CANADA, HUMAN RIGHTS AND THE O.A.S.

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In 1990, Canada became a member of the Organization of American States (OAS). In this article, the authors provide a useful introduction to the OAS system and explore some of the implications of Canada's membership. One implication is that Canada is now subject to the jurisdiction of the Inter-American Commission on Human Rights (IACHR). As an organ of the OAS, the IACHR is entitle to hear complaints alleging violations of the human rights enshrined in the American Declaration. The authors describe the procedures involved in such complaints and, in particular, examine the complaint in Joseph, a refugee determination case which was the first and is, still, the only Canadian decision of the IACHR. Although the petition in Joseph ultimately failed, it is clear that future human rights complainants may well look beyond existing domestic remedies, to the international fora. As a result, practitioners representing such complainants undoubtedly will require an increased understanding of international human rights law. This is particularly apparent in light of the expertise the government demonstrated in its reply in Joseph.

En 1990, le Canada est devenu membre de l'Organisation des États américains (OEA). Les auteurs du présent article fournissent une introduction utile au régime de l'OEA et examinent certaines des conséquences de l'adhésion du Canada. L'une d'elles est que le Canada relève désormais de la compétence de la Commission interaméricaine des droits de l'homme (IACHR). En tant qu'organisme de l'OEA, l'IACHR a le droit d'entendre les plaintes alléguant la violation de droits enchâssés dans la Déclaration américaine. Les auteurs décrivent les procédures suivies et examinent en particulier les doléances de la cause Joseph portant sur la revendication du statut de réfugié — le premier et unique cas canadien sur lequel l'IACHR s'est prononcée.Bien que la requête ait échoué, il est évident que les plaignants pourraient à l'avenir rechercher des remèdes sur la scène internationale. Il faudra donc que les praticiens représentant cette catégorie de griefs approfondissent leur connaissance du droit international en matière de droits de la personne. Cette conclusion s'impose à la lumière de l'expertise démontrée par le gouvernement dans sa réplique à la requête Joseph.

Canada became the thirty-third member state of the Organization of American States (OAS) in 1990.[1] In so doing, Canada moved from its long-held

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1 Then Prime Minister Brian Mulroney made the announcement on 27 October 1989 in San Jose, Costa Rica. The *Charter of the Organization of American States* (as amended), 30 April 1948, Can. T.S. 1990 No. 23, 21 U.S.T. 607, T.I.A.S. No. 6847 [hereinafter *OAS Charter*], was signed by Canada on 13 November 1989 and was ratified on 8 January 1990, whereupon it entered into force. Interestingly, Canada's declaration at the time of ratification states, in part, that "Canada will not carry correspondence of the Organization of American States free of charge in the mails of Canada." For a review of Canada's pre-membership relationship with the OAS, see D. Pharand, "Canada and the OAS: the Vacant Chair Revisited" (1986) 17 R.G.D. 429. For a review of Canada's first year of membership by the Canadian ambassador to the OAS, see J.P. Hubert, "Canada's Role in Latin America: OAS First Year Report" [1991] Proceedings, Can. Council Int. L. 2.

In 1991, Belize and Guyana brought the number of member states to thirty-five,

status as an active observer state to full membership, and persons in Canada thereby gained access to a regional international human rights body with the jurisdiction to consider human rights complaints against Canada. This avenue of potential redress is in addition to the global fora to which Canadians have had access through the United Nations system.[2]

In December 1992, approximately thirty-five months after commencing membership, the OAS received its first human rights complaint against Canada.[3]

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but only thirty-four states are active members. Largely because of U.S. pressure to isolate the Castro regime, the OAS has excluded Cuba from participation in OAS organs since 1962. Because Cuba has not denounced its membership, the OAS continues to treat it as a member state, at least for the purpose of monitoring its obligations to the Organization. For example, OAS, General Secretariat, *Annual Report of the Inter-American Commission on Human Rights 1994*, OEA/Ser.L/V/II. 88/doc.9 rev (1994) at 142-67, contains a report on the latest review of the human rights situation in Cuba.

Canada has also acceded to three other Inter-American treaties: the *Inter-American Convention on the Nationality of Women*, 26 December 1933, Can. T.S. 1991 No. 28; the *Inter-American Convention on the Granting of Political Rights to Women*, 2 May 1948, Can. T.S. 1991 No. 29; and the *Inter-American Convention on the Granting of Civil Rights to Women,* 2 May 1948, Can. T.S. 1991 No. 30.

2 In the mid-1970s, Canada ratified the *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, Can. T.S. 1976 No. 46, and the *International Covenant on Civil and Political Rights* with *Optional Protocol*, 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171, 6 I.L.M. 368. These human rights treaties entered into force for Canada on 19 August 1976.

3 The first complaint against Canada under the *Optional Protocol* to the *International Covenant on Civil and Political Rights*, occurred on 29 December 1977, sixteen months after the treaties had entered into force for Canada. See "Views of the Human Rights Committee under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. R.6/24" in *Report of the Human Rights Committee*, UN GAOR, 36th Sess., Supp. No. 40, UN Doc. N36/40 (1981) at 166-75 [hereinafter the *Lovelace Case*]. Numerous reasons may account for the considerably longer period which elapsed before the OAS received a human rights complaint against Canada. For example, from an international perspective, the OAS is probably less known or less respected in Canada than the United Nations, and many deem Canada's United Nations human rights obligations to carry more weight than its OAS obligations. Also, the debate over Canada's decision to ratify the major United Nations human rights conventions may have been more public than its sudden decision to join the OAS. Further, Canada's human rights obligations under the OAS are not to be as transparent as they are under the United Nations human rights treaties, at least until Canada ratifies the *American Convention on Human Rights*, *infra* note 21. From a domestic perspective, Canada's laws in the 1990s protect human rights and provide remedies for their breach far more effectively than they did twenty years ago. This factor may also diminish the need to rush as quickly to international human rights fora as was the case in the 1970s. That change, of course, is the result of the impact of constitutional guarantees embodied in the *Charter of Rights and Freedoms*, Part I of the

The decision on the complaint, filed on behalf of Mrs. Cheryl Joseph,[4] was released in October 1993.[5] Though the release garnered little, if any, publicity in the Canadian media, the OAS forum has attracted increasing attention from those seeking a remedy beyond Canada's borders. In 1995, five complainants selected the OAS forum to pursue human rights complaints against Canada.[6]

This paper will discuss the implications for Canada of the OAS system for the protection of human rights by examining the complaint and decision in *Joseph* — still the only decision of an OAS organ involving Canada — and commenting on the process giving rise to the decision.

Evolution of the OAS System for the Protection of Human Rights

The OAS is a regional 'arrangement' for international peace and security within the meaning of Article 52 of the *Charter of the United Nations*.[7] It evolved from a series of hemispheric conferences first held in Washington in 1890 and convened periodically thereafter.[8] The *American Declaration of the*

Constitution Act, 1982. Unlike the earlier *Canadian Bill of Rights,* S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III, which invited the judiciary to respect human rights, the *Charter of Rights* commands the judiciary to favour them.

4 *Report No. 27/93, Case 11.092* (6 October 1993) reported in OAS, General Secretariat, *Annual Report of the Inter-American Commission on Human Rights 1993* or OEA/Ser.L/V/II.85/doc.9 rev. (1994) at 32-59 [hereinafter the *Joseph Case*].

5 The Court released the decision in the *Joseph Case*, relatively quickly (a few days less than ten months from the receipt of the complaint). This time frame contrasts sharply with the forty-three months it took for the release of the recommendation in the *Lovelace Case*. Again, numerous reasons may explain this discrepancy. For example, the OAS had developed an established complaints procedure which, by the 1990s, had become reasonably efficient, whereas the United Nations in the late 1970s had none. At the time of the *Lovelace Case*, the Human Rights Committee (a body created under the *International Covenant on Civil and Political Rights* and mandated by the *Optional Protocol, supra* note 2 to hear individual complaints) was newly formed and had yet to establish its complaints process. Further, the *Lovelace Case* contained more substance than did the *Joseph Case*.

6 Source: Personal conversation with a legal officer of the Department of Justice, Canada (16 May 1996). To date, no decisions have been rendered in respect of these communications.

7 26 June 1945, Can. T.S. 1945 No. 7, 59 stat. 1031, 145 U.K.F.S. 805. The *Charter of the Organization of American States*, *supra* note 1 art.1, expressly refers to the OAS as a regional agency within the United Nations. The *OAS Charter* was adopted in 1948 at the conference held in Bogota, Columbia.

8 These were known as the International Conference of American States. See OAS, General Secretariat, *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/II.71/doc.6 rev.1 (1987) [hereinafter *Basic Documents*]

Rights and Duties of Man[9] has its origins in a conference held in Mexico City in 1945[10] which directed the Inter-American Juridical Committee (a pre-existing body of the Inter-American Conference) to draft a declaration of fundamental rights. The member states had originally intended that the *American Declaration* become a regional treaty. However, when the Committee presented its draft in 1948 at Bogota, Columbia, the Conference reneged on its initial intention to adopt a binding treaty and the *Declaration* remained a document without regulatory or enforcement mechanisms. The *Declaration* has the distinction of being the first post-World War Two human rights instrument presented for approval at an international meeting of states.[11]

The *American Declaration* consists of thirty-eight articles of which twenty-eight recognize what are generally classified as civil and political rights and economic, cultural and social rights.[12] The rights are expressed subject to a general limitation provision, similar in intent to section 1 of the *Canadian Charter of Rights and Freedoms*, that the rights are "... limited by the rights of others, by the security of all, and by the just demands of the general welfare and

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at 1.

The First Meeting of the International Conference of American States in 1890 established the International Union of American Republics for the primary purpose of collecting and distributing commercial information through a central office known as the Commercial Bureau of the American Republics. The Fourth Conference (Buenos Aires, 1910), changed the name of the International Union of American Republics to the Union of American Republics, and the Commercial Bureau of the American Republics to the Pan American Union. The Ninth Conference (Bogota, 1948) renamed itself the Inter-American Conference, replaced the Union of American Republics with the Organization of American States and reorganized the Pan American Union into the General Secretariat of the OAS. In 1967, the *Protocol of Buenos Aires* (1967) 6 I.L.M. 310 (in force 27 February 1970), amended the *OAS Charter* and also replaced the Inter-American Conference with the General Assembly of the OAS. See Union of International Associations, *Yearbook of International Associations 1990/91* (Munich: K.G. Saur, 1990) at 915; and "The OAS in Action: Seventy Years Together" (1960) 12:4 *Américas* at 2.

9 See *Basic Documents*, *supra* note 8 at 17 [hereinafter *American Declaration*].

10 The Inter-American Conference on Problems of War and Peace.

11 The *American Declaration* preceded the United Nations *Universal Declaration of Human Rights* (1948) [UNGA Res. 217(III)] by a few months, and the Council of Europe's *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) Eur. T.S. No. 5; 2133 U.N.T.S. 222, by approximately two years.

12 Carol Hilling, "La Participation Canadienne au Système Interaméricain de Protection des Droits et Libertés: Les Obligations Immédiates et les Perspectives D'Avenir" [1991] Proceedings, Can. Council Int. L. 223 at 224, states that the rights protected reflect the rights contained in the majority of the constitutions of Latin American countries in 1948.

the advancement of democracy" (article XXVIII). The remaining ten articles contain obligations which are absent from many human rights instruments. They include general duties of good citizenship such as the duty to vote, to obey the law, to pay taxes, to serve the community, and to refrain from political activities in a foreign country.

In 1959, foreign ministers of the American states[13] approved a resolution containing two significant developments in the Inter-American human rights system. First, it instructed the Inter-American Council of Jurists to prepare a draft human rights treaty to include a human rights court. Second, the resolution established the Inter-American Commission on Human Rights (IACHR), composed of seven persons elected in their individual capacities and not as representatives of governments, and "... charged [IACHR] with furthering respect for [human] rights."[14] The OAS Council approved the Statute of the IACHR in May 1960 but made a significant alteration to the original proposal: the Council deleted a provision which would have authorized the IACHR to examine individual complaints of human rights violations. The Council made the change because of a growing concern among most states that international human rights obligations, strengthened by the right of individual complaint, could embarrass governments, limit their domestic freedom of action, and would provide entities beyond their control with a forum to criticize them. Some representatives described the possibilities of such attacks as a potential derogation of the principle of non-intervention in domestic affairs.[15]

Though it lacked the power to hear individual complaints, the IACHR was not left completely powerless. It had the authority to make general recommendations on human rights matters to all the member states, or to individual states, and in spite of this limited function, the Commission accepted over thirty complaints during its first three months of existence.[16]

The next significant step in the development of the IACHR came in 1965. At the Second Special Inter-American Conference, held in Rio de Janeiro,

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13 The Fifth Meeting of the Consultation of Ministers of Foreign Affairs held in Santiago, Chile in 1959.

14 Inter-American Commission on Human Rights, *Ten Years of Activities: 1971-81* (General Secretariat, OAS) at 6.

15 See J.A. Cabranes, "The Protection of Human Rights by the Organization of American States" (1968) 62 A.J.I.L. 889 at 893. Also see, generally, D.T. Fox, "The Protection of Human Rights in the Americas" (1968) 7 Colum. J. Transnat'l L. 222 at 223.

16 "The Human Rights Commission" (1960) 12:12 *Américas* at 28-29.

Brazil, OAS member states amended the Statute of the Commission to confer upon it the jurisdiction denied in 1960. The Conference authorized the IACHR[17]

> ... to examine communications submitted to it and any other available information so that it may address to the government of any American state a request for information deemed pertinent by the Commission, and so that it may make recommendations, when it deems this appropriate....

The same Conference mandated the Commission to "give particular attention" to the observance of seven rights affirmed in the *American Declaration:* 1) the right to life, liberty and personal security (article I); 2) the right to equality before the law (article II); 3) the right to freedom of religion (article III); 4) the right to freedom of expression (article IV); 5) the right to a fair trial (article XVIII); 6) the right to protection from arbitrary arrest (article XXV); and 7) the right to the presumption of innocence and due process of law (article XXVI).[18] As with other international human rights instruments of the time, the Conference imposed an important condition precedent on the Commission's exercise of this jurisdiction: prior verification in each case that complainants have exhausted domestic remedies.[19]

In 1967, the *Protocol of Buenos Aires*[20] amended the *OAS Charter* to recognize the IACHR as one of the organs of the OAS (article 52(e)) and, pending the coming into force of an OAS human rights convention, to mandate the IACHR to "... keep vigilan[t] over the observance of human rights" (article 150). These amendments to the *OAS Charter* and the Statute of the IACHR are significant to Canada because, as a member of the OAS, it, like all other member states, is automatically subject to the jurisdiction of the IACHR to examine and

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17 Final Act of the Second Special Inter-American Conference, para. 3, as reproduced in *Ten Years of Activities: 1971-1981, supra* note 14 at 6.

18 *Ibid.*

19 *Ibid.* para. 5. The most notable similar examples are art. 26 of the *European Convention* and art. 2 of the *Optional Protocol* to the *International Covenant on Civil and Political Rights*.

20 *Supra* note 8.

investigate communications alleging violations of the *American Declaration*.[21] One such communication, of course, is the Joseph complaint.

The American Convention

The *American Convention on Human Rights*,[22] signed by nineteen states in 1969, came into force on the deposit of the eleventh instrument of ratification on 18 July 1978. Ratification and coming into force of the *American Convention* may be credited to initiatives of then U.S. President Jimmy Carter whose administration overtly linked foreign aid with human rights progress.[23] Within approximately two and one-half years of President Carter taking office, thirteen states had ratified it[24] whereas, prior to the Carter administration, only two states

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[21] The ambiguous status of the *American Declaration* was clarified by the Inter-American Court's opinion in *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention of Human Rights*, Advisory Opinion OC-10/89 in T. Buergenthal & R. Norris, eds., *Human Rights: The Inter-American System*, Vol. 6, Booklet 25.8 (Dobbs Ferry, N.Y.: Oceana Publications, 1993). The Court concluded at paras. 43 and 45:

> ... the member states of the Organization have signaled [*sic*] their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus, the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration. ...
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> For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.

[22] 22 November 1969, O.A.S. Tr.S. (1970) No. 36 at 1; 1144 U.N.T.S. 123, *Basic Documents*, *supra* note 8 at 25; (1970) 9 I.L.M. 99 [hereinafter *American Convention*]. Also referred to as the *Pact of San José*.

[23] See W. Christopher, "Human Rights: Principles and Realism" (1978) 64 A.B.A.J. 198 at 200-01 and J.C. Kitch, "The American Convention on Human Rights: The Propriety and Implications of United States Ratification" (1979) 10 Rutgers Camden L.J. 359 at 360. President Carter signed the *American Convention*, *ibid.*, on behalf of the United States on 1 June 1977.

[24] The thirteen states which ratified the *Convention* between 1977 and 1979 are Bolivia, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Nicaragua, Panama, Peru and Venezuela. See OAS, General Secretariat, *Annual Report of the Inter-American Commission on Human Rights* 1995, OR OEA/Ser.L/V/II.91/doc.7 rev. (1996) at 229.

had done so — Costa Rica, designated to be the seat of the new Inter-American Court of Human Rights, and Columbia.

As of mid-1996, twenty-five of the thirty-five member states had ratified the *American Convention*.[25] The United States is the only country which has signed but not ratified it and, after more than a twenty year hiatus, there are no signs to indicate that it will ratify in the foreseeable future. Canada, one of the newest OAS member states, is the only other major member state yet to decide whether it will accept the human rights obligations of the *American Convention*. To date, it stands in the company of the other non-signatory states: Antigua-Barbuda, Bahamas, St. Kitts-Nevis, St. Lucia, St. Vincent-Grenadines, and Cuba, the excluded member of the OAS.

The preamble to the *American Convention* links the treaty to the principles contained in the *OAS Charter* and its *American Declaration* and, significantly, to the *Universal Declaration of Human Rights*. The preamble accepts that human rights derive not from state sovereignty or the individual's connection to a state, but from the "attributes of the human personality." It also recognizes that

> ... accordance with the *Universal Declaration of Human Rights* the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.

This threefold emphasis — that human rights stand independent of the state, that human rights are universal, and that economic, social and cultural rights are of equal importance with civil and political rights — is crucial to interpreting the substantive rights contained in the *American Convention* and the *American Declaration*.

Part I of the *American Convention* (articles 1-32) begins with a standard obligation on states parties to respect the rights and freedoms recognized in the treaty without discrimination on the basis of "... race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."[26] A detailed enumeration of twenty-three civil and political rights follows and range from the right of individuals to recognition as persons before the law (article 3) to the right to a remedy for the

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[25] The ratifying states of the post-Carter era are Argentina, Barbados, Brazil, Chile, Dominica, Mexico, Paraguay, Suriname, Trinidad and Tobago, and Uruguay. See *Annual Report of the Inter-American Commission on Human Rights 1995*, *ibid.*

[26] *American Convention*, *supra* note 22 art.1.

violation of one's fundamental rights (article 25). Part I continues with a general undertaking by states parties to engage in the progressive achievement of economic, cultural and social rights.

Like the *American Declaration*, the *American Convention* contains a functional equivalent to section 1 of the *Canadian Charter of Rights and Freedoms*. Article 32 provides that rights may be limited "... by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society." As with each of the rights enumerated in the *American Convention*, the limitation section must be interpreted to accord with the threefold recognition in the preamble of the independence of human rights from state sovereignty, the universality of human rights, and the equality of economic, social and cultural rights with civil and political rights in achieving the 'ideal' of 'freedom from fear and want.'

Part II (articles 33-73) provides a means of protection for the rights in the treaty. In particular, it outlines the functions and jurisdiction of the IACHR and the Inter-American Court of Human Rights, a body created by the *American Convention*.

Part III (articles 74-82) outlines the methodology of signature and ratification by states parties, defines permissible reservations to the *American Convention*, and stipulates the processes both for its entry into force and for denunciation of the treaty.

States which ratify the *American Convention* are not automatically bound to the jurisdiction of the Inter-American Court of Human Rights. Each must recognize the jurisdiction of the Court in accordance with article 62, much like states must voluntarily accept the jurisdiction of the International Court of Justice.[27] When states accede to the Court's jurisdiction, they do so by a declaration made unconditionally, on condition of reciprocity, for a specified period of time, or in relation to specific cases. To date, seventeen countries have accepted the jurisdiction of the Court.[28]

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[27] *Statute of the International Court of Justice*, art. 36(1). See *Encyclopaedia of the United Nations and International Agreements* (New York - Philadelphia - London: Taylor and Francis, 1990) at 445.

[28] Member states which accept the jurisdiction of the Inter-American Court of Human Rights are Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela. See, *Annual Report of the Inter-American Commission on Human Rights, 1995*, supra note 24.

Having joined the OAS, Canada must decide whether or not to ratify the *American Convention*. Part of that decision-making process requires a determination by the federal and provincial governments whether any rights in that treaty conflict with either federal or provincial laws, respectively, or with existing international legal obligations.[29] Leaving aside specific provincial concerns, as information relating to them is normally restricted to persons privileged to attend closed sessions specific to federal-provincial human rights negotiations, article 4 provides a notable example of a possible rights conflict with both existing domestic law and international law. The article protects the right to life — a pre-existing domestic and international obligation to which Canada adheres[30] — but defines "life" in a significantly different way. Specifically, it protects the right to life "... in general, *from the moment of conception*." A literal interpretation of that wording may well conflict with Canadian abortion law[31] and with the human rights provisions in other treaties.[32]

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[29] Canadian experts have long been aware that the OAS has a different vision of human rights. For example, the eminent Canadian human rights authority and author of the first draft of the *Universal Declaration of Human Rights*, *supra* note 11, Professor John P. Humphrey, encountered it in the 1940s during the meetings of the Third Committee of the United Nations, when formulating the text of the *Universal Declaration.* Professor Humphrey writes, in his memoirs, of the rejection of the OAS vision by the majority of U.N. delegates:

> There was even a well-organized attempt, under the leadership of the Cuban Guy Perez Cisneros, to replace the commission's text [of the *Declaration*] in most of its essentials by the text of the *American Declaration on the Rights and Duties of Man* which the Organization of American States had adopted at Bogota earlier in the year ... [T]hey didn't succeed. But the Bogota menace continued to hang over us. Highly intelligent Perez Cisneros used every procedural device to reach his end. His speeches were laced with Roman Catholic social philosophy, and it seemed at times that the chief protagonists in the conference room were the Roman Catholics and the communists, with the latter a poor second.

See J.P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (Dobbs Ferry, N.Y.: Transnational Publishers, 1984) at 65-6.

[30] The right to life is expressly protected by numerous provisions. For example, see the *Canadian Charter of Rights and Freedoms*, *supra* note 3, s. 7; the *Universal Declaration of Human Rights*, *supra* note 11 art. 3; and the *International Covenant on Civil and Political Rights*, *supra* note 2 art. 6(1).

[31] See *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, 82 N.R. 1. This topic has been the subject of a complaint to the OAS against the United States, *infra* note 33.

[32] For example, consider interpretations of the equality and other provisions relating to women contained in the major United Nations human rights treaties, in the *European Human Rights Convention, supra* note 11, and in specialized treaties like the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1 March 1980 Can. T.S. 1982 No. 31. The annual *United Nations Population Fund Report* generally supports the existence of a right to reproductive integrity and choice:

The travaux préparatoires of the *American Convention* clearly indicate the concern of some delegations that the phrase would restrict abortion availability to "special circumstances, such as medical need."[33] Considering the present division of opinion in Canada on the pro-choice issue, and the similar one in international fora, Canada may withhold its ratification unless the Convention right is modified by amendment or clarified by judicial interpretation. A legally debatable and unlikely alternative is that Canada will ratify the treaty with reservations exempting it from certain rights or applications of those rights.[34]

In addition, at least two other rights in the *American Convention* distinguish it from other human rights treaties to which Canada is a party and may contribute to reasons why Canada has not yet ratified. The first deals with freedom of expression (article 13) and the second with the right to property (article 21).[35]

"All couples have the right to decide freely and responsibly the number and spacing of their children and to have the information, education, and means to do so." UNFPA, *United Nations Population Fund Report 1995* (New York: United Nations, 1995) at 6. Quoting the quantitative goals of the International Conference on Population and Development, the *Report* also states that "... the aim should be to assist couples and individuals ... to exercise their right to have children by choice." *Ibid.*

33 S. Liskofsky, 'Report on The American Convention on Human Rights adopted by Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 7-22 1969' (Foreign Affairs Department of the American Jewish Committee Institute of Human Relations) in T. Buergenthal & R. Norris, *Human Rights: The Inter-American System*, *supra* note 21, vol. 3, booklet 15 at 18. In the draft convention, as prepared by the Inter-American Council of Jurists in 1959, the phrase had been 'starting from the moment of conception.' See 'Draft Convention on Human Rights Prepared by the Inter-American Council of Jurists' (article 2) in Buergenthal & Norris, *ibid.*, vol. 3, booklet 16.1 at 2. See also *Case 2141 (United States)*, the so-called "Baby Boy Case" reported in *Annual Report of the Inter-American Commission on Human Rights 1980-1981* OR OEA/Ser.L/V/II.57/doc.6 rev 1 (1982) at 25-43, in which the Commission determined that the U.S. abortion laws issue did not violate the *American Declaration.* As the U.S. has not ratified the *American Convention*, this case does not specifically address a similar issue that must be confronted under it.

34 Hilling, *supra* note 12 at 235, draws attention to the fact that Mexico entered the following interpretative statement at the time of ratification:

> ... the Government of Mexico considers that the expression "in general" does not constitute an obligation to adopt or keep in force legislation to protect life "from the moment of conception," since this matter falls within the domain reserved to the States.

See *Annual Report of the Inter-American Commission on Human Rights 1995*, *supra* note 24 at 237.

35 Elizabeth Abi-Mershed, speaking to Canadian international lawyers as a staff attorney for the IACHR, discusses these rights from the OAS perspective in "Regional Approaches to Human Rights and Supervisory Mechanisms: The Inter-American

The *American Convention* provides a less restricted right to freedom of expression than other international human rights instruments by broadly prohibiting prior censorship including "... indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions."[36] The Inter-American Court of Human Rights recognizes that the right to freedom of expression, as set out in the *American Convention*, departs from other human rights treaties (*e.g.*, the equivalent provisions being article 10 of the *European Convention* and article 19 of the *International Covenant on Civil and Political Rights*). Nevertheless, it has determined that the more liberal provisions of the *American Convention* should remain unaffected:[37]

> [While] it is frequently useful ... to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the matter in which a certain right has been formulated, ... that approach should never be used to read into the Convention restrictions that are not grounded in its text. This is true even if these restrictions exist in another international treaty ... .
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> Hence, if the same situation in both the American Convention and another international treaty are applicable, the rule most favourable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.[38]

Human Rights System" [1995] Proceedings, Can. Council Int. L. 111 at 120-23.

36 *Supra* note 22, art. 13, paras. 2 and 3. In construing this right, the Inter-American Court of Human Rights stated the following:

> Abuse of freedom of information cannot be controlled by preventative measures but only through the subsequent imposition of sanctions on those who are guilty of the abuses. But even here, in order for the imposition of such liability to be valid inter the Convention, the following requirements must be met:
>
> a) the existence of previously established grounds for liability;
>
> b) the express and precise definition of these grounds by law;
>
> c) the legitimacy of the ends sought to be achieved;
>
> d) a showing that these grounds of liability are "necessary to ensure" the aforementioned ends.

See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) (sub nom. Costa Rican Law for the Practise of Journalism)* (Costa Rica) (1985), Inter-Am. Ct. H.R. Advisory Opinion OC-5/85, Ser. A No. 5, para. 39.

37 *Ibid.* at para. 51.

38 *Ibid.* para. 52.

Buergenthal and Shelton ask whether this opinion of the Court has elevate "... freedom of expression to a 'preferred freedom' such as exists in the United States?"[39] While the Inter-American Court based its opinion on a general principle endorsing "... the rule most favourable to the individual," the preferred freedom status may well be the result.[40] Like most states, Canada (and likely the provincial governments) resists the U.S. notion that the right to freedom of expression takes priority other rights. Hence, the interpretations and views expressed by the Inter-American Court and the IACHR may present obstacles to Canada's ratification of the *American Convention*.

The right to property (article 21 of the *American Convention*) poses a similar problem for Canada. It does not exist in the *International Covenant on Civil and Political Rights* and the Canadian govemments that prohibited its inclusion in the *Canadian Charter of Rights and Freedoms* are likely to continue to oppose it. The objection to the right to property may reside in a fear that governments will face limitations on the acquisition, transfer, or expropriation of private property. Socialist governments, for example, may fear that property rights as set out in the *American Convention* will disrupt their efforts to redistribute

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[39] T. Buergenthal & D. Shelton, *Protecting Human Rights in the Americas: Cases and Materials, 4th Rev'd ed.* (Int'l. Institute of Human Rights, Strasbourg: N.P. Engel, 1995) at 409.

[40] Confirmation of the preferred freedom approach may be found in an IACHR report on Guatemala in which the Commission examined freedom of expression and of the press, particularly during the period of Guatemala's civil disruption. The IACHR stated the following:

> ... in this difficult time of democratic recovery in Guatemala, the presence of an independent, responsible and professional press is vital. It is equally essential that all agents of the state fulfil their obligation to respect the press, ensure that it is respected and give free access to sources of information; when freedom of its press is abused, State authorities are to see to it that the legal procedures available under Guatemalan law are exercised to cut short those abuses.
>
> The Commission also believes that the law on freedom of expression of thought must be brought in line with the principles enunciated in Guatemala's Constitution, which states that *privacy and morals are the only limits on freedom of expression*, a very progressive constitutional norm that is an example for the region as a whole.

See OAS, General Secretariat, *Fourth Report on the Situation of Human Rights in Guatemala*, OR OEA/Ser.L/V/II.83, doc.16, rev. (1993) at 79-86. From Buergenthal & Shelton, *ibid.* at 417 (emphasis added).

wealth, while other governments may fear that they will limit ownership restrictions which they have imposed to protect or preserve a way of life.[41]

Individual Complaints to the IACHR

As discussed above, it is the 1965 Statute of the Commission which authorizes the IACHR to examine communications or petitions relating to OAS member states which have not ratified the *American Convention* — the so-called non-Convention states.[42] By Regulations adopted under the authority of article 24 of the Statute, the IACHR has employed the device of incorporation by reference to make the same procedures applicable to petitions against both *Convention* and non-*Convention* states.[43] The difference, naturally, is that alleged violations in petitions against non-*Convention* states, such as Canada, pertain only to rights in the *American Declaration*.

In brief, any person, group, or legally recognized non-governmental organization may submit a petition claiming to be a victim of a violation of a right set out in the *American Declaration*, or may submit such a petition on behalf of a third party. The petition must be writing and be signed by the party

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41 For an explanation of provincial opposition to the inclusion of property rights in the *Canadian Charter of Rights and Freedoms*, see Canada, Senate and House of Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* No. 14 (27 November) at 83, and No. 45 (26 January 1981) at 11. See also R. Romanow, J.D. Whyte & H.A. Leeson, *Canada ... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 242.

42 In the present version of the Statute, approved by the OAS General Assembly in 1979 and amended in 1980 and 1991, art. 20 reiterates that authority. See Resolution No. 447 of the General Assembly of the OAS, Ninth Regular Session, La Paz, Bolivia, October 1979; amended by Resolution No. 508, Tenth Regular Session, Washington, D.C., November 1980, *ibid.* vol. 1, booklet 7 at 81; and amended by Resolution 1098, Twenty-first Regular Session, Santiago, Chile, June 1991 in Buergenthal & Norris, eds., *supra* note 21, vol. 2, booklet 9.1.

43 *Regulations of the Inter-American Commission on Human Rights*, in Buergenthal & Norris, eds., *ibid.* vol.2, booklet 9.2. Chapter III of the Regulations, arts. 51-54, is headed 'Petitions Concerning States That Are Not Parties To The American Convention On Human Rights.' Art. 52 expressly makes arts. 25-30 and 32-43 applicable to petitions concerning non-Convention countries.

In 1989, the Inter-American Court of Human Rights held that it had jurisdiction to render advisory opinions on the interpretation of the *American Declaration* in the context of performing its functions under the *Charter, American Convention*, or other human rights treaties. See *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention of Human Rights*, *supra* note 21 at 3.

making the submission who must be identified. The petition must specify the state alleged to be responsible for the violation, and detail the violation as best as possible by identifying relevant particulars such as the place of occurrence, the date, the name of the victim or victims and, if possible, any official informed of the violation. Additionally, the petition must state whether domestic remedies have been exhausted "... in accordance with the general principles of international law ..." or why this obligation should be excused (article 36). Two further procedural requirements govern the admissibility of a petition: it must be submitted no later than six months after local remedies have been exhausted and the complaint must not be under consideration by another international organization to which the subject state is a member — for example, the Human Rights Committee under the *International Covenant on Civil and Political Rights*.

If the IACHR accepts the petition as admissible in principle, the government of the respondent state is informed and requested to provide information within ninety days. This information may relate to the admissibility of the petition and/or to the merits of the substantive complaint. When informing the government, the IACHR keeps the identity of the petitioner confidential unless the petitioner otherwise consents. Once the petition survive the hurdles of admissibility, the petitioner gains what is, at times, a decisive evidentiary advantage. The IACHR presumes that the facts alleged in the petition are true unless the government provides "pertinent information" to refute the alleged violation within a ninety day period set by the Regulations.[44] This presumption is, of course, subject to the existence of basic or *prima facie* evidence to support the finding of a rights violation (article 42). Once the IACHR deems a petition to be admissible, it may conduct a hearing into the allegations (article 43). The IACHR will transmit its final decision to both the petitioner and the respondent state, including "... any recommendations that the Commission deems advisable ..." (article 53). However, its decision is not absolute, as article 54 provides a right of reconsideration on the presentation of new facts or legal arguments not previously considered.

The Regulations provide no remedial jurisdiction; the powers of the IACHR are recommendatory only. This limitation is not surprising considering the diverse levels of respect for human rights accorded by the variety of OAS member states. Finally, the Commission may request that, pending consideration of a petition, provisional or precautionary measures be taken to avoid irreparable

[44] The IACHR may grant an extension to a total of 180 days. See *Regulations of the Inter-American Commission on Human Rights*, in Buergenthal & Norris, eds., *ibid.* art. 31(6).

damage to persons (article 29). Using the 1993 *Annual Report* of the IACHR for illustration (it is the year of the first decision involving Canada), one finds that eighteen decisions (concerning six countries) deal with murder, disappearance, rape, and/or torture. These decisions regularly conclude with a finding that the respondent state failed to respect and guarantee the rights in issue; that the national authority should conduct, or continue, a proper investigation; that it should provide fair compensation to the victims or next of kin; and that it should guarantee the security of witnesses. Two decisions in the 1993 *Annual Report* deal with the admissibility of petitions against the United States — one relating to its military intervention in Panama and another with its treatment of Haitian refugees. The three remaining decisions deal with other forms of human rights allegations. One recommends that the government of Nicaragua return expropriated properties to the former owners and compensate them, a second concerns Mexican election laws, and the third is the decision in the *Joseph Case*.

The Joseph Petition and Decision

In December 1987, Cheryl Monica Joseph, her husband and eldest daughter travelled from Trinidad to Canada to visit her sister. Three months later, in March 1988, the Josephs claimed refugee status. In September 1989, Mr. Joseph died in an automobile accident and their other four children, who had remained in Trinidad in the care of a sister, joined their mother and sister in Canada. In 1992, Canada rejected their claim to refugee status and issued a departure notice requiring Mrs. Joseph and her children to leave by 13 December 1992.[45] On 10 December 1992, a mere three days before the departure notice took effect, the Inter-Church Committee for Refugees of the Canadian Council of Churches filed a petition with the IACHR on behalf of Mrs. Joseph. On the filing of the petition, the government granted a temporary stay of execution of the departure notice.

As a refugee claimant, Mrs. Joseph was subject to expedited administrative processing under the *Immigration Act*.[46] The government had implemented the

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[45] Mrs. Joseph's eldest daughter, who had accompanied her and her husband to Canada in 1987, and was of the age of majority in 1992 (being twenty years of age), was considered individually in the expedited refugee backlog procedure and was the subject of a separate departure notice. See *supra* note 4 at 40.

[46] R.S.C. 1985, c. I-2, as am. By s. 6(2) of the *Act*, the Governor in Council may designate a class of persons and establish particular rules for the grant of admission to Canada to persons within that class "notwithstanding any other regulations made under this Act." By the *Refugee Claimants Designated Class Regulations*, (21 December 1989) SOR/90-40, s. 3(1) a class of persons were designated (as applicable to Mrs. Joseph) who were in Canada on 1 January 1989, had signified before that date an intention to

procedure in late 1989 to deal with a refugee claimant backlog, then estimated at 95,000-100,000 claims. It involved a simplified three-step process which replaced the requirement that a claimant prove actual refugee status with a lesser onus: that of establishing a "credible basis" for such a claim.[47] In the first step, an immigration officer interviewed Mrs. Joseph on 27 May 1992 and determined that she could establish no humanitarian or compassionate grounds to justify an application for permanent residence in Canada. The IACHR decision reports that this first step was not directed at the refugee claim specifically, but rather at general humanitarian and compassionate considerations to determine if justification existed to warrant an application for permanent residence in Canada.[48]

The second step, involving a "credible basis hearing," focused directly on the refugee claim of Mrs. Joseph. A two-person panel (consisting of an adjudicator appointed under the *Act* and a member of the *Convention* Refugee Division of the Immigration Refugee Board) conducted a hearing to determine whether Mrs. Joseph possessed a credible basis to assert refugee status. A favourable decision required that only one member of the panel find for the claimant.[49] However, on October 29, 1992, both panel members concluded that Mrs. Joseph could not establish a well-founded belief that her return to Trinidad would lead to persecution. Accordingly, the government issued a departure notice requiring Mrs. Joseph to leave Canada by 13 December 1992. The third

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claim refugee status and were determined to have a 'credible basis' for claiming refugee status under the *Act*.

By s. 114(2) of the *Act*, the Minister is authorized to exempt any person from the regulations made under the *Act* or "... otherwise facilitate the admission of any person ... for reasons of public policy or due to the existence of compassionate or humanitarian considerations."

47 Under the *Immigration Act*, *ibid*., a refugee is defined in terms of the 1951 United Nations *Convention Relating to the Status of Refugees*, 28 July 1951, Can. T.S. 1969, No. 6 and is defined, in part, as a person with "... a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion." *Ibid.* s. 2(1).

48 *Supra* note 4 at 38. The *Immigration Act*, *supra* note 46, s. 6(5) permits an immigrant in a prescribed class to be granted landing in Canada "... for reasons of public policy or compassionate or humanitarian considerations." Section 114(1)(e) of the *Act* is the regulation-making authority permitting the Governor in Council to prescribe classes of immigrants for this purpose. It is Immigration Regulations, SOR/78-172 as amended, s. 11.2 which establishes two such classes of immigrants: (i) live-in caregivers in Canada and (ii) post-determination refugee claimants in Canada.

49 *Ibid.* s. 46(1). Before its repeal in 1992, s. 46(5) of the *Act* provided that the evidence at the hearing be "... credible or trustworthy in the circumstances of the case." (Repealed by S.C. 1992, c. 49, s. 35.)

and final step in the process, a pre-removal review of the file by senior officials of the Immigration Department, returned to the question of whether humanitarian and compassionate grounds existed to support Mrs. Joseph's plea to remain in Canada. Its determination confirmed the previous findings. On 7 December 1992, the Minister's delegate reviewed the decision (a process beyond the three-step procedure) and confirmed the departure notice, again with negative findings relative to the claimant.

In summary, the expedited processing of Mrs. Joseph's claim involved two reviews on humanitarian and compassionate grounds (steps one and three), one panel hearing directed specifically at refugee status (step two), and an additional review conducted by the Minister's delegate.

The Petition

The Joseph petition to the IACHR contains numerous allegations: it alleged that the Canadian government violated the *American Declaration*, Canadian domestic law, and Canada's international legal obligations. The petition appears not to have presented a strong argument on specific violations of the *American Declaration*[50] but, rather, to have relied on the mere existence of the deportation notice as, ipso facto, establishing those violations. The petition concentrated on three compassionate and humanitarian grounds: that Mrs. Joseph deserved to remain in Canada because of family circumstances, personal circumstances, and by virtue of a notion of minimum redress. Such "humanitarian and compassionate" grounds do not relate to any article in the *American Declaration* and appear, more properly, to be grounds of appeal under Canadian immigration law than the *American Declaration*.

The argument based on "family circumstances" stated that, as protection of the family (a right recognized in international treaties and the case law of both the U.N. Human Rights Committee and the European Court of Human Rights[51])

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[50] The petition alleged violations of five articles of the *American Declaration*, *supra* note 9; viz., the right to protection of the law against abusive attacks upon family life (art. V); the right to establish a family and to receive protection therefor (art. VI); the right to protection for children (art. VII); the right to the protection of the courts (art. XVIII); and the right of asylum (art. XXVII).

[51] The petition referred to arts. 17 and 23 of the *International Covenant on Civil and Political Rights*, *supra* note 2:

> Article 23.
>
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

may supersede the interests of the state, deportation to enforce immigration laws could, therefore, be suspended. It reasoned that depriving Mrs. Joseph and her children of their links with Canada — a husband buried in its territory, her mother and other close relatives enjoying Canadian citizenship or landed immigrants status, the formative years her children spent in Canada, and their established lives and friendships in Canada — would violate her and her children's domestic rights, notably, their right to psychological security of the person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms* and their right not to be subjected to cruel treatment as guaranteed by section 12 of the *Canadian Charter*.

The "personal circumstances" arguments reaffirmed those presented as "family circumstances" and raised two other concerns. First, the petition asserted that undue financial and administrative hardship would occur if Mrs. Joseph had to pursue an outstanding Canadian insurance claim, arising from the death of her husband, from offshore. Second, it maintained that Mrs. Joseph should not be forced to pay the travel costs of voluntarily removing herself and her children from Canada to Trinidad — recourse to which might be necessary to protect future immigration prospects to Canada.

The petition's argument on the notion of "minimum redress" alleged violations of both domestic constitutional law and international law. The most

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2. Everyone has the right to the protection of the law against such interference or attacks.;

Article 23.1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State ...

The petition also referred to art 3(2) of the *Convention on the Rights of the Child*:

Article 3(2). States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

See "The Rights of the Child *Human Rights* Fact Sheet No. 10 (United Nations, Centre for Human Rights) at 13ff for text of the *Convention on the Rights of the Child*.

Additionally, the complaint referred to the 1981 decision of the Human Rights Committee in *Aumeeruddy-Cziffra* v. *Mauritius*, UN GAOR, 16th Sess., Supp. No. 40, UN Doc.A/36/40(1981), and to four immigration decisions of the European Court of Human Rights: *Abdulaliz, Cabales and Balkandali* v. *U.K.* (1985), Eur. Ct. H.R. Ser.A, No. 94, 7 E.H.R.R. 471; *Beldjoudi* v. *France* (1992), Eur. Ct. H.R. Ser.A, No.234-A, 14 E.H.R.R. 801; *Djeroud* v. *France* (1991), Eur Ct. H.R. Ser.A, No. 191, 14 E.H.R.R. 68 (friendly settlement) and *Moustaqui* v. *Belgium* (1991), Eur. Ct. H.R. Ser.A No. 193, 13 E.H.R.R. 802. An additional decision of the European Court, *Marckx* v. *Belgium* (1979), Eur. Ct. H.R. Ser.A., No. 31, 2 E.H.R.R. 330, was cited as authority for consideration of links with grandparents as part of a family.

significant of these was that Canada's immigration program discriminated by targeting English-speaking claimants for accelerated processing,[52] that the failure to process refugee claimants within a reasonable time violated standards of fairness, and that the delays and uncertainties in processing the backlog of claimants constituted cruel treatment because it induced post-traumatic stress for claimants, particularly those separated from spouses or children.[53]

The complaint argued more generally that the IACHR need not find Canada in violation of any alleged complaints. Rather, it need only determine that, "if ... one or more of them may have occurred, this should be considered as a humanitarian and compassionate ground for staying deportation."[54] Again, this reflects an appeal under domestic immigration law rather than a specific violation of the *American Declaration*.

The Government's Reply

The reply of the Canadian government was rather exhaustive and asserted the government's adherence to both its international obligations and domestic law. In addition, the reply argued procedural grounds for dismissing the petition. In addressing the substantive grounds under the *American Declaration*, the government's reply took the position that article V of the *American Declaration* (protection against abusive attacks on family life) does not provide individuals with a right to enter or reside in the country of their choice and asserted that deportation *simpliciter*, neither violates article V, nor establishes grounds to support the presumption of a violation. Referring to decisions of the European Court of Human Rights, the European Commission of Human Rights and the

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52 The Human Rights Committee raised this concern during its review of Canada's second and third periodic reports (October 1990) under the *International Covenant on Civil and Political Rights*, *ibid.* art. 40. Canada's representative responded that the targeting of English-speaking claimants facilitated the processing of the backlog of claims by avoiding the need of translation services and that no discrimination was involved. See *Report of the Human Rights Committee*, UN GAOR, 46th Sess., Supp. No. 40, UN Doc. A/46/40 (1991) at 15, para. 61 and at 16, para. 63.

53 The *American Declaration*, *supra* note 9, provides a specific right to equality before the law (art. II) which was not included in the list of articles of the *Declaration* alleged to have been violated. It should also be noted that the *American Declaration* right to trial without undue delay and right to humane treatment (art. XXV) is expressed in terms of persons deprived of their liberty, a situation not applicable to Mrs. Joseph and her children. Accordingly, these allegations may be considered as referring to Canadian constitutional law, specifically the *Canadian Charter of Rights and Freedoms*, *supra* note 3, s. 7 (security of the person and principles of fundamental justice), s. 12 (cruel and unusual treatment) and s. 15 (equality).

54 *Supra* note 4 at 37, para. 10.

Human Rights Committee,[55] the reply established that, at international law, no violation of the right to respect family life exists where a person can establish family life in another country to which (s)he has a connection. In relation to Mrs. Joseph, the reply outlined her connection to Trinidad and attempted to demonstrate that she could re-establish her family life there. Similarly, the reply denied any violation of articles VI (the right to establish a family) and VII (the right to protection for mothers and children) merely because the state denied residency status to foreign visitors who desire it. The reply also denied a violation of article XXVII (the right of asylum) by arguing that tribunals had rejected Mrs. Joseph's claim for refugee status for lack of merit.

In response to the humanitarian and compassionate grounds raised in the petition, the government's reply argued that Mrs. Joseph's family ties continued to exist in Trinidad; that she could proceed effectively on her insurance claim by a power of attorney; and that she had not proven that she could support herself and her family in Canada, but would have to rely upon social assistance programs (in fact, she had been a recipient under these programs). Further, the reply asserted that, at each step of the expedited procedure, the administrative hearings respected the requirements of procedural fairness or due process, and provided appropriate legal remedies for Mrs. Joseph's claim.

Significantly, the reply denies a violation of article XVIII (the right to protection of the courts) by describing the system of judicial review then available, and pointing out that Mrs. Joseph had failed to avail herself of that remedy. This failure by Mrs. Joseph permitted the government to argue that she had not satisfied a critical procedural requirement: a petition to the IACHR must establish exhaustion of domestic remedies, or a good reason to be excluded from that requirement.[56] This issue was ultimately decisive.

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[55] The European Court of Human Rights cases referred to were *Abudlazia, Cabales and Balkandali* v. *U.K., supra* note 51; *Beldjoudi* v. *France, supra* note 51; *Djeroud* v. *France, supra* note 51; *Moustaquim* v. *Belguim, supra* note 51; and *Berrehab* v. *Netherlands* (1988) Eur. Court. H.R. Ser. A, No. 138, 11 E.H.R.R. 322. The decisions of the European Commission of Human Rights: *Agee* v. *The United Kingdom* (No. 7729/76) (1976), 7 Eur. Comm. H.R. R.D. 164; *X and Y* v. *The United Kingdom* (No. 5269/71) (1972), 39 Eur. Comm. H.R. C.D. 104; *X and X* v. *The United Kingdom* (Nos. 5445/72 and 5446/72) (1972) 4 Eur. Comm. H.R. C.R. 146; *X* v. *The United Kingdom* (No. 5302/71) (1972) 43 Eur. Comm. H.R. C.D. 82. A U.N. Human Rights Committee decision cited was *Aumeeruddy-Cziffra* v. *Mauritius, supra* note 51.

[56] Article 35 of the *Regulations of the Inter-American Commission on Human Rights*, as amended (1987), provides that the Commission examine whether domestic remedies have been exhausted as one of the preliminary questions to consideration of the merits of a petition. Article 37 sets out what that term means:

The Decision in the Joseph Case

The IACHR found that Mrs. Joseph had enjoyed the right to counsel and the benefit of due process rights.[57] The Commission also accepted that Mrs. Joseph could have resorted to a judicial review of the "credible basis" and "humanitarian and compassionate" hearings and that she had failed to pursue that domestic remedy.[58] Thirdly, the IACHR accepted that Mrs. Joseph could have raised alleged violations of the *Canadian Charter of Rights and Freedoms* in a constitutional challenge to the *Immigration Act* before Canadian domestic

1. For a petition to be admitted by the Commission, the remedies under domestic jurisdiction must have been invoked and exhausted in accordance with the general principles of international law.
2. The provisions of the preceding paragraph shall not be applicable when:
   a. the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have been violated;
   b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them;
   c. There has been unwarranted delay in rendering a final judgment under the aforementioned remedies.
3. When the petitioner contends that he is unable to prove exhaustion as indicated in this Article, it shall be up to the government against which this petition has been lodged to demonstrate to the Commission that the remedies under domestic law have not previously been exhausted, unless it is clearly evident from the background information contained in the petition.

(See Buergenthal & Norris, eds., *supra* note 43.)

57 It is not clear from the reasons for decision whether the statement that Mrs. Joseph had the "benefit of the right to counsel" means that she actually had the assistance of legal counsel during her immigration hearings or merely had the right to counsel which she did not exercise.

The due process rights refer to the fact that the fifteen day time limit within which to file an application for leave to seek judicial review could be extended "for special reasons" by a judge of the Federal Court (per the *Federal Court Act*, R.S.C. 1985, c. F-7, as am. by R.S.C. 1985 (4th Supp.), c. 28, s. 19); and that, in an application for leave, Mrs. Joseph had the right to either retain her own counsel or have counsel provided by the Minister at the Minister's expense.

58 The Commission accepted that all three immigration hearings — the initial and final humanitarian and compassionate reviews and the credible basis hearing — were subject to judicial review on leave being granted, to either the Federal Court, Trial Division under the general provisions of s.18 of the *Federal Court Act* R.S.C. 1985, c. F-7, or to the Federal Court of Appeal, on grounds of a breach of the principles of natural justice, under s. 28 of that *Act*. See also *An Act to Amend the Immigration Act, 1976*, S.C. 1988, c. 35; R.S.C. 1985 (4th Supp.), c. 30, in force 1 October 1989 per S.I./88-199; repealed and substituted by S.C. 1990, c. 8, s. 53, in force 1 February 1992 per S.I./92-6. The Commission did, however, note that an unsuccessful application for leave to seek judicial review was not further appealable to the Federal Court of Appeal or the Supreme Court, as appropriate.

courts.[59] In essence, the only real issue before the Commission was whether the domestic remedies "... must have been invoked and exhausted in accordance with the general principles of international law."[60]

In its analysis, the Commission applied, from the case law of the Inter-American Court of Human Rights, the notion that the "general principles of international law" require that a domestic remedy not only be formally existent, but also adequate and effective.[61] According to that case law, a remedy is adequate if "... suitable to address an infringement of a legal right ..." and effective if "... capable of producing the result for which it is designed."[62] Having established the standard, the Commission did not examine the adequacy and effectiveness of the available remedies. Instead, it held that the onus of proof to demonstrate that domestic remedies were "inadequate and ineffective" rests with the complainant, Mrs. Joseph, and that this onus had not been satisfied. The pre-condition to admissibility not having been satisfied, the Commission ruled the petition inadmissible. In its concluding declaration, the Commission found that Canada had not violated its human rights obligations but, nevertheless, invited the government to permit Mrs. Joseph to remain in Canada until completion of the court actions arising from the death of her husband.

Canadian immigration law did not remain static between the time that Mrs. Joseph originally applied for refugee status and when the domestic authorities decided her case. In its deliberations of the Joseph petition, the IACHR had for consideration a copy of the *Immigration Act* as amended in 1989, with effect on 1 January 1990. As a result, the Commission's description and understanding of the process of judicial review to either the Trial or the Appeal Divisions of the Federal Court was fundamentally flawed. Direct access to the Federal Court of Appeal on the general basis of an alleged breach of the principles of natural

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59 In June 1994, the Supreme Court of Canada affirmed a stay of proceedings granted in an action in a provincial superior court. That action had attempted to challenge the "two-member tribunal/ credible basis" process for refugee claims on constitutional grounds, in particular, the *Canadian Charter of Rights and Freedoms*, *supra* note 3, s. 7. The Court confirmed that the judge properly exercised his discretion to stay the action in deference to the comprehensive immigration jurisdiction of the Federal Court. See *Reza* v. *Canada*, [1994] 2 S.C.R. 394, (1994) 24 Imm.L.R. (2d) 117, 167 N.R. 282.

60 Per art. 37 of the *Regulations of the Inter-American Commission on Human Rights* in Buergenthal & Norris, eds., *supra* note 43.

61 *Velásquez Rodríguez Case*, (Honduras) (1988), Inter-Am. Ct. H.R. Ser. (No. 4, paras. 63ff. *Annual Report of the Inter-American Court of Human Rights*: 1988, OEA/Ser.L/V/III.19/ doc.13 (1988) 28 I.L.M. 294 at 305ff.

62 *Ibid*. at paras. 64 and 66, respectively.

justice did not exist at the relevant time. By amendments to the *Federal Court Act*, enacted in 1990 and in force in February 1992 (therefore, in effect before the processing of Mrs. Joseph's claim), the judicial review jurisdiction of the Federal Court of Appeal was restricted to fourteen specific federal boards, commissions or other tribunals including the Immigration Appeal Division and the *Convention* Refugee Determination Division of the Immigration and Refugee Board.[63] The humanitarian and compassionate reviews of Mrs. Joseph's claim would not be considered decisions of the either Division of the Immigration and Refugee Board for the purposes of permitting judicial review by the Federal Court of Appeal. When, in its reasons for decision, the Commission quoted the 1989-90 version of section 28 of the *Federal Court Act* to demonstrate Federal Court of Appeal review jurisdiction, it was quoting a version which did not represent good law at the appropriate time (May to December 1992) and was not applicable to Mrs. Joseph. Though of no significance to the merits of the decision, it is notable that subsection 30(3) of the *Immigration Act*, quoted by the Commission to support the existence of the right of Mrs. Joseph to have counsel provided at the Minister's expense, was repealed in 1992 with effect on 1 February 1993.[64] Accordingly, though that subsection was in effect in relation to Mrs. Joseph, it was repealed a mere two months later. One may easily speculate how that subsection may have coloured the Commission's favourable perception of available remedies. Nevertheless, it is likely safe to conclude that the existence of the subsection could only have been perceived to the government's advantage.

Conclusion

The benefits, if any, of Canada's membership in the OAS are not yet apparent to most observers. Nor is it clear what contemporary advantage prompted the Mulroney government to move from observer status to full membership in the Organization. The government may have determined that joining the OAS might assist developing Canadian financial and trading interests

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63 *An Act to Amend the Federal Court Act*, S.C. 1990, c. 8, s. 8 amending R.S.C. 1985, c. F-7 *supra* note 57, ss. 28-35.

64 See *An Act to Amend the Immigration Act*, S.C. 1992, c. 49, s. 19 (in force 1 February 1993) amending s. 30, R.S. 1985 c. 28 (4th supp.), s. 9. In addition, the Commission quoted s. 46.01(6), which also was repealed. The section provided that either the adjudicator or the member of the Refugee Division could determine that a credible basis for a claim of refugee status had been proven on the basis of any credible or trustworthy evidence.

in the evolving regional economy.[65] One issue to which the Canadian government does not appear to have given sufficient consideration when deciding to join the OAS was the human rights commitments that membership brought with it. The fact that Canada has yet to determine whether or not it will ratify the *American Convention* some seven years after gaining OAS membership provides strong proof of the low priority, or lack of consideration, its decision-makers gave to the human rights commitments of the OAS.

Membership in the OAS creates responsibilities, particularly for a state like Canada which claims a respected international human rights record. One such responsibility is to commit financial and human resources to respond to, or address, human rights complaints lodged against it. Submitting itself to the scrutiny of the IACHR has added yet another body to which the Canadian government must commit resources and effort. This is a significant responsibility not only in defending the actions of the state in an international forum but also in contributing to the development of human rights jurisprudence for the regional system. The Canadian experience before the Human Rights Committee under the *International Covenant on Civil and Political Rights* will be invaluable to those officials charged with formulating Canada's responses to human rights petitions submitted to the IACHR. To date, there have been at least thirty-nine complaints against Canada before the Human Rights Committee, the overwhelming majority of which have been declared inadmissible.[66]

Canada has demonstrated its expertise in international human rights matters in its reply to the *Joseph* petition. Its legal arguments refer to the decisions of the Human Rights Committee as well as of the European Commission and Court of Human Rights. The expertise enjoyed by the state will require petitioners and those who represent them to utilize a considerable understanding of international human rights law.

Although it was ultimately unsuccessful, the submission of the *Joseph* petition induced the government to grant a temporary stay of the departure

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[65] See E.J. Dosman, "Canada and Latin America: The New Look" (1992) 47 International Journal 529 at 534ff and P. McKenna, "Canada's Policy Toward Latin America: A Statist Interpretation" (1994) 49 International Journal 929 at 942ff.

[66] In 1994, news reports indicated that the Human Rights Committee agreed to consider the 39th complaint which alleges that Canada's policy of deporting criminals who, as children, had immigrated to Canada violates its international human rights commitments under the *International Covenant on Civil and Political Rights*, *supra* note 2. See, for example, "Canada's Deportation Rules Fare Human Rights Challenge: UN Probes Expulsion of Criminals Who Immigrated as Children" *The Globe and Mail* (12 August 1994) A6. To date, no decision has been released.

notice against the complainant. This might induce refugee claimants to employ international human rights fora as a practical device to delay involuntary departures from Canada. This very fact raises again the question of resource allocation and the value of Canada's membership in the OAS. If one effect is to provide individuals with a second international alternative to resolve human rights complaints, Canada should first have determined the value of the OAS human rights processes and what potential benefit Canadian input could add to their development. Canada played a founding role in the development of the United Nations human rights instruments and Canadians have contributed greatly to the development of the substantive rights and processes reflected in the United Nations human rights treaties. Canada, however, has had no direct influence on the formulation or development of OAS human rights obligations. Whether the *American Declaration*, or perhaps eventually the *American Convention*, will make a real contribution to the development of human rights for Canadians remains to be determined, as does the question of what real contribution Canada will make to the OAS.

Mrs. Joseph and her family did not remain in Canada. It is unclear whether they left voluntarily, perhaps hoping that such an act would benefit a future claim for residency, or whether the government implemented its departure notice. Canadian immigration officials refuse to comment on these matters on the ground that they are obliged to respect the confidentiality of such records.