

Cambridge, Massachusetts, March 31, 2004

Santiago Canton
Executive Secretary
Inter-American Commission on Human Rights
1889 F Street, N. W.
Washington, D.C. 20006
United States of America

BY COURIER

Dear Mr. Canton:

The Canadian Council for Refugees, Vermont Refugee Assistance, Amnesty International Canada, Freedom House (Detroit, MI), Global Justice Center, Harvard Immigration and Refugee Clinic, and Harvard Law School Advocates for Human Rights (hereinafter “the petitioners”) jointly file this petition against Canada, on behalf of John Doe 1, John Doe 2, John Doe 3, and nameless others (hereinafter “the victims”), for violation of the fundamental rights of the victims to seek asylum in Canada.

Beginning on January 27, 2003, Canadian immigration authorities implemented a new procedure whereby it has returned refugee claimants at the United States-Canada border to the United States without seeking assurances that these claimants would be permitted to return to Canada for hearings. As a result, refugee claimants, including the named victims, were detained in the United States for many months, often in violation of international legal standards. While in detention in the United States, claimants missed their appointments for their refugee status interviews with Citizenship and Immigration Canada, lost control of evidentiary documents, and were separated from family members. In several known cases, such as those of the John Doe victims in this case, the United States deported refugee claimants, who were entitled to seek asylum in Canada, to the countries from which they had fled persecution.

Canada’s action, in “directing back” refugee claimants to the United States pursuant to the January 27, 2003 policy, violates their right to seek asylum under Article XXVII of the American Declaration of the Rights and Duties of Man (American Declaration), and the prohibitions against *refoulement* in Article 33 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention). Further, by failing to provide any administrative or judicial measures to appeal Canada’s decision to send them to the United States, Canada also violates refugee claimants’ right to a fair trial under Article XVIII of the American Declaration.¹

In light of these violations, we request that the Commission:

¹ This petition specifically challenges Canada’s implementation of the January 27, 2003 direct back policy. The petition does not endorse the direct back policy in existence before this time, except for its requirement that Citizenship and Immigration Canada (CIC) receive an assurance from the United States Bureau of Citizenship and Immigration Services (BCIS) that the claimant will be able to return to Canada for his or her eligibility determination interview. Nor does the petition endorse any future refugee policies instituted as a consequence of the Safe Third Country Agreement signed by Canada and the United States on December 5, 2002.

- Initiate formal proceedings against Canada;
- Immediately issue precautionary measures seeking the suspension of the January 27, 2003 direct back policy;
- Find that Canada's refusal to grant hearings to asylum applicants after January 27, 2003 constitutes a violation of the guarantees of Articles XXVII and XVIII of the American Declaration and Article 33 of the Refugee Convention; and
- Order Canada to revise its refugee and asylum policies in accordance with its international obligations under the American Declaration, the Refugee Convention, and general principles of international law.

I. GENERAL BACKGROUND

A. Administrative Context for the Direct Back Policy

Canada returns refugee claimants, who arrive at Canadian border points of entry, to the United States under a procedure referred to as a "direct back." Direct backs are not a new practice in Canada's refugee processing procedures. However, the January 27, 2003 policy change eliminated, without adequate explanation or justification, critical safeguards for refugee claimants that had existed in the policy's prior formulations.

1. Administrative authorization for the direct back policy

For refugee claimants who arrive at Canadian border points of entry, access to the Canadian refugee and asylum determination system begins with an initial screening procedure at the Canadian border. All refugee claimants must go through an in-person examination, security screening, and criminality check. At this examination, Citizenship and Immigration Canada (CIC) officers determine whether the refugee claim is eligible to be heard.

If the officer deems the claim eligible, he or she refers the refugee claimant to the Refugee Protection Division of the Immigration and Refugee Board, and permits the claimant to remain in Canada with certain rights and access to refugee services. If the officer deems the claim ineligible, the claimant is entitled to file for judicial review in the Canadian Federal Court. Certain ineligible claimants are also entitled to file for a Pre-Removal Risk Assessment.

Usually, a CIC officer conducts the initial eligibility determination hearing when a refugee claimant arrives at a border point of entry. However, in recent years, CIC has begun to apply a general provision of the Canadian Immigration and Refugee Protection Regulations, Regulation 41, to postpone the eligibility determination hearings. Regulation 41 states that

...an officer who examines a foreign national who is seeking to enter Canada from the United States 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.²

² Immigration and Refugee Protection Regulations, Art. 41 (2002) (Can.).

CIC refers to this temporary return of foreign nationals to the United States as a “direct back.”³ Although Regulation 41 was not originally intended for use with refugee claimants, CIC’s administrative guidelines now authorize officers to apply Regulation 41 to refugee claimants and postpone eligibility determinations in “exceptional circumstances.” CIC guidelines regarding what constitute such exceptional circumstances have become increasingly lenient.

Prior to January 2003, the use of direct backs was strongly regulated. In a directive issued on October 11, 2001, CIC instructed its officers that direct backs

may be applied to refugee claimants arriving from the United States, but only in exceptional circumstances and on a case by case basis where, in the view of the port or area manager, pressures are so great that it is either impossible or impracticable to process them on arrival; *and* only where the officer is satisfied that the applicant will be able to return to Canada to pursue his claim.⁴

The directive further stated 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. In the absence of positive confirmation, return to the United States cannot be effected.”⁵

However, on January 27, 2003, CIC changed this policy in a new set of guidelines, entitled *Instructions for Front-end Processing of Refugee Protection Claims (Instructions)*.⁶ These *Instructions* continued to qualify the use of direct backs, stating that “direct backs are not supposed to be used indiscriminately but rather selectively and responsibly as tools to manage unusual flows and/or unavailability of critical resources when the full front-end processing cannot be [completed].”⁷ The *Instructions* also cautioned that direct backs “should be used judiciously and only after all other efforts have been made to deploy staff from other offices.”⁸

Yet, in direct reversal of CIC’s earlier policy, these *Instructions* eliminated the fundamental safeguard in the direct back policy: the requirement that CIC obtain an assurance from the United States Bureau of Citizenship and Immigration Services (BCIS, formerly the USINS) that the refugee claimant would be able to return to Canada for his or her eligibility determination interview.⁹ Instead, the new *Instructions* explicitly state that “[c]onfirmation from USINS that the claimant will be made available for the future examination on the date and time specified is

³ Citizenship and Immigration Canada (CIC), *CIC Refugee Claimant Deferral and Temporary Return Policy* (Oct. 11, 2001).

⁴ *Id.* Emphasis in original.

⁵ *Id.*

⁶ Citizenship and Immigration Canada, *Instructions for Front-end Processing of Refugee Protection Claims* (Jan. 27, 2003).

⁷ *Id.*

⁸ *Id.*

⁹ In 2002, the United States Congress restructured and relocated many of its administrative agencies, including the Immigration and Naturalization Service (INS), under a new Department of Homeland Security. Beginning on March 1, 2003, a new Bureau of Citizenship and Immigration Services (BCIS) began to administer many of the immigration and naturalization services formerly provided by the INS.

not required.”¹⁰ The *Instructions* do not state any means by which refugee claimants may appeal the direct back decision.

When challenged to provide reasons for the new policy, Canadian authorities have asserted only that the United States is now a safe place for refugee claimants.¹¹

2. The context of the policy change

The timing of the direct back policy change was within the context of an unexpected increase in refugee claims at the Canadian-United States border at the end of 2002 and beginning of 2003. On December 5, 2002, the United States and Canada signed the final draft text for a Safe Third Country Agreement (STCA). Signed as part of a larger Smart Border Agreement, the STCA is intended to regulate the adjudication of refugee and asylum claims between the two countries. The STCA will not enter into force until both governments have finalized regulations, which has not yet occurred. However, some refugee claimants mistakenly thought that their asylum claims would be precluded beginning on January 1, 2003, and traveled to the Canadian-American border towards the end of 2002 to apply for asylum in Canada.¹²

The numbers of refugee claimants further increased at this time as the United States started enforcing its new National Security Entry Exit Registration System (NSEERS). Under the NSEERS program, the United States Department of Homeland Security required men, who were between 16 and 25 years of age and were either undocumented or on temporary visas to the United States from any of more than twenty mostly Muslim countries, to register with BCIS. It ordered the first round of non-immigrants to register by December 16, 2002 (and later extended the deadline to February 7, 2003), the second round by January 10, 2003 (and later extended the deadline to February 7, 2003), the third round by March 21, 2003, and the fourth round by April 25, 2003. During the registration process, the BCIS arrested, detained, and deported many men amid allegations of discriminatory treatment by BCIS.¹³ These actions provoked a climate of

¹⁰ *Id.* Emphasis added.

¹¹ See e.g., Statement by Hon. Denis Coderre (Minister of Citizenship and Immigration) in response to question by Ms. Madeleine Dalphond-Guiral (Laval Centre, BQ), House of Commons (37th Parl., 2d sess.) (Can.), Feb. 6, 2003, available at http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/054_2003-02-06/ques054-E.htm#SOB-407452 (stating that “...those who have an appointment with Immigration Canada, if detainees, have for the most part been released by the American authorities. No formal agreement is required.”); Standing Comm. on Citizenship and Immigration, (37th Parl. 1st sess.) (Can.), *Hands Across the Border: Working Together at our Shared Border and Abroad to Ensure Safety, Security and Efficiency* (Dec. 2001), available at <http://www.parl.gc.ca/InfoComDoc/37/1/CIMM/Studies/Reports/cimm03rp-e.htm> (“Whether the U.S. is officially designated as a “safe third country” or not, refugee claimants are clearly not at risk of persecution while on American soil. With the agreement of our U.S. counterparts, refugee claimants should, when warranted due to resource constraints, be directed back to the U.S. until Canadian authorities can satisfy themselves that the claimants do not pose a security risk.”); Minister of Citizenship and Immigration (Can.), *Government Response to the Report of the Standing Committee on Citizenship and Immigration Report “Hands Across the Border”* (May 2002), available at www.cic.gc.ca/english/pub/hab.html (“...the United States does not pose a risk to persons who choose to make a refugee claim at a Canadian border.”).

¹² See e.g., Colin Nickerson, *Asylum Seekers Turn to Canada*, Boston Globe, Jan. 4, 2003, at A1; Ingrid Peritz, *Fears Spark Surge in Rate of Asylum Seekers at Border*, Globe & Mail (Montreal, Can.), Jan. 3, 2003, at A6.

¹³ See e.g., Letter to Attorney-General John Ashcroft from Russell D. Feingold (U.S. Senator), Edward M. Kennedy (U.S. Senator), and John Conyers (U.S. Representative) as of Dec. 23, 2002, available at

fear within the United States for undocumented immigrants and refugee claimants, causing some claimants to apply for asylum at the Canadian border as well.¹⁴

B. Impact of the Direct Back Policy

After issuing the new *Instructions* on January 27, 2003, CIC began using direct backs as standard operating procedure at many of its border offices. It is difficult to estimate the numbers of refugee claimants directed back for the very reason that they are at risk: the effects of the direct back policy – illegal detention and *refoulement* - render its consequences invisible.

1. The immediate consequences of the direct back policy

After the issuance of the *Instructions* on January 27, 2003, CIC began using direct backs as standard procedure at Canadian border points of entry.¹⁵ The exact number of refugee claimants directed back is unknown because the Canadian government has not publicly released official statistics on the numbers of direct backs issued.¹⁶ Thus, Canadian and United States NGOs have provided basic information on the direct back program. These NGOs obtained the information from the claimants themselves, who approached the organizations for assistance in the policy's aftermath.

Even though the *Instructions* stated that the direct backs were supposed to be issued “selectively and responsibly,” many CIC offices issued direct backs routinely during this time. For example, beginning January 30, 2003, CIC Lacolle began directing back all refugee claimants (except unaccompanied minors), irrespective of the numbers of claimants arriving on a particular day.¹⁷ Even when some claimants failed to appear for their appointments, CIC Lacolle continued to issue direct backs.¹⁸ Similar procedures took place at CIC's Fort Erie and Windsor offices.¹⁹

http://www.house.gov/judiciary_democrats/dojentryexitltr122302.pdf; American Civil Liberties Union Letter to the Department of Justice on the ‘Registration and Monitoring of Certain Nonimmigrants,’ Program (NSEERS), Apr. 2, 2003, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12249&c=206>. For more information about the context for refugee claimants’ fear of the registration process, see also United States Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2003), available at <http://www.usdoj.gov/oig/igspeccr1.htm> (denouncing the United States government’s treatment of aliens held on immigration charges in connection with the investigation of the Sept. 11, 2001 terrorist attacks).

¹⁴ See e.g., DeNeen L. Brown, *Pakistanis Find Cool Reception in Canada*, Wash. Post, Mar. 19, 2003, at A24.

¹⁵ Canadian Council for Refugees (CCR) Letter to Minister of Citizenship and Immigration, Feb. 10, 2003, available at www.ocasi.org/sys/report_article_print.asp?reportID=106. [hereinafter CCR Letter to Minister of Citizenship and Immigration]

¹⁶ At most, Canadian authorities have stated unofficial numbers in newspaper articles or in private conversations with refugee advocates. See e.g., Catherine Solyom, *Refugees Failing to Turn Up*, *Gazette* (Montreal, Can.), Feb. 7, 2003 (stating that, among 100 back refugee claimants who were to return from Feb. 3 to 6, nine did not return); Catherine Solyom, *Refugee Claimants Turned Back at Lacolle are Often Detained by U.S. Authorities*, *Gazette* (Montreal, Can.), Mar. 3, 2003 (suggesting that about 25% of families scheduled to appear for eligibility determination interviews between Jan. 30 and Feb. 28, 2003 did not show up).

¹⁷ CCR Letter to Minister of Citizenship and Immigration, *supra* note 15.

¹⁸ *Id.*

¹⁹ *Id.* See also Canadian Council for Refugees (CCR), “Impacts of Directing Refugee Claimants Back to the United States” (Feb. 2003), available at www.ocasi.org/sys/report_article_print.asp?reportID=107. [hereinafter Impacts of Directing Refugee Claimants Back to the United States]

Since each CIC office made ad-hoc direct back decisions, refugee claimants faced uncertainty as to whether they would be able to apply for refugee status when they arrived at Canadian border points of entry, when their interview would be held, and where and how to wait in the United States.

CIC directed claimants back to the United States even when they might face suffering or hardship. Those directed back included: sick or disabled claimants, women in advanced states of pregnancy, severely traumatized claimants, and claimants without any resources to look after themselves in the United States.²⁰ Directed back claimants were often sent back to the United States in the evening, when BCIS resources were low.²¹ As a result, claimants waited many hours in uncomfortable accommodations and some were released in the middle of the night.²²

Furthermore, Canadian authorities failed to provide any formal arrangements for the safety or care of the asylum applicants directed back to the United States. Once returned to the United States, some refugee claimants had to wait six to seven weeks for their appointment to enter Canada.²³ Many claimants had no means of supporting themselves during this time. Near Lacolle, the Salvation Army and Vermont Refugee Assistance responded to the crisis by providing emergency shelter, but the need was far beyond their means.²⁴ The numbers of claimants and long waiting times also overwhelmed centers assisting refugee claimants in Detroit, Michigan and Buffalo, New York.²⁵

2. The consequences of the direct back policy

CIC's rationale that all claimants directed back would be able to appear for their interviews was unfounded. In unofficial statements, CIC reported that in a significant number of the scheduled appointments at Lacolle and other points of entry, claimants failed to appear.²⁶ In some of these cases, the refugee claimant was still in the United States in detention or had been returned to his or her country of origin.

a. Refoulement of refugee claimants

The most serious consequence of the direct backs has been the *refoulement* of refugee claimants entitled to an eligibility determination hearing in Canada. In several known cases, such as those of the John Doe victims *infra*, the United States government deported refugee claimants back to their country of origin, despite the claimants' pending refugee determination interviews in

²⁰ See Impacts of Directing Refugee Claimants Back to the United States, *supra* note 19.

²¹ *Id.*

²² *Id.*

²³ Canadian Council for Refugees, "Forced returns of refugee claimants to the US by the Canadian Government: Questions and Answers" (Mar. 2003). [hereinafter Forced returns of refugee claimants]

²⁴ See e.g., *id.*; Vermont Refugee Aid Group Says Policy Thins Resources, N.Y. Times, Mar. 13, 2003, at A17; Catherine Solyom, *Pakistanis in U.S., Vermont Volunteers Blame Canada*, Montreal Gaz., Mar. 12, 2003.

²⁵ See e.g., Forced returns of refugee claimants, *supra* note 23; Francis X. Donnelly, *Refugees seek safe harbor in Canada*, Detroit News, Mar. 4, 2003, at 1 (citing overcrowding at shelters in Detroit, Michigan); Michael Powell, *Pakistani Exodus To Canada Brings Waits, Crowding*, Wash. Post, Feb. 1, 2003, at A3 (citing overcrowding at shelters in Plattsburgh, New York); Edward Alden, *Shadow of September 11 casts gloom over American dream*, Fin. Times, Feb. 19, 2003, at P18 (citing overcrowding at shelters in Buffalo, New York).

²⁶ See Impacts of Directing Refugee Claimants Back to the United States, *supra* note 19. See also note 16 *supra*.

Canada. Even where the United States determined that claimants, who still had eligibility determinations in Canada, could not remain in the United States, the United States did not allow the claimants to return to Canada. Instead, the United States government removed them to their countries of origin.

In doing so, the United States disregarded the substantive and procedural differences between Canadian and United States immigration, refugee, and asylum laws, which might cause a refugee claimant, who is eligible for refugee status in Canada, to be ineligible for any form of relief from deportation in the United States.²⁷ Refugee claimants, like the John Doe victims *infra*, were unable to protect themselves in these cases because they did not have the legal knowledge or access to adequate legal resources to defend against BCIS' actions.

b. Detention of refugee claimants

Another serious consequence of the direct backs has been the illegal detention of asylum seekers in the United States. International human rights standards clearly mandate that, as a general practice, those seeking asylum should not be detained.²⁸ If refugee claimants are detained, they are entitled to humane treatment, including the use of separate detention facilities from common prisoners; the opportunity to make regular contact and receive visits from friends, relatives, religious, social, and legal counsel; and the opportunity to receive medical treatment and psychological counseling, where appropriate.²⁹ Refugee claimants are also entitled to certain

²⁷ There are several ways in which a refugee claimant might receive different levels of protection in Canada compared to the United States. For example, the United States has certain procedural requirements, unrelated to the merits of a claim, which disqualify certain persons from applying for asylum, such as the requirement that claimants apply for asylum within one year of arriving to the United States. This requirement is clearly inconsistent with the requirements of the Refugee Convention; Canada does not have such a requirement. *See e.g.*, UNHCR, Comments on the United States' Proposed Rules on "Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens: Conduct of Removal Proceedings; and Asylum Procedures" (Feb. 4, 1997), *available at* <http://www.usaforunhcr.org/usaforunhcr/dynamic.cfm?ID=122> ("Failure to submit an asylum request within a certain time limit, or the failure to fulfill other formal requirements, should not lead to an asylum request being excluded from consideration. The US is obliged to provide international protection to refugees regardless of whether a filing deadline has been met."). As a second example, in contrast to every other country in the world, the United States has a higher standard for withholding of removal than asylum. While asylum is a discretionary remedy in the United States, withholding of removal is a mandatory remedy that codifies the prohibition against *refoulement* as stated in Article 33 of the Refugee Convention. The United States Supreme Court, however, has interpreted the standard of proof for each remedy differently; while the standard is "well-founded fear" for asylum, the governing standard for withholding requires that an application be supported by evidence establishing that it is "more likely than not" that the claimant would be subjected to persecution on one of the specified grounds. Thus, in the United States, a refugee claimant who meets the "well-founded fear" standard, but is denied asylum for other reasons, may still be returned to his or her country of origin if he or she fails to meet the higher withholding standard. *See generally* James C. Hathaway & Anne K. Cusick, *Refugee Rights are not Negotiable*, 14 Geo. Immigr. L.J. 481 (2000) (demonstrating that the United States Supreme Court has systematically failed to comply with international refugee law in its interpretation of refugee rights).

²⁸ *See e.g.*, Refugee Convention, Articles 31(1), (2). *See also* United Nations High Commissioner for Refugees' (UNHCR) Guidelines on the Detention of Asylum Seekers (1995) [hereinafter UNHCR Guidelines]; Report on Terrorism and Human Rights, Inter-Am. C.H.R., OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), para. 380. [hereinafter Report on Terrorism]

²⁹ UNHCR Guidelines, *supra* note 28.

minimum procedural guarantees.³⁰ Yet human rights organizations have documented that the United States routinely violates its international obligations to refugee claimants in these respects.³¹

In 2003, as already mentioned above, the United States routinely arrested and detained undocumented persons in the United States as part of its NSEERS program. Thus, those refugee claimants who were directed back from Canada, especially male refugee claimants, were subject to detention as well.³² The United States government has not released figures about how many refugees BCIS detained or deported within this time period, or how many of these persons had been issued direct backs in Canada.

As part of their detention procedures, BCIS officials often seized refugee claimants' paperwork and property, including direct back letters and evidence for refugee claims.³³ BCIS officials did not demonstrate adequate consideration for refugee claimants' direct back interviews in Canada. For example, BCIS released some claimants from detention on bail. To be released, many refugee claimants were required to post substantial bonds ranging from \$1500 to \$20,000.³⁴ However, BCIS then scheduled some of these claimants' subsequent BCIS hearings in conflict with the claimants' CIC direct back interviews. Thus, to appear for their CIC appointments, some claimants were forced to abandon their BCIS proceedings, thereby losing the money posted as bail.³⁵ By March 2003, it was calculated that refugee claimants directed back had collectively paid over \$100,000 in bonds to the United States government.³⁶

BCIS placed detained refugee claimants into jails with the general criminal population, including in Oneida County Jail in Oriskany, New York; Batavia Federal Detention Facility in Batavia, New York; and Monroe County Jail in Monroe, Michigan.³⁷ Once in jail, refugee claimants had limited ability to contact family members or attorneys.³⁸ Families were unaware of the whereabouts of the detained member, and even though free to return to the Canadian border,

³⁰ See *id.*; UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (1999).

³¹ See e.g., Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (Sept. 1998), available at <http://www.hrw.org/reports98/us-immig/>; Physicians for Human Rights, *From Persecution to Prisons: The Health Consequences of Detention for Asylum Seekers* (June 2003), available at http://www.phrusa.org/campaigns/asylum_network/detention_execSummary/dr12-leg.html#8; Human Rights First, *In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security* (2004), available at http://www.humanrightsfirst.org/about_us/events/Chasing_Freedom/asylum_report.htm.

³² See e.g., Impacts of Directing Refugee Claimants Back to the United States, *supra* note 19; Susan Sachs, *U.S. Crackdown Sets Off Unusual Rush to Canada*, N.Y. TIMES, Feb. 25, 2003, at A1; Catherine Solyom, *Refugee Claimants Turned Back at Lacolle Are Often Detained by U.S. Authorities*, *Gaz.* (Montreal, Can.), Mar. 3, 2003; Margaret Phillip, *Pakistanis Flocking to Canada*, *Globe & Mail* (Toronto, Can.), Mar. 15, 2003, at A9; Francis X. Donnelly, *Refugees seek safe harbor in Canada*, *Detroit News*, Mar. 4, 2003, at 1.

³³ See Impacts of Directing Refugee Claimants Back to the United States, *supra* note 19.

³⁴ See Forced returns of refugee claimants, *supra* note 23; Impacts of Directing Refugee Claimants Back to the United States, *supra* note 19.

³⁵ *Id.*

³⁶ See Forced returns of refugee claimants, *supra* note 23.

³⁷ See Impacts of Directing Refugee Claimants Back to the United States, *supra* note 19.

³⁸ *Id.*

families were reluctant to return for the interview without the detained member.³⁹ Many families did not know that they could do so.

Furthermore, once detained, refugee claimants had little or no access to legal representation. Once an asylee has been detained, there is little that non-governmental organizations can do. Detainees have the right to legal representation, but are not necessarily afforded the opportunity. The United States Executive Office for Immigration Review provides detainees with a list of legal advocates as part of its Pro Bono Program. However, this is not necessarily a guarantee of representation. The majority of the organizations listed do not accept collect calls, and detainees may not receive calls. Even if communication between the advocate and the detainee is achieved, there is no guarantee that the advocate will be able to take the case due to significant backlogs. Some agencies also focus their limited resources on the most promising cases, and thus those refugee claimants with cases that are more difficult to verify are not represented.

C. Specific Cases⁴⁰

Each of the victims below arrived at the Canadian border, made a refugee claim, and was directed back to the United States to await his initial eligibility determination hearing. As a consequence of being issued a direct back from Canada, each victim was arrested in the United States, detained, and subject to *refoulement* to his country of origin. Each was thereby deprived of his right to receive a refugee determination hearing and seek asylum in Canada.

1. John Doe 1

John Doe 1 applied for asylum in Canada at the CIC Windsor office in early April 2003. At this time, John Doe 1 was approximately 23 or 24 years old. He had fled from Malaysia by himself about one and half years earlier. He had made attempts to seek asylum in the United States, but became ineligible to apply for asylum in the United States after being defrauded by someone who had misrepresented himself as an immigration attorney. When John Doe 1 arrived at the CIC office, he was issued an appointment for an eligibility determination interview three days later. CIC told him to return to the United States until his interview date.

However, after leaving Canada and arriving in the United States, an officer from BCIS arrested John Doe 1 for being present in the United States without proper documentation. BCIS considered it irrelevant that John Doe 1 had an eligibility determination interview scheduled with CIC. BCIS took John Doe 1 to the Monroe Detention Facility in Monroe, Michigan. He was kept at that facility for a few weeks before being transferred to another detention facility.

Because he was in detention in the United States, John Doe 1 was not able to attend his interview with the Canadian authorities. He wrote letters requesting assistance to the United Nations and Canada but did not receive replies. He remained in detention for approximately three to four months. BCIS deported him back to Malaysia in July or August 2003.

³⁹ *Id.*

⁴⁰ The summaries of the circumstances of the process and detention of John Does 1, 2, and 3 are based on the attached affidavit of Witness One.

2. John Doe 2

John Doe 2 applied for asylum in Canada at the CIC Windsor office in January 2003. At the time, John Doe 2 was approximately 30 years of age. He had fled from Pakistan by himself a few years earlier. When he arrived at the CIC office, he was issued a future appointment date for an eligibility determination interview. CIC told him to return to the United States until his interview date.

However, after leaving Canada and arriving back to the United States, an officer from BCIS arrested John Doe 2 for being present in the United States without proper documentation. The BCIS considered it irrelevant that John Doe 2 had an eligibility determination interview scheduled with CIC. BCIS took John Doe 2 to the Monroe Detention Facility in Monroe, Michigan.

Because he was in detention in the United States, John Doe 2 was not able to attend his asylum interview with the Canadian authorities. He wrote letters requesting assistance to the United Nations and Canada. In April, he received a response from the Canadian government, which stated that it could not provide assistance because he was in United States detention. The Canadian government suggested that he return to Pakistan and then apply to enter Canada from there. John Doe 2 remained in detention at the Monroe Detention facility for approximately eight months. BCIS deported him back to Pakistan in approximately August 2003.

3. John Doe 3

John Doe 3 and his family applied for asylum in Canada at the CIC Windsor office around August 2003. At the time, John Doe 3 was approximately 50 years old. He was married and had two young children. John Doe 3, his wife, and their two children had fled Albania together. When they arrived at the CIC office, they were issued an appointment for an eligibility determination interview. CIC told them to return to the United States until their interview date.

However, after John Doe 3 left Canada and arrived back in the United States, an officer from BCIS arrested him for being present in the United States without proper documentation. BCIS did not arrest John Doe 3's wife and children. BCIS considered it irrelevant that John Doe 3 and his family had an eligibility determination interview scheduled with CIC. BCIS took John Doe 3 to the Monroe Detention Facility in Monroe, Michigan.

Because he was in detention, John Doe 3 was not able to attend his asylum interview with the Canadian authorities. His wife also missed the interview since she was worried about his safety and hoped they could cross into Canada together. His wife went to Freedom House, a local Michigan nonprofit that provides assistance to refugee claimants, who helped her obtain another interview date for herself and the children. John Doe 3 wrote letters requesting assistance to the United Nations and Canada but did not receive replies. He remained in detention in the United States for approximately three to four months. BCIS deported him back to Albania in late October or early November 2003. His wife and children are currently in Canada.

II. ADMISSIBILITY

A. Competence Ratione Materiae, Personae, Temporis, and Loci

Canada has violated the John Does' and other victims' rights under the American Declaration of the Rights and Duties of Man. The Commission has competence *rationae personae, materiae, temporis*, and *loci* to hear this case.

1. Rationae personae

The Commission is competent *ratione personae* to examine the petition. Under Article 23 of the Commission's Rules of Procedure, the petitioners have standing to bring the claim since the victims of this case – John Doe 1, John Doe 2, John Doe 3, and nameless others – were subject to the jurisdiction of Canada at the time of the alleged violations, and the petitioners are non-governmental organizations legally recognized in Canada and the United States.

2. Rationae materiae

The Commission is competent *ratione materiae*. The petition alleges violations of human rights protected by the American Declaration of the Rights and Duties of Man. Specifically, Canada has violated Articles XXVII (Right to asylum) and XVIII (Right to a fair trial) of the American Declaration. The Commission is also competent to hear the claim under Article 33 of the Refugee Convention for the purpose of assisting it in its interpretation of Article XXVII.⁴¹

3. Rationae temporis

The Commission is competent *ratione temporis*. Canada ratified the Charter of the Organization of American States (OAS) in 1990, and is thereby subject to the Commission, under the American Declaration, in respect to individual complaints. Article 20 of the Commission's Statute, and the Rules of Procedure of the Commission, authorize the Commission to consider the violations enumerated in this petition, which occurred after Canada joined the OAS.

4. Rationae loci

The Commission is competent *ratione loci*. The petition alleges violations of rights protected in the American Declaration within the territory of Canada, a state subject to the Commission's jurisdiction under that instrument.

⁴¹ See Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System, Inter-Am. C.H.R., EA/Ser.L/V/II.106, Doc. 40 rev. (2000), paras. 38. [hereinafter Canada Report] See e.g., Case 10.675, Report No. 51/96, United States, Mar. 13, 1997, Annual Report of the IACHR 1996, paras. 151-57 [hereinafter Haitian Interdiction Case]; Case 12.071, Report No. 6/02, 120 Cuban Nationals and 8 Haitian Nationals Detained in the Bahamas (Bahamas), Feb. 27, 2002, Annual Report 2002, paras. 42-43. [hereinafter Case 12.071(Bahamas)]

B. Deadline for Submission of the Petition

This petition has been filed within a reasonable period of time, less than a year of the events detailed in the petition. Article 32 of the Commission's Rules of Procedure indicates that the petition must be presented within six months from the time the petitioner is notified of the final decision that has exhausted domestic remedies, or if the exhaustion requirement is not relevant, then it shall be filed within a reasonable period of time. As argued *infra*, the exhaustion requirement is not relevant in this case.

C. Duplication of Procedures

This petition satisfies the requirements of Article 33 of the Commission's Rules of Procedure because the petitioners are unaware of any other petitions with the same subject matter pending before any other international organization. To the best of their knowledge, petitioners also have not reproduced a petition already examined by this or any other international organization.

D. Characterization of the Facts Alleged

As required by the Commission's Rule of Procedure Article 34, this complaint refers to facts that establish a violation of the rights guaranteed by Articles XXVII and XVIII of the American Declaration. In addition, the Commission should consider the victims' claims relating to Article 33 of the 1951 Convention Relating to the Status of Refugees (and the 1967 Protocol Relating to the Status of Refugees) in the merits phase of the petition.

E. Exhaustion of Domestic Remedies

This petition meets the exhaustion of domestic remedies requirement of Article 31 of the Commission's Rules of Procedure. Article 31(1) provides that, in order to decide on the admissibility of a matter, the Commission shall verify whether the victim has pursued and exhausted all remedies of domestic legal system in accordance with the general principles of international law.

Article 31(2) states that the domestic remedies need not be exhausted if: "(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."

This case is admissible on three grounds: First, Canada has not afforded domestic remedies for the rights violated, and thus the victims are excused from the exhaustion requirement under Article 31(2)(a). Second, even if the Commission finds that domestic remedies are available, the exhaustion requirement is still inapplicable because the remedies provided are inadequate and ineffective. Third, as an alternative to the second ground, the victims are excused from exhausting any available remedies, because the victims have been denied access to Canada's domestic remedies under the exception of Article 31(2)(b).

1. Under Article 31(2)(a), the victims are excused from exhausting domestic remedies because Canada has not afforded due process of law for protection of the rights that have been violated.

This case is admissible under Article 31(2)(a) because no domestic remedies exist in Canada to contest a direct back. There are no administrative or legislative codes that specify how a refugee claimant may appeal a direct back either at the time of issuance or at a later time. When John Doe 2 wrote to the Canadian authorities from the United States requesting assistance, these authorities conceded that no domestic remedy exists: it replied that he should return to Pakistan and then apply to enter Canada from there.

2. The victims are also excused from exhausting domestic remedies because, if any remedies are available, they are inadequate and ineffective.

Even if the Commission finds that domestic remedies exist, this petition must be deemed admissible because the remedies are inadequate and ineffective. Specifically, Canada may allege that asylum seekers may apply for leave for judicial review with the Federal Court under Immigration Regulation and Protection Act (IRPA) § 72, which states that “[j]udicial review by Federal Courts in Canada with respect to any matter - a decision, determination or order made, a measure taken or a question raised - under this Act is commenced by making an application for leave to the Court.”⁴²

Although Canada is not a party to the American Convention, for purposes of analysis, the Commission may refer to the *Velásquez Rodríguez Case*,⁴³ in which the Inter-American Court on Human Rights interpreted the exhaustion of domestic remedies requirement.⁴⁴ In the *Velásquez Rodríguez Case*, the Court stated that, for the rule of prior exhaustion of domestic remedies to apply, the domestic remedies of the state concerned must be adequate and effective.⁴⁵

The Court defined “adequate remedies” as “those which are suitable to address an infringement of a legal right.”⁴⁶ It clarified further that,

[a] number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should

⁴² Immigration and Refugee Protection Act, ch. 27, § 72 (2001) (Can.).

⁴³ Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988). [hereinafter *Velásquez Rodríguez Case*]

⁴⁴ The Commission has used the Court's interpretation of the exhaustion requirement under the American Convention in cases under the American Declaration. See e.g., Case 12.071 (Bahamas), *supra* note 41, para. 48; Case 11.092, Report No. 27/93, Canada, Oct. 6, 1993, paras. 26-28.

⁴⁵ *Velásquez Rodríguez Case*, *supra* note 43, para. 63. See also *Godínez Cruz Case*, Judgment of Jan. 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989), para. 66; *Fairen Garbi and Solís Corrales Case*, Judgment of Mar. 15, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 6 (1989), para. 87.

⁴⁶ *Velásquez Rodríguez Case*, *supra* note 43, para. 64. See also *Godínez Cruz Case*, *supra* note 45, para. 67; *Fairen Garbi and Solís Corrales Case*, *supra* note 45, para. 88. See also *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46.1, 46.2.a and 46.2.b, American Convention on Human Rights), Advisory Opinion OC-11/90, August 10, 1990, Inter-Am. Ct. H.R. (Ser. A) No. 11 (1990), para. 36. [hereinafter *Exceptions to Exhaustion of Domestic Remedies*]

not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable.⁴⁷

Likewise, the Court defined an effective remedy as one that was “capable of producing the result for which it was designed. Procedural requirements can make [a remedy] ineffective: if it is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not impartially applied.”⁴⁸

Under these standards, IRPA’s § 72 judicial review is not an effective remedy. Because direct back decisions are implemented immediately, refugee claimants have insufficient opportunity to make applications to the Canadian Federal Court. Even if the refugee claimant is able to file the leave in time, judicial review is a discretionary remedy subject to the Federal Court’s acceptance.⁴⁹ Furthermore, under § 72, there is no automatic stay on deportation while a judicial review application is pending and thus, the refugee claimant may be forced to leave Canada even if he or she is able to file a case. Yet once a refugee claimant is removed from Canada, the Federal Court no longer has jurisdiction over him or her. If the refugee claimant is in detention in the United States, the Canadian government does not have the authority to release him or her out of detention to return to Canada. Thus, in such conditions, judicial review does not serve to protect refugee claimants’ right to seek asylum in Canada.

Moreover, judicial review or any other domestic remedy is inadequate given that the victims have no knowledge of these remedies and how to invoke them. In order to invoke the remedy, a refugee claimant would have to know of its existence, know how to file a claim, know how to find a legal representative who is competent in Canadian law, and know how to actually prepare and file such a claim in Canada -- all while in detention in the United States. Yet asylum seekers 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 United States or Canada. They have little access to legal representation in detention, and, in some cases, BCIS has confiscated their property and any supporting evidence for their case when it arrested them. In such circumstances, to hold refugee claimants responsible for invoking § 72 or any other remedy would be manifestly unreasonable.

3. Under the exception of Article 31(2)(b), the victims are excused from exhausting domestic remedies because they were denied access to any possible remedy.

Alternatively, the victims are excused from exhausting domestic remedies because they were denied access to any possible domestic remedy in Canada. The Inter-American Court has stated that the provisions of this exception apply to “situations where domestic remedies cannot be exhausted because they are not available either as a matter of law or as a matter of fact.”⁵⁰

⁴⁷ Velásquez Rodríguez Case, *supra* note 43, para. 64. See also Godínez Cruz Case, *supra* note 45, para. 67; Fairen Garbi and Solís Corrales Case, *supra* note 45, para. 88.

⁴⁸ Velásquez Rodríguez Case, *supra* note 43, para. 66. See also Godínez Cruz Case, *supra* note 45, para. 69; Fairen Garbi and Solís Corrales Case, *supra* note 45, para. 91.

⁴⁹ In a report on Canada’s refugee determination system in 2000, the Commission also critiqued the Canadian appellate system for its administration and consideration of asylum claims in Canada. See Canada Report, *supra* note 41, paras. 92-103.

⁵⁰ Exceptions to Exhaustion of Domestic Remedies, *supra* note 46, para. 17.

Thus, in the past, the Commission and the Court have found denials of access where, even though a remedy may exist in law, it is not available in fact. For example, in *Sergio Schiavini and María Teresa Schnak de Schiavini*, the Commission held that the petitioners had been denied access to domestic remedies for a wrongful death claim because the petitioners, as private citizens, lacked legal standing under domestic criminal procedural law to appeal criminal verdicts.⁵¹ Under Argentinian law, only the Public Prosecutor's Office could appeal a criminal verdict, which it failed to do in this case.⁵² Thus, although a remedy existed, the Commission held that petitioners had been procedurally barred from accessing it.⁵³ Similarly, in *Plan de Sánchez Massacre*, the Commission found a denial of access to remedies because "the survivors and family members of the victims were prevented from invoking domestic remedies for a period of years due to the fear which [sic] affected them and the general community," including the judiciary.⁵⁴ Likewise, the Inter-American Court has stated that "if it can be shown that an indigent needs legal counsel to effectively protect a right which the Convention guarantees and his indigency prevents him from obtaining such counsel, he does not have to exhaust the relevant domestic remedies."⁵⁵ Thus, in these cases and others, the Inter-American Court and Commission have determined that "[t]he formal existence of legal remedies is not, in and of itself, sufficient to show that they offer the available and effective relief required."⁵⁶

Likewise, in the present case, the victims were denied access in fact to any domestic remedies in Canada. When issued a direct back, the John Doe victims in this case were not given the opportunity - much less the legal knowledge or resources - to effectively contest the issuance of a direct back in Canada. Instead, they were immediately returned to the United States, where they were subject to detention and deportation to their countries of origin. Once in United States' detention or in their countries of origin, they did not have practical access to the Canadian legal system, legal representatives, or legal knowledge to challenge the direct back policy. Even if judicial review or other domestic remedies existed in Canada, the victims were effectively denied access to them by the original direct back decision.

In these circumstances, the Canadian government's use of direct backs constitute a "practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others."⁵⁷ As the Court held in *Velásquez*, "[i]n such cases, resort to those remedies becomes a senseless formality. The

⁵¹ Case 12.080, Report No. 5/02, Argentina, Feb. 27, 2002, paras. 45-57. *See also* Case 11.819, Report No. 51/03, Christian Daniel Domínguez Domenichetti (Argentina), Oct. 22, 2003, para. 42; Case 11.804, Report No. 72/01, Juan Ángel Greco (Argentina), Oct. 10, 2001, paras. 47-48.

⁵² *Id.*, para. 48.

⁵³ *Id.*, para. 52.

⁵⁴ Case 11.763, Report No. 31/99, Guatemala, Mar. 11, 1999, para. 27. [hereinafter *Plan de Sánchez Massacre*]. *See also* Case 10.586 et. al, Report No. 39/00, Extrajudicial Executions (Guatemala), Apr. 13, 2000, paras. 202-04; and Exceptions to Exhaustion of Domestic Remedies, *supra* note 46, para. 35 ("It follows therefrom that where an individual requires legal representation and a generalized fear in the legal community prevents him from obtaining such representation, the exception set out in Article 46(2)(b) is fully applicable and the individual is exempted from the requirement to exhaust domestic remedies.").

⁵⁵ Exceptions to Exhaustion of Domestic Remedies, *supra* note 46, para. 31.

⁵⁶ *Plan de Sánchez Massacre*, *supra* note 54, para. 27.

⁵⁷ *See Velásquez Rodríguez Case*, *supra* note 43, para. 68. *See also* Godínez Cruz, *supra* note 45, para. 71; *Fairen Garbí and Solís Corrales Case*, *supra* note 45, para. 93.

exceptions of [Article 31] would be fully applicable in those situations and would discharge the obligation to exhaust internal remedies since they cannot fulfill their objective in that case.”⁵⁸

III. ANALYSIS OF THE MERITS

A. Canada Violated the Victims’ Right of Asylum (Article XXVII) and Right to *Non-Refoulement* (Article 33 of the Refugee Convention).

Article XXVII of the American Declaration states that

[e]very 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.

The Commission has interpreted Article XXVII within the broad jurisprudence of refugee rights as articulated in general international law and through specific international instruments, including the 1951 Refugee Convention, the 1967 Protocol Relating to the Status of Refugees, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social Rights, and a host of others.⁵⁹

The protection of refugees from return to persecution is a fundamental principle of general international law.⁶⁰ The duty to protect refugees arises as soon as the individuals or group concerned come within the territory or jurisdiction of a state.⁶¹ In accordance with international law, the Commission has stated these rights arise from the recognition that asylum seekers are a special category of aliens, “whose very status under international instruments is derived from the need for protection from persecution.”⁶² It has further emphasized that, “[t]he status of refugee is one which derives from the circumstances of the person; it is recognized by the State rather than conferred by it. The purpose of the applicable procedures is to ensure that it is recognized in every case where that is justified.”⁶³

Paramount among these obligations is that of non-return or *nonrefoulement*.⁶⁴ Article 33 of the 1951 Refugee Convention states that,

[n]o 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

⁵⁸ See Velásquez Rodríguez Case, *supra* note 43, para. 68. See also Godinez Cruz, *supra* note 45, para. 71; Fairen Garbi and Solís Corrales Case, *supra* note 45, para. 93.

⁵⁹ Canada Report, *supra* note 41, paras. 21-28. See also Report on Terrorism, *supra* note 28, para. 377.

⁶⁰ Goodwin-Gill, Guy S., *The Refugee in International Law* (2d ed, 1996), at 167. [hereinafter *The Refugee in International Law*]

⁶¹ *The Refugee in International Law*, *supra* note 60, at 141. See e.g., Haitian Interdiction Case, *supra* note 41, para. 156-57 (“The Commission shares the view advanced by the United Nations High Commissioner for Refugees ... that Article 33 had no geographical limitations.”).

⁶² Report on Terrorism, *supra* note 28, para. 384.

⁶³ Canada Report, *supra* note 41, para. 70. See also Report on Terrorism, *supra* note 28, para. 394.

⁶⁴ Canada Report, *supra* note 41, para. 24.

threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

If a state party engages in either direct or indirect *refoulement*, it may itself be in violation of the Refugee Convention.⁶⁵ Under general principles of international law, state responsibility may arise directly from the acts and omission of its government officials and agents, or indirectly where the domestic legal and administrative systems fail to enforce or guarantee the observance of international standards.⁶⁶ The fact that the harm caused by state action may be inflicted outside the territory of the state does not diminish the responsibility of the state.⁶⁷

The obligation of non-return also means that any person recognized or seeking recognition as a refugee can invoke this protection to prevent their removal.⁶⁸ Thus, upholding *non-refoulement* necessarily requires that “such person cannot be rejected or expelled without an adequate, individualized examination of their [sic] claim.”⁶⁹ According to the Commission, “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 Convention.”⁷⁰

Canada’s direct back policy, as of January 27, 2003, deprives refugee claimants of a refugee determination hearing and thus constitutes *refoulement*. As such, Canada has violated the victims’ right to seek asylum under Article XXVII of the American Declaration and right to *non-refoulement* under Article 33 of the Refugee Convention.

1. Canada’s direct back policy deprives refugee claimants of a refugee determination hearing.

Canada demonstrated an intentional or reckless disregard for applicants’ safety when it changed its direct back procedure on January 27, 2003. For asylum seekers directed back to the United States, where they are subject to detention and *refoulement*, Canada's direct back policy deprives them of refugee or asylum eligibility determination hearings in Canada.

Under international law, as part of its Article XXVII obligations, Canada must provide refugee claimants with a refugee determination hearing. This right is owed to refugee claimants from the moment that they enter Canadian territory or become subject to Canadian authority. In this case, the victims and other refugee claimants arrived at border points of entry in Canada and stated their intention to apply for refugee status and asylum. Thus, they had a right to a refugee determination hearing under international law.

⁶⁵ Haitian Interdiction Case, *supra* note 41, para. 167.

⁶⁶ The Refugee in International Law, *supra* note 60, at 141. See e.g., Haitian Interdiction Case, *supra* note 41, para. 163 (The Commission found that the United States violated Haitian asylum seekers’ Article XXVII right to seek and receive asylum in a “foreign territory” other than the United States when the United States summarily interdicted them on the high seas and repatriated them to Haiti without refugee determination hearings.).

⁶⁷ *Id.*

⁶⁸ Canada Report, *supra* note 41, para. 25.

⁶⁹ *Id.*

⁷⁰ Haitian Interdiction Case, *supra* note 41, para. 155.

However, Canada turned the victims and other refugee claimants away from the Canadian border without a hearing and without taking any steps to ensure that they would be able to return for their hearings. Canada was aware that the United States was registering, detaining, and deporting undocumented and temporary residents in the United States as part of its NSEERS program. Thus, although a claimant might not be subject to persecution per se in the United States, there was a clear risk that he or she might be subject to illegal detention or *refoulement* to his or her country of origin by the United States government.

Also, as shown by its own pre-January 2003 policies, Canada was well aware of the significant challenges and obstacles that refugees faced in making claims if detained or deported by the United States immigration authorities. In such circumstances, the right to apply for asylum in Canada would be rendered meaningless if the refugee claimant were “temporarily” sent back to the United States without adequate assurance of the ability to return to Canada. Yet, Canada proceeded to do exactly that under its January 27, 2003 direct back policy change.

In the past, when evaluating Canada’s refugee determination procedures, the Commission has recognized that “the process of determining who is and is not a refugee involves making case by case determinations that may affect the liberty, personal integrity, and even the life of the person concerned.”⁷¹ The Commission has further stated that “[d]eterminations in such cases are not administrative but substantive in nature.”⁷² The Commission has emphasized that, especially when evaluating whether a particular procedure is sufficient in refugee and asylum cases, the substantive nature of the determination should be balanced with the potential consequences at issue.⁷³ The opportunity for a hearing, and adequate protections during the hearing, are integral to protecting refugees’ Article XXVII rights.

Yet, the moment that a direct back is issued becomes the first and last time that a claimant has access to the Canadian asylum system if Canada does not ensure that the claimant will be able to return for his or her interview. This was certainly the case with the John Doe victims in this case, who were deported after receiving a direct back that returned them to the United States. Canada thus deprived them of their right to apply for asylum in Canada.

2. Canada's direct back policy constitutes *refoulement*.

Without such minimum protections in place, rather than protecting refugee seekers, Canada prevented refugee claimants from accessing the Canadian refugee determination system and effectively returned refugee claimants to their country of origin, where they feared persecution.

In the *Haitian Interdiction Case*, the Commission held that the United States’ actions of preventing refugee claimants from accessing refugee protection in the United States constituted a violation of the claimants’ right to *non-refoulement*.⁷⁴ The United States had summarily interdicted and repatriated boatloads of Haitian asylum seekers, who had fled Haiti and were in international waters. The Commission disagreed with the United States’ claim that Article 33

⁷¹ Canada Report, *supra* note 41, para. 52.

⁷² *Id.*, para. 62.

⁷³ *Id.*, paras. 60, 69.

⁷⁴ *Haitian Interdiction Case*, *supra* note 41, para. 163.

did not apply to refugee claimants who were interdicted on non-United States territory.⁷⁵ Instead, the Commission held that Article 33 did not have any geographical limitations.⁷⁶ Thus, it found that the United States' action of summarily interdicting and repatriating the asylum seekers constituted a breach of the United States' Article 33 treaty obligations.⁷⁷

In contrast to the refugee claimants in the *Haitian Interdiction Case*, in this case, the John Doe victims and other refugee claimants had physically reached Canadian territory and had presented themselves as asylum seekers. Thus, they had a right under Canadian and international law to apply for asylum in Canada. Yet like the United States government in the *Haitian Interdiction Case*, Canada turned them back from Canadian territory, prevented them from applying for asylum, and effectively returned them to their country of origin by sending them to the United States.

By sending refugee claimants back to the United States without considering their claims, Canada's actions constituted *refoulement*. Canada had no legally cognizable grounds to assume that the victims and other refugee claimants would be safe from *refoulement* in the United States; instead, based on the actions of the United States government under the NSEERS program, it was clear that the United States was engaged in a deliberate policy of detaining and removing undocumented persons – even some with valid refugee claims – from its territory. Yet, nonetheless, Canada proceeded to issue direct backs without any regard to refugee claimants' safety in the United States.

B. Canada Violated the Victims' Right to a Fair Trial (Article XVIII).

Article XVIII of the American Declaration states that

[e]very 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.

Article XVIII, along with Articles XXIV (Right of petition) and XXVI (Right to due process of law), establish a “baseline of due process to which all non-citizens, regardless of their legal status, have a right.”⁷⁸

The due process protections under the American Declaration apply not only to criminal proceedings, but also to proceedings for the determination of rights or obligations of a civil,

⁷⁵ *Id.*, para. 156-57.

⁷⁶ *Id.*, para. 157.

⁷⁷ *Id.*, para. 158.

⁷⁸ Report on Terrorism, *supra* note 28, para. 398. The Refugee Convention also states in Article 16(1) that refugees shall have “free access to the courts of law on the territory of all Contracting States.”

fiscal, labor, or any other nature, including non-criminal proceedings against non-nationals.⁷⁹ Article XVIII applies to court decisions and decisions made by administrative bodies.⁸⁰

However, Canada has not provided any legal recourse to appeal a direct back, and thus violates the Article XVIII rights of the victims, who were detained in the United States with no physical or legal ability to access the Canadian courts to vindicate their Article XXVII right to seek asylum in Canada.

1. Canada failed to provide available and effective legal remedies for the victims to contest the issuance of a direct back.

Canada has not provided any available and effective remedies by which a refugee claimant, who has been issued a direct back, may bring a claim before Canadian courts challenging the issuance of a direct back.

A necessary aspect of the right to resort to the courts is access to legal systems.⁸¹ Access may be judged by whether *available and effective* recourse exists for the violation of a right protected under the Declaration.⁸² The Inter-American Court has ruled that the meaning of a fair hearing must be considered in light of the specific facts of the case:

[t]o accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.⁸³

Under these standards, Canada's appellate procedures do not provide available or effective recourse. As discussed *supra*, the direct back policy does not contain any instructions on how a

⁷⁹ Report on Terrorism, *supra* note 28, paras. 219, 401. See also Constitutional Court Case, Judgment of Jan. 31, 2001, Inter-Am. Ct. H.R., Ser. C, No. 7, paras. 69, 70; Exceptions to Exhaustion of Domestic Remedies, *supra* note 46, para. 28.

⁸⁰ See Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, Inter-Am. C.H.R., OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 95 ("It is outside the scope of this report to cite all the procedural guarantees to be applied in all judicial or administrative contexts. Accordingly we will simply repeat the principle that a minimum of due process is necessary even in administrative law..."). See also Report on Terrorism, *supra* note 28, para. 401. For cases involving the application of Article XVIII to administrative procedures concerning the detention, status, or removal of non-nationals, see e.g., Case 9903, Report No. 51/01, Ferrer-Mazorra et al. (United States), Annual Report of the IACHR 2000, para. 213; Canada Report, *supra* note 41, paras. 109, 115; Haitian Interdiction Case, *supra* note 41, para. 180.

⁸¹ Canada Report, *supra* note 41, para. 95.

⁸² *Id.* Emphasis added.

⁸³ The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, October 1, 1999, Inter-Am. C.H.R. (Ser A) No. 16 (1999), paras. 117-119.

refugee claimant may appeal a direct back decision. Even if judicial review is possible, such review does not serve to correct or address the real disadvantages that refugee claimants face in asserting their rights: refugees are not ordinarily aware of the law, have little to no access to social, economic, and legal resources, and may be experiencing severe trauma and injuries. The direct back policy also sends claimants out of Canada before they can access any resources that might educate or support them in these matters in Canada.

Ultimately, once a refugee is returned to the United States, and especially after the refugee is detained or *refouled*, available recourses in Canada are no longer accessible or effective. Each of the victims in this case faced these challenges. Thus, Canada has failed to provide available and effective legal recourse that the victims, and other refugee claimants, could have used to protect their right to seek asylum.

2. Canada kept the victims from accessing the Canadian legal system.

Moreover, instead of having a fair appellate process in place, Canada expressly excluded the victims from accessing the Canadian legal system by directing them out of Canada.

The Commission has found before that deliberate exclusion of refugee claimants from accessing the legal system of a country constitutes a violation of Article XVIII. In the *Haitian Interdiction Case*, after finding that the United States had violated refugee claimants' right to seek asylum, the Commission also analyzed whether the United States had violated their Article XVIII right to a fair trial.⁸⁴ The Commission found that the United States had violated their rights in this regard as well, because it did not give them an opportunity to resort to United States courts to vindicate their rights.⁸⁵ The Commission contrasted the ability of Haitian asylum seekers who had landed on United States shores and thereby were able to vindicate their rights against those of petitioners, who had been interdicted at sea and thus prevented from doing so.⁸⁶ In its analysis, the Commission found no difference in the Article XVIII right of the two groups, even though the latter group was not physically present on American territory.⁸⁷

In this case, the victims' claim for an Article XVIII violation is even stronger than those of the petitioners in the *Haitian Interdiction Case*. In contrast to the petitioners in the *Haitian Interdiction Case*, who had never reached the physical territory of the United States, the victims in this case were on Canadian territory. Therefore, they had both a clear Article XXVII right to apply for asylum and an Article XVIII right to access the Canadian courts to vindicate their Article XXVII right. Yet Canada, by sending refugee claimants to the United States, precluded the victims and other refugee claimants from not only receiving eligibility determination hearings, but also from accessing the Canadian courts to challenge the direct back. Thus, like the United States in the *Haitian Interdiction Case*, Canada illegitimately prevented the victims from exercising their Article XVIII right by keeping them out of Canadian territory.

⁸⁴ *Haitian Interdiction Case*, *supra* note 41, paras. 163, 180.

⁸⁵ *Id.*, para. 180.

⁸⁶ *Id.*

⁸⁷ *Id.*

CONCLUSION

On January 27, 2003, Canada knowingly violated its international obligations of refugee protection to the victims and other refugee claimants. In changing its direct back policy and sending refugee claimants to the United States without protection, Canada subjected refugee claimants to illegal detention and *refoulement*. It did not institute an appeal process that would allow claimants to challenge the direct back, nor did it offer any legally cognizable justification for its policy change. Thus, Canada breached its duties to the victims and other refugee claimants under Articles XXVII (Right to asylum) and XVIII (Right to a fair trial) of the American Declaration, and the prohibition against *refoulement* contained in Article 33 of the Refugee Convention.

In light of these violations, we request that the Commission:

- Initiate formal proceedings against Canada;
- Immediately issue precautionary measures seeking the suspension of the January 27, 2003 direct back policy;
- Find that Canada's refusal to grant hearings to asylum applicants after January 27, 2003 constitutes a violation of the guarantees of Articles XXVII and XVIII of the American Declaration and Article 33 of the Refugee Convention; and
- Order Canada to revise its refugee and asylum policies in accordance with its international obligations under the American Declaration, the Refugee Convention, and general principles of international law.

In accordance with Article 28 of the Commission's Rules of Procedure, any correspondence from the Commission should be sent to Ms. Deborah Anker, who will be the principal contact for the petitioners. Her contact information is as follows:

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Respectfully submitted,

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