20third%20country"%20%20background%20paper.

[66] State's submission dated July 27, 2007, App. 13 (Affidavit of Kay Hailbronner, para. 111).

[67] Eur. Ct. H.R., *T.I. v. the United Kingdom*, App. No. 43844/98 (Mar. 7, 2000); Eur. Ct. H.R., *K.R.S. v. the United Kingdom*, App. No. 32733/08 (Dec. 2, 2008).

[68] Eur. Ct. H.R., *K.R.S. v. the United Kingdom*, App. No. 32733/08 (Dec. 2, 2008).

to prevent their removal. This necessarily requires that such persons cannot be rejected at the border or expelled without an adequate, individualized examination of their claim."[69] The IACHR notes that the individualized assessment with respect to the risk of indirect *refoulement* does not necessarily involve the same level of due process required for a hearing on the merits of asylum claim or other claim for protection.

112. Based on these principles, the Inter-American Commission will now examine whether the State performed the requisite individualized risk assessment of *refoulement* prior to directing back the John Does to the United States. The record indicates that the very purpose of the changes to the "direct back policy" under the 2003 Instructions, was to eliminate the need to conduct any analysis of an asylum seeker's claim until the future scheduled appointment. This does not satisfy the individualized risk assessment of *refoulement* required by Article XXVII of the American Declaration, in light of developments under the Refugee Convention, Refugee Protocol, and the U.N. Convention Against Torture.[70] Consequently, the IACHR finds an additional violation of Article XXVII for failing to conduct an individualized risk assessment before returning the John Does to the United States where they faced the possible risk of chain *refoulement* to their countries of origin.

[69] IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106 Doc. 40 rev., para. 25 (February 28, 2000).

[70] The Inter-American Commission would note that the STCA seems to contemplate the requisite individualized review in its "Statement of Principles." *See* STCA, "Statement of Principles," (last modified December 5, 2002), *available at* http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp.

F. Alleged violations of Article XVIII: due process claim

113. As previously noted, in its Admissibility Report N° 121/06 the Inter-American Commission determined that the alleged violation of Article XVIII of the American Declaration was inextricably bound up in the issue of exhaustion of domestic remedies and decided to join consideration of them at the merits stage of this case. As determined above in section IV.D., the IACHR has ruled that the alleged victims are exempt from exhausting domestic remedies because they were not provided the requisite access to adequate and effective domestic remedies. The Inter-American Commission now addresses whether the lack of access concurrently is a violation of Article XVIII of the American Declaration.

114. Article XVIII of the American Declaration provides:

> Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

115. In its Canada Report, the IACHR considered this provision in conjunction with Article II of the Declaration observing that:

> The effect of this right is to require the provision of a domestic remedy which enables the relevant judicial authority to deal with the substance of the complaint and grant appropriate relief where required. In addition to the explicit rights to judicial protection and equal protection of the law, implementation of the overarching objective of the Declaration – ensuring the effectiveness of the fundamental rights and freedoms set forth – necessarily requires that judicial and other mechanisms are in place to provide recourses and remedies at the national level.
>
> While applicants do not necessarily have an unlimited right of access to judicial remedies, controls on that right may not be unreasonable or such as to deprive the right of its essence.[71]

116. The Inter-American Court has established that the guiding principle to due process, protected under article XVIII of the American Declaration and Article 25 of the American Convention, is to provide "all the guarantees which make it possible to arrive at fair decisions."[72] The Inter-American Court went further in articulating that due process contemplates:

> all the requirements that must be observed in the procedural stages in order for an individual to be able to defend his rights adequately vis-à-vis any [...] act of the State that could affect them. That it to say, due process of law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of an administrative, punitive or jurisdictional nature.[73]

The IACHR has indicated that in the context of removal proceedings that the "right to be heard" is an essential due process right: "A migrant worker must have and be able to effectively exercise the right to be heard, to have his say and defend his right not to be expelled."[74] Based on the evidence presented by both parties, the Inter-American Commission determines that the direct back policy had the effect of expelling the John Does without providing basic due process to challenge their expulsion, as required by article XVIII of the American Declaration. The direct backs were designed to postpone the John Does' due process with the added component of expelling them from Canada for the interim period. Because the State gained no assurance that the John Does would be permitted to return for their due process, their expulsion had the

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[71] IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106 Doc. 40 rev., paras 98-99 (February 28, 2000).

[72] Inter-Am. Ct. H.R., *Case of Baena-Ricardo et al. v. Panamá*, Judgment of February 2, 2001. Series C No. 72, para. 127.

[73] Inter-Am. Ct. H.R., *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18 (September 17, 2003), citing Inter-Am. Ct. H.R., *Case of Baena-Ricardo et al. v. Panamá*, Judgment of February 2, 2001. Series C No. 72, para. 124.

[74] IACHR, Second Progress Report of the Special Rapporteurship on the Rights of Migrant Workers and Their Families, Annual Report 2000, para. 99A (April 16, 2001).

effect of denying the John Does the opportunity to any process to be heard and defend their continued presence in Canada.

117. Accordingly, the IACHR concludes that the manner in which the direct-back policy was applied to the John Does violated their rights under Article XVIII to seek recourse before a competent court. The conditions under which they were "directed back" to the United States prevented any effective access to challenge their "direct back" decisions.

V. ACTIONS SUBSEQUENT TO PRELIMINARY REPORT No 48/10

118. On March 17, 2010, the IACHR adopted Report No. 48/10 on the merits of this case. The report was sent to the State on July 29, 2010, with a time period of two months to inform the Inter-American Commission on the measures taken to comply with its recommendations.

119. On September 29, 2010, the State sent a communication with its "follow-up response to the decision and recommendations in the John Doe case." The Inter-American Commission acknowledged receipt of the response to the State and transmitted it to the petitioners, on October 12, 2010 with a request for observations within one month. Subsequently, on October 18, 2010 the IACHR submitted the pertinent parts of Report No. 48/10 to the petitioners, on a confidential basis. The petitioners submitted a communication on October 25, 2010. On November 5, 2010 the Inter-American Commission acknowledged receipt and transmitted that communication to the Canadian State for information.

120. In its September 29, 2010 communication, the State indicates that it takes very seriously its obligations under the American Declaration and that "Canada fully supports the important role mandated to the Commission and will always do its utmost to cooperate with its processes and decisions." The State then expresses that "despite the Commission's conclusions, Canada considers that it is in full compliance with its international obligations in this case" and then provides information on the IACHR's findings. In the section of the response that deals with the recommendations, Canada starts by noting that, in their opinion, "the Commission's decisions are not binding under international law, as distinct from the human rights obligations themselves." After the considerations on the report, the State concludes that it has complied with the recommendations of the report "to the greatest extent possible in the circumstances of the case."

121. The petitioners, on the other hand, emphasize in their October 25, 2010 communication that "Canada attempts in various ways to re-open consideration of the merits of the case and indicates refusal to comply with the Commission's recommendations." They add that "the arguments offered by Canada are essentially repetitions of arguments offered during the litigation of the matter, meaning that the Commission considered these arguments and decided the case in light of them."

122. Before proceeding, the IACHR should clarify that the State had the full opportunity during the processing of this case to present its allegations on the facts and the law, which were duly considered in the adoption of the merits report. In the absence of new facts, or evidence that was not previously available and that might affect its analysis or conclusions, the Inter-American Commission must focus during this procedural stage on the consideration of actions taken toward compliance with its recommendations, as indicated in the request for information submitted to the State on July 29, 2010.

123. Regarding the first recommendation at paragraph 129(1) *infra*, about the identification of John Does 1, 2 and 3 and the verification of their situation, the State reiterates the position it held during the processing of this case, in the sense that it was unable to find any possible matches for any of these persons in its central immigration database or in the paper records of the Windsor port of entry. Canada adds that without additional information from the petitioners "identifying the individuals remains impossible" and that "a possible match was made for John Doe 3, who, it was determined, returned to Canada and made a claim for refugee protection, which was granted." For their part, the petitioners stress that the State does not intend to comply because it disagrees with the Commission's analysis.

124. Regarding the second recommendation at paragraph 129(2) *infra* on full reparation for the established violations, the State expresses that "without identification, it is impossible to determine what actually happened to the John Does 1 and 2 and whether reparation is warranted" and adds that if the petitioners identify them it would consider the IACHR's recommendations. With respect to John Doe 3, the State affirms that "his rights have not been violated and no reparation is owing to him". The petitioners again point out that the State does not intend to comply because it disagrees with the Commission's analysis, even in the case of John Doe 3 who is identified and living in that country.

125. Regarding the third recommendation at paragraph 129(3) *infra*, on the adoption of legislative and administrative changes to ensure due process in the presentation of asylum claims, the State indicates that it has already complied for the following reasons:

> While the direct back policy remains in effect, it has not been used with respect to refugee claimants since 2007. The revised direct back policy, as contained in the instructions issued to border services officers, specifies that direct back can be used for refugee claimants in only "exceptional" circumstances, which circumstances expressly do not include the lack of interpretation services. The revised direct back policy requires border service officers to use appropriate alternatives to direct back of refugee claimants: having the claimants wait at the port of entry before their claim can be processed; and consider detaining the refugee claimants if grounds to detain exist. Only if these alternatives have been considered and are unavailable, can the border services officers consider the use of direct back. In such cases, the senior officer must obtain headquarters approval from a senior departmental official in Ottawa before allowing a direct back to occur.
>
> In addition to being required to obtain senior-level approval from national headquarters, border services officers are instructed to "seek assurances from the U.S. Customs and Border Protection that the claimant can be made available to return to Canada for their scheduled examination."
>
> Canada considers that its revised direct back policy, which imposes significant limits on the use of direct back, and which includes the use of assurances from the United States that the directed back individuals will be allowed to return for their appointments, is in full compliance with the Commission's recommendations in this regard and that no further modifications to its direct back policy are required.

126. In this respect, the petitioners observe that Canada's direct back policy and judicial remedies were reformed before the IACHR adopted its report on the merits of this case, and that the information supplied by the State was already available and considered when Report 48/10 was adopted. The petitioners highlight that the direct back policy of Canada was criticized by the United Nations High Commissioner for Refugees in its June 2006 report on the matter,[75] and they add that despite the more limited use of "direct backs", this practice is still being applied in some cases to refugee claimants. The petitioners submit that "the September 1, 2006 direct back policy is not consistent with Canada's international obligations for the same reasons that the previous direct back policy failed to do so". In brief, they allege that it does not comply with the IACHR's recommendation which requires that all "direct backs" be preceded by assurances from U.S. authorities that the claimants will be able to return for their appointments, or by individual assessments of the claimant's ability to seek asylum and protection from refoulement in the U.S. asylum system.

127. Regarding the fourth recommendation on judicial remedies at paragraph 132(4) *infra*, The State "considers that its existing remedies are adequate and effective to challenge direct backs before they occur and that no other measures are necessary to be implemented". The petitioners, for their part, submit that "this response overlooks the fact that throughout the past six years of litigation the petitioners have demonstrated that the current system does not afford any legal remedy that would prevent a direct-back from happening and the only remedies available to challenge the legality of a direct-

[75] In the report, UNHCR strongly recommended that CBSA (Canadian Border Services Agency) find an alternative to direct backs, particularly for claimants who are without legal status in the U.S. and who therefore risk being detained upon return. United Nations Hi9gh Commissioner for Refugees, Monitoring Report: Canada-United States "Safe Third Country" Agreement: 29 December 2004 – 28 December 2005 (Junes 2006), p. 25.

back take place once the person has already been removed Canada (thus rendering them moot in cases in which the person is detained and deported in the United States)". Further, the petitioners hold that "the failure to comply with the aforementioned recommendation will continue to place in jeopardy the rights, safety, and lives of asylum seekers who are directed back, threatening to reproduce the human rights violations experienced

VI. FINAL CONCLUSIONS AND RECOMMENDATIONS

128. The IACHR, based on the foregoing considerations of fact and law, reiterates its conclusions:

- Canada violated the John Does' right to seek asylum, as provided by Article XXVII of the American Declaration.

- Canada violated the John Does' right to protection from possible chain *refoulement* by failing to conduct individualized risk assessments prior to returning them to the United States, in contravention of Article XXVII of the American Declaration, in light of developments in refugee law under the Refugee Convention, Refugee Protocol, and the U.N. Convention Against Torture.

- Canada violated the John Does' right to resort to the courts before being returned to the United States, as provided by Article XVIII of the American Declaration.

129. As to the statement made by Canada regarding the nature of the recommendations, the Inter-American Commission must highlight that the State recognizes in its communication the binding nature of human rights obligations under international law. The Preamble of the Charter of the Organization of American States highlights the importance of the "consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man". Canada deposited its instrument of ratification of the OAS Charter on January 8, 1990, thereby accepting and assuming all the obligations arising from its condition of Member State of the Organization. By virtue of Article 3.b) of the OAS Charter, the States of the Americas have reaffirmed the fundamental principle of "faithful fulfillment of obligations derived from treaties and other sources of international law". Under Article 106 of the OAS Charter the Inter-American Commission is the organ charged by the member states with the function of promoting the observance and protection of human rights; and pursuant to Article 20 of its Statute, this organ is vested with the authority to examine communications and issue recommendations to bring about more effective observance of fundamental human rights.

130. As a principal organ of the OAS by virtue of the Charter and the terms of its Statute, the Inter-American Commission is the supervisory mechanism entrusted with the responsibility to monitor compliance by Member States compliance with their regional human rights obligations. The State accepts that the obligations are binding as a matter of international law, but suggests that the IACHR's determinations with respect to its compliance with these obligations does not require action on its part.

131. In order for the provisions of Article 106 of the OAS Charter to have an *effet utile* and for Inter-American Commission to effectively carry out its function of promoting the observance and the defense of human rights, OAS Member States must comply in good faith with its recommendations. Pursuant to article 31(1) of the Vienna Convention on the Law of Treaties, Member States are required to apply good faith in efforts comply with the recommendations of supervisory bodies such as this Commission.

132. The careful review and consideration of the submissions of both parties after the adoption of the preliminary merits report on this case, leads the IACHR to conclude that the State of Canada has not complied with the recommendations of Report No. 48/10. Accordingly,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES ITS RECOMMENDATIONS THAT CANADA:

1. Adopt measures to identify the John Does and verify their situation and status, in order to process any outstanding claim for asylum they may wish to present.

2. Make full reparation to the John Does for the established violations, including, but not confined to material damages.

3. Adopt the necessary legislative or administrative changes to ensure that refugee claimants are afforded due process in presenting their asylum claims. If the direct back policy is continued, this would require gaining the necessary assurances from the third State's immigration officials that directed back individuals will be able to return to Canada for their scheduled refugee eligibility interviews. In the alternative, the State would need to conduct individualized assessments based on the third State's immigration law to determine whether directed back individuals would have access to seek asylum in that State and not face automatic legal bars. In those cases where there is a bar from seeking asylum, those individuals may not be directed back. Finally, any "direct back" policy shall include an individualized determination of whether there is risk of subsequent *refoulement* for any refugee claimant directed back to the third State.

4. Adopt the necessary legislative or other measures to ensure refugee claimants have access to adequate and effective domestic remedies to challenge direct-backs before they occur.

VII. PUBLICATION

133. On April 11, 2011 the Inter-American Commission transmitted to both parties Report 24/11 regarding this case, indicating that it was not yet a public decision. In the communication sent to the State, a request was made that it provide to the IACHR within a one-month time period a report on the measures adopted to comply with the recommendations of the report and solve the situation.

134. The State sent a communication on May 9, 2011 in which it does not supply information on possible measures of compliance but, to the contrary, it reiterates the position it had already expressed during the processing of this case, and which is reflected in the instant report. Canada "profoundly regrets that it has been found in non-compliance with the Commission's recommendations" and reiterates its position in the sense that compliance is either impossible, or has already occurred. Finally, the State requests that the IACHR reflect its explanations and preoccupations in the final public version on this case, and asks that the record be closed.

135. On the basis of all of the above, the Inter-American Commission reiterates that its recommendations are still pending compliance by the State. Pursuant to Article 45(3) of its Rules, the IACHR decides to publish the instant report and to include it in its Annual Report to the General Assembly of the Organization of American States. The Inter-American Commission shall continue to evaluate the measures adopted by Canada with respect to the recommendations until there is full compliance.

Done and signed in the city of Washington, D.C., on the 21st day of the month of July, 2011. (Signed): José de Jesús Orozco Henríquez, First Vice-President; Rodrigo Escobar Gil, Second Vice-President (dissenting vote follows below); Paulo Sérgio Pinheiro, Felipe González, Luz Patricia Mejía, and María Silvia Guillén Commissioners.

DISSENTING OPINION BY COMMISSIONER RODRIGO ESCOBAR GIL
Case 12.586 "John Doe *et al*. v. Canada`"

While agreeing with the Commission's interpretation of the principles of international law studied in the report on the merits in Case 12.586 "John Doe *et al*. v. Canada," I must depart from the decision with respect to the State's international responsibility because I feel that the alleged victims needed to be properly and individually identified before a decision could be made on the existence of an internationally wrongful act with respect to them.

Although the decision on the merits asserts otherwise, it is my view, as I shall explain, that John Doe 1, 2 and 3 are not properly identified. Given that there is no proper individual identification, it is important to examine whether there are exceptions to this requirement. My view is that there are two exceptions in accordance with the jurisprudence of the Inter-American Human Rights System (hereinafter the "IAHRS" or "the System") to the requirement of individual identification of victims in the merits phase of proceedings, as follows:

a) When a single act has caused multiple victims and it has been impossible for the petitioners to identify all of them, given the very nature of the action. This is true of massacres and it was this aspect that allowed the Inter-American Court, for example, to defer the identification of the victims, even until after the judgments were handed down in the Plan de Sanchez Massacre (2004)[76] and the Mapiripán Massacre (2005)[77] cases.

b) When what is being examined is a violation of the American Convention on Human Rights (particularly the duty contained in Article 2 of that Convention) due to the existence of laws or provisions that are *per se* in violation of the international treaty.[78]

The legal basis for these two exceptions is that even without the individual identification of victims it is possible to examine the existence of an internationally wrongful act and fully ascertain the two components of that act and later assert the State's international responsibility.

I will try to explain below, first, why the alleged victims are not properly identified; and second, that the instant case does not fall under either of the exceptions to the requirement of individual identification. However, before addressing the specifics, I consider it important to state clearly that I understand that the discussion of jurisdiction *ratione personae* ended with Admissibility Report 121/06,[79] and for this reason my opinions are supported solely with respect to the examination of the merits of the case. This is

[76] I/A Court H.R. *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations and Costs. Judgment of November 19, 2004. Series C, No. 116. para. 67. In that case, the Court affirmed that: "With regard to the victims individualized in the judgment delivered by the Court on April 29, 2004, or those who were included for the first time in the attachments to the representatives' final written arguments or in the helpful evidence (in accordance with paragraph 48 of that judgment), with regard to whom the representatives could not remit the appropriate documents to identify them, this Court decides that the compensation that corresponds to them for the damage suffered will be adjusted to the parameters of the identified victims (*supra* paras. 64 and 65), provided they present themselves before the competent State authorities within 24 months of the notification of this judgment and bring the necessary information to identify themselves."

[77] I/A Court H.R. *Case of the Mapiripán Massacre v. Colombia***.** Preliminary Objections. Judgment of March 7, 2005. Series C, No. 122.8. In that case, the Court asserted in the operative paragraphs that "The State must immediately take such steps as may be necessary to individually identify, within a reasonable time, the victims who were executed and made to disappear, as well as their next of kin, in accordance with the terms of paragraphs 305 to 310, 311 and 326 of this Judgment."

[78] *Cf.* I/A Court H.R. *Case of Suárez-Rosero v. Ecuador*. Merits. Judgment of November 12, 1997. Series C, No. 35. In that case, the Court considered that "this exception deprives a part of the prison population of a fundamental right, on the basis of the crime of which it is accused and, hence, intrinsically injures everyone in that category. This rule has been applied in the specific case of Mr. Suárez Rosero and has caused him undue harm. The Court further observes that, in its opinion, this law violates *per se* Article 2 of the American Convention, whether or not it was enforced in the instant case. (Underlining ours).

[79] It is important to recall that in the admissibility phase Canada argued a lack of jurisdiction *ratione personae* before the IACHR, based on the failure to identify the victims and the absence of powers of attorney or mandates on the part of the petitioners. The Commission decided it was competent to hear the case because it is not necessary for the petitioners to have a power of attorney or special mandate from the victims in order to file a complaint. It did not rule specifically on the argument regarding the failure to identify the victims (see para. 55 of Admissibility Report No. 121/06).

notwithstanding my desire to participate in more in-depth discussions regarding this aspect of jurisdiction, which I regard not only as procedural but substantive as well.

The alleged victims are not properly identified

In the Report on the Merits, few allusions are made as to why the petitioners did not correctly identify the victims, but in any case it is accepted that they have not been duly identified. Thus, on one hand, it states that "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."[80] Nonetheless, other than this entirely general explanation, the petitioners do not present a sufficient argument as to why it was not possible to specifically identify the alleged victims.

On the other hand, for the purpose of examining the reasonable timeframe for submission of the petition, the Report on the Merits concludes that "based on the record before it, both parties had significant difficulties in identifying the John Does."[81] However, there is no explanation of what those significant difficulties are, nor any indication of why the State could overcome those difficulties easily, but the petitioners could not.

The State informed the Commission of the steps taken to cooperate on the identification of John Doe 3, which yielded no concrete results regarding the two other people in presumably similar circumstances; in any case, as for John Doe 3, even though a record with similar characteristics was found, this alleged victim was not fully identified. There are no additional documents or arguments in the file that would allow the IACHR to infer that the collaboration was other than diligent, or that it was insufficient, and different results could be found by the State. Neither did the petitioners allege, much less prove, bad faith on this specific point on the part of the State.

The State has asserted that it did not find "possible matches"[82] for John Does 1 and 2, "either in the national immigration database or in the paper records of the Windsor port of entry."[83] As respects John Doe 3, some data was found, however inadequate.

On the other hand, the alleged identification of John Doe 1 and 2 was achieved through a single piece of documentary evidence. Thus, the report on the merits in the instant case states that:

> In support of their contentions, the petitioners principally rely on the affidavit of a person known as "Witness One."[84] According to the affidavit, Witness One was a 23-year-old asylum-seeker who was directed back from Canada to the United States on April 15, 2003. He was arrested upon returning to the United States and subsequently detained in Monroe County Jail in Detroit, Michigan. Witness One states that he was eventually released in November 2003, pursuant to a judicial order. Following his release, Witness One states that he renewed his application for asylum status in Canada and due to the serious risk to the safety of his or her family in the country of origin requested that his identity not be disclosed. Witness One testifies that he met John Does 1, 2, and 3 at Monroe County Jail. According to Witness One, all of the John Does had been directed back to the United States, where they were subsequently detained by US authorities prior to their deportation to their countries of origin.[85] (Underlining added)

This means that the information gathered from Witness One is the only evidence of what happened with John Doe 1 and 2, including their existence. In addition, this was documentary evidence provided by the

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[80] Report on the Merits. Case 12.586 "John Doe *et al.* v. Canada," para. 1.

[81] Report on the Merits. Case 12.586 "John Doe *et al.* v. Canada," para. 88.

[82] Report on the Merits. Case 12.586 "John Doe *et al.* v. Canada," para. 55.

[83] Report on the Merits. Case 12.586 "John Doe *et al.* v. Canada," para. 55.

[84] The affidavit of "Witness number 1" was submitted as an annex to the petition (March 31, 2004).

[85] Report on the Merits. Case 12.586 "John Doe *et al.* v. Canada," para. 18.

petitioners as an annex to the petition, as thus not evidence submitted before the Commission and subject to challenge as evidence, i.e., it is documentary evidence and no additional evidence is provided to allow for the conclusion that the assertions made by Witness One are entirely valid.

The decision on the merits adopted by the Commission in the instant case itself recognizes the need to identify the victims for the purpose of examining the existence of international responsibility on the part of the State. This means that, according to the report, the affidavit of Witness No. 1 and the existence of some policies within the State are sufficient to deduce that the John Does actually existed and additionally to infer that their rights were violated. What I propose to submit in this opinion is that these elements are not sufficient for proper identification and, without that proper identification, an examination of the international responsibility of the State, particularly the element of attribution, is impossible.

From my point of view and regarding the decision adopted, it is impossible to see this as constituting adequate identification of the victims in a serious analysis of the merits of a case involving human rights violations. It might perhaps achieve some degree of identification (although not sufficient in my opinion) for a decision exclusively with respect to competence, but not certainty regarding the existence of an internationally wrongful act that entails the international responsibility of the State.

The absence of individual identification of the alleged victims renders impossible an examination as to the existence of an internationally wrongful act in the instant case, and thus does not fall under the exceptions to compliance with the requirement to identify victims.

Beyond the discussion regarding jurisdiction *ratione* personae, what is true is that the requirement of identification of alleged victims is in keeping with the very foundations of the inter-American system, and its principal objective: protection of human persons. This discussion does not, of course, evade the elements of international responsibility on the part of States, which must be satisfied in order for the Inter-American Commission to conclude that there was international responsibility on the part of the State, a task that must be performed in the merits phase.

In the instant case, because it involves a State that has not ratified the American Convention on Human Rights (hereinafter "ACHR"), international responsibility is analyzed within the framework of the American Declaration on the Rights and Duties of Man, which does not mean that the analysis of the elements of the State's international responsibility need not be performed with the same rigor as if it were an examination under the ACHR.

The criteria as to the existence of an internationally wrongful act and the elements for the configuration thereof belong to the sphere of international public law as well as the special area of international human rights law.

Regarding the existence of an internationally wrongful act, the "Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its 53rd session (A/56/10) and annexed by the GA under Resolution 56/83 of December 12, 2001," clearly states that:

> **Article 1.-** Responsibility of a State for its internationally wrongful acts. Every internationally wrongful act of a State entails the international responsibility of that State.
>
> **Article 2.-** Elements of an internationally wrongful act of a State.
> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> a) Is attributable to a State under international law; and
> b) Constitutes a breach of an international obligation of the State.

From my perspective and with all respect for the decision on the merits in the case that concerns us, it is not possible to even examine the existence of the two elements of the internationally wrongful act unless the alleged victims of this act are individually identified. In effect, the attribution of an action or omission on the part of a State could not be examined in relation to a violation of an international obligation the State has with respect to a specific person if there is no certainty that the person exists, and that the State

has engaged in an action or omission that affects that person in particular and makes him or her a victim of human rights violations.

In principle, the main burden of individual identification lies with the petitioners and the State is only responsible for special collaboration on this point when it is reasonably able to make the identification, and this is not available to the petitioners. Nonetheless, the total reversal of the burden of proof --as occurred in the case now under consideration-- should at least be based on:

a) Clear reasons allowing for an entirely forceful assertion that the petitioners were unable to obtain the information by any means, and

b) Reasonable arguments and proof allowing for the conclusion that the State is able to make the identification and has not done so for reasons imputable solely to the international subject.

Of course, there are cases in which individual identification of victims is not an easy task and for this reason there are exceptions to the requirement of identification, as I explained at the beginning of this opinion. However, these exceptions are not present in the instant case.

Thus, the first exception is valid when there is a single act that produces multiple victims. This is not true in cases involving separate acts that produce identifiable and distinguishable violations. In such cases, the examination must necessarily be individual. For example, in the case of the *Case of the Juvenile Reeducation Institute* (2004),[86] the Inter-American Court required identification before addressing the examination on the merits and thus the examination of the international responsibility of the State, and ultimately issued a decision solely with respect to the properly and individually identified victims.

What would not be proper would be to declare a State internationally responsible for violating the human rights of persons with respect to whom there is no certainty as to their existence or when there is ignorance regarding the concrete circumstances surrounding the alleged violations against them that would make it possible to impute an action or omission to the State, in violation of a concrete international obligation.

This is the case with the John Does, about whose existence we have knowledge solely on the basis of documentary evidence or some vague information provided by the State, as in the case of John Doe 3.

Now then, the facts in the instant case are substantially different in terms of the circumstances of time, method, and place with respect to each of the John Does. If what is being evaluated are the specific violations of their human rights (as recognized by the decision on the merits itself when it asserts that it does not seek to examine Canada's general policy but rather its application in specific cases), it is then impossible to consider this case an example of those cases in which international responsibility can viably be imputed to a State due to a single action that has multiple victims. On the contrary, the case involves three separate acts, with three separate victims. Thus, international responsibility must be examined individually, and it is impossible to do so without knowing who was affected and under what circumstances by the application of the policy in question.

Even the State expresses a series of possible scenarios that could explain why the applicants did not appear for their interviews[87] (they may have entered Canada through another border crossing, they may

[86] I/A Court H.R. *Case of the Juvenile Reeducation Institute v. Paraguay.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 2, 2004. Series C, No. 112. Para. 30. In that case, the Court maintained that: "On June 21, 2002 the Court issued an order wherein it admitted the application filed in the instant case with regard to the persons named in the application. The Court also asked the Commission to identify by name within three months "the children and adolescents confined in the 'Panchito López' Juvenile Reeducation Institute between August 1996 and July 2001, and subsequently remanded to adult prisons in the country" and indicated that "should said information not be received, proceedings in the case would continue only regarding the alleged victims identified in the application." (Underlining added).

[87] Report on the Merits. Case 12.586 "John Doe *et al.* v. Canada," para. 53.

have continued to be illegal, they may have abandoned their intention to seek asylum protection, or they may have decided to remain in the United States, and other possible scenarios), and there is no way to demonstrate whether these scenarios were true or not, without knowing who the alleged victims are as well as their particular circumstances. It is not even possible for the petitioners to have rejected these scenarios based solely on the existence of a single piece of documentary evidence. This forcefully demonstrates the impossibility of imputing international responsibility to the State with respect to these three persons.

Based on the above, the first exception regarding the absence of individual identification is excluded.

On the other hand, with respect to the second possible exception, even though the individual petitions procedure should be that defined by the ACHR and the Commission's Rules of Procedure, independently of the international instrument alleged to have been violated, the examination of the State's international responsibility should take into account the substantive content of the relevant instruments in each case. In the instant case, the Commission is competent to apply only –-as it did-– the American Declaration, which establishes some specific rights. Unlike the provisions of the ACHR -–particularly Article 2-- the American Declaration does not expressly impose the reform of domestic legislation in keeping with international commitments.

The obligation that arises from Article 2 of the American Convention does not *strictu sensu* constitute a human right, but rather the general obligation of the States Parties to "adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms." To conclude that this provision establishes a human right that must be examined and guaranteed on an individual basis would imply –-in my opinion-– a restrictive interpretation of the American Convention, contrary to the provisions of Article 29. Thus, the States Parties to the ACHR may incur international responsibility for failures to honor obligations that do not necessarily constitute violations of human rights. It is worth recalling what the Inter-American Court stated in its *Advisory Opinion 13 (1993),* as follows:

> A State may violate an international convention and, specifically, the Convention, in many ways. It may do so in the latter case, for example, by failing to establish the norms required by Article 2. Likewise, it may adopt provisions which do not conform to its obligations under the Convention.[88]

However, there is no provision in the American Declaration with the reach of Article 2 of the American Convention. As a result, I am of the opinion that, based on the American Declaration, it is impossible to conclude the existence of international responsibility on the part of the State for the mere act of issuing legal provisions contrary to the Declaration, unless there are specific victims to whom such provisions have been applied.

However, based on the principle of good faith, the State could not manifestly ignore the rights established in the Declaration by issuing a law or a policy, and in any case the application of a law or a policy contrary to a State's international obligations entails the international responsibility of the State in the specific case, that is, with respect to the specific person to which the law was applied.[89]

As a result of the above, the Commission's recommendations should be limited to violation of a right as individually conceived and should not be presented generically. Otherwise, it would appear to be acting on an *actio popularis*, distorting the individual and specific nature of the petitions procedure.

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[88] I/A Court H.R. Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50, and 51 of the American Convention on Human Rights), Advisory Opinion OC-13/93, July 16, 1993. Series A, No. 13, para. 26.

[89] In Advisory Opinion No. 14, the Court concluded that "the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, it gives rise to international responsibility for the state in question." (*International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 of the American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A, No. 14. para. 50.

Finally, I would like to present some thoughts regarding the recommendations in the report on the merits.

The very language of the first recommendation allows the conclusion that the responsibility of the State with respect to the John Does is still not demonstrated. The State is asked to adopt measures to "identify the John Does and verify their situation and condition, in order to process any outstanding claim for asylum they may wish to present."[90] First, this shows that we do not know the situation and condition of the John Does, which once verified could lead to the conclusion that there were no violations. One of the different possible scenarios that Canada suggested to the Commission could be confirmed.

Secondly, the State already made efforts to identify these persons, using the available data, and this did not produce results. Then, without any reasons beyond those indicated in the report, it is a disproportionate burden for the State to have to make an individual identification, without the help of additional evidence. Furthermore, on this point, only the petitioners have any contact with Witness No. 1, apparently the only source of information that would allow the identification process to move ahead. For the rest, the John Does could either not exist or might be in a country with regard to which Canada has no jurisdiction or power to gather information.

From my perspective, this identification would be a preliminary step for submitting a new petition before the Inter-American System but not for reparations in this case.

The second recommendation consists of "full reparation to the John Does."[91] Of course, this is impossible without proper identification, but also impossible after identification, without a legal analysis regarding what really happened to these persons, which would determine the degree of responsibility and the reparations in the specific case. In my opinion, the determination of these concrete facts and of reparations is being left exclusively to the State, due to the impossibility of analyzing, in this case, the concrete acts that produce international responsibility.

Finally, recommendations three and four of the report, which seek to prevent a repetition of violations, could only be put into effect if individual violations had existed, which has not happened in this case.

In conclusion, the failure to properly identify the alleged victims prevents the Commission from concluding that international responsibility on the part of the State existed and as a result issuing recommendations designed to repair the rights of these three persons.

I submit these opinions with great respect for the decision adopted by my colleagues and with the belief that these discussions will make it possible to strengthen the Inter-American System of Human Rights and its ultimate purpose: the protection of the human person.

Rodrigo Escobar Gil
Commissioner

[90] Report on the Merits. Case 12.586 "John Doe *et al.* v. Canada," para. 118.

[91] Report on the Merits. Case 12.586 "John Doe *et al.* v. Canada," para. 118.