



INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

REPORT ON THE SITUATION OF HUMAN RIGHTS OF ASYLUM SEEKERS WITHIN THE CANADIAN REFUGEE DETERMINATION SYSTEM

I. BACKGROUND

1. This report examines a series of issues relating to the situation of human rights of persons subject to the refugee determination system of Canada. That system has been recognized by many sources, including the United Nations High Commissioner for Refugees, as demonstrating a strong commitment to providing durable solutions for refugees in need of protection. Overall, the system is extremely generous in terms of accepting and resettling refugees, and exemplary in many important respects. The present report studies the system in that context, while focusing on a number of very specific issues concerning compliance with Canada's inter-American human rights obligations, including the ability of asylum seekers who have reached Canada to obtain access to the refugee determination system, the availability and scope of administrative review and judicial protection for persons seeking refugee status whose claims have been rejected, the ability of persons in detention for reasons of public security to obtain judicial review of the legality of that detention, and the availability and scope of judicial protection for the rights of Canadian-born children directly affected by proceedings to remove a non-citizen parent or parents from Canada.

2. Pursuant to its competence as the principal organ of the Organization of American States (hereinafter "OAS") charged with protecting and promoting human rights in the Americas, the Inter-American Commission on Human Rights (hereinafter "Commission" or "IACHR") has been monitoring the human rights situation in Canada since the country became an OAS member State in 1990.¹ In accordance with its mandate, which is further defined in its Statute and Regulations, the Commission monitors human rights developments in each member State of the OAS. The Commission periodically deems it useful to report the results of its study of a particular country, formulating the corresponding recommendations designed to assist that State in ensuring the fullest enjoyment of protected rights and liberties by all persons subject to its jurisdiction.

3. This report was prepared on the basis of material gathered by the Commission, in particular during an on-site visit it carried out in Canada in October of 1997 to observe the refugee determination process and the domestic remedies available to refugee claimants. The report refers to information gathered in preparation for, during, and following that visit. Material referred to also includes relevant data provided by governmental, intergovernmental and non-governmental sources collected through the Commission's normal monitoring procedures, as well as media reports and data gleaned from the processing of individual petitions. Finally, the Commission has taken full account of the observations formulated by the Government of Canada in response to the draft version of the present report.

The On-Site Visit Carried Out in October of 1997

4. In a note of April 25, 1997, the Government of Canada invited the Commission to carry out its first on-site visit to that country for the purpose of examining its refugee determination process and the domestic remedies available to refugee claimants. The State expressed its interest in

providing the Commission with a first-hand understanding of Canadian practices concerning refugee determination, in the context of the importance of the issue in international law, and its support for the work of the Commission.

5. The Commission conducted its on-site visit to Canada from October 20 through 22, 1997. The Commission's delegation was composed of John S. Donaldson, Chairman; Carlos Ayala Corao, First Vice-Chairman; Robert K. Goldman, Second Vice-Chairman; and Members Alvaro Tirado Mejía, Claudio Grossman and Oscar Luján Fappiano. The Commission received technical support from Jorge E. Taiana, Executive Secretary, David J. Padilla, Assistant Executive Secretary, and staff attorneys Relinda Eddie and Elizabeth Abi-Mershed. Tania Hernandez and Gabriela Hageman provided administrative support.

6. During its stay in Canada, the Commission met with numerous high-level political, administrative, legislative and judicial authorities, including the Hon. Lloyd Axworthy, Foreign Affairs Minister and the Hon. Lucienne Robillard, Minister of Citizenship and Immigration. Further, the Commission met with Janice Cochrane, Deputy Minister of Citizenship and Immigration, Greg Fyffe, Assistant Deputy Minister of Citizenship and Immigration Policy, and other Government representatives from the Foreign Affairs Ministry, Citizenship and Immigration, and the Immigration and Refugee Board. The Commission also met with Chief Justice Julius Isaac and Mr. Justice William McKeown of the Federal Court of Canada.

7. The Commission held discussions with Mr. Yilma Makonnen, representative of the United Nations High Commissioner for Refugees in Ottawa. It also met with numerous representatives of non-governmental organizations and other sectors of civil society, as well as with members of the bar. The organizations referred to included the Inter-Church Committee for Refugees, Ligue des Droits et Libertés (FIDH), Canadian Council for Refugees, Amnesty International, Canadian Bar Association, Community Coalition on Immigration, Canadian Convention of Ontario and Quebec, Toronto Refugee Affairs Committee, Documenting the Undocumented, Canadian Centre for Victims of Torture, Sanctuary Group, Ontario Coalition Against Poverty, Parkdale Community Legal Services, Tamil Elam Society, African Canadian Legal Clinic, Native African Inmates and Friends Association, Metro Toronto, Chinese and South Asian Legal Clinic, and South Etobicoke Community Legal Services.

8. The Commission traveled to Ottawa, Toronto and Montreal to hold meetings and carry out other activities, which included visiting the Metro Toronto West Detention Centre in Toronto, and the Laval Holding Centre and the Dorval Airport facilities in Montreal.

9. During its visit, the Commission received a great deal of information on issues including, among others, the eligibility requirements and procedures for obtaining refugee status, the grounds and scope of judicial review, family unification, and the detention and exclusion of persons on public danger grounds. This report examines the Canadian refugee determination system in light of the insights and extensive data gathered during that visit. The impressions formed and information received at that time, necessarily preliminary in nature, have been subjected to detailed research and analysis in preparing the present report. Additionally, the Commission's visit to Canada provided an opportunity to develop further ties with State and non-state actors working on behalf of human rights.

10. The Government of Canada provided the Commission with its full assistance and cooperation during the visit, permitting the latter to fully discharge its mandate. The Commission wishes to once again thank the Government of Canada and its officials, as well as members of non-governmental organizations, civil society and the bar for their cooperation and assistance during the visit.

Processing and Approval of the Report

11. The draft "Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System" was approved by the Commission on November 9, 1999. In accordance with Article 62 of the Commission's Regulations, this Report was transmitted to the

Government of Canada on November 12, 1999, with a request that it submit the observations and comments deemed pertinent within a period of two months.

12. By note of January 12, 2000, the Government of Canada forwarded its observations in response to the Commission's draft report. In presenting its submission, the Government commended the Commission on the thoroughness and calibre of the draft. Having stated that "Canada is proud of its humanitarian tradition and strives to ensure that those seeking its protection benefit from a fair and transparent process," the Government noted that the Commission's report would provide a significant contribution by setting forth interpretive principles applicable to all member States of the OAS. The Government provided specific observations concerning: the context of the draft report; three of the broader issues dealt with therein -- namely the independence of decision-makers, remedies, and the security certificate determination process; and certain recommendations formulated by the Commission. The information provided by the Government has been carefully analyzed by the Commission, and, to the extent pertinent, has been reflected in the present final version of the report.

II. INTRODUCTION

13. The statutory mandate of Canada's refugee program requires the State to fulfill its "international legal obligations with respect to refugees and uphold its humanitarian tradition with respect to the displaced and the persecuted," as well as "to maintain and protect the health, safety and good order of Canadian society."² Canada has a rich and lengthy history of serving as a safe haven for refugees fleeing persecution and oppression. The information before the Commission is consistent in indicating that, overall, the Canadian system for processing and resettling refugees is exemplary in many respects.

14. It was in recognition of the national commitment to providing such safe haven that, in 1986, the UNHCR awarded the Canadian people the Nansen Medal for their outstanding efforts on behalf of refugees. Canada has demonstrated its willingness to resettle vulnerable refugees from countries of first asylum as a form of international responsibility and solidarity, and is considered a major resettlement country.³ It also provides strong support for the vital work of the UNHCR. Its efforts have enabled victims of persecution to reestablish their lives protected against the threat of such fundamental violations as illegal and arbitrary detention, torture and death.

15. In its observations on the report, the Government of Canada recalled that, according to a statement issued by the UN High Commissioner for Refugees in March of 1998, "the Canadian system, with its resources, expertise and humanitarian focus, is recognized as a model to be emulated." The Government indicated that, "in 1997, Canada accepted 40% of all finalized claims for Convention Refugee status, arguably one of the most generous levels of acceptance in the world." It was in this context, it noted, that the attributes of its system must be examined. As noted at the outset of this report, the Commission has taken full account of these positive attributes of the system, which have played their due role in its analysis. It must be kept in mind, however, that the specific objective of the Commission's report is to analyze how certain aspects of Canada's refugee determination system comport with its inter-American human rights obligations as the basis for framing recommendations designed to assist the State in further enhancing compliance with those obligations.

16. Government figures indicate that Canada accepts between 20,000 and 30,000 Convention refugees and other displaced persons each year. Official projected figures for 1999 indicate that between 22,100 and 29,300 refugees will be accepted. 24,214 refugees became permanent residents of Canada in 1997. Of those refugees who are accepted, approximately half are selected abroad for resettlement in Canada, and the other half are asylum seekers who arrive in the country and have their claims accepted by the Immigration and Refugee Board.⁴ The present report focuses on the processes applicable to refugee claimants who have arrived in Canada.

17. The Canadian refugee determination system is far from static; in the interim since the Supreme Court of Canada issued its decision in the *Singh Case* (1985), it has undergone

dramatic changes. In that decision, the Court established that the then-existing system, established prior to the adoption of the Canadian Charter, which permitted some claimants to be removed without ever having had an oral hearing before a tribunal, did not comport with the principles of fundamental justice established in the Charter or with the right to a fair hearing under the Canadian Bill of Rights. In particular, the Court established, *inter alia*, that the right to "life, liberty and security of the person" set forth in section 7 of the Charter, and the right to a fair hearing set forth in section 2(e) of the Bill of Rights required that a refugee claimant be guaranteed at least one oral hearing before an impartial tribunal. Since that decision, the pertinent branches of Government have effectuated changes in the system aimed at bringing it into greater conformity with the Canadian Charter and other applicable obligations while serving the objective of protecting genuine refugees and other relevant national interests. According to the information before the Commission, the authorities responsible for implementing the determination process continue to pursue adjustments aimed at refining and enhancing it.

18. Canada has been in the forefront of a number of positive innovations in the cause of refugee protection. In terms of programmatic advances, it has, for example, established extensive research and documentation facilities for the use of those tasked with making refugee determinations, as well as claimants. These facilities provide information concerning country conditions, relying on reports and other material in the public domain. The Commission also received information during the course of its visit about various training activities designed to improve the quality of IRB decision-making. In terms of policy initiatives, in 1993 the IRB adopted its guidelines for women refugee claimants fearing gender-related persecution, recognizing the specific concerns which apply to such claimants. In 1996, the IRB adopted guidelines on child refugee claimants, reportedly the first such policy initiatives of their kind adopted by any State system.

19. In examining the extensive Canadian system aimed at meeting the needs of persons fleeing persecution, the Commission has received reports on many of its commendable practices. The Commission has also received detailed information concerning aspects of the system characterized as deficient in meeting certain basic safeguards established in the American Declaration of the Rights and Duties of Man and other applicable norms. The present report is not intended to be exhaustive, but to provide an overview of certain aspects of the system so as to analyze specific human rights issues within it. These issues primarily concern (1) the question of access to the refugee determination system for those who have reached Canadian shores, (2) the availability and scope of administrative review and judicial protection open to refused refugee claimants; (3) the ability of persons in detention for reasons of public security to obtain judicial review of the legality of that detention; and (4) the availability and scope of judicial protection for the rights of Canadian-born children directly affected by proceedings to remove a non-citizen parent or parents. These issues are analyzed in relation to the applicable safeguards of the inter-American human rights system, interpreted with reference to other pertinent obligations of the State.⁵

20. The Commission's evaluation of these aspects of the refugee system is necessarily grounded in the need to ensure that the fundamental human rights of asylum seekers and refugees are rigorously respected, in particular the right to seek asylum, the prohibition of return to places where they are or may be subject to persecution, and to respect for the full range of their protected civil and political, and economic, social and cultural rights. At the same time, the Commission has taken full account of the right and, moreover, the duty of the State to manage the refugee system so as to deter abuse and safeguard the rights of persons genuinely at risk, as well as to control the ingress and egress of persons across its borders, and to protect related interests such as citizen and national security.

III. SOURCES AND SYSTEMS OF PROTECTION

A. International Instruments

21. Canada is Party to a number of international treaties with special relevance to the human rights of asylum seekers. The primary instruments governing the status and protection of

asylum seekers and others who have crossed borders and are unable or unwilling to return to their countries of origin for fear of persecution are the 1951 Convention relating to the Status of Refugees⁶ (hereinafter "1951 Convention") and the 1967 Protocol relating to the Status of Refugees⁷ (hereinafter "1967 Protocol"). Canada has been Party to both instruments since 1969.

22. The 1951 Convention was adopted to address refugee situations resulting from World War II, and thus places a heavy emphasis on the rights of non-return and assimilation. The 1967 Protocol expanded the applicability of the 1951 Convention by removing the geographic and temporal restrictions which had limited the application of the latter to persons displaced pursuant to World War II. The 1951 Convention and its Protocol define: who is and is not a refugee, or has ceased to be a refugee; the legal status of a refugee, and his or her rights and duties in the country of refuge; and matters relative to the implementation of the respective instruments.⁸ Under the regime of the 1951 Convention modified by the 1967 Protocol, a refugee is a person who:

- owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,
- is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;
- or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

23. The 1951 Convention defines three basic groups that, while otherwise meeting the foregoing criteria, are excluded from refugee status: persons already subject to UN protection or assistance; persons not considered in need of international protection due to having been accorded treatment equivalent to that of nationals by the country of residence; and persons deemed undeserving of international protection. The latter group includes persons with respect to whom there are "serious reasons for considering" that they have committed "a crime against peace, a war crime, or a crime against humanity," "a serious non-political crime outside the country of refuge prior to admission," or "acts contrary to the purposes and principles of the United Nations."

24. With respect to persons accorded refugee status, the corresponding protections must be maintained unless or until they come within the terms of one of the "cessation clauses." The paramount obligation of States Parties is that of non-return (*nonrefoulement*) set forth in Article 33(1) of the 1951 Convention:

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

Article 33(2) specifies that this benefit may not "be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." As a general matter, Article 3 specifies that the provisions of this regime must be applied without discrimination as to "race, religion or country of origin." Further, judicial protection is to be available in principle through the "free access to the courts of law on the territory of all Contracting States" set forth in Article 16(1) of the 1951 Convention.

25. The obligation of non-return means that any person recognized or seeking recognition as a refugee can invoke this protection to prevent their removal. This necessarily requires that such persons cannot be rejected at the border or expelled without an adequate, individualized examination of their claim.⁹

26. The specific terms of these instruments are complemented and in certain respects amplified by a range of international human rights instruments, as well as certain provisions of international humanitarian law. Pursuant to this network of protections, States are obliged to refrain from taking measures contrary to the principle of asylum, such as returning or expelling asylum seekers or refugees contrary to international human rights, humanitarian and refugee law.¹⁰ Even prior to the 1951 Convention, the Universal Declaration of Human Rights of 1948¹¹(hereinafter "Universal Declaration") provided in Article 14(1) for the right of every person "to seek and to enjoy in other countries asylum from persecution."

27. Canada is Party to the International Covenant on Civil and Political Rights¹² (hereinafter "ICCPR"), its First Optional Protocol, and the International Covenant on Economic, Social and Cultural Rights ¹³(hereinafter "ICESCR"), which enhance the provisions of the Universal Declaration in important respects. In the refugee context, Article 13 of the ICCPR provides that "[a]n alien lawfully in the territory of a State Party ... may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit reasons against and to have his case reviewed by, and be represented ... before," the relevant competent authority. Of course the foregoing instruments protect a broad range of basic rights applicable to refugee and non-refugee alike.

28. The International Bill of Human Rights has been further complemented by a range of treaties and other instruments defining and protecting particular rights. Canada is also Party to, *inter alia*, the Convention on the Prevention and Punishment of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. Other relevant multilateral instruments and United Nations resolutions concerning persons vulnerable due to displacement from their countries of origin include, *inter alia*, the Statute of the Office of the United Nations High Commissioner for Refugees,¹⁴ the Constitution of the International Refugee Organization,¹⁵ the Convention relating to the Status of Stateless Persons,¹⁶ and the Convention on the Reduction of Statelessness.¹⁷

B. Regional Instruments

29. Member States of the OAS such as Canada have undertaken to respect and ensure the fundamental rights of all persons subject to their jurisdiction -- aliens and nationals alike. Respect for human rights is a fundamental principle of the Organization, guiding the actions of each member State. Pursuant to Article 3(I) of the Charter, "[t]he American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex." The fundamental rights of man are also referred to, *inter alia*, in the preamble of the Charter, and Articles 17, 45, 47 and 49, as well as in those articles which address the role of the Commission as the principal organ charged with the promotion and protection of human rights in the hemisphere.

30. The member States have given specificity to the rights generally referred to in the Charter.¹⁸ Most pertinently for the purposes of the present analysis, the American Declaration of the Rights and Duties of Man (hereinafter "American Declaration") specifies the fundamental rights to which each person is entitled, and which each member State is bound to uphold. While the majority of the OAS member States are also Parties to the American Convention on Human Rights, in the case of those States such as Canada that have yet to ratify that treaty, the OAS Charter and the American Declaration provide the source of legal obligation.¹⁹

31. In relation to the refugee context specifically, Article XXVII of the American Declaration provides 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.

More generally, the Declaration recognizes a broad range of fundamental rights including, *inter alia*, to:

- life, liberty and security of [the] person (Article I)
- equality before the law and to have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor (Article II)
- the protection of the law against abusive attacks upon his ... private and family life (Article V)
- establish a family, the basic element of society, and to receive protection therefor (Article VI)
- measures of special protection in the case of children, and pregnant and nursing women (Article VII)
- to be recognized everywhere as a person having rights and obligations, and

to enjoy basic civil rights (Article XVII)

- to resort to the courts to ensure respect for one's legal rights; likewise, there should be available a simple brief procedure whereby the courts will protect the person concerned from acts of authority that, to their prejudice, violate any fundamental constitutional rights (Article XVIII)
- to maintain one's liberty except in the cases and according to the procedures established by pre-existing law; further, any person detained has the right to have the legality of the detention ascertained without delay (Article XXV).**20**

32. Pursuant to the terms of the Declaration and other applicable obligations of Canada, refugees cannot be returned to a place where they face the risk of persecution involving the violation of their fundamental human rights. Under the Declaration, in particular, the obligation of the State to respect the fundamental rights of the individual, such as to life, liberty and personal integrity, limits its ability to act where this would place the individual at risk. Strict adherence to the principle of non-return is one of the ways that such basic rights are ensured.

C. Domestic Law

33. In accordance with Canadian law, a refugee claimant will receive protection when found to be a "Convention refugee" as defined under Canada's Immigration Act, which provides the law of general application with respect to admission and the right of residence in the country. Under Section 2(1) and the related schedule of the Immigration Act, the definition of a refugee set forth in the 1951 Convention has been incorporated into domestic legislation, and provides the basis for recognition of refugee status and the subsequent granting of permanent residence. As Canada noted in its observations, it has implemented its obligation of *nonrefoulement* under the 1951 Convention through the enactment of section 53 of the Immigration Act, which provides that a person recognized as a Convention refugee, or who was excluded from the determination process for having been recognized as a Convention refugee by a third country, "cannot be *refouled* unless he/she has been certified to be a danger to the public or to the security of Canada or has been convicted of a criminal offence punishable by a sentence of ten years or more."

34. Since 1982, fundamental human rights and freedoms have been set forth in Canada's Constitution, under Schedule B to the Constitution Act, 1982, entitled Canadian Charter of Rights and Freedoms (hereinafter "Canadian Charter" or "Charter"). The Canadian Charter provides another important source of law in asylum matters, as government legislation, programs and policies must comport with the standards set forth therein.²¹ As noted above, the Supreme Court of Canada has affirmed that asylum seekers on national territory are entitled to the general protections of the Charter. Under Section 24(1) of the Charter, any person whose rights or freedoms have been infringed may apply to a court to obtain the remedy the latter deems appropriate and just under the circumstances. Further, any law found incompatible with the Charter may be declared by a court to be of no force and effect.

35. Canadian administrative law, which allows for judicial review of decisions taken by persons exercising delegated authority under the Immigration Act and other federal statutes, and the Regulations which implement the Immigration Act, provide further sources of applicable law. Domestic law will be referred to more specifically as necessary in the analysis which follows.

36. In its observations on the report, the Government of Canada noted with respect to the relationship between international guarantees and domestic law that:

In devising its refugee determination system, Canada draws upon the *Canadian Charter of Rights and Freedoms* (hereinafter: "*Charter*"), which contains many of the same principles as those in the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *American Declaration*. Canada implements the relevant parts of the *American Declaration* and the *Covenant* using the standards and procedures of the *Immigration Act* and the general legal system of Canada.

37. As set forth in the foregoing review, the human rights of asylum seekers in the Canadian refugee system are subject to norms of protection drawn from international, regional and domestic sources of law. These norms derive from a range of sources including the law of human rights, international refugee law, and international humanitarian law. The preceding review detailed some of the norms most pertinent to the legal analysis which follows.

38. In its observations on the draft report, the Government of Canada indicated that it understood that "many of the comments in the Report are suggestions to improve the Canadian refugee determination system and go beyond Canada's obligations under the *American Declaration*." The Government requested "therefore, that comments in the Report relate explicitly to Canada's compliance with the *American Declaration*." It may thus be useful to provide a note as to the scope of the provisions referred to in the analysis which follows. As noted above, as a Party to the OAS Charter, Canada has undertaken to respect the fundamental human rights of persons subject to its jurisdiction. For member States, such as Canada, that have yet to ratify the American Convention, the expression of their obligations in the sphere of human rights is set forth in the American Declaration. Accordingly, in preparing the present report, the Commission has interpreted Canada's obligations in relation to the OAS Charter generally, and the American Declaration more specifically. Pursuant to general principles of interpretation, other relevant rules of international law applicable to Canada must be taken into account in construing its regional human rights obligations.²² Consequently, in referring to other norms applicable to Canada where necessary to interpret its obligations under the OAS Charter and American Declaration, the Commission is acting squarely within its mandate. It should be noted that the Commission's long standing practice of invoking other human rights instruments when interpreting and applying the American Declaration and Convention has been affirmed by the inter-American Court of Human Rights.²³ Further, the international law of human rights is a dynamic body of norms evolving to meet the challenge of ensuring that all persons may fully exercise their fundamental rights and freedoms. In this regard, as the International Covenants elaborate on the basic principles expressed in the Universal Declaration of Human Rights, so too does the American Convention represent, in many instances, an authoritative expression of the fundamental principles set forth in the American Declaration. While the Commission clearly does

not apply the American Convention in relation to member States that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration.

IV. ACCESS TO THE REFUGEE DETERMINATION SYSTEM IN CANADA

A. Overview of the Application and Determination Process

39. Any person in Canada may submit a Convention refugee claim to the Department of Citizenship and Immigration, usually through a senior immigration officer at a port of entry or a Canada Immigration Center. That Department is responsible for determining if the claim is eligible for referral to the Convention Refugee Determination Division (hereinafter "CRDD" or "Refugee Division") of the Immigration and Refugee Board (hereinafter "IRB") for processing and determination.

40. The IRB is the administrative tribunal established under the Immigration Act with responsibility for, *inter alia*, adjudicating Convention refugee claims in the first instance. It is independent of the Department of Citizenship and Immigration and the Department of Foreign Affairs, and has three divisions: the CRDD, the Immigration Appeals Division and the Adjudication Division. Members of the CRDD and Immigration Appeal Division are independent decision-makers appointed by the Federal Cabinet, with the assistance of an independent advisory board, for fixed terms which may be renewed.²⁴ They are not permanent civil servants, and are intended to be representative of the population. The staff of the Adjudication Division, on the other hand, are public servants employed under the Public Service Employment Act.²⁵ Under the Act, no fewer than 10% of the members of the Refugee Division and Appeals Division shall be barristers or advocates of at least five years standing at the bar of a province or notaries with as much experience in the *Chambre des notaires du Quebec*.

41. Under the Immigration Act, the vast majority of claims are deemed eligible for consideration within the IRB's refugee determination process. Of the thousands of individuals who seek refugee status, the State reports that fewer than 1% are excluded.²⁶ The exclusion criteria set forth in the Act include persons: already recognized as Convention refugees by a country to which they can be returned; already considered as Convention refugees under Canadian law; who arrived from a "prescribed country;"²⁷ who have previously been found ineligible by a senior immigration officer or whose claims were rejected by the IRB (this does not apply to persons who were subsequently out of Canada for 90 days); or who have been "convicted of serious criminal offenses or [found] to be terrorists, subversives, or war criminals, and whom the Minister of Citizenship and Immigration has determined should not be in Canada because they pose a danger to Canadians or the national interest;" and persons against whom an unexecuted removal order is pending.²⁸

42. State officials indicated to the IACHR that these criteria had been established to protect the system, and that approximately two-thirds of the persons thereby excluded fell under the heading of persons whose claims had recently been examined and rejected.

43. Decisions on eligibility are made by senior immigration officers, except in the case of criminality or national security or public order issues.²⁹ In the latter case, where a senior immigration officer has reason to believe that a claimant is inadmissible on such a basis, he or she will prepare a report that is forwarded to the Adjudication Division of the IRB. A member of that Division will then hold an inquiry (adversarial in nature) to hear the claimant and the officer.

44. Where the Adjudicator finds no grounds to believe the officer's allegations, the claim will be referred to the CRDD for determination. Where the Adjudicator finds the allegations grounded, and the officer provides a Minister's opinion that the person constitutes a public danger, or that it would be contrary to the public interest to have the claim heard, the claim will not be heard and an order to remove the claimant will be issued. Further, if new information concerning fraud or criminality surfaces pursuant to the referral of a claim to the Refugee Division, the senior

immigration officer may revisit his or her determination. If the claimant is found ineligible at that point, the Refugee Division will terminate its examination of the claim. Barring grounds for ineligibility, the senior immigration officer will issue a conditional removal order and refer the claim to the CRDD for processing.³⁰ The claimant is provided with a personal information form, which must be completed and submitted to the CRDD within 28 days.

45. Refugee claims are screened by a Refugee Claim Officer, an employee of the Immigration and Refugee Board, into two basic categories: either a full hearing before two members of the CRDD, although it may be held before one member if the claimant agrees; or expedited processing, which allows the Claim Officer to make a recommendation to a member of the CRDD on the basis of an interview. In certain situations, for example, in the case of unaccompanied minors, the Claim Officer can designate priority processing. Those claimants rejected in the expedited process are rescheduled for a full hearing.

46. The State deems proceedings before the CRDD to be non-adversarial in nature, with no participant having a stake in disproving the claim. Exceptionally, however, the Minister intervenes to oppose a claim. The State informed the Commission that the Minister of Citizenship and Immigration was represented in approximately 2% of the cases heard, usually in relation to an allegation of criminality.

47. The Refugee Division is statutorily required to proceed "as informally and expeditiously as fairness permits." The State further indicated that technical rules of evidence do not apply, and that all means of proof considered trustworthy may be considered.

48. In most cases, the CRDD is represented at the hearing by a Refugee Claim Officer, who is tasked to assist the Refugee Division in its investigation of the claim. Claimants have the right to be represented by an attorney or other counsel. The State indicated to the Commission that the vast majority were in fact represented by lawyers, most through legal aid, with others represented by "immigration consultants." The claimant and the Refugee Claim Officer are both entitled to present evidence, question witnesses and make representations. Further, the Minister always has the right to present evidence, and may question witnesses and make representations when permitted by the Refugee Division.

49. Where a claimant is represented by a lawyer, testimony is elicited through his or her examination, followed by questions from the Claim Officer and panel members. The lawyer then has the opportunity to redirect questions to the claimant. Witnesses and affidavit evidence are reportedly often used. Where a claimant is not represented, the Commission was informed that the presiding officer would meet with the claimant in advance to explain the procedures and his or her rights. Claimants are entitled to an interpreter when requested, provided at State expense. It is provided by statute that the UNHCR may always attend these proceedings as an observer. The proceedings are otherwise in camera, but may be opened to observers upon application.

50. Members often render positive decisions from the bench at the conclusion of the hearing. Subject to certain exceptions, a "split" decision between the members usually operates to the benefit of the claimant. Both the claimant and the Minister receive written notice of the decision. A negative decision must be supported by written reasons. Unsuccessful claimants are usually informed of the decisions and reasons in the months following the hearing. Persons who are denied access to the refugee determination system, as well as those whose claims are rejected within it have the right to request leave to obtain judicial review of the decision by the Federal Court of Canada. The question of the availability and efficacy of judicial review in both cases will be taken up below in section V.

51. Successful claimants must apply for permanent residence ("landing") within 180 days. Immediate family members may be included in that claimant's application. At the time of the Commission's on-site visit, such applications were subject to a processing fee of \$500 and a landing fee of \$975 per adult. If the claimant applying for permanent residence does not have sufficient identity documents, or he/she or a dependent included in the application is

inadmissible for criminal or security reasons, landing may not be granted. Reports indicate that the processing of such applications generally takes one to two years, and is often delayed in relation to processing immediate family members abroad.

B. Issues Concerning Access to the Determination Process under the American Declaration and other Applicable Law

52. The process of determining who is or 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. As is evident, the factors which lead individuals to flee persecution are often highly specific to their particular situation. At the same time, the basic principles of equal protection and due process reflected in the American Declaration require predictable procedures and consistency in decision-making at each stage of the process.

53. According to the information before the Commission, the vast majority of those who have reached Canada are able to invoke the process to apply for refugee status. In numerical terms, according to the data received, very few applicants are deemed ineligible to initiate that process. During the Commission's on-site visit, for example, it received information to the effect that, of the thousands of applicants who sought to apply for asylum in 1996, only 112 had been deemed ineligible for a hearing before the CRDD.³¹ Applicants deemed eligible have access to information about the procedures, which are defined by law, regulations and policy guidelines. Where necessary, they are entitled to interpretation services provided by the State. Applicants have a general right to be represented, in certain circumstances at State expense, as well as to produce evidence and make representations in the decision-making process. The CRDD, for its part, is comprised of members appointed to serve as independent, quasi-judicial decision-makers. The IRB has developed an extensive research and documentation facility concerning applicable law and country conditions for the use of its members as well as applicants. CRDD members are required to provide written reasons for negative determinations. The foregoing factors constitute important guarantees to ensure that applicants may be fairly heard by an independent decision-maker.

54. With respect to the question of access to the refugee determination process, the Commission would like to draw attention to three specific issues, each affecting a relatively small number of applicants, which arise in relation to this process and potentially implicate the rights and safeguards applicable under the American Declaration and other international norms which assist in interpreting and applying the Declaration. The principal issue relates to the procedures by which applicants may be denied eligibility to initiate the process on the basis of exclusionary grounds. A second issue concerns the inability of rejected claimants to seek the reopening of the determination process to present new facts or evidence. The third issue relates to the specific situation of a small sub-category of persons accepted as refugees who lack the required documentation to verify their identity, and the impact of current procedures on their possibility to reunite with immediate family members in Canada.

1. Eligibility Screening on the Grounds of Criminality and National Security and Public Order

55. As noted above, under the Immigration Act, the decision to allow applicants access to the determination process is delegated to senior immigration officers of the CIC and, in cases concerning criminality or security issues, involves members of the Adjudication Division of the IRB. The Commission has received information to the effect that these officials generally discharge their responsibilities courteously and effectively. The UNHRC, for example, periodically monitors the performance of officials at points of entry, and indicated to the Commission that it had been favorably impressed in those observations.³²

56. The grounds by which these officials may deem an applicant ineligible to be heard by the CRDD are reviewed in general terms in section IV.A, *supra*. According to the information before the Commission, most of the applicants deemed ineligible are rejected on the basis that they have already been accorded refugee status by a country to which they may be returned, or have

already been determined not to be a Convention refugee and have not been out of the country for more than 90 days.**33**

57. A smaller number are deemed ineligible on the basis of criminality and/or national security grounds. The Immigration Act provides, *inter alia*, that persons are ineligible to have their claims determined: if they have committed a crime punishable by a maximum term of imprisonment of ten years or more and the Minister is of the opinion that they constitute a danger to the public in Canada (section 46.01(e)(i)(iii)(v)); if there are reasonable grounds to believe that the person constitutes a danger to the security of Canada and the Minister is of the opinion that it would be contrary to the public interest to have the claim heard (section 46.01(e)(ii)); or if there are reasonable grounds to believe that the person is a war criminal or has committed a crime against humanity, or is or was a senior member of a government that engaged in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity, and the Minister is of the opinion that it would be contrary to the public interest to have the claim heard (section 46.01(e)(ii)). Within the context of the system as a whole, these criteria apply to a very small number of individuals.

58. It is particularly with regard to persons deemed ineligible on the basis of criminality and/or public security or order that the nature of the screening process raises certain concerns under applicable law. Pursuant to Article XXVII of the American Declaration, "[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." In accordance with international and national law, that right is subject to certain limitations, most pertinently in the present case the exclusionary clauses of the 1951 Convention. The Immigration Act in turn sets forth grounds for exclusion similar to those in the 1951 Convention.**34**

59. According to the 1951 Convention, exclusionary grounds may be applied where it is established that there are "serious reasons for considering" that the person concerned committed one of the acts described. Proof of previous criminal prosecution is not necessarily required.**35** At the same time, given the potential consequences the denial of protection may have for the person concerned, "the interpretation of these exclusion clauses must be restrictive."**36** Because this determination potentially involves questions of life and death, it must necessarily be made pursuant to certain minimum guarantees.

60. More specifically, while the right to seek asylum contained in Article XXVII implies no guarantee that it will be granted, it necessarily requires that the claimant be heard in presenting the application.**37** This right to be heard is linked to the principle of respect for due process which underlies various provisions of the American Declaration, most pertinently Articles II (equal protection), XVII (recognition of juridical personality and civil rights), XVIII (fair trial) and XXVI (due process). While the right to be heard in presenting a claim does not necessarily presuppose the application of the same range of procedural guarantees that would apply, for example, in a criminal court case, it does require that the person concerned be accorded the minimum guarantees necessary to effectively state his or her claim. In this regard, while the determination that a person has previously submitted a claim in Canada that was rejected may in some cases involve no more than a records review, the determination that there are reasonable grounds to presume that a person presents a danger to national security or public order may require the resolution of extremely complex questions of fact and law. As was reported to the Commission during its on site visit, even the determination that a person has already been accorded refugee status in another country may give rise to certain complexities. The Commission received information about the situation of a woman who had fled persecution in a West African country, been granted refugee status in a neighboring country, and then been forced to flee that second country. It was alleged that upon arrival in Canada, she had been excluded from the determination process by virtue of having been recognized as a Convention refugee in another country. Regardless of the merits of the specific situation, it illustrates how a seemingly administrative determination may involve sophisticated interpretations of fact and law.

61. Further, the UNHCR has noted that the exclusion under the 1951 Convention for a serious non-political crime raises problems of definition and application in practice.³⁸ With respect to application in particular, a balance must be struck between the offense presumed to have been committed and the degree of persecution feared. Accordingly, where the claimant demonstrates fear of persecution placing his or her life or personal integrity at risk, the crime would have to be "very grave" indeed to justify exclusion.³⁹ Moreover, in evaluating the nature of the crime, all relevant factors, including mitigating and aggravating factors, are to be taken into account. ⁴⁰

62. Determinations in such cases are not administrative but substantive in nature, requiring appropriate procedural guarantees. The effective observance of the rights of asylum seekers and the obligation of non-return necessarily presuppose the existence of a procedure to effectively determine who is entitled to be accorded these protections. It is axiomatic that the effective protection of rights requires a procedural framework which offers the necessary minimum guarantees.

63. Accordingly, given the substantive nature of the determination and the potential consequences at issue, the Commission is necessarily concerned that the exclusion provisions are applied at first instance by immigration officials of the Department of Citizenship and Immigration. It may be noted that the asylum seekers have no right to be provided State-appointed counsel at the pre-hearing stage.⁴¹ Once the senior immigration officer has made an initial determination that a claim should not be heard for reasons of criminality or national security, the posture of the proceedings appears to be such that the claimant must essentially rebut the particular charge before the Adjudicator.⁴² The relatively few cases which arise may involve very complex, specialized determinations, and considerations relative to exclusion may be interconnected with the basis of an individual's refugee claim.

64. The senior immigration officers and members of the Adjudication Division responsible for determining who may obtain access to the refugee determination system do not enjoy the same level of independence, nor are they expected to have the same expertise as members of the CRDD responsible for making refugee determinations. As noted above, CRDD members are part of the IRB, and are appointed as independent decision-makers. Senior immigration officers are employees of the Department of Citizenship and Immigration Canada. Members of the Adjudication Division, while part of the IRB, are also public servants rather than appointed decision-makers. Further, while the CRDD has specialized expertise, procedures and resources for determining refugee claims, the Adjudication Division deals in broader terms and through adversarial procedures with who is admissible or removable from Canada, and with detention reviews.⁴³ Because the mandate of the Adjudication Division is more heavily directed toward control issues and law enforcement, it is inherently less able to properly balance the public and individual interests involved.

65. In its observations, the Government of Canada expressed its view that the decision-makers in question enjoy the fullest independence. It stated that:

...Canada's immigration legislation is very clear. The discretion of an immigration officer cannot, under any circumstances, be fettered. No body or individual, including the Minister of Citizenship and Immigration, may direct that an immigration officer take a particular decision. Similarly, the decision-making authorities of Adjudicators and Members of the Immigration and Refugee Board (IRB) are unfettered within legislative parameters which comply with the *Charter*. The independence of decision-makers under Canada's immigration and refugee determination regime is thus ensured.

In this regard, the Commission notes that the concerns expressed relate not to any implication that the Minister or other entity has directed decisions of the relevant officials, but to the specific questions of procedure referred to above and the fact that officials charged with enforcing immigration law and policy have a purpose and objective distinct from those charged with applying refugee law and policy. The Commission draws the attention of the relevant authorities

to these points because of the decisive role eligibility screening may play in the asylum seeker's quest to be effectively heard.

66. The Government further indicated in its observations on this point that:

The Report expresses concern related to eligibility decisions performed by officials of the Department of Citizenship and Immigration Canada Eligibility determinations are assessments of fact; senior immigration officers do not assess the validity of a refugee claim, which is the purview of the CRDD, a body independent of CIC.... With respect to eligibility decisions based on criminality or national security, it must be noted that the SIO who makes a determination can do so only after the adjudicator makes a finding of inadmissibility at the conclusion of a full hearing where there is a right to counsel and the Minister has determined the person to be a danger or that it would be contrary to the national interest to have the claim heard. Therefore there are two separate tests applied by two separate decision makers prior to an SIO finding the person to be ineligible. The Courts have recognized that this process is constitutionally sound under the *Charter*.

67. The Government referred to the following additional safeguards applicable to the eligibility determination process: "The individual concerned may be interviewed in the presence of counsel; CIC ensures that qualified interpreters are available; SIO's explain the reasons for and consequences of an ineligibility determination and counsel individuals concerned regarding the possibility of seeking judicial review of the decision." Accordingly, the Government concluded, "Canada is confident that senior immigration officers have the ability to make fair eligibility decisions; clarification from the Commission is required should this practice contravene provisions of the *American Declaration*."

68. The right to seek asylum necessarily requires that asylum seekers have the opportunity to effectively state their claim before a fully competent decision-maker. While applicable international law leaves the decision as to which procedural means are necessary to accomplish this to the national authorities, the Commission shares the view of the UNHCR that eligibility determinations are best made by those tasked with interpreting and applying refugee law and policy.⁴⁴ This view is held by a number of individuals and entities dealing with refugee issues, including Amnesty International.⁴⁵ The eligibility determination may well have a decisive impact on the situation of the person concerned. As stated above, the relatively few cases of rejection that arise may involve complex, specialized determinations that are not just purely factual or administrative, and considerations relative to exclusion may well be interconnected to the basis of the individual's claim for asylum.

69. When dealing with the much lower threshold of screening out claims which are "manifestly unfounded" – i.e. clearly fraudulent or not related to the criteria of the 1951 Convention – the UNHCR has indicated that, in all cases, a potential applicant should:

- be given a complete interview, preferably by an official of the authority competent to determine refugee status;
- "the manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status;"
- an unsuccessful applicant should be entitled to some form of review before rejection at the frontier or removal.⁴⁶

70. The Commission considers that, taking into account the fundamental right of the individual to seek asylum from persecution and to be heard in making that presentation through an effective procedure -- rights recognized in the American Declaration -- as well as the legitimate right and duty of the State to uphold citizen security and public order, issues of eligibility to enter

the determination process should be placed within the competence of the CRDD. Given the interests at stake, these eligibility determinations would necessarily involve a different, more expedited procedure than the refugee determination process. While the denial of eligibility to enter the determination process involves a small number of individuals, the nature of the rights potentially at issue – for example, to life and to be free from torture – requires the strictest adherence to all applicable safeguards. Those safeguards include the right to have one's eligibility to enter the process decided by a competent, independent and impartial decision-maker, through a process which is fair and transparent. The 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.

2. The Absence of Means to Reopen the Convention Refugee Determination Process to Present New Information

71. As noted, the information provided to the Commission indicated that hearings before the CRDD are generally characterized by the application of fair procedural rules, the right of claimants to be represented by counsel, and the requirement that written reasons be issued for any denial, all vital safeguards for the rights of the claimant. However, a particular concern identified by practitioners, claimants, and even certain State representatives is that, once the decision on an application has been taken by the CRDD, the process generally cannot be reopened to introduce newly available material facts or evidence. Case law indicates that, while the CRDD retains a limited "implicit, discretionary and residual" competence under common law to reopen the process in the event that procedural unfairness seriously undermined the determination hearing,⁴⁷ it lacks the authority to reopen a hearing on the basis of newly available information such as changed country conditions.⁴⁸ In its observations, the Government indicated that, "[w]hile the CRDD lacks the authority to reopen a hearing on the basis of newly-available information," persons whose claims have been rejected "also have access to administrative remedies where this information may be presented."

72. One of the highly positive attributes of the determination process is that it attempts to respond to the reality of the asylum seeker's often precarious situation. This is reflected, for example, in the relative informality and non-adversarial nature of the hearing process. Victims of persecution who have fled their countries are often at an extreme disadvantage when it comes to producing evidence, and sometimes even in explaining the treatment to which they have been subjected. The experience of human rights organs, including this Commission, as well as various studies indicate, for example, that persons who have been subjected to physical and/or psychological torture may be unable to clearly articulate or to provide details of their situation due to the physiological and psychological damage sustained.⁴⁹ In those cases where asylum seekers have been forced to take flight precipitously, or have been seriously scarred by trauma, important evidence may well become available subsequent to the determination of their claim. Further, given the sensitive and often unpredictable conditions from which asylum seekers are forced to flee, conditions in the country and the situation of the individual vis-à-vis those circumstances may undergo a sudden and profound change after the refugee hearing. The Commission has been consistently informed that the CRDD lacks jurisdiction to reconsider such cases.

73. Because the determination process is not effectively susceptible to reopening to present new facts or evidence, this potential safeguard is not available to a refused refugee claimant. The limitation that the process is not subject to reopening is further compounded by the discretionary nature of access to judicial review in the refugee context. The issues of access to and the scope of judicial and administrative remedies, including the relevant observations of the Government, will be dealt with below. The Commission considers that allowing the determination process before the CRDD to be reopened on the basis of new facts or evidence deemed to meet a reasonable threshold of relevance would not only be consistent with the spirit of the existing process, but would provide an important safeguard in identifying genuine refugees and ensuring their right to non-return.

3. The Situation of Persons Recognized as Convention Refugees but Lacking Sufficient Documentation of their Identity for Landing

74. The Commission has received extensive information about the overall generosity of the Canadian refugee process. Among other significant benefits, persons accorded status as Convention refugees are permitted to apply for permanent residence in Canada, and are further permitted to include immediate family members in those applications. It must be noted that, in granting permanent residence, Canada exceeds its obligations of protection under the 1951 Convention.

75. The situation is somewhat distinct for persons who have been determined to be Convention refugees, but who lack satisfactory identity documents.⁵⁰ They may apply to become permanent residents as part of the Undocumented Convention Refugee in Canada Class, but will not be granted that status for five years. Since 1997, for example, Convention refugees from Somalia and Afghanistan who do not have satisfactory identity documents due to sustained situations of conflict and the lack of a central government in those countries have been permitted to apply for landing as part of that class. Such persons may include immediate family members in Canada in their applications for landing, but may only seek to reunite with immediate family members abroad through a sponsorship application once they have been landed.

76. Because such persons will not be subject to removal (barring grounds for the cessation of that status), and are thereby effectively protected from persecution, their situation of risk is not at issue. However, the 5 year waiting period effectively precludes hopes of prompt reunion in Canada with immediate family members abroad. Further, the refugee may have difficulty in obtaining Convention travel documents during that period. This means that spouses and dependent children may be separated from one and other during the time, perhaps substantial, that the refugee is in flight, for the five years subsequent to his or her recognition as a Convention refugee, and for the time required thereafter to file and process the sponsorship application (with respect to which similar problems with lack of documentation of family members may cause further delay).

77. The American Declaration establishes that "[e]very person has the right to establish a family, the basic element of society, and to receive protection therefore." This principle is reflected in a range of other instruments, including the Universal Declaration of Human Rights and the ICCPR.⁵¹ For its part, the Final Act of the Conference which adopted the 1951 Convention recommended that governments take the measures necessary for the protection of the refugee's family, and especially to ensure family unity. This principle is reflected in general terms in the policies and practices of the majority of States, including those of Canada.

78. The situation of persons within the Undocumented Refugee in Canada class raises serious concern where the five-year waiting period may cause the extended separation of the refugee from his or her spouse and children. The longer that separation continues, the greater the resulting hardship for all members of the family, and the more difficult the eventual process of reintegration. The Commission considers that, in such cases, the adoption of measures to enable family reunification to take place on a much prompter basis would be consistent with the generous overall commitment of Canada to family reunification, as well as with the right to family life under the American Declaration.

79. The Commission is pleased to report that, in its observations, the State indicated that "[t]he Minister of Citizenship and Immigration has announced that the waiting period for the UCRCC will be reduced from five years to three ... hasten[ing] both stability and family reunification" for members of this class. The Commission recognizes and values this measure as a positive contribution to the protection of the right to family life.

1 See, Charter of the Organization of American States, as amended by the Protocol of Buenos Aires (1967), Protocol of Cartagena de Indias (1985), Protocol of Washington (1992), and Protocol of Managua (1993), Arts. 53 (defining the status of the IACHR within the OAS) and 106 (setting forth the IACHR's mandate).

2 Immigration Act, 1976-77, c. 52, section 3(g), (i).

3 October 20, 1997 presentation of UNHCR Representative Yilma Makonnen to the IACHR. UNHCR figures indicate that in 1996, arrivals numbered 10,934 of which 7,852 were government-sponsored refugees. In the first half of 1997, 3,022 Government-sponsored refugees had been resettled.

4 Citizenship and Immigration Canada website, "The Canadian Refugee System: refugee services," at <http://cic.ci.gc.ca> (last updated 18 June 1999.)

5 See paras. 21 -38, *infra*, detailing the applicable norms and scope of analysis.

6 *Adopted on July 28, 1951, 189 U.N.T.S. 137, entered into force on April 22, 1954.*

7 *Adopted on December 16, 1966, 606 U.N.T.S. 267, entered into force on October 4, 1967.*

8 Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* [hereinafter "*UNHCR Handbook*"] (reedited, Geneva, 1992), at pp. 4-5.

9 Specific aspects of this obligation are analyzed in further detail *infra*.

10 See *generally*, UN General Assembly Resolution 52/103, 12 December 1997, "Office of the UN High Commissioner for Refugees," para. 5.

11 G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

12 G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

13 G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

14 G.A. Res. 428(V), U.N. GAOR Supp. No. 20, Annex, U.N.Doc. A/429 (1950)(approved by the UN General Assembly on December 14, 1950).

15 *Adopted on December 15, 1946, 18 U.N.T.S. 2 (entered into force on August 20, 1948).*

16 *Adopted on September 13-23, 1954, 360 U.N.T.S. 117 (entered into force on June 6, 1960).*

17 *Adopted on December 4, 1954, 989 U.N.T.S. 175 (entered into force on December 13, 1975).*

18 In addition to the American Declaration and Convention, the inter-American human rights system includes the following instruments: the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"); Protocol to the American Convention on Human Rights to Abolish the Death Penalty; Inter-American Convention to Prevent and Punish Torture; Inter-American Convention on Forced Disappearance of Persons; and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará").

19 IACtHR, Advisory Opinion OC-10/89 of July 14, 1989, "Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights," Ser. A No. 10, paras. 45-46. As the Court indicated:

the member states of the organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter ... cannot be interpreted and applied as far as human rights norms are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.

Id., para. 43. The functions of the Commission in interpreting and applying the Declaration are further set forth in its Statute, which is approved by the OAS General Assembly, and its Regulations, which are approved by the Commission itself. Pursuant to its Statute, the Commission is tasked in relation to States not Party to the American Convention to pay particular attention to the observance of the core rights set forth in Articles I, II, III, IV, XVIII, XXV and XXVI of the American Declaration.

20 Beyond the specific ambit of human rights, it may also be noted that a number of treaties and other instruments have been adopted in the Americas in relation to the status of refugees, including, *inter alia*, the 1889 Montevideo Treaty on International Penal Law, the 1928 Havana Convention on Asylum, the 1933 Montevideo Convention on Political Asylum, the 1954 Caracas Convention on Diplomatic Asylum, the 1954 Caracas Convention on Territorial Asylum, and the 1984 Cartagena Declaration.

21 Section 52(1) of the Constitution Act, 1982 provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

22 See *generally*, Vienna Convention on the Law of Treaties, Art. 31(3)(c).

23 In its advisory opinion on "Other Treaties," the Court indicated with approval that:

The Commission has properly invoked in some of its reports and resolutions 'other treaties concerning the protection of human rights in the American states,' regardless of their bilateral or multilateral character, or whether they have been adopted within the framework or under the auspices of the inter-American system.

As the Court explained, the "need of the regional system to be complemented by the universal finds expression" in this practice of the Commission, which "is entirely consistent with the object and purpose of the Convention, the American Declaration and the Statute of the Commission." Advisory Opinion OC-1/82 of September 24, 1982, "Other Treaties' Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention), Ser. A No. 1, para. 43 (citing examples under the American Convention and Declaration).

24 Immigration Act, section 61.

25 Immigration Act, section 63.3.

26 UNHCR data for 1996 indicated that only 112 asylum seekers had been ruled ineligible for a CRDD hearing during that period. Presentation by UNHCR Representative Makonnen, *supra*.

27 According to the information before the Commission, this provision is not in effect because no country has yet been listed as "prescribed."

28 See Immigration Act, section 46.01. See *generally*, Citizenship and Immigration Canada, "The Canadian Refugee System: Refugee Determination in Canada," at <http://cicnet.ci.gc.ca>, at p. 1.

29 Immigration Act, section 45(2).

30 The conditional removal order will take effect if the claimant withdraws or abandons the claim, is determined not to be a Convention refugee, or despite being a Convention refugee, does not have the right to remain in Canada.

31 Presentation of UNHCR Representative Makonnen, *supra*.

32 *Id.*

33 In its observations, the Government indicated:

The eligibility process in Canada is judiciously applied. In 1996, Canada received 25,616 inland refugee claims, of which 122 were found by a Senior Immigration Officer to be ineligible for referral to the CRDD for hearing. Thus more than 99% of claimants were found to be eligible for referral to the CRDD. Of the 122, 31% were deemed to be ineligible for referral as the individual had received Convention Refugee status in another country; 31% had previously been found not to be a Convention Refugee by the CRDD; and 11% were ineligible due to criminality or security concerns. This represents far less than 1% of all claims.

34 See sections IV.A and III.A, respectively, *supra*.

35 *UNHCR Handbook, supra*, p. 35.

36 *Id.*

37 See *generally*, Report N° 51/96, Case 10.675, United States, March 13, 1997, in *Annual Report of the IACHR 1996*, OEA/Ser.L/V/II.95, Doc. 7 rev., March 14, 1997, at para. 163.

38 *UNHCR Handbook, supra*, paras. 155-56.

39 *Id.* para. 156.

40 *Id.* para. 157.

41 See *Delghani v. Canada (Min. of Employment and Immigration)*, [1993] 1 S.C.R. 1053.

42 See *generally*, Immigration Act, Section 45(4), providing that "[t]he burden of proving that a person is eligible to have a claim to be a Convention refugee determined by the Refugee Division rests on the person." Referral to the Adjudication Division is based on an initial finding that the burden has not been met.

43 "Administrative determinations of eligibility should, in the view of UNHCR, be limited to simple factual concerns. Where issues of judgment or interpretation of domestic or international legal standards arise, the matter should be referred to a hearing before the Immigration and Refugee Board, which has the expertise to weigh such concerns in the context of the claim as a whole." Statement by Mr. D. Chefeke, Rep. in Canada of the UNHCR to the Legislative Committee Studying Bill c-86 (11 Aug. 1992).

44 See, presentation of UNHCR Representative Makonnen, *supra*; see *generally* note 45, *supra*.

45 Amnesty International has "frequently called on the government to put this decision-making in the hands of the relevant, appropriate and independent expert body in Canada, the Immigration and Refugee Board." The organization has expressed its concern that the categories for denial of eligibility are "broad and potentially overreaching," and has further noted that the exclusion of persons already granted refugee status in another country is problematic because it does not allow for cases where the country of first asylum has itself become a place where the person concerned is in danger. The organization characterized the determinations at issue in the eligibility screening process as "very sensitive and difficult assessments ... which are often interconnected to the facts which lie at the base of an individual's refugee claim." Amnesty International, "Refugee Protection in Canada", presentation before the IACHR of October 20, 1997, p. 5.

46 UNHCR Executive Committee, Conclusion N° 30 (XXXIV)– 1983, "The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum," Report of the 34th Session, UN Doc. A/AC.96/631, at para. 97(2)(e).

47 See Federal Court Trial Division, *Faghihi v. Canada* (Min. of Citizenship and Immigration), Decision of Aug. 17, 1999 [Docket: IMM-4836-98], available at web site www.fja.gc.ca, at paras. 43, 47, 51-52 (finding material error in translation of country of nationality in the claimant's personal information form insufficient basis to grant a motion for reopening).

48 See Federal Court Trial Division, *Chaudhry v. Canada* (Min. of Employment and Immigration) [1994], 25 Imm.L.R. (2d) 139, 83 F.T.R. 81, [1985] 1 F.C. 104, Decision of July 15, 1994 (finding that, in view of the textual indication in the Immigration Act against reopening, new information about changed country conditions was not a sufficient basis for reopening; noting that such factors could be considered within the scope of humanitarian and compassionate review).

49 See e.g., Glenn Randall and Ellen Lutz, *Serving Survivors of Torture*, p. 29, and at pp. 42-44 (1992)(discussing the psychological sequelae of traumatic human rights violations, and added consequences of being a refugee); see also, Federico Allodi et al., "Physical and Psychiatric Effects of Torture: Two Medical Studies," in *The Breaking of Bodies and Minds: Torture, Psychiatric Abuse, and the Health Professions*, pp. 58-78 (Stover and Nightingale eds. 1985)(analyzing results of studies of torture survivors in the United States and Canada).

50 In its observations, the State noted that applicable law provides "maximum flexibility for determining what constitutes satisfactory identity documents." "Immigration officers will consider documents that are genuine; pertain to the Convention refugee; and, provide credible evidence of the person's identity." The State further noted the importance it attributes to balancing the need to protect persons with a well-founded fear of persecution against the need to protect the system from those who would abuse it.

51 See *infra*, section VI.B (analyzing protections to be accorded children, and the right to family life in removal proceedings).