

**THE
SENATE**

**LE
SÉNAT**

**ENHANCING CANADA'S ROLE IN THE OAS:
CANADIAN ADHERENCE TO THE
AMERICAN CONVENTION ON HUMAN RIGHTS**

Report of the Standing Senate Committee
on Human Rights

Chair

The Honourable Shirley Maheu

Vice-Chair

The Honourable Eileen Rossiter

May 2003

MEMBERSHIP

The Honourable Shirley Maheu, *Chair*

The Honourable Eileen Rossiter, *Vice-Chair*

and

The Honourable Senators:

Gérald A. Beaudoin

* Sharon Carstairs, P.C. (or Fernand Robichaud, P.C.)

Maria Chaput

Marisa Ferretti-Barth

Mobina Jaffer

Laurier LaPierre

* John Lynch-Staunton (or Noël Kinsella)

Vivienne Poy

Jean-Claude Rivest

* Ex-officio members

In addition, the Honourable Senators Raynell Andreychuk, Ethel M. Cochrane, Joan Fraser, Elizabeth Hubley, Serge Joyal, Noël A. Kinsella, Landon Pearson, Nicholas W. Taylor and the Very Reverend Lois Wilson were members of the Committee at various times during this study or participated in its work.

Staff from the Parliamentary Research Branch of the Library of Parliament:

David Goetz, Research Officer

Carol Hilling, Research Officer

Line Gravel
Clerk of the Committee

ORDER OF REFERENCE

Extract from the *Journals of the Senate*, Thursday, November 21, 2002:

The Honourable Senator Fraser for the Honourable Senator Maheu moved, seconded by the Honourable Senator Murray, P.C.:

That the Standing Senate Committee on Human Rights be authorized to examine and report upon Canada's possible adherence to the American Convention on Human Rights;

That the documents and evidence received by the Committee during its consideration of these same matters in the First Session of the Thirty-seventh Parliament be referred to the Committee; and

That the Committee table its final report no later than June 27, 2003.

The question being put on the motion, it was adopted.

Paul C. Bélisle
Clerk of the Senate

TABLE OF CONTENTS

CHAIR'S FOREWORD	1
SUMMARY OF RECOMMENDATIONS	3
I. INTRODUCTION	5
II. HISTORY	8
A. Canada's Links with the Americas	8
B. Canada's entry into the OAS	10
III. THE HUMAN RIGHTS SYSTEM	13
A. Legal instruments	13
1. Inter-American Declaration of the Rights and Duties of Man.....	13
2. American Convention on Human Rights and Additional Protocols.....	15
a. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights	15
b. Protocol to the American Convention on Human Rights to Abolish the Death Penalty.....	17
3. Other Inter-American Conventions.....	17
a. Inter-American Convention to Prevent and Punish Torture	18
b. Inter-American Convention on Forced Disappearance of Persons.....	18
c. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women	19
d. Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities	19
B. Monitoring Bodies	20
1. The Inter-American Commission on Human Rights	20
a. History.....	20
b. Functions.....	21
2. The Inter-American Court of Human Rights	23
a. Advisory Jurisdiction.....	23
b. Contentious Jurisdiction.....	24
C. Mechanisms for Protection and Redress	26
1. The Individual Petition Process Before the Inter-American Commission.....	26
a. Filing a Petition.....	26
b. Friendly Settlement Procedure.....	28
c. Recommendations or Referral of the Case to the Court	29
2. Reports of the Inter-American Commission	33
a. State Reports	33
b. The Annual Report of the Inter-American Commission.....	33
c. Country Reports	34
3. Recourse to the Inter-American Court.....	35
a. Contentious Cases.....	36
b. Enforcement of the Court's Decisions	37
c. Requests for Advisory Opinions.....	38

IV. DISCUSSION OF ISSUES RAISED WITH THE COMMITTEE	39
A. Government Concerns.....	39
B. Concerns of Non-Governmental Witnesses	42
1. The Right to Life.....	42
2. Article 13: Freedom of Expression and Prohibition of Prior Censorship.....	44
3. Article 14: Right of Reply.....	45
4. Property Rights	47
5. Article 22(5): Expulsion of Nationals.....	47
6. Article 24: Equality Rights	48
7. Article 28: Federal Clause	49
C. Discussion of Interpretive Declarations and Reservations.....	51
D. Advantages to Ratification	55
1. Strengthening the Inter-American system	55
2. Increased Protection of Human Rights for Canadians.....	56
3. Increased Protection of Women’s Rights in the Americas	57
4. Stimulating United States and Caribbean participation	58
5. Greater Precision of the American Convention.....	58
V. THE COMMITTEE’S CONCLUSIONS AND RECOMMENDATIONS.....	58
APPENDIX A: WITNESSES	63
APPENDIX B: SELECTED DOCUMENTS PREPARED FOR OR RECEIVED BY THE COMMITTEE DURING THIS STUDY	67
APPENDIX C: SIGNATURES AND CURRENT STATUS OF RATIFICATIONS.....	69

CHAIR'S FOREWORD

In November 2002, the Senate Standing Committee on Human Rights received a second mandate to study and report on Canada's possible adherence to the American Convention on Human Rights. The role of the Committee was to review Canadian participation in the Inter-American system for the protection of human rights and make recommendations on whether or not Canada should ratify the American Convention on Human Rights.

Canada has been a member of the Organization of American States since January of 1990. We have developed strong relationships with the Americas and we have been active in promoting human rights issues in the region. However, Canada has not yet ratified the principal treaty with respect to the protection of human rights in the Americas: the American Convention on Human Rights. Many wonder why Canada is so reluctant to ratify the Convention and therefore be fully part of the OAS Human Rights System.

Over the course of our hearings, we have found that there are in fact no compelling reasons for Canada not to ratify the Convention. While legitimate concerns were raised before the Committee, both by government and non-government witnesses; concerning the compatibility of Canadian law with some provisions of the Convention, none of these concerns constitute insurmountable obstacles. Witnesses, including legal experts, human rights groups, representatives from NGOs, all have suggested solutions to overcome the obstacles highlighted by the Government of Canada. Support for Canadian ratification of the Convention, with at least one reservation and some statements of understanding has been unanimous among witnesses.

The Committee has heard from a variety of experts. During its first mandate, it traveled to the seat of the Inter-American Court of Human Rights, in San José, Costa Rica. Members of the Committee met with the President and judges of the Inter-American Court and were able to witness first hand how the Court functions by attending hearings. While in Costa Rica, Committee members also had an opportunity to meet with the Inter-American Commission on Human Rights. Many of the concerns raised by government officials before the Committee concerning the functioning of the Commission have been and continue to be addressed by the Commission while Canada sits on the sidelines because it is not yet a full participant in the human rights system. Committee members also met with the Ombudsman for Costa Rica, the

Inter-American Institute for Human Rights, United Nations bodies and representatives from many non-governmental human rights organizations. All have expressed their hope that Canada will ratify the American Convention on Human Rights so as to play an even greater role than the one it currently plays in the promotion and protection of human rights in the hemisphere.

In short, through its study, the Committee has found that the Inter-American Commission and Court would like to see Canada ratify the Convention. Civil society in Canada would like to see our government ratify the Convention. The Committee has been told that the Canadian provinces have concerns but none of them agreed to share them with the Committee. Witnesses, including legal experts, have suggested solutions to address specific issues of compatibility between Canadian domestic law and the Convention.

On behalf of all Committee members, I would like to thank Senator Raynell Andreychuk for initiating this study.

I would also like to thank Senator Gerald A. Beaudoin, Senator Ethel M. Cochrane, Senator Joan Fraser, Senator Marisa Ferretti Barth, Senator Mobina S.B. Jaffer, Senator Noël A. Kinsella, Senator Laurier L. Lapierre, Senator Vivienne Poy, Senator Eileen Rossiter, Senator Nick Taylor, and the Right Reverend Lois Wilson for their participation and contribution to this study.

Finally, I would like to thank our staff whose work made this study possible. Mrs. Carol Hilling, our analyst from the Library of Parliament, has been an exceptional support from the beginning, as well as Mrs. Line Gravel, our clerk. I would also like to thank the staff from the previous session, Mr. David S. Goetz and Mr. Till Heyde.

Shirley Maheu
Chair

SUMMARY OF RECOMMENDATIONS

1. The Committee recommends that Canada take all necessary action to ratify the *American Convention on Human Rights*, with a view to achieving this goal by July 18, 2008, which is the thirtieth anniversary of the entry into force of the Convention.
2. The Committee further recommends that, upon ratification of the Convention, Canada recognize the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the Convention.
3. Given the concerns expressed by government officials and representatives of various sectors of civil society that certain provisions of the Convention may appear problematic in the light of contemporary Canadian domestic law, whether federal, provincial or territorial, the Committee recommends that the federal-provincial-territorial Continuing Committee of Officials on Human Rights identify specific provisions of the *American Convention on Human Rights* that raise concerns and inform the Canadian public about them so as to foster debate and a search for solutions.
4. The Committee recommends that the Government of Canada consider making the necessary interpretive declarations and reservations to address any concerns raised, in particular to maintain the *status quo* of abortion under Canadian law.
5. The Committee recommends that as the Government of Canada takes appropriate steps towards the ratification of the Convention, it should actively engage in promoting the Convention and the whole Inter-American system for the protection of human rights in Canada.

**ENHANCING CANADA’S ROLE IN THE OAS:
CANADIAN ADHERENCE TO THE
AMERICAN CONVENTION ON HUMAN RIGHTS**

I. INTRODUCTION

The Standing Senate Committee on Human Rights was authorized by the Senate on May 10, 2001, to examine issues relating to human rights, and *inter alia*, to “review the machinery of government dealing with Canada’s international and national human rights obligations”¹. In its Report of December 2002, *Promises to Keep: Implementing Canada’s Human Rights Obligations*, this Committee identified several issues for further study, including the possibility of Canada acceding to the *American Convention on Human Rights* (hereinafter the “*American Convention*”). On February 2, 2002, the Committee was authorized to study the status of Canada's adherence to international human rights instruments and the process whereby Canada enters into, implements, and reports on such agreements. It began this study by looking at the *American Convention on Human Rights*. Following the prorogation of Parliament and the Throne Speech of September 30, 2002, the Committee received a new mandate, on November 21, 2002, to study the possibility of Canada’s adherence to the *American Convention on Human Rights*.

In the Spring of 2002, the Committee held a number of hearings in order to “engage the public, to hear the views of relevant groups, and to facilitate decisions at the political level”². In addition, in September 2002, the Committee travelled to the seat of the Inter-American Court of Human Rights where it met not only the members of the Court but also the members of the Inter-American Commission on Human Rights, as well as various human rights experts and representatives of non-governmental organizations who have practical knowledge of the *American Convention* and the Inter-American system for the protection of human rights. Between November 2002 and March 2003, the Committee continued to hold hearings to complete its study of the *American Convention*. In April 2003, the Chair and one member of the Committee took part in a round-table discussion on the *American Convention* organized by the Ligue des droits et libertés du Saguenay-Lac-Saint-Jean.

¹ *Promises to Keep: Implementing Canada’s Human Rights Obligations*, Report of the Standing Senate Committee on Human Rights, December 2001, at 5.

² *Promises to Keep: Implementing Canada’s Human Rights Obligations*, Report of the Standing Senate Committee on Human Rights, December 2001, at 39.

Canada has been a member of the Organization of American States (the OAS, or the “Organization”) since January 8, 1990. Although some obligations with respect to human rights arose from the ratification of the OAS Charter, several witnesses before the Committee have stressed that the government should be encouraged to ratify the *American Convention* in order to participate more fully in the OAS human rights system.

When the Hon. Lloyd Axworthy, then Minister of Foreign Affairs, was asked in the House of Commons, in 1999, why Canada had not yet ratified the *American Convention*, his reply was as follows:

Before Canada can ratify a human rights convention, we must ensure that we are in a position to live up to the commitments we would undertake by ratifying it. Since 1991, consultations have been conducted with federal, provincial and territorial officials to assess compliance of federal and provincial legislation with the convention. The review process has been complicated by the vague, imprecise and outdated language used in the convention. Many provisions in the Convention are ambiguous or contain concepts which are unknown or problematic in Canadian law. More importantly, many provisions of the Convention are inconsistent with other international human rights norms, making it difficult for us to comply with both the ACHR and those norms.

By way of example, the ACHR would preclude prior censorship, and therefore would conflict with Canada's international obligations to suppress hate propaganda and child pornography. The ACHR would preclude the extradition of nationals, and therefore would conflict with Canada's extradition obligations and our obligations to co-operate with international criminal tribunals or the future international criminal court. Serious concerns have been raised that the unusual wording of the ACHR provision on the right to life may create a conflict with charter rights. The ACHR contains a right of reply to inaccurate or offensive statements in the media, which is not known in our law and may conflict with charter rights. The ACHR guarantees equality before the law but does not contemplate affirmative action.

In order to ratify the ACHR at present, a very large number of reservations and statements of understanding, SOUs, would be required. However, Canada's position with respect to reservations to human rights treaties is that reservations should be few in number and limited in scope. We are concerned that ratifying the ACHR with a large number of reservations and SOUs would be contrary to this position and would undermine our efforts to

dissuade other states from ratifying human rights treaties subject to sweeping reservations.

Until such time as the concerns with respect to reservations and SOUs expressed by both levels of government have been satisfactorily dealt with, Canada will not be in position to ratify the ACHR.

Canadians are already entitled to bring petitions to the Inter-American Commission on Human Rights alleging human rights violations. Therefore, even without ratification of the ACHR, Canadians already benefit fully from the inter-American human rights system.³

The issue of ratification of the *American Convention* was addressed again when the Government of Canada responded to the June 2001 Report of the Standing Committee of Foreign Affairs and International Trade entitled *Balance, Transparency and Engagement after the Quebec Summit*. This Report contained the following recommendation concerning the *American Convention*:

Given the importance of the Inter-American Human Rights System of the *American Convention on Human Rights*, the Committee recommends that the Government of Canada investigate mechanisms such as a Memorandum of Understanding or a Reservation, to allow it to ratify the Convention in the near future.”⁴

The Government of Canada replied that:

Options for accession to the American Convention on Human Rights have been seriously examined on a regular basis since 1990 through the federal, provincial and territorial consultation process, which is part of the bi-annual meetings of the Continuing Committee of Officials on Human Rights. The question of accession to the Convention was most recently discussed with the provincial and territorial governments on May 24, 2001, and is expected to be on the agenda again at the upcoming meeting in the fall.

In their consideration of the Convention to date, the Government of Canada and the provincial and territorial governments have identified a number of provisions that are inconsistent or otherwise problematic in light of Canadian laws and practices in federal, provincial and territorial jurisdictions. Such issues could, in principle, be addressed by having Canada make reservations and

³ http://www.parl.gc.ca/36/1/parlbus/chambus/house/debates/220_1999-05-03/han220_1520-e.htm.

⁴ The Government's Reply can be found on the DFAIT Internet site.

statements of understanding at the time of its accession to the Convention. However, it should be noted that the number of reservations or statements of understanding that would be necessary to address federal, provincial and territorial concerns is higher than considered necessary by the NGO community.⁵

The testimony before the Committee indicated that the concerns remain the same and that little, if any, progress has been made in working towards solutions in the three years since Mr. Axworthy's statement.

This Report identifies recommendations with respect to the *American Convention on Human Rights*. It should be noted, however, that there are other Inter-American Conventions and Protocols that are open to ratification by Canada.

II. HISTORY

A. Canada's Links with the Americas

On April 30, 1948, twenty Latin American countries⁶ and the United States ratified the *Charter of the OAS*. The Charter established a new regional organization, which was the result of discussions and negotiations that began in 1826, when Simón Bolívar convened the Congress of Panama with the idea of creating an association of states in the hemisphere.

In 1890, the First International Conference of American States, held in Washington, D.C., established the International Union of American Republics and its secretariat, the Commercial Bureau of the American Republics – the forerunner of the OAS. At that time, Canada was still dependent on Great Britain for its international relations and was not invited to participate in this Conference⁷.

In 1910, this organization became the Pan American Union (PAU). Initially, the United States was interested in Canada's membership and even reserved it a chair at the Union's Headquarters,

⁵ The Report is available on line: www.parl.gc.ca/InfoComDoc/37/1/FAIT/Studies/Reports/faitc12-e.htm.

⁶ Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela.

⁷ McKenna, Peter, "Canada and the Inter-American System, 1890-1968", (1995) 41 *Australian Journal of Politics and History* 253-270, at 254.

but there was little Canadian interest in Latin America. Some even feared that the United States had ulterior motives⁸.

Canada was never formally invited to join the PAU, although the issue was raised on several occasions. Some Latin American States such as Ecuador, Mexico and Chile supported Canada's membership. Others were less than enthusiastic at the prospect of having another predominantly English-speaking country join the Union, and the United States soon became concerned about "British meddling in their own backyard"⁹, and no longer supported Canadian membership.

World War II changed Canada's attitude as closer ties with Latin America began to look advantageous both from the economic and security perspective. In 1940, Canada began to establish diplomatic relations with Latin American States, first with Argentina and Brazil and soon thereafter with Chile and Mexico. In December of 1941, Canada announced its intention to attend the next Meeting of Foreign Ministers of the PAU in Rio de Janeiro, and informed the Brazilian authorities of its willingness to join the Union if it were formally invited. However, faced with strong opposition from the United States, Canada ultimately did not attend the Meeting.

After the war, Canada concentrated its energies and interest on the newly created United Nations and then NATO. It did not participate in Inter-American Conference that led to the creation of the OAS.

Canada became a permanent observer at the OAS in 1972. At that time, it also became a party to the *Agreement Establishing the Inter-American Development Bank*¹⁰. However, although the issue of full membership in the OAS was raised periodically, it was generally met with skepticism about any advantages for Canada. Parliament considered the possibility of Canadian membership in the Organization, most notably in 1981-1982 when the House of Commons Subcommittee on Canada's Relations with Latin America and the Caribbean, after an exhaustive study of the issues involved, produced a report in favor of Canada seeking admission to the OAS.¹¹ However, the Falkland Islands/Malvinas conflict in 1982, and the 1983 invasion of Grenada by the US caused the long-standing Canadian concern that joining the OAS was not in the best interest of Canada to resurface. With respect to the Falklands/Malvinas War, Canada

⁸ *Ibid.*, at 255.

⁹ *Ibid.*, at 256.

¹⁰ OAS Treaty Series n° 14, <http://www.oas.org/juridico/english/signs/c-15.html>.

sided unequivocally with Great Britain and imposed economic sanctions on Argentina, actions it could not have taken had it been a member of the OAS. The invasion of Grenada by the US reminded Canada that over the years the OAS had been rather ineffective in preventing conflicts and that the United States was playing a dominant role in the Organization. Given that the 2/3 majority rule at the OAS required compliance by members, there was serious concern that joining the OAS would “end up merely rubber-stamping US foreign policy forays in the region”¹². Then, in the summer of 1989, the Department of External Affairs recommended that Canada join the OAS.¹³

B. Canada’s entry into the OAS

By 1988, there was growing public awareness and interest in Latin America. In addition, the Prime Minister of Canada, Brian Mulroney, and his then Secretary of State for Foreign Affairs Joe Clark both believed that it was time for Canada to become a full-fledged member of the OAS. The Mulroney government undertook a review of Canada’s relations with Latin America and developed a policy strategy with, as its key objective, “the development of democracy and the pursuit of economic prosperity within the region.”¹⁴ Membership in the OAS was seen as a means of allowing Canada to expand its ties with Latin America and to pursue its political and economic interests. In late 1989, the Canadian government announced its intention to join the OAS and by early January, it had ratified the OAS Charter.

The Charter of the OAS sets out the three objectives of the Organization: the peaceful resolution of conflicts, collective security and economic development. The Charter also affirmed the States’ commitment to respect fundamental human rights without discrimination.

The strengthening of democracy and economic progress have been at the forefront of the Organization’s priorities. The Charter was modified four times since its creation, by the *Protocol of Buenos Aires*, in 1967¹⁵, the *Protocol of Cartagena de Indias*¹⁶, in 1985, the *Protocol*

¹¹ See Peter McKenna, *Canada and the OAS*, Carleton University Press, Ottawa: 1995, at 108.

¹² *Ibid.*, at 110-111

¹³ See 1989 Policy Review, Policy Staff Paper 94/06 “Canada in the Americas: New Opportunities and Challenges”.

¹⁴ Peter McKenna, *Canada and the OAS*, at 137-138.

¹⁵ Art. 51 of this Protocol Recognized the Inter-American Commission as an organ of the OAS.

¹⁶ This Protocol recognised the concept of integral development as an indispensable factor in the quest for peace and security in the hemisphere.

of *Washington*¹⁷, in 1992, and the *Protocol of Managua*¹⁸, in 1993. More recently, the OAS adopted a Democratic Charter which illustrates its commitment to strengthen democracy in Latin America. Under article 2 of the *Charter*:

The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States. Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.

Under the terms of article 19, non-democratic governments can be prevented from exercising their rights as OAS members:

An unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to its government's participation in sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization.

When Canada joined the OAS, democratically elected governments had replaced longstanding dictatorships in most countries of the Americas. One of Canada's first initiatives was to propose the creation of a Unit for the Promotion of Democracy (UPD), to provide guidance and assistance to OAS member States to strengthen their democratic institutions and processes.¹⁹ Initially focused on monitoring elections, the UPD now has a much broader range of activities.²⁰

Officials who appeared before the Committee suggested that the role played by Canada in this instance illustrates the fact that non-ratification of the Convention does not impede participation

¹⁷ This Protocol provided for the suspension of States whose democratically elected government has been overthrown. It also affirmed the Member States commitment to the eradication of poverty.

¹⁸ The Protocol of Managua, ratified in January 1996, eliminated the Inter-American Councils and created an Inter-American Council for Integral Development. The aim of this Council is to promote cooperation among the American states for the purpose of integral development, particularly by contributing to the eradication of critical poverty through work in the economic, social, educational, cultural, scientific, and technological fields.

¹⁹ See <http://www.upd.oas.org/Introduction/history.htm>.

²⁰ Committee Evidence, March 18, 2002, at 8:5 (Alexandra Bugailiskis, DFAIT)

in the system²¹. They added that Canada's role is continuing through the promotion of recent instruments such as the *Proposed Inter-American Declaration on the Right of Indigenous Peoples*.

Although Canada has not ratified the *American Convention on Human Rights*, it is a party to several Inter-American legal instruments including:

- The *Inter-American Convention on the Granting of Political Rights to Women*²², adopted in 1948, ratified by Canada in 1991.
- The *Inter-American Convention on the Granting on Civil Rights to Women*²³, adopted in 1948, ratified by Canada in 1991.
- The *Agreement Establishing the Inter-American Institute for Global Change Research*,²⁴ accepted by Canada in 1993.
- The *Inter-American Convention on Serving Criminal Sentences Abroad*²⁵, adopted in 1994, ratified by Canada in 1995.
- The *Inter-American Convention on Mutual Assistance in Criminal Matters*²⁶, adopted in 1992, ratified by Canada in 1996, and
- The *Inter-American Convention Against Corruption*²⁷, adopted in 1996, ratified by Canada in 1996.

In addition, Canada signed, but has not yet ratified the *Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials*²⁸, adopted in 1997. Canada has also ratified the *Inter-American Convention on Transparency in Conventional Weapons Acquisitions*²⁹, which came into force on November 22, 2002.

²¹ Committee Evidence, March 18, 2002, at 8:5 – 8:9 (Alexandra Bugailiskis).

²² OAS Treaty Series n° 3.

²³ OAS Treaty Series n° 23.

²⁴ <http://www.oas.org/juridico/english/Sigs/c-19.html> .

²⁵ OAS Treaty Series n° 76.

²⁶ OAS Treaty Series n° 75.

²⁷ <http://www.oas.org/juridico/english/Sigs/b-58.html>.

²⁸ <http://www.oas.org/juridico/english/Sigs/a-63.html>.

²⁹ <http://www.oas.org/juridico/english/treaties/a-64.htm>.

III. THE HUMAN RIGHTS SYSTEM

A. Legal instruments

The Inter-American system for the protection of human rights, which was initially based on the OAS Charter, currently consists of one legally binding Declaration and several conventions and protocols, some of which were adopted after Canada joined the OAS. A Commission and a Court oversee the implementation of these legal instruments. The Inter-American system, which was modelled on the European system for the protection of human rights, has unique characteristics that reflect particular needs, as should any regional system. Although the present study focuses on the *American Convention on Human Rights*, other Inter-American human rights treaties are open to Canada's ratification.

1. Inter-American Declaration of the Rights and Duties of Man

The OAS began to develop its own regional system for the protection of human rights in 1948, when member States of the newly created Organization adopted several resolutions pertaining to human rights³⁰. One of these resolutions, the *American Declaration of the Rights and Duties of Man*³¹ (hereinafter the *American Declaration*), was to become the cornerstone of the Inter-American system for the protection of human rights. Originally adopted as a statement of intent because the Member States could not agree on a Convention³², the *American Declaration* gradually acquired a unique legal status through the creation and subsequent development of the Inter-American Commission on Human Rights. By the time Canada joined the OAS, the Inter-American Court of Human Rights had confirmed that the *American Declaration* was a source of legal obligations for all the member States of the OAS.³³

It may be noted here that the United States rejects the legal standing of the American Declaration. The most recent example is its response to the conclusions of the Inter-American Commission in the Case of *Rafael Ferrer-Mazorra et al.*³⁴, finding the US to be in violation of

³⁰ Conventions on the Granting of Civil and Political Rights to Women; Charter of Social Guarantees.

³¹ <http://www.cidh.oas.org/Basicos/basic2.html>.

³² Stoetzer, O. Carlos, *The Organization of American States*, 2nd Ed. Praeger Publishers, Westport, 1993, at 245.

³³ *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Series A, N° 10, 14 July, 1989.

³⁴ <http://www.oas.org/annualrep/20003ng/ChapterIII/Merits/USA9903.htm>.

several provisions of the American Declaration as a result of the treatment of Cuban nationals. The official response from the United States stated that:

With regard to each implication or direct assertion in the Commission's report that the American Declaration of the Rights and Duties of Man itself accords rights or imposes duties, some of which the United States has supposedly violated, the United States reminds the Commission that the Declaration is no more than a recommendation to the American States. Accordingly, the Declaration does **not** create legally binding obligations and therefore **cannot** be "violated."³⁵

This response was in keeping with the long-standing position of the United States with respect to the binding nature of the *American Declaration*. In 1948, it was opposed to the adoption of a legally binding human rights instrument³⁶. It repeated its objections in 1989, before the Inter-American Court of Human Rights³⁷. However, it would be difficult for Canada to adhere to this position since, as mentioned earlier, it became a member of the OAS after the advisory opinion of the Inter-American Court concerning the legally binding character of the American Declaration.

Thus, ratification of the OAS Charter triggered human rights obligations under the *American Declaration* and, as will be developed further below, it automatically subjected Canada to the

³⁵ Response of the Government of the United States of America to Inter-American Commission on Human Rights Report 85/00 of October 23, 2000 concerning Mariel Cubans (Case 9903), [emphasis in the text].

³⁶ D. Forsythe, "Human Rights, the United States and the Organization of American States", (1991) 13 *Human Rights Quarterly* 66-98.

³⁷ *Interpretation of the Inter-American Declaration of the Rights and Duties of Man Within the Framework of article 64 of the American Convention on Human Rights*, Advisory opinion OC-10/90. 14 July 1989, at para. 12:

The American Declaration of the Rights and Duties of Man represents a noble statement of the human rights aspirations of the American States.

Unlike the American Convention, however, it was not drafted as a legal instrument and lacks the precision necessary to resolve complex legal questions. Its normative value lies as a declaration of basic moral principles and broad political commitments and as a basis to review the general human rights performance of member states, not as a binding set of obligations.

The United States recognizes the good intentions of those who would transform the American Declaration from a statement of principles into a binding legal instrument. But good intentions do not make law. It would seriously undermine the process of international lawmaking --by which sovereign states voluntarily undertake specified legal obligations-- to impose legal obligations on states through a process of "reinterpretation" or "inference" from a non-binding statement of principles.

jurisdiction of the Inter-American Commission on Human Rights without any requirement for an official acceptance of this jurisdiction.

2. American Convention on Human Rights and Additional Protocols

The *American Convention on Human Rights* (hereinafter the *American Convention*) was drafted roughly at the same time as the International Covenants on Human Rights. Moreover, when the Council of the OAS sent the *Draft American Convention* to the Inter-American Commission on Human Rights for study, in 1966, the Commission decided to “take into special consideration the experience of the European countries which approved the *European Convention on Human Rights and Basic Freedoms*, and the discussions held during the preparation of the draft United Nations Covenants on Human Rights”.³⁸ Although witnesses before this Committee argued that some of the language of the *American Convention* is foreign to a Canadian understanding of the law³⁹, the language used in many of the Convention’s provisions is very similar to the language of the European Convention. There are many similarities as well with the provisions of the *International Covenant on Civil and Political Rights*, which was drafted with Canada’s participation.

One unique characteristic of the *American Convention* is that the right of individuals to bring alleged violations by States Parties to the Convention of the rights it protects to the attention of the Commission can be exercised without any formal acceptance of the Commission’s jurisdiction.⁴⁰ There are two additional Protocols to the *American Convention*.

a. *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*

Also known as the *Protocol of San Salvador*, it was adopted in 1988 to give effect to the provisions of article 26 of the *American Convention*. It entered into force on November 16, 1999. Article 26 of the *American Convention* expresses the general commitment of State Parties to adopt measures with a view to the full realization of economic, social and cultural rights.

³⁸ *The Organization of American States and Human Rights, 1960-1967*, General Secretariat, Organization of American States, Washington, 1972, at 57.

³⁹ Committee Evidence, March 18, 2002, at 8:13 (Elisabeth Eide, Department of Justice).

⁴⁰ As confirmed by the Inter-American Court in *In the Matter of Viviana Gallaro et al*, Ser. A n°G 101-81, para. 25.

Ratification of the Protocol of San Salvador is only open to States that have ratified the *American Convention*.

The Protocol can be seen as part of what is commonly referred to as “soft law”. Rather than assuming immediate obligations States undertake to implement their obligations progressively:

The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.⁴¹

Progressive implementation is, nonetheless, an obligation. The Inter-American Court of Human Rights was recently seized of a case asking for determination of the scope and content of the duties of States with respect to the progressive implementation of social, economic and cultural rights. While the Committee was on its fact-finding mission in Costa Rica, it had the opportunity to visit the Inter-American Court of Human Rights on the day of the hearing of this case⁴². The alleged victims argued that a decision, by the Government of Peru, to modify pension payments which resulted in a de facto reduction of the payments, violated, among others, their right to the progressive development of their economic, social and cultural rights under article 26 of the *American Convention*, as interpreted in the light of the Protocol of San Salvador. However, in its judgment of February 28, 2003, the Court did not answer this question. It held that economic, social and cultural rights, that have both an individual and a collective dimension, must be assessed in reference to the general situation prevailing in the country. In the Court’s opinion, the five pensioners were a very small group and were not necessarily representative of a general situation.⁴³

Some provisions of the *Protocol* are of immediate application. Thus, violations of the right to organize and to join unions, national federations of unions or international trade union

⁴¹ *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, Article 1.

⁴² *Five Pensioners Case*, September 3-4, 2002. See the Commission’s conclusions in Report n° 89/99, Case 12.034, *Carlos Torres Benvenuto et al. v. Peru*, 27 September, 1999, *Annual Report of the Inter-American Commission on Human Rights, 1999*, OEA/Ser.L/V/II.106, Doc. 6 rev., April 13, 1999

⁴³ The Court did find that Peru violated the pensioners’ right to property (art. 21 of the Convention), their right to judicial protection (art. 25) and its obligation to ensure respect of the rights guaranteed under the Convention (art. 1.1).

organizations, protected under article 8(a) of the *Protocol of San Salvador*, as well as violations of the right to education can be brought to the attention of the Inter-American Commission through the individual petition mechanism⁴⁴. The case can also be referred to the Inter-American Court.

b. *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*

This Protocol was adopted on June 8, 1990. It expands upon article 4 of the *American Convention* and its ratification is open only to States Parties to the *American Convention*. It has been ratified by Brazil, Costa Rica, Ecuador, Nicaragua, Panama, Paraguay, Uruguay and Venezuela. The Protocol enters into force immediately between the States that have ratified it. The only reservation allowed at the time of ratification concerns the application of the death penalty in wartime, for certain crimes:

No reservations may be made to this Protocol. However, at the time of ratification or accession, the States Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.⁴⁵

However, this exception must be provided for in domestic law and its application is subject to strict reporting conditions set out in the Protocol.

3. Other Inter-American Conventions

The following “stand alone” conventions are open to ratification by Canada whether or not it ratifies the *American Convention*. All but one have been adopted since Canada became a member of the OAS but it has not ratified any of them.

⁴⁴ *Protocol of San Salvador*, article 19(6).

⁴⁵ *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, Article 2(1).

a. *Inter-American Convention to Prevent and Punish Torture*

The *Inter-American Convention to Prevent and Punish Torture* (Convention on Torture) expands upon the provisions of article 5 of the *American Convention* which already prohibit torture and cruel, inhuman or degrading punishment or treatment. It entered into force on February 28, 1987. It is open to ratification by all the member States of the OAS. Although Guatemala⁴⁶ and Chile⁴⁷ had initially made reservations to some of the Convention's provisions, most of these reservations have since been withdrawn⁴⁸. The Convention on Torture can be invoked before the Inter-American Court of Human Rights to interpret the provisions of article 5 of the *American Convention*. The Convention excludes the defence of superior orders as well as any state of emergency or any other kind of public emergency, the suspensions of constitutional guarantees or political instability as justifications for torture.

b. *Inter-American Convention on Forced Disappearance of Persons*

Adopted on June 9, 1994, the *Convention on Forced Disappearance of Persons* (Convention on Forced Disappearance) came into force on March 28, 1996. It addresses an issue that has plagued Latin America for decades. Violations of the Convention can be brought to the attention of the Inter-American Commission on Human Rights and follow the same process as petitions under the *American Convention*. Ratification is not limited to States Parties to the *American Convention*, but is open to all members of the OAS. The Convention has been ratified by

⁴⁶ The Republic of Guatemala does not accept the application nor shall it apply the third paragraph of Article 8, because in conformance with its domestic legal procedures, when the appeals have been exhausted, the decision acquitting a defendant charged with the crime of torture becomes final and may not be submitted to any international fora. <http://www.cidh.oas.org/Basicos/basic10.htm>.

⁴⁷ a) To Article 4, to the effect that, inasmuch as it alters the principle of "automatic obedience" established in Chile's domestic law, the Government of Chile will enforce the provisions of that international rule in respect of subordinate personnel subject to the jurisdiction of the Code of Military Justice, provided that execution of an order whose obvious intent is the perpetration of the acts stipulated in Article 2, is not demanded by the superior over the subordinate's representation.

b) With regard to the final paragraph of Article 13, because of the discretionary and subjective way in which the rule is drafted.

c) The Government of Chile states that in its relations with the countries of the Americas that are Parties to the present Convention, it will apply this Convention in those cases where there is incompatibility between its provisions and those of the Convention against torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted by the United Nations in 1984.

d) With regard to the third paragraph of Article 8, since a case may only be submitted to the international fora whose competence has been recognized by the State of Chile. <http://www.cidh.oas.org/Basicos/basic10.htm>.

⁴⁸ On October 1, 1990, Guatemala deposited at the General Secretariat an instrument dated August 6, 1990, withdrawing the reservation made by the Government of Guatemala at the time of signing the Convention and reiterated at the time of ratifying it on December 10, 1986. On August 21, 1990 Chile deposited an instrument dated

Argentina, Bolivia, Costa Rica, Guatemala, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. Guatemala withdrew the reservation it made at the time of ratification of the Convention concerning the extradition of its nationals. There are no other reservations.

c. *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*

Also known as the *Convention of Belém do Pará*, it was adopted at the same time as the Convention on forced Disappearance. It condemns any act or conduct “based on gender which causes death or psychological harm or suffering to women, whether in the public or the private sphere.”

The definition of violence under the Convention includes domestic violence in the widest sense, that is to say within any inter-personal relationship and whether or not the perpetrator resides with the victim. It also includes violence occurring in the community or perpetrated or condoned by the State or its agents, wherever it occurs. States Parties have specific duties under the Convention to adopt the required legislative measures to prevent and punish all forms of violence against women.

The Convention came into force on March 2, 1995, thirty days after the date of deposit of the second instrument of ratification. All the parties to the *American Convention* with the exception of Jamaica have ratified the *Convention of Belém do Pará*.

d. *Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities*

Adopted on June 7, 1999, this Convention⁴⁹ entered into force on September 14, 2001. Its Preamble refers to a number of international conventions, declarations, and resolutions aimed at the protection of persons with physical, mental, or sensory impairment “whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.”

May 18, 1990, withdrawing the reservations formulated by the Government of Chile to Article 4 and to the final paragraph of Article 13 of the Convention. <http://www.cidh.oas.org/Basicos/basic10.htm>.

⁴⁹ <http://www.cidh.oas.org/Basicos/disability.htm>.

States Parties to the Convention undertake to take all the necessary measures, including legislation, to promote the integration of persons with disabilities into society, “under conditions of equality”. Their obligations range from ensuring that buildings and vehicles be designed so as to allow access by persons with disabilities, to giving priority to the prevention, early detection and treatment. States Parties also undertake to increase public awareness so as to eliminate stereotypes, prejudices, and discrimination in employment.

B. Monitoring Bodies

There are two monitoring bodies in the Inter-American system for the protection of human rights: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

1. The Inter-American Commission on Human Rights

a. History

The Commission was created in 1959, but was not officially recognized as an organ of the OAS until 1967, when the OAS Charter was amended by the *Protocol of Buenos Aires*. At the time of its official recognition, the Commission was given jurisdiction to hear allegations of violations of some of the rights guaranteed under the American Declaration⁵⁰. However, the subsequent adoption and entry into force of the *American Convention* had significant consequences both for the Inter-American Commission and for the *American Declaration*.

The Convention preserved the scope and legal status of the *American Declaration* by providing that “no provision of the Convention shall be interpreted as....d) excluding or limiting the effects that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have”⁵¹. In addition, the *Convention* provided for the creation of a “Commission” and a Court. However, the “Commission” contemplated in the *American Convention* could only have jurisdiction over the States Parties to the *Convention*, under the general rule of international law which provides that treaties do not create obligations for third States.

⁵⁰ Articles I, II, III, IV, XVII, XXV, and XXVI of the American Declaration.

⁵¹ *American Convention on Human Rights*, art. 29

Therefore, if a new Commission were created to replace the one that exists under the *Charter* of the OAS, States not parties to the *American Convention* would escape scrutiny. In order to avoid such an undesirable situation, the Commission's initial jurisdiction was preserved and it became a dual institution. In addition to its original jurisdiction over all member States of the OAS by virtue of their ratification of the OAS Charter, the Commission acquired jurisdiction to monitor implementation of the provisions of the *American Convention* in the States that have ratified it. Furthermore, its Statute was amended so as to include all the provisions of the American Declaration. The jurisdiction of the Commission has since been further extended to include the more recent Inter-American Conventions pertaining to human rights.⁵²

b. Functions

The seat of the Commission is in Washington, D.C. Its function is to promote the observance and the defence of human rights. Among its various activities, the Commission:

- Receives, analyzes and investigates individual petitions which allege violations of the rights guaranteed under the *American Declaration* or the *American Convention*.
- Refers cases to the Inter-American Court of Human Rights under the *American Convention* and appears before the Court on behalf of the victim. It should be noted, however, that since 2000, the victim may appear independently of the Commission once the application made by the Commission has been accepted.
- Requests advisory opinions from the Inter-American Court regarding questions of interpretation of the *American Convention*.
- Monitors the general human rights situation in the member States, carries out on-site visits and publishes special reports when it considers it appropriate. As of 2001 the Commission had published over fifty country reports.⁵³
- Publishes reports on specific situations such as the situation in the so-called “Communities of People in Resistance” in Guatemala⁵⁴, the human rights of Miskito

⁵² *Rules of procedure of the Inter-American Commission on Human Rights*, article 23.

⁵³ Available online, although the earlier reports are in Spanish only. See <http://www.cidh.oas.org/pais.eng.htm>.

⁵⁴ OEA/Ser/L/V/II.86, Doc.5 Rev. 1, June 1994,

Indians in Nicaragua⁵⁵, the human rights of asylum seekers in Canada⁵⁶, and the status of women⁵⁷ and indigenous peoples⁵⁸ in the Americas.

- Undertakes and publishes documents such as the study of both domestic and international authorities and precedents in the context of the *Proposed Declaration on the Rights of Indigenous Peoples*.⁵⁹

Officials told the Committee that Canada has some concerns about the credibility of the Commission⁶⁰. Nonetheless, it should be noted that the Commission was a key player in the struggle against the hemisphere's repressive regimes, and today continues to provide recourse to people who have suffered human rights violations.

In addition, Committee members had occasion to meet with the members of the Inter-American Commission on Human Rights and they learned that there had been changes in the Commission's Rules of Procedure. Such changes may address Canadian concerns. For example, although the Commission has been criticized in the past for picking and choosing the cases it would take to the Court, there is now a presumption that all cases will be referred to the Court⁶¹ unless special circumstances make it unnecessary or the victim does not want his or her case to go to the Court. The decision not to refer a case to the Court must be adopted by a majority of the Commissioners and it must be explained in writing. The explanation must include the wishes of the victim and the degree to which the State concerned has made good faith efforts to comply with the conclusions of the Commission.

It should also be noted that as a State Party to the Convention, Canada would be in a position to take its case to the Court if it did not agree with the Commission's determinations. States like Canada that have not ratified the Convention do not have that option.

⁵⁵ *Report on the Human Rights of a Segment of the Population of Nicaragua of Miskito Origin*, OEA/Ser.L/V/II.62, doc. 26, May 16, 1984 In Spanish only on the site of the Inter-American Commission on Human Rights (Publications).

⁵⁶ *Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System* OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000.

⁵⁷ (1998) <http://www.oas.org/countryrep/mujeres98.en/Tableofcontents.htm>.

⁵⁸ OEA/Ser.L/V/II.108, Doc. 62, 20 October, 2000.

⁵⁹ OEA/Ser.L/V/II.110, Doc. 22, 1 March, 2000.

⁶⁰ Committee Evidence, March 18, 2002, at 8:23 (Elisabeth Eide).

⁶¹ Provided, of course, that the State concerned accepts the compulsory jurisdiction of the Court in contentious matters.

2. The Inter-American Court of Human Rights

The Inter-American Court of Human Rights was established under the terms of article 33 of the *American Convention*. Its seat is in San José, Costa Rica. It consists of seven judges who are nationals of the OAS member States but do not have to be nationals of the States that have ratified the *American Convention*. However, only States Parties to the Convention may present candidates and elect judges⁶². OAS member States like Canada that have not ratified the *American Convention* must convince a State Party to present their candidate. Shortly after joining the OAS Canada unsuccessfully tried to have Madam Justice Bertha Wilson elected. She was presented by Venezuela and Uruguay, but she was defeated by one vote.⁶³

The Court has two areas of jurisdiction: it can hear allegations of violations of the *American Convention* and other Inter-American conventions and protocols, whether they are brought by the Inter-American Commission on behalf of victims or by States against one another. In addition, the Convention gives the Court jurisdiction to render advisory opinions. The Court's jurisdiction over contentious cases is limited to States that have both ratified the *American Convention* and recognized the jurisdiction of the Court on all matters relating to the interpretation and application of the *Convention*. In the case of State-to-State complaints, all of the States involved must be Party to the *Convention* and have recognized the jurisdiction of the Court.

a. *Advisory Jurisdiction*

The Inter-American Court's advisory jurisdiction is unique in several ways. In addition to the Inter-American Commission and other authorized bodies of the OAS, it extends to all OAS member States, whether Party to the Convention or not, and even if they have not recognized the jurisdiction of the Court over contentious matters. This is the largest advisory jurisdiction of any international court. States cannot make requests for advisory opinions to either the European Court of Human Rights or the International Court of Justice⁶⁴. Furthermore, OAS member States

⁶² Articles 81 and 82 of the *American Convention*.

⁶³ McKenna, Peter, "Canada and the OAS: Opportunities and Constraints", (1993) 327 *Round Table*, 323, 326.

⁶⁴ In the European system only the Committee of Ministers of the Council of Europe can ask the European Court of Human Rights for an advisory opinion. With respect to the United Nations, the advisory jurisdiction of the

may consult the Court regarding the interpretation not only of the Convention but also of any other treaty pertaining to the protection of human rights in the Americas.⁶⁵ They can also consult the Court on the compatibility of their domestic laws, bills and proposed legislative amendments.⁶⁶

The Court itself has stated that its advisory jurisdiction aims to "assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and sanctions associated with the contentious judicial process"⁶⁷. Thus, Canada may consult the Court on the compatibility of Canadian legislation with any of the provisions of the Convention that raise concerns for either the federal government or the provinces. In addition, Canada may intervene as *amicus curiae* in any advisory opinion request placed before the Court.

b. Contentious Jurisdiction

One witness before the Committee noted that by 1998, twenty years after it came into existence, the Court had only issued a limited number of judgments considering the human rights situation in many countries of the Americas⁶⁸. However, it should be noted that this was basically a "start-up" phase, during which contentious cases worked their way through the system. The Court began functioning in 1979. At that time approximately 14 States had ratified the *American Convention on Human Rights* and were in a position to recognize the jurisdiction of the Court. However, in most cases, several years elapsed between the ratification of the *Convention* and the recognition of the Court's jurisdiction over contentious matters.⁶⁹

International Court of Justice extends only to the General Assembly and the Security Council, as well as other UN organs and specialized agencies authorized by the General Assembly.

⁶⁵ Article 64 of the American Convention. See "*Other Treaties*" *Subject to the Consultative Jurisdiction of the Court (Article 64 American Convention on Human Rights)*, OC-1/82, Ser. A n° 2.

⁶⁶ *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, OC-4/84, Ser. A n° 4. See also *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights*, OC-12-91, Ser. A n° 12, on which the Court refused to give an advisory opinion

⁶⁷ [*Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*], Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 43.

⁶⁸ Committee Evidence, March 18, 2002, at 8:32 (Timothy Ross Wilson).

⁶⁹ More than ten years elapsed between ratification and recognition of the Court's jurisdiction for the following States: Barbados, Bolivia, Colombia, the Dominican Republic, Guatemala, Haiti, Mexico and Panama. However, Colombia, the Dominican Republic, Haiti and Panama were among the early ratifying States, before the Court came into existence.

The Court rendered its first judgment in 1981. The Government of Costa Rica had waived the rule of exhaustion of local remedies as well as the rule requiring the exhaustion of the process before the Inter-American Commission⁷⁰. The Court held that the procedure before the Commission had not been set up solely for the benefit of States and that it could not be waived. The case was referred back to the Commission. The next decision would not come until 1987, in a case against Honduras, which originated in a petition received by the Commission on October 7, 1981.⁷¹

While there were no decisions on contentious matters between 1982 and 1987, the Court was not inactive. It gave a number of advisory opinions on a wide variety of issues including the effect of reservations on the entry into force of the Convention, restrictions to the death penalty, the interpretation of the *American Declaration* within the framework of article 64 of the *Convention*, exceptions to the rule of exhaustion of local remedies, compatibility of draft domestic legislation with the *Convention*, judicial guarantees during emergency situations, attributes of the Inter-American Commission on Human Rights as well as its preliminary and final reports (arts. 50 and 51 Reports). All these advisory opinions assisted the Commission and States Parties to understand the scope and content of the *American Convention*, in a manner similar to the decisions of the Supreme Court of Canada with respect to the *Constitution Act, 1982* and in particular the *Charter of Rights and Freedoms*.

Between 1987 and February of 2002, the Court gave 32 decisions on the merits of contentious matters⁷². Most cases raised issues such as forced disappearances, extra-judicial executions, arbitrary detention resulting in the death of the detainees, torture, and other inhumane treatment causing death, military killing of civilians. Although such cases still find their way onto the Court's docket⁷³, the Court has recently been dealing with an increasing range of issues, including the wrongful dismissal of judges and civil servants, film censorship, the withdrawal of citizenship and removal from positions of authority of government critics, and the land rights of Indigenous peoples. As noted above while the Committee was visiting the Inter-American Court on Human Rights in September 2002, the Court held hearings on the Case of the *Five Pensioners*

⁷⁰ *In the Matter of Viviana Gallardo et al.*, Ser. A n° G 101/81.

⁷¹ *Velasquez Rodriguez Case, Preliminary Objections*, Ser. C. n°1, Judgment of June 26, 1987.

⁷² In addition to 64 judgments on preliminary objections, reparations, interpretation or enforcement of judgments, and orders on provisional measures in 70 cases.

⁷³ The *Las Palmeras* decision of December 2001, for instance, is about the killing of civilians by military police.

against Perú, pertaining to modifications to their pension payments that were allegedly incompatible with the *American Convention*.

All but three States Parties to the *American Convention* have now recognized the jurisdiction of the Court over contentious matters⁷⁴. It should not be forgotten that the Court also has jurisdiction to hear complaints filed by one State against another. Nine States Parties to the Convention have recognized the jurisdiction of the Court over inter-State complaints⁷⁵, although it has never been exercised.

C. Mechanisms for Protection and Redress

The Inter-American system for the protection of human rights provides several mechanisms designed to protect human rights in the Americas, prevent violations and provide remedies and redress for victims.

1. The Individual Petition Process Before the Inter-American Commission

a. *Filing a Petition*

Individuals and groups who feel that their rights have been violated may petition the Inter-American Commission for redress, once they have exhausted all the remedies available to them at the national level.

In the Inter-American system, anyone aware of a violation may petition the Inter-American Commission⁷⁶. In addition, non-governmental organizations such as the Center for Justice and International Law (CEJIL), the Indian Law Resource Center as well as national human rights organizations have been able to present petitions on behalf of alleged victims.

⁷⁴ Dominica, Grenada and Jamaica. See Annex I, *Signatures and Current Status of Ratifications, American Convention on Human Rights, "Pact of San José, Costa Rica"*

⁷⁵ Argentina, Chile, Colombia, Costa Rica, Ecuador, Jamaica, Peru, Uruguay and Venezuela.

⁷⁶ Under the terms of article 23 of the Commission's Rules of Procedure: "Any person or group of persons or nongovernmental entity legally recognized in one or more of the member States of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights....."

An electronic form is available on the Internet site of the Inter-American Commission on Human Rights. However, its use is not mandatory. The petition may take the form of a simple letter stating the facts of the situation denounced, the identity of the petitioner if the petition is not signed by the alleged victim, and what remedies have been pursued at the national level. The letter can be sent by mail or by fax. Thus, in response to concerns expressed at hearings⁷⁷ it should be noted that the alleged victim does not have to travel to Washington.

Non-governmental organizations such as CEJIL work with local lawyers and organizations who handled the case at the national level to prepare cases for submission to the Inter-American Commission. However, CEJIL does not have the means to represent everyone and must select cases on the basis of the weight of the evidence, the type of violation – giving preference to violations that reflect a generalized situation in the country –and the relationship with local organizations.

During their fact-finding mission to the seat of the Inter-American Court, Committee members also learned that institutions such as the Inter-American Institute for Human Rights train local associations such as women's groups so that they can learn to use the Inter-American system and file their own petitions.

There are *sine qua non* admissibility requirements such as the exhaustion of all the local remedies available. Exhaustion of domestic remedies essentially means a decision rendered by the highest court in the country, unless the alleged victim can invoke one of the recognized exceptions. These include lack of remedy, undue delay in the proceedings, lack of independence of the judiciary, indigence of the victim or inability to find legal representation because of fear of reprisals in the legal or judicial community.

In addition, the petition will be declared inadmissible if another international dispute resolution body has been seized of the same case. The Rules of Procedure require that the petition be filed within six months of the notification of the decision of the court of last resort. Although the whole process can be done in writing, with the exception of the Friendly Settlement Procedure, the Commission may hold hearings. Once the petition has been declared admissible, the Commission acts on behalf of the victim to obtain information from the State concerned, but it

⁷⁷ Committee Evidence, March 18, 2002, at 8:29, 8:33 (Tim Ross Wilson)

also acts as judge of the case when it determines whether there have been any violations of the rights guaranteed under the Declaration or the Convention.

b. Friendly Settlement Procedure

This procedure is part of the individual petition process. It can be initiated at the request of the parties or on the Commission's own initiative. While it was initially limited to disputes concerning the *American Convention*, it is now an option in disputes concerning all the Inter-American human rights instruments, including the American Declaration. Questions could be raised as to the legal basis for the friendly settlement procedure with respect to States that have not ratified the American Convention since it is to be found only in the Rules of Procedure of the Inter-American Commission, adopted by the Commission itself. However, the procedure is not mandatory. It requires the consent of all parties and may be ended at any time by the Commission if it feels that the matter in dispute will not lend itself to a friendly settlement, or if any of the parties lacks the willingness to reach a settlement.

It could be argued that a friendly settlement is of a political nature and that it does not create precedents that can be useful to other victims. The procedure could also be seen as a tool for the Commission to maintain greater control over the outcome of disputes and refer fewer cases to the Court. Such concerns would appear to be unfounded, however. The contents of settlements are made public, and although they are not precedent-setting, they provide clues that can make them useful. In addition, alleged victims of human rights violations are free to pursue the remedy of their choice, and they may prefer the relatively more expedient friendly settlement procedure.⁷⁸

During their fact-finding mission to the seat of the Inter-American Court, members of the Committee learned that Casa Alianza for instance, a non-governmental organization which offers a variety of services to homeless youth, uses the Inter-American system to denounce the situation of street children. However, Casa Alianza does not necessarily want each case to reach the Court. It tends to prefer the Commission's less expensive friendly settlement procedure.

⁷⁸ On the basis of the cases published by the Inter-American Commission for the year 2002, a decision on the merits of the case may take seven years, while a friendly settlement may be reached in less than four years. See: <http://www.cidh.oas.org/casos.eng.html>.

Finally, the friendly settlement procedure has the support of the OAS member States. On June 5, 2000, the General Assembly of the OAS adopted Resolution 1701, “Evaluation of the Workings of the Inter-American System for the Protection and Promotion of Human Rights With a View to its Improvement and Strengthening”⁷⁹, which recommends that the Inter-American Commission “consider the possibility of [...] continuing to promote the friendly settlement procedure as a suitable mechanism for the successful resolution of individual cases.”

c. Recommendations or Referral of the Case to the Court

As noted earlier, the Rules of Procedure of the Inter-American Commission have been amended to include a presumption that all cases against States Parties to the Convention that have recognized the compulsory jurisdiction of the Court in contentious matters will be referred to the Court.

The process of examination by the Commission is essentially the same whether the petition alleges violations of the *Declaration* or of the *Convention*. The fundamental difference is that the jurisdiction of the Inter-American Court of Human Rights is based on the *American Convention*, not on the OAS Charter, and it requires formal acceptance by States. Consequently, if the State concerned has not ratified the *American Convention*, or has ratified the *Convention* but has not recognized the jurisdiction of the Court, the Commission will not be able to refer the case to the Court and the process will end with the Commission’s recommendations. That is currently the case for Canada.

Although OAS member States have an obligation to abide by the decisions of the OAS organs, the Commission’s recommendations are not decisions⁸⁰, and they are therefore not legally binding⁸¹. In addition, the Inter-American Court has held that they do not “have the character of an obligatory judicial decision for which the failure to comply would generate State responsibility”⁸². On the other hand, the Court also stated that “ in accordance with the principle

⁷⁹ OEA/Ser. P, AG/Res. 1701 (XXX-0/00).

⁸⁰ Under art. 106 of the *OAS Charter*, the Inter-American Commission on Human Rights serves as a consultative organ of the Organization on matters pertaining to the promotion and protection of human rights.

⁸¹ This is the general rule under international law. However, it should be noted that by complying with the recommendations of the Commission, OAS member States may contribute to the development of customary norms of international law. Recommendations of the Commission may rely on such binding norms.

⁸² *Caballero Delgado and Santana Case*, Judgement of December 8, 1995, Ser. A n° 22, at para. 67.

of good faith, embodied in the aforesaid Article 31(1) of the Vienna Convention, if a State signs and ratifies an international treaty, especially one concerning human rights, such as the *American Convention*, it has the obligation to make every effort to apply with the recommendations of a protection organ such as the Inter-American Commission, which is, indeed, one of the principal organs of the Organization of American States, whose function is "*to promote the observance and defence of human rights*" in the hemisphere (OAS Charter, Articles 52 and 111)".⁸³ If the State concerned does not comply with the recommendations of the Commission, details of the case, including the Commission's recommendations can be published in the Annual Report of the Inter-American Commission on Human Rights.

The Inter-American Commission has greater authority over the OAS member States that have ratified the *American Convention* and recognized the jurisdiction of the Inter-American Court. With respect to those States, the Commission can defer the case to the Inter-American Court. As illustrated in the following outline of the individual complaint process, States get ample warning. If the preliminary report drafted by the Commission establishes violations, it sets a deadline of three months for compliance. The purpose of this preliminary report is to give the State concerned time to redress the situation before initiating judicial proceedings.

Once the Court has accepted the case, the role of the Commission changes, especially if the alleged victim chooses to appear independently. In that case, the Commission and the victim become independent parties, albeit linked by a common interest. Before the Court, the Commission acting as guardian of the Convention and of the Inter-American system for the protection of human rights, present its own case while the alleged victim has independent legal counsel presenting his or her case. Transparent rules and procedural guarantees ensure that this switch in the role of the Commission poses no threat to the integrity of the system.

⁸³ *Loayza Tamayo Case*, Judgment of September 17, 1997, Serie C, n° 33, at para. 80.

OUTLINE OF THE INDIVIDUAL COMPLAINT PROCESS BEFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Any person or group of persons or nongovernmental entity legally recognized in one or more of the member states of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women...

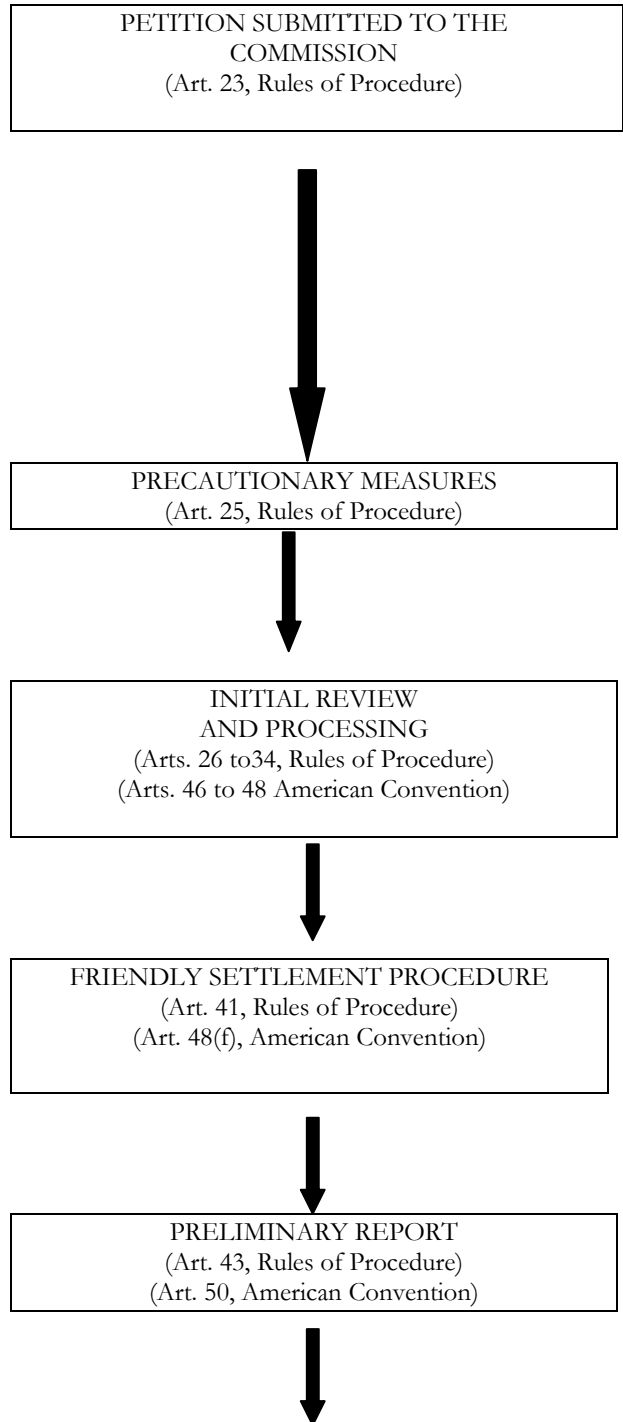
Deadline: 6 months following the notification of the domestic court's final decision

In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.

- Identification of the author of the petition and of the victim.
- Facts and alleged author
- Proof of exhaustion of local remedies
- Complaint not submitted to another international settlement proceeding

Can be initiated at any stage of the proceedings, either at the request of any of the parties or on the Commission's own initiative. Requires the consent of all parties. Negotiations are confidential but the details of the settlement are made public. (Report, art. 49, American Convention)

If it establishes one or more violations, [the Commission] shall prepare a preliminary report with the proposals and recommendations it deems pertinent and shall transmit it to the State in question. In so doing, it shall set a deadline by which the State in question must report on the measures adopted to comply with the recommendations. The State shall not be authorized to publish the report until the Commission adopts a decision in this respect.



If within three months from the transmittal of the preliminary report to the State in question the matter has not been solved or, for those States that have accepted the jurisdiction of the Inter-American Court, has not been referred by the Commission or by the State to the Court for a decision, the Commission, by absolute majority of votes, may issue a final report that contains its opinion and final conclusions and recommendations.

The final report shall be transmitted to the parties, who, within the time period set by the Commission, shall present information on compliance with the recommendations.

The Commission shall evaluate compliance with its recommendations based on the information available, and shall decide on the publication of the final report by the vote of an absolute majority of its members. The Commission shall also make a determination as to whether to include it in the Annual Report to the OAS General Assembly, and/or to publish it in any other manner deemed appropriate.

If the State in question has accepted the jurisdiction of the Inter-American Court in accordance with Article 62 of the American Convention, and the Commission considers that it has not complied with the recommendations of the report approved in accordance with Article 50 of the American Convention, it shall refer the case to the Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary.



The Commission shall give fundamental consideration to obtaining justice in the particular case, based, among others, on the following factors:

- a. the position of the petitioner;
- b. the nature and seriousness of the violation;
- c. the need to develop or clarify the case law of the system;
- d. the future effect of the decision within the legal systems of the member States; and,
- e. the quality of the evidence available.

FINAL REPORT
(Art. 45, Rules of Procedure)
(Art. 51, American Convention)

**END OF THE PROCESS FOR PETITIONS
ALLEGING VIOLATIONS OF THE
AMERICAN DECLARATION AND PETITIONS
AGAINST STATES PARTIES TO THE
AMERICAN CONVENTION THAT HAVE NOT
RECOGNIZED THE JURISDICTION OF THE
COURT**



**COMPLAINT AGAINST A STATE PARTY TO
THE CONVENTION THAT HAS
RECOGNIZED THE JURISDICTION OF THE
COURT:
REFERRAL OF THE CASE TO THE
COURT**
(Art. 44, Rules of Procedure)

2. Reports of the Inter-American Commission

a. *State Reports*

Although there is no formal procedure calling for periodic reports from the States on measures implementing their obligations under the *American Convention*, as under other international human rights instruments, the Inter-American Commission can ask States to report on the human rights situation in their respective countries.

On the other hand, States that ratify the *San Salvador Protocol on Social, Economic and Cultural Rights* do undertake obligations under article 19 of the Protocol which requires that they “submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol”. There are also reporting obligations under other conventions including the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, and the *Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities*.

b. *The Annual Report of the Inter-American Commission*

In addition to reporting on individual communications, the Inter-American Commission follows human rights developments in countries that merit special attention according to criteria developed by the Commission in 1996⁸⁴ and further expanded upon in 2002⁸⁵. Generally, the

⁸⁴ *Annual Report of the Inter-American Commission on Human Rights 1996*, OEA/Ser.L/V/II.95, March 14, 1997, Chapter V, : “The first criterion in which the Commission believes that special reporting is warranted obtains in states which are ruled by governments which have not been chosen by secret ballot in honest, periodic and free popular elections in accordance with accepted international standards. [...]

The second criterion concerns states where the free exercise of rights contained in the American Convention or Declaration have been effectively suspended, in whole or part, by virtue of the imposition of exceptional measures, such as a state of emergency, state of siege, prompt security measures, and the like.

The third criterion which could justify a particular state's inclusion in this chapter is where there are serious accusations that a state is engaging in mass and gross violations of human rights set forth in the American Convention and/or Declaration or other applicable human rights instruments. Of particular concern here are violations of non-derogable rights, such as extra-judicial executions, torture and forced disappearance.[...]

The fourth criterion concerns those states which are in a process of transition from any of the above three situations.” <http://www.cidh.oas.org/annualrep/96eng/TOC.html>

⁸⁵ *Annual Report of the Inter-American Commission 2000*, OEA/Ser.L/V/II.111, doc. 20 rev., April 16, 2001, Chapter IV: The fifth criterion regards temporary or structural situations that may appear in members states confronted, for various reasons, with situations that seriously affect the enjoyment of fundamental rights enshrined in the American Convention or the American Declaration.”

Inter-American Commission studies countries that have systemic problems, such as Cuba, Colombia and Guatemala. However, it does not just denounce problems that need to be addressed; it also commends States on action taken to improve the status of human rights.

The Commission will also study specific situations that can lead to human rights violations. In 2001, for instance, the Inter-American Commission studied the situation in the United States following the events of September 11, when the President declared a national emergency. The Commission reminded the US that it “remains subject to the fundamental rights of individuals as proclaimed in the provisions of the OAS Charter and the Inter-American Declaration of the Rights and Duties of Man”. Subsequently, the Commission undertook a study of international human rights requirements that must govern State conduct in responding to terrorist threats. When Committee members met with the Commission in San José, it was holding an extraordinary session to study its draft *Report on Terrorism and Human Rights*.⁸⁶

In addition, the Commission reports annually on compliance by the States concerned with the Commission’s recommendations. Reports over the years seem to indicate partial compliance with the Commission’s recommendations in most cases.⁸⁷

c. Country Reports

Since its first report on Cuba in 1962, when it decided to closely monitor the situation of political prisoners in that country, the Inter-American Commission has published over fifty “country reports”, as well as several reports on specific groups⁸⁸.

Country reports are preceded by on-site visits, always with the consent of the State concerned. During the on-site visits, delegates of the Commission conduct interviews with government officials as well as religious leaders, representatives from professional associations, lawyers and any other sector of the population deemed appropriate to consult in order to get as accurate a

⁸⁶ OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002. Now available on the Internet site of the Commission: www.cidh.oas.org/Terrorism/Eng/exe.htm.

⁸⁷ See *Annual Report of the Inter-American Commission on Human Rights 2002*, Chapter III, D: «Status of compliance with the recommendations of the IACHR», www.cidh.oas.org/annualrep/2002eng/chap.3h.htm.

⁸⁸ A complete list can be found on the Internet site of the Inter-American Commission.

picture as possible of the human rights situation in the country. These interviews can lead to preliminary recommendations to the government concerned to give it an opportunity to comment and, where applicable, to begin to address some of the issues raised. The Commission takes note of the government's response in its final report. Between 1962 and 2002, the Commission made 83 on-site visits, including one to Canada, in October 1997, to verify the situation of refugees⁸⁹.

Reports on conditions for specific groups have included a 1983 report on the situation of the Miskito Indians in Nicaragua, the 1998 Report on the status of women in the Americas and the 2000 Report on the situation of Indigenous peoples in the America.

In addition, in March 2002, the Commission published an extensive study of authorities and precedents concerning the rights of Indigenous peoples in the context of developing an Inter-American draft declaration of the rights of Indigenous peoples⁹⁰. It looked at existing and emerging norms of international law pertaining to Indigenous peoples as well as those which can be useful even though they are not specifically aimed at Indigenous peoples, such as the prohibition of discrimination, the rights of persons belonging to minority groups, social, economic and cultural rights etc. In addition, it compiled the provisions of domestic legislation in the Americas corresponding to each of the provisions of the draft declaration. Unfortunately, the full extent of Canadian legislation, and in particular of the many aspects of section 35 of the *Constitution Act, 1982*, is not reflected in the study. Under the heading of cultural development, for instance, there is no mention of section 35 as a means of protection for activities that form an integral part of distinctive aboriginal cultures⁹¹.

3. Recourse to the Inter-American Court

As indicated earlier, there are two forms of recourse to the Inter-American Court of Human Rights: the referral of the contentious case by the Inter-American Commission on behalf of an

⁸⁹ For a complete list of on-site visits, see <http://www.cidh.oas.org/visitas.eng.html>.

⁹⁰ "Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples", OEA/Ser.L/V/II.110, Doc. 22, March 1, 2001, <http://www.cidh.oas.org/Indigenas/Indigenas.en.01/index.html>.

⁹¹ *Ibid.*, articles X and XI.

individual or by States against one another, or a request for an advisory opinion, which can be addressed directly by the State concerned, by the Commission or by authorized OAS bodies.

a. Contentious Cases

Thus far, no State-to-State complaints have been filed before the Inter-American Court. Individuals do not have direct access to the Inter-American Court of Human Rights. Only States and the Commission do⁹². Victims of violations can appear on their own behalf, but only once the application made by the Commission for the referral of a case has been accepted by the Court⁹³. They cannot directly request the Court to hear their case. The Court will not hear the case if its examination by the Inter-American Commission has not been completed.⁹⁴

The process is similar to that of Canadian Courts: Applications are filed with the Secretariat with a brief indicating the claims, the facts and arguments pertaining to admissibility, facts supporting evidence and legal arguments, particulars concerning the witnesses the applicant intends to call, including expert witnesses, and the remedy sought (including reparations and costs). If the application is filed by the Commission, it must include the preliminary Report (article 50 Report).⁹⁵

The respondent State files its brief within two months of the notification of the application. It states whether it accepts or rejects any of the specific facts and claims. It may also, at that time, raise preliminary objections. There is usually a period before the opening of the oral proceedings during which the parties enter additional written pleadings, with the authorization of the Court.

Hearings are public and are usually held at the seat of the Court. However, the Court can hold hearings elsewhere and, in exceptional circumstances, may also hold hearings in private. States that do not have a judge of their nationality on the bench hearing a case against them may appoint *ad hoc* judges.

⁹² Article 61(1), *American Convention on Human Rights*

⁹³ *Rules of Procedure of the Inter-American Court of Human Rights*, article 23.

⁹⁴ Article 61(2), *American Convention on Human Rights*, as confirmed in: *In the matter of Viviana Gallardo et al.*, *supra*, note 67.

⁹⁵ Article 33(2), *Rules of Procedure of the Inter-American Court*.

At any stage of the proceedings, the parties may ask the Court for provisional measures to preserve the rights of the parties, or the Court may decide to order them on its own initiative in cases of extreme gravity or urgency, and whenever it is necessary in order to avoid irreparable harm to persons involved in the case.⁹⁶ If the Court is not sitting, the President can make the order.⁹⁷ The jurisprudence of the Inter-American Court reveals that provisional measures are frequently ordered. Between July 2000 and June 2001, for instance, they were ordered in 13 cases⁹⁸, generally to protect the lives of witnesses and victims of the alleged violations.

Another characteristic of the Inter-American Court is the possibility of intervening in *amicus curiae*. There is no formal process for requesting permission to intervene. Parties wishing to intervene send a brief to the Court asking it to take it into consideration. Individuals and organizations that have a particular interest in the outcome of the case have made such requests and the Court has accepted *amicus* briefs on several occasions⁹⁹, although it has also refused a brief in at least one instance¹⁰⁰.

b. Enforcement of the Court's Decisions

There is no formal system for monitoring the execution of the Court's decisions partly because of a lack of funds and partly because the Court, at the moment, is only a part-time organization. However, the Court has begun to include a report on the enforcement of its decisions in its Annual Report to the General Assembly of the OAS.

⁹⁶ Article 25(1), *Rules of Procedure of the Inter-American Court*.

⁹⁷ Article 25(4), *Rules of Procedure of the Inter-American Court*. See for instance *Order of the President of the Inter-American Court of Human Rights of April 7, 2000. Provisional Measures in the Constitutional Court Case*.

⁹⁸ See "Serie E: Provisional Measures, n° 3, Compendium: July 2000 – June 2001.

⁹⁹ The following list of examples does not purport to be exhaustive: the Inter-American Press Association intervened in the *Bronstein Case*, several aboriginal organizations including the Assembly of First Nations intervened in the *Case of the Mayagna (Sumo) Community of Awas Tingni*; the International Commission of Jurists intervened in the *Bamaca Velasquez Case*; Rights International intervened in the *Benavides Cevallos Case* and in the *Suarez Rosero Case*. In this last case, the Center for International Human Rights Law also submitted an *amicus* brief. In the *Genie Lacayo Case* International Legal Advisors Esq. and the Foundation for the Development of International Law presented an *amicus* brief alleging the non-exhaustion of domestic remedies during the phase of preliminary objections.

¹⁰⁰ *Paniagua Morales et al. Case*, Ser. C, n° 37 (1998) at para. 43.

A witness before the Committee indicated that since 1995, the Court's record of compliance has been remarkable¹⁰¹. The turning point appears to have been the decision by Honduras to comply with the decisions of the Court in the *Velasquez* case (1988) and the *Godinez* case (1989), after Carlos Roberto Reina, a former judge on the Inter-American Court, was elected President of the country. Since then, there has been "substantial compliance in all of the cases"¹⁰².

Compliance with the Court's decisions compares favourably with the record of national courts, including courts of the United States. Every prisoner whose release has been ordered has in fact been released. Compliance with decisions awarding damages is substantial and although compliance with orders setting aside wrongful court decrees (such as those wrongfully charging victims or absolving perpetrators of responsibility) is not perfect, it has been described as "pretty good".¹⁰³

Full compliance in matters of forced disappearance means conducting exhumations of suspected gravesites and identification of the body in order to return it to the family. It generally means complying with the order to conduct an investigation and prosecute the perpetrators, as well as paying damages to the family. If a government does not comply with a decision of the Court, the General Assembly of the OAS can, as a last resort, apply political pressure, but it has never done so¹⁰⁴

c. Requests for Advisory Opinions

As mentioned earlier, any member State of the OAS including Canada can ask the Court for an advisory opinion on the interpretation of the *American Convention* as well as other Inter-American human rights treaties. These requests can also be about the compatibility of domestic legislation with international obligations under the Inter-American system. Consequently, if the government of Canada has any doubts about the scope and content of article 4(1) or any other

¹⁰¹ Committee Evidence, April 29, 2002, at 9:67 (Professor Cassel).

¹⁰² *Ibid.*

¹⁰³ Committee Evidence, April 29, 2002, at 9:59 (Professor Cassel); Committee Evidence, June 3, 2002, at 11:52 (Professor Dinah Shelton).

¹⁰⁴ Committee Evidence, April 29, 2002, at 9:67 (Professor Cassel).

provision of the *American Convention*, or if any provincial government is concerned about the compatibility of its legislation with the Convention, it can ask for the Court's opinion. In the case of the provinces and the territories, the request would have to be made through the Government of Canada because, under the rules of international law, it is the entity with international sovereignty and the potential Party to the *American Convention*.

IV. DISCUSSION OF ISSUES RAISED WITH THE COMMITTEE

A. Government Concerns

Canadian government Officials have said ¹⁰⁵that the *Convention* has an impact on matters of provincial jurisdiction, making it difficult for Canada to proceed without the support of the provinces and territories. However, no details were given as to specific provincial issues because of concerns that the federal-provincial consultation process remain confidential. Some insight into federal and provincial concerns was provided by one witness, who believed they were unfounded¹⁰⁶. The concerns were said to be:

- Lower standards than those of other international instruments. However, as pointed out by the witness, article 29 of the Convention provides that if there is a higher standard, it applies.
- Article 22 prohibiting the expulsion of nationals could be considered incompatible with Canadian law and practice authorizing the extradition of Canadians. However, as pointed out by the witness, expulsion is not synonymous with extradition and article 22 does not prevent the extradition of nationals.¹⁰⁷
- Article 13, prohibiting prior censorship could be considered incompatible with Canadian legislation on hate propaganda. However, the Convention makes an exception in the case of hate propaganda. The witness also suggested that an interpretive declaration could be added.

¹⁰⁵ Department of Justice and Department of Foreign Affairs and International Trade.

¹⁰⁶ Committee Evidence, April 29, 2002, pp. 9:42 – 9:44 (Warren Allmand, Rights and Democracy).

- Article 14, providing for the right of reply when one is injured by inaccurate or offensive statements, unknown in Canadian legislation. The witness suggested that since Canadian legislation does provide for reparation, the risk of a successful petition against Canada is minimal. This issue was the subject of further study by the Committee, as discussed below.¹⁰⁸

Senior Canadian government officials expressed some more general concerns and provided reasons why the Government of Canada is reluctant to ratify the *American Convention*.

1. Ratification of the Convention will have little impact on Canadians

Canadian government representatives have suggested that ratification of the Convention would have little impact on Canadians as Canada has a *Charter of Rights and Freedoms* as well as provincial and federal legislation protecting the human rights of Canadians.¹⁰⁹

Although it is true that Canadians already enjoy protection under the Charter as well as federal and provincial human rights legislation, this Committee believes that human right norms and complaint mechanisms are developed for the benefit of individuals, not the State. It cannot be said that people have so much protection that they do not need any more. In addition, ratification of international treaties and recognition of the jurisdiction of the bodies created to oversee their implementation give another level of protection not afforded by domestic courts, especially in Canada where the absence of legislation implementing international treaties seriously limits the possibility of invoking them before the courts.

2. Ratification will raise the issue of the jurisdiction of the Inter-American Court

Canadian government representatives alluded to the non-binding nature of the decisions from the human rights bodies to which Canada is subject, including the Inter-American Commission, as opposed to the binding decisions of the Inter-American Court.¹¹⁰

¹⁰⁷ This opinion is shared by professors Flemming and McEvoy, Brief submitted to the Committee, March 31, 2003.

¹⁰⁸ See pp. 51-55.

¹⁰⁹ Committee Evidence, March 18, 2002, at 8:14 (Elisabeth Eide).

3. Canada is already subject to the jurisdiction of the Inter-American Commission

In this regard, officials expressed concerns about the lengthy delays in getting a decision from the Commission. This was said to be both a resource issue and an issue of the credibility of the Commission. The example given was that of the precautionary measures imposed on Canada with respect to immigration, requesting a stay of removal pending the Commission's consideration of a petition. Years later, Canada still awaits the Commission's conclusions.

The following example would tend to indicate that the Commission is not necessarily entirely responsible for delays, but that both Canada and the petitioners may contribute to them. On February 27, 2002, the Commission declared admissible a petition against Canada which had been filed on July 26, 1996. The petition alleged that the government of Canada bore international responsibility for the denial of fundamental human rights to a refugee from Sri Lanka.¹¹¹ It would appear, according to the Commission's report, that several requests for information were addressed to the Canadian government between August of 1996 and April of 1997, when the Commission granted Canada an extension until the end of June 1997. Canada presented its submission on the admissibility of the petition on July 31, 1997. The Commission forwarded it to the petitioners a few days later, giving them 30 days to respond. On October 23, 1997, the petitioners requested an extension until mid-November. On January 16, 1998, the Commission requested Canada to stay the pending deportation of Mr. Suresh from Canada until it had an opportunity to investigate the allegations made in his petition. The Commission held a hearing on February 23, 1998. Subsequent developments in Mr. Suresh's case in Canada, including a decision of the Supreme Court of Canada which held that Mr. Suresh was entitled to a new deportation hearing, led to the withdrawal of most of the issues raised in the initial petition, with the exception of those pertaining to the compatibility of his detention with the *American Declaration*.

¹¹⁰ Committee Evidence, March 18, 2002, at 8:14, 8:21 (Elisabeth Eide)

¹¹¹ *Manickavasagam Suresh v. Canada*, Report, N° 7/02, Petition 11.661, *Annual Report of the Inter-American Commission on Human Rights 2002*, OEA/Ser.L/V/II.117, Doc. 1 rev. 1, 7 March 2003

In addition, as noted above, Committee members learned that the Commission is evolving and making an effort to address the issues that could adversely affect its credibility and effectiveness. As a Party to the *American Convention*, Canada would increase its chances of having a Canadian Commissioner, thereby enhancing the role it could play in bringing about necessary changes to improve the Inter-American system.

B. Concerns of Non-Governmental Witnesses

Article 4 and particularly paragraph 1 protecting the right to life “in general from the moment of conception” was raised by most of the witnesses as the main source of concern. Other provisions of the Convention raise questions which appear easier to address.

1. The Right to Life

Article 4(1) of the *American Convention on Human Rights* guarantees the right to life “in general from the moment of conception”. The Inter-American Commission on Human Rights held, in a case against the United States, that the terms “in general” were added as a result of a compromise between OAS member States, and that article 4(1) did not impose any specific obligation on States with respect to abortion.¹¹² However, the Inter-American Court has not yet pronounced on this issue. Although one cannot discount the possibility that the *Baby Boy* decision be challenged in the future, one witness before the Committee suggested that it would not be easy to bring the issue before the Court as it would raise questions as to who is the alleged “victim” in such a case.¹¹³

No matter how difficult it may be, it cannot be denied that the issue could be raised again before the Commission¹¹⁴, or before the Court, if not by means of an individual petition, then through a request for an advisory opinion. Therefore, one cannot dismiss the concerns expressed by many witnesses about article 4(1) in the light of the current absence of Canadian legislation on the matter of abortion. Representatives from women’s associations in particular feared that the

¹¹² *Baby Boy Case*, Resolution 23/81, March 6, 1981, *Annual Report of the Inter-American Commission on Human Rights 1980-1981*, pp. 23-45, at 35.

¹¹³ Committee Evidence, June 17, 2002, at 11:59 (Mr. Peter. Leuprecht).

¹¹⁴ Committee Evidence, June 3, 2002, at 11:15 (Jennifer Kitts, Action Canada for Population and Development).

provisions of article 4(1) could be used to prohibit abortions in Canada,¹¹⁵ or even prevent access to some contraceptives such as the “morning-after pill”, intra-uterine devices or RU-486, which act after conception.¹¹⁶ Even though article 4(1) does not impose an obligation to prohibit abortions, it may impose an obligation to regulate them. However, at the moment, there is no Canadian legislation or regulation with respect to abortions. The Supreme Court of Canada found in *R. v. Morgentaler*¹¹⁷ that the procedure created under section 251 of the criminal Code for obtaining an abortion was incompatible with a woman’s right to the security of her person. No new provision has been adopted to replace s. 251.

One witness¹¹⁸ suggested that in the light of subsequent developments in international law since the adoption of the *American Convention*, as well as the interpretation by the Human Rights Committee of article 6 of the *International Covenant on Civil and Political Rights* guaranteeing the right to life, a woman’s right to abortion and access to adequate reproductive health services is an essential component of the right to life, security, and equality under international law. These developments have to be taken into account in order to interpret the scope and content of article 4(1) of the *American Convention*, given the requirement, under article 29, not to restrict the enjoyment of exercise of any right of freedom recognized by virtue of the laws of any State party or by virtue of another convention to which the State is a party. However, as underlined by Professor Lamarche, this analysis does not entirely resolve the issue for Canada.

In addition, research conducted by the Committee into the reports of various human rights treaty monitoring bodies concerning Latin-American States tends to indicate that the criminalization of abortion is considered to be incompatible with the rights of women to health and life.¹¹⁹ However, these reports do not indicate recognition of a general right to abortion. The human

¹¹⁵ Fédération des Femmes du Québec, Committee Evidence, May 27, 2002 , pp. 10:36 – 10:39 (Diane Matte, Gisèle Bourret).

¹¹⁶ National Association of Women and the Law, Committee Evidence, May 27, 2002, at 10:41 (Andrée Côté).

¹¹⁷ [1988] 1 S.C.R. 30.

¹¹⁸ Committee Evidence, May 6, 2002, at 10:9 (Professor Lucie Lamarche).

¹¹⁹ See, for instance: Analysis of the Report from Antigua and Barbuda. 12/08/97. A/52/38/Rev.1, Part II, paras.228-272. (Concluding Observations/Comments of the Committee on the Elimination of all Forms of Discrimination against Women), at par. 258; Women and health: 02/02/99. CEDAW General Recommendation 24. (General Comments) CCPR/CO/70/ARG. (Concluding Observations/Comments of the Human Rights Committee), 3 November 2000; A/54/38, paras.337-401. (Concluding Observations/ Comments of the Committee on Social, Economic and Cultural Rights);

rights treaty monitoring bodies are not suggesting that States take the necessary measures to give women access to abortion. Rather, they are asking States to remove any criminal penalty imposed on women who undergo abortions so as to protect them from unsafe clandestine abortions. There does not seem to be any rule preventing States from regulating abortions.

The consensus among the witnesses who appeared before the Committee was that the *American Convention* should not be ratified without a reservation or an interpretative declaration regarding article 4(1). Experts consulted by the Committee, including members of the Inter-American Court and the Inter-American Commission share Canada's position as to the undesirability of reservations in general. However, they indicated that the Convention does not prohibit them from doing so and that as long as they are drafted in such a way as to preserve the object and purpose of the *American Convention*, reservations may be justifiable, especially in the case of a State that did not participate in the negotiation and the drafting of the Convention. This issue is discussed at greater length below.

2. Article 13: Freedom of Expression and Prohibition of Prior Censorship

One witness suggested that closer analysis of the compatibility of Canadian legislation with the provisions of article 13 prohibiting prior censorship might be required.¹²⁰ One witness¹²¹ provided further insight into the scope of article 13 which prohibits prior censorship except for public entertainments, “for the sole purpose of moral protection of childhood and adolescence”, under the terms of its paragraph 4. This Committee feels that the concept of “public entertainment” is vague and would recommend a statement of understanding of this provision as meaning any form of entertainment including, but not limited to, the Internet.

Article 13 allows others restrictions to freedom of expression by prescribing that hate propaganda as well as other forms of propaganda must be “considered as offences punishable by law”. In addition, the Inter-American Court of Human Rights judges restrictions to freedom of expression “by reference to the legitimate needs of democratic societies” and requires that the restrictions “follow a compelling government interest”, and that they “do not limit the right more

¹²⁰ Committee Evidence, May 6, 2002, at 10:9 (Professor Lucie Lamarche, UQAM).

than necessary”¹²². Canadian legislation with respect to hate propaganda has to meet similar standards in order to be constitutional. Article 13 should not affect Canadian hate propaganda legislation. However, any remaining concern in this respect can be addressed by means of an interpretive declaration.

3. Article 14: Right of Reply

One witness stated that there are two ways of reading article 14: literally or in context. Although Canadian law does not appear to fully conform to the provisions of article 14, Canadian law does offer useful and effective remedies to victims of libel.¹²³ The witness suggested that compatibility with international law should not be analysed literally but rather in the context of their interdependence.

Subsequently, the Committee heard from an attorney with experience in freedom of the press, who expressed concerns about article 14, which in his view provides for an automatic and mandatory right of reply that is not provided for in provincial statutes.¹²⁴ Even the *Quebec Press Act*, which was said to offer the best protection to victims of erroneous or libellous statements, could be incompatible with the provisions of article 14. *The Quebec Press Act* provides an opportunity to reply, but it is optional and, if exercised, extinguishes the right to take legal action. On the other hand, the witness believes that article 14 gives an “automatic right of reply to anyone who happens to disagree with an article or an opinion published in a news medium”. He also expressed concern about the term “ideas” in the English version of article 14, which is very wide and subject to interpretation. He questioned the constitutionality of a mandatory right of reply and suggested a reservation to article 14.

Another witness heard by the Committee disagreed and stated that in her opinion, the right of reply is indeed mandatory, but it is not absolute. Article 14 contains an express reference to domestic law which states that the right to reply shall be exercised “under such conditions as the

¹²¹ Professor Johanna Harrington, CLAIHR, Supplementary letter to the Committee, April 3, 2003.

¹²² Series A No. 5, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), [Advisory Opinion OC-5/85](#) of November 13, 1985.

¹²³ Committee Evidence, May 6, 2002, at 10:12 (Professor Lucie Lamarche, UQAM).

¹²⁴ Committee Evidence, March 17, 2003, at 3:6 – 3:17 (Mark Bantey, Gowling, Lafleur, Henderson).

law may establish”. She believes that the inaccuracy or offensive nature of a statement would be decided by an objective, rather than subjective test.¹²⁵ As far as the inclusion of the term “ideas” in article 14, the witness pointed out that it does not appear in the Spanish, French or Portuguese versions. Canada could maintain that it is an incorrect translation of the original Spanish and include an interpretive declaration to this effect in ratifying the Convention.

There are, therefore, two issues related to article 14: the term “ideas” in the English version and the scope of the right of reply. With respect to the first issue, this Committee believes that Canada should make an interpretive declaration expressing its understanding that only offensive statements, not ideas, may trigger a right of reply. The second issue was the object of contradictory testimony, as indicated above.

During their fact-finding mission, Committee members heard from the Inter-American Commission’s Special Rapporteur on Freedom of Expression that article 14 had been included so as to balance the very broad freedom of expression in the *American Convention*. However, the manner in which this right is to be exercised is left to the discretion of States, according to their own laws and regulations. The Convention does not prescribe any particular mechanism and does not contemplate an automatic right of reply whenever anyone feels offended by a statement. In Guatemala, for example, a tribunal must first establish the offensive, incorrect or libellous nature of the statement.

It should be noted that unlike the United Nations *Convention on the International Right of Correction* (the “United Nations Convention”), which aims at the protection of States against “false or distorted reports likely to injure friendly relations between States”, the provisions of article 14 aim at the protection of individuals. The United Nations Convention virtually gives a State the right to demand that its correcting statement be published if it contends that a news dispatch will harm its relations with other States or its national prestige or dignity. However, this mechanism was put in place because, according to the Preamble of the United Nations Convention, the Contracting States felt that “it is not at present practicable to institute, on the international level, a procedure for verifying the accuracy of a report which might lead to the

¹²⁵ Committee Evidence, March 17, 2003, at 3:21 (Professor Joanna Harrington, CLAIHR).

imposition of penalties for the publication of false or distorted reports”. Such an impracticality does not exist at the national level. There does not appear, therefore, to be any analogy between the right of reply under article 14 of the *American Convention* and the “Right of correction” in the United Nations Convention.

This Committee believes that the concern about the scope of the right of reply can be addressed by an interpretive declaration expressing Canada’s understanding that the right of reply is not absolute and is exercised according to applicable domestic legislation.

4. Property Rights

Questions were raised about the possible incompatibility of the individual right to property protected under article 21 of the *American Convention* and property rights of aboriginal peoples, which have been held by the Supreme Court of Canada to be collective in nature. However, the Inter-American Court of Human Rights has interpreted article 21 as including the collective property rights of indigenous communities.

It is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.¹²⁶

Therefore, it is this Committee’s opinion that there is no incompatibility between the provisions of Canadian law respecting aboriginal title to land including section 35 of the *Constitution Act, 1982* and article 21 of the *American Convention*.

5. Article 22(5): Expulsion of Nationals

Although article 22 did not generate much debate, one witness referred to the concern expressed by the Canadian government that the guarantee that “no one can be expelled from the territory of a State of which he is a national or be deprived of the right to enter it” could prevent the

¹²⁶ *The Case of the Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, Judgment of August 31, 2001, Series C, N° 79, at paras. 148-149.

extradition of Canadian nationals.¹²⁷ However, the witness stated that this concern is unfounded because “the Inter-American system has already said that that article does not apply to extradition”.¹²⁸

The distinction between the terms “expulsion” and “extradition” in the reports of the Inter-American Commission does not appear to be very clear although it seems that “expulsion” is used in reference to aliens while “extradition” is used in reference to nationals.¹²⁹ In any event, this can easily be addressed by means of an interpretive declaration.

One witness suggested that the decision of the Supreme Court of Canada in the *Suresh* case meets the requirements of article 22(8) concerning the prohibition of deportation of foreigners back to their country of origin where they face the risk of violation of their right to life or personal freedom.¹³⁰

6. Article 24: Equality Rights

Concerns were expressed about the formulation of equality rights in the *Convention*, which does not seem to contemplate affirmative action programs. The International Centre for Rights and Democracy suggested that affirmative action is part of the right to equality under international law. This interpretation is shared by the Inter-American Commission on Human Rights.

The Committee’s research found that equality does not mean identical treatment for all under international law. The following Comment from the United Nations Human Rights Committee reflects the status of international law on this issue:

The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions, which cause or help to perpetuate discrimination prohibited by the Covenant. For example,

¹²⁷ Committee Evidence, April 29, 2002, at 9:42 – 9:43 (Warren Allmand, Rights and Democracy).

¹²⁸ *Ibid.*

¹²⁹ Report N° 2/92, Case 10.289 , Costa Rica , February 4, 1992 Annual Report of the Inter-American Commission on Human Rights, 1992.

¹³⁰ Committee Evidence, May 6, 2002, at 10:9 (Lucie Lamarche, UQAM).

in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.¹³¹

In fact, the Human Rights Committee has on occasion expressly recommended that affirmative action programs be implemented when necessary to ensure effective equality:

The Committee emphasizes the need for the government to increase its efforts to prevent and eliminate persisting discriminatory attitudes and prejudices against persons belonging to minority groups and women including, where appropriate, through the adoption of affirmative action.¹³²

Given that article 29 (b) of the *American Convention* expressly provides that the *Convention* cannot be interpreted so as to offer less protection than other human rights treaties such as the *International Covenant on Civil and Political Rights* to which Canada is a Party, there would not appear to be any reason why article 29 should be interpreted as excluding affirmative action programs. In fact, members of the Inter-American Commission referred the Committee to the work of the Human Rights Committee as reflecting the status of international law on this issue. In addition, as pointed out to the Committee by members of the Inter-American Commission, there are no references to affirmative action programs in other general human rights treaties, included the International Covenant on Civil and Political Rights, which Canada has ratified.

7. Article 28: Federal Clause

Committee members wondered about the federal clause in article 28 of the Convention. When asked if there were problems in the United States given the federal state principle, Professor

¹³¹ Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), at para. 10.

¹³² Human Rights Committee, Comments on United States of America, U.N. Doc. CCPR/C/79/Add 50 (1995) at para. 30.

Cassel referred to the case against Mexico where the Commission found that article 28 of the Convention requires that the central government take responsibility for compliance with the Convention by its constituent units. The United States has a standard declaration on federalism that says that the federal government takes responsibility for compliance in its areas of jurisdiction only.

Professor Shelton explained that the federal clause in the *American Convention* was included at the insistence of the United States and her interpretation is that it preserves the division of powers and governance structures of federal States such as Canada.¹³³ However, concerns remain in the light of the interpretation of article 28 by the Inter-American Commission.

The Inter-American Commission has interpreted article 28 of the *American Convention*, in two cases concerning Mexico, as imposing on the central government responsibility for implementing the Convention regardless of its constitutional division of powers. It has applied the same interpretation to Brazil. This interpretation would appear inconsistent with the wording of article 28(1) of the Convention:

Where a State Party is constituted as a federal State, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

With respect to its constituent units, the responsibility of the central government seems to be limited to taking “suitable measures in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfilment of this Convention.”

However, it is worth recalling that, although hesitant at first, Canada did ratify the *International Covenant on Civil and Political Rights*, which expressly confirms the responsibility of the federal government for the application of the Covenant throughout the entire Canadian territory regardless of the country’s internal structure. This led the Canadian government to sign an agreement with the provinces in order to address, *inter alia*, the situation where provincial

¹³³ Committee Evidence, June 3, 2002, at 11:45 (Professor Dinah Shelton).

legislation or institutions are said to be the source of violations alleged in a petition before an international body. Canada therefore does not need a federal clause to become a party to an international human rights treaty, and the narrow interpretation of article 28 by both the Inter-American Commission and the Inter-American Court should not be an obstacle to Canadian ratification of the Convention.

C. Discussion of Interpretive Declarations and Reservations

The Department of Foreign Affairs and International Trade (DFAIT) has stated that the Convention was negotiated without Canada's participation. The Department of Justice added that the Convention was drafted in old language that does not reflect Canadian understanding of the law.¹³⁴ Consequently, a large number of reservations and statements of understanding would be required before Canada could ratify the *American Convention*.

The Committee was told that ratifying the Convention with numerous reservations and interpretive declarations, which the government views as necessary, would be a departure from Canada's position and would reduce Canada's credibility as well as undermine its ability to convince others to withdraw their reservations.¹³⁵ However, non ratification of the Convention could also undermine Canada's credibility. One witness pointed out that non ratification limited Canada's ability to convince Trinidad and Tobago and Peru to reconsider when they threatened to withdraw from the Convention.¹³⁶ Indeed, Committee members were reminded of this incident when they met the Inter-American Commission on Human Rights. Peru's objection to Canada's interference, arguing that it was in no position to tell anyone what to do, placed Canada in the embarrassing situation of having to explain why it had not yet ratified the Convention.

Some witnesses before the Committee favoured an interpretive declaration with respect to article 4(1), rather than a reservation. Some felt that a reservation would be inadmissible because of the

¹³⁴ Committee Evidence, March 18, 2002, at 8:11 (John Holmes), 8:13 (Elizabeth Eide).

¹³⁵ Committee Evidence, March 18, 2002, at 8:11 (John Holmes).

¹³⁶ Committee Evidence, April 29, 2002, at 9:54 (Warren Allmand, Rights and Democracy).

fundamental nature of the right to life,¹³⁷ while others believed that because of its purpose, an interpretive declaration might be interpreted as a reservation.¹³⁸ One witness suggested a conditional interpretive declaration that would make Canada's ratification of the Convention conditional upon acceptance of its understanding of article 4(1).¹³⁹

Mr. Leuprecht was of the opinion that reservations could be justified even if, in principle, Canada does not like to make reservations.¹⁴⁰ He does not believe that distinctions between reservations and interpretive declarations are important and does not favour one over the other. His opinion is that it is preferable to ratify the Convention with interpretive statements or reservations than not to ratify it at all. He believes the debate around article 4 to be "artificial" in that it can be overcome easily by means of a reservation or an interpretive declaration. He added that in his opinion there is little risk of a case being made against Canada for not taking any legislative action with respect to abortion¹⁴¹.

The Committee conducted its own research and found that according to the International Law Commission, the body entrusted with the codification of international law:

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.¹⁴²

In theory, an interpretive declaration differs from a reservation to the extent that it does not attempt to suspend or alter the application of certain provisions of a treaty, but rather to explain the meaning that a State intends to give them.

In addition, the International Law Commission distinguishes between simple and conditional interpretive declarations. A conditional interpretive declaration is a unilateral statement whereby

¹³⁷ Committee Evidence, May 6, 2002, at 10:11 (Professor Lucie Lamarche, UQAM).

¹³⁸ Committee Evidence, May 27, at 10:49 (Andrée Côté, National Association of Women and the Law).

¹³⁹ Committee Evidence, June 3, 2002, at 11:29 (Jennifer Kitts, Action Canada for Population and Development).

¹⁴⁰ Committee Evidence, June 17, 2002, at 11:56 – 11:57.

¹⁴¹ *Ibid.*, at 11:58 – 11:59.

¹⁴² Report of the International Law Commission, 2001, Chapter VI, "Reservations to Treaties", art. 1.2.

the State “subjects its consent to be bound by the treaty to a specific interpretation of the treaty or certain provisions thereof”.¹⁴³ Whereas simple interpretive declarations may theoretically be formulated at any time,¹⁴⁴ conditional declarations can only be made at the time of ratification, adherence or accession to the treaty.¹⁴⁵

Under the terms of article 2(d) of the *Vienna Convention on the Law of Treaties*:

“Reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

The Vienna Convention has codified and expanded upon the principles established by the International Court of Justice in its advisory opinion of May 28, 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*:

- Reservations are valid if the treaty concerned permits them. In this case, no formal acceptance by other State Parties is required.
- If the treaty is silent on the issue, reservations are valid only if they are compatible with the object and purpose of the treaty. In such cases, State Parties will be deemed to have accepted the reservation unless they express their objections within a period of twelve months following notification.

Under article 75, of the *American Convention on Human Rights*, reservations are permitted:

The Convention shall be subject to reservations only in conformity with the provisions of the *Vienna Convention on the Law of Treaties* signed on May 23, 1969.

¹⁴³ *Ibid.*, at 457.

¹⁴⁴ Unless the treaty itself prohibits it or prescribes the specific times when interpretive declarations can be made. In addition, if the other State parties have relied on an interpretive declaration its author may be estopped from modifying it subsequently.

¹⁴⁵ *Ibid.*, at 499.

In its advisory opinion of September 25, 1982, the Inter-American Court of Human Rights has held that in view of the reference to the *Vienna Convention on the Law of Treaties*, article 75 of the *American Convention* “must be deemed to permit States to ratify or adhere to the Convention with whatever reservations they wish to make, provided only that such reservations are not incompatible with the object and purpose of the Convention.”¹⁴⁶ The Court also held that although as a general principle, a reservation to a fundamental right such as the right to life (non derogable right) would be incompatible with the object and purpose of the Convention, “the situation would be different if a reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose”.¹⁴⁷

It would appear that both the option of an interpretive declaration and of a reservation are open to Canada. However, one should be aware of the jurisprudence of the European Court of Human Rights with respect to interpretive declarations that seem to have been made in order to avoid the rules regarding reservations or the criticism usually associated with them. The Court decided to treat as a reservation a declaration which purported to exclude certain categories of proceedings from the scope of the right to a fair trial, so as to avoid a broad judicial interpretation of the right. It applied the rules relative to reservations to assess the validity of the interpretive declaration:

In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content.

[...]

Accordingly, it will examine the validity of the interpretative declaration in question, as in the case of a reservation, in the context of this provision.¹⁴⁸

This means, *inter alia*, that the interpretive declaration has to be compatible with the object and purpose of the treaty in question and that it can only be made at the time of ratification, adhesion

¹⁴⁶ *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, OC-2/82, at par. 22.

¹⁴⁷ *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, OC-3/83, 8 September 1983, at par. 61.

¹⁴⁸ *Case of Belilos v. Switzerland*, Judgment of 29/04/1988, at par. 49, Application number 00010328/83.

or accession to the treaty. This precedent is reflected in the *Draft Guidelines on Reservations to Treaties* developed by the International Law Commission:

- Under article 1.1.4 of the Draft Guidelines, “A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which its authors purports to limit the obligations imposed on it by the treaty constitutes a reservation.”
- Under article 1.3 of the Draft Guidelines, “the character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce”.
- Under article 1.3.1, “To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.”¹⁴⁹

All these elements should be taken into account to decide whether to make a reservation or an interpretive declaration to article 4, to ensure that it can withstand the scrutiny of the Inter-American Commission and the Inter-American Court.

D. Advantages to Ratification

1. Strengthening the Inter-American system

Canada’s leadership can be important in solidifying democracy and human rights. As a bilingual country it could be an important source of leadership both for the English-speaking Caribbean countries and for Haiti.¹⁵⁰ With increasing talk of expanding the free trade area in the Americas, the need for regional human rights has never been greater. Canadian participation would

¹⁴⁹ *Report of the International Law Commission, supra*, note 1.

¹⁵⁰ Committee Evidence, June 3, 2002, at 11:37 (Professor Dinah Shelton).

strengthen the Inter-American system and increase both Canada's credibility in the general area of human rights and our ability to bring about any required reforms.¹⁵¹

Although Canada is by no means inactive in the area of human rights in the Americas, as a party to the Convention, it could play a more effective role. As stated by one witness: "once you are inside a club, you are taken much more seriously if you have recommendations about how that club should improve its practices".¹⁵²

As Canada becomes increasingly "part of" the Americas and builds closer political and economic ties with its OAS partners, human rights must be part of the equation. Strengthening the system is also achieved through compliance with the decisions of its institutions. Ratification of the Convention would allow recognition of the Court's jurisdiction over contentious matters. Canada would enhance its role as a human rights champion if it showed willingness to stand with the other States Parties and accept the judgment of the Inter-American Court when it finds that Canada is not fulfilling its obligations.¹⁵³ Canada could also contribute to the Court's voluntary fund for contributions thereby significantly increasing the Court's budget and its material capacity.¹⁵⁴

As a party to the Convention Canada would be able to nominate candidates for election to the Inter-American Commission and the Inter-American Court. Committee members were told that Canadian judges and commissioners could contribute tremendously by bringing a common law perspective to the jurisprudence of the Court.¹⁵⁵

2. Increased Protection of Human Rights for Canadians

Ratification of the *American Convention* would make it possible for Canada to ratify the *San Salvador Protocol on social, economic and cultural rights*. This would trigger the reporting obligations States Parties undertake under article 19 of the Protocol, which requires that they

¹⁵¹ Committee Evidence, May 6, 2002, John W. Graham, FOCAL.

¹⁵² *Ibid.*

¹⁵³ Committee Evidence, May 27, 2002, at 10:76 (Alex Neve, Amnesty International).

¹⁵⁴ Committee Evidence, April 29, 2002, at 9:61 (Professor Cassel).

“submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol”. It would also give Canadians access to the Inter-American Commission in cases of violations of trade union rights as well as the right to education.¹⁵⁶

Ratification of the Convention would also enhance human rights protection in Canada in other ways. One witness referred to social origin as a prohibited ground of discrimination in the *American Convention*¹⁵⁷, also to be found in the International Covenant on Civil and Political Rights to which Canada is a party. In addition, Canadians would enjoy protection of the right to property under the *American Convention*. One witness referred to a recent decision of the Inter-American Court, which relied on the right to property to conclude that States have specific obligations with respect to aboriginal lands¹⁵⁸.

3. Increased Protection of Women’s Rights in the Americas

The Committee heard about the role Canada could play to enhance the protection of women’s rights in the Americas from the witnesses who appeared before it¹⁵⁹, and from the officials and NGO representatives it met during its fact-finding mission.

One example given was that of a Canadian interpretive declaration or reservation to article 4, which could benefit Latin-American women¹⁶⁰ as the Canadian interpretation of the right to life with respect to abortion made its way into the Inter-American Court’s jurisprudence.

Another witness referred to the Canadian constitutional standards with respect to equality rights, which feminist groups in Latin America hope they would benefit from as a result of Canadian ratification of the Convention.¹⁶¹

¹⁵⁵ *Ibid.*

¹⁵⁶ Committee Evidence, May 27, 2002, at 10:55 – 10:56 (John Foster, North-South Institute).

¹⁵⁷ Committee Evidence, May 6, 2002, at 10:8 (Lucie Lamarche, UQAM).

¹⁵⁸ *Ibid.*

¹⁵⁹ Committee Evidence, April 29, 2002, at 9:50 (Geneviève Lessard, Rights and Democracy); Committee Evidence, May 6, 2002, at 10:19 (Professor Lucie Lamarche, UQAM).

¹⁶⁰ Committee Evidence, April 29, 2002, at 9:50 (Geneviève Lessard, Rights and Democracy).

¹⁶¹ Committee Evidence, May 6, 2002, at 10:19 (Lucie Lamarche, UQAM).

4. Stimulating United States and Caribbean participation

United States ratification of the Convention is not out of the question and although it may not be high in the priorities of the current administration, this could change later. One US argument is that Canada has not ratified so why should the US. By removing this argument Canada could perhaps help any future move towards US ratification of the *Convention*.¹⁶² Canadian ratification of the Convention, bringing another common law country “on board” could also stimulate participation of the Caribbean countries.

5. Greater Precision of the American Convention

Professor Shelton stated that the American Declaration, which was not intended to be legally binding, was not drafted as a treaty and that its terms are therefore broad and often vague. Its provisions required allowing a great deal of interpretation to the Inter-American Commission on Human Rights, which has broad and quite considerable powers. The more precise formulation of the Convention leaves less room for interpretation.¹⁶³

V. The Committee’s Conclusions and Recommendations

All the witnesses who appeared before the Committee as well as the persons and organisations who expressed their position at the roundtable organised by the League of Rights and Freedoms for Saguenay-Lac-Saint-Jean were in favour of Canadian ratification of the Convention.¹⁶⁴

Few, if any, of the Government concerns seem to pose an insurmountable obstacle to Canadian ratification of the Convention. This conclusion is, however, based on limited information from Government sources. Although officials of the Federal Government did appear before the Committee, they said that they could not give any information concerning possible provincial

¹⁶² Committee Evidence, April 26, 2002, at 9:61 (Professor Cassel, Centre for International Human Rights, Northwestern University)

¹⁶³ Committee Evidence, June 3, 2002, at 11:35 (Professor Dinah Shelton)

¹⁶⁴ Jean-Guy Girard, Centre for international solidarity of Saguenay-Lac-Saint-Jean; Luc Connolly, Conseil des Montagnais de Masteuiatsh; Steeve Émond, MÉPAQ.

and territorial concerns, invoking the confidentiality of the federal-provincial-territorial consultation process. The provincial and territorial governments have declined the Committee's invitation to appear and although some indicated that they may forward a written response, thus far the Committee has not had the benefit of any information from provincial and territorial sources. In fact, the Committee has had no indication that the federal-provincial-territorial Continuing Committee of Officials on Human Rights is actually meeting regularly to discuss the *American Convention*. The arguments put forward by the Government of Canada to justify not ratifying the Convention are essentially the same arguments we have been hearing over the past thirteen years, since Canada joined the Organization of American States.

Canada is proud of its well-deserved reputation as a world leader in human rights and yet, it is still standing on the sidelines of the Inter-American system for the protection of human rights. Without wishing to downplay the Canada's role since 1990, the fact remains that Canada is not party to the *American Convention* and its Protocols. Canada has not recognized the jurisdiction of the Inter-American Court over contentious matters thereby depriving Canadians of full access to the Inter-American system. Canada claims that it has concerns, but it has not availed itself of the possibility to request the advisory opinion of the Inter-American Court of Human Rights. There is no Canadian judge or Canadian commissioner, and although at the moment Canadian lawyers are assisting the Inter-American Commission on Human Rights, no Canadian lawyer works with the Inter-American Court. Canada may not be totally inactive with respect to human rights in the Americas, but it clearly is not doing all that it could.

Unless a timeframe is put in place, this Committee fears that little progress will be made towards ratification of the Convention.

Recommendation:

The Committee recommends that the Government of Canada take all necessary action to ratify the *American Convention on Human Rights*, with a view to achieving ratification by July 18, 2008, which is the thirtieth anniversary of the entry into force of the American Convention.

Ratification of the Convention would be incomplete if it did not include a declaration that Canada recognizes the jurisdiction of the Court on all matters relating to the interpretation or application of the *American Convention*.

Recommendation:

The Committee recommends that Canada make such a declaration upon depositing its instruments of ratification or adherence, as provided for under article 62 of the Convention.

The Committee deplores the mystery surrounding the federal-provincial-territorial consultation process. There can be no public debate if the public does not know what the concerns of the respective governments are. Nor can there be academic analysis and deliberation. Government officials claim that ratifying the *American Convention* will have little impact on Canadians but through the hearings, the Committee discovered that few Canadians actually know about the Convention. Members of the Inter-American Court asked the Committee what was the perception of the Canadian population with respect to the Convention and underlined the importance of the participation of civil society in the debate. The Committee agrees.

Recommendation:

The Committee recommends that the federal-provincial-territorial Continuing Committee of Officials on Human Rights identify specific provisions of the Convention that raise concerns and inform the Canadian public about them so as to foster debate and a search for solutions.

It is possible that the study of the compatibility of federal, provincial and territorial legislation may leave some concerns unresolved. If so, the Committee believes that Canada should make the necessary interpretative statements or reservations. Interpretive statements would seem more in keeping with the Canadian tradition of limiting the use of reservations, and may be adequate with respect to some provisions such as the prohibition on prior censorship under article 13 and the right of reply under article 14. The issue of article 4(1) and more precisely of the scope and content of the right to life with respect to abortion, is admittedly more complex.

The opinion stated by several experts before the Committee to the effect that Canada could justify making a reservation since it had not participated in the negotiation and drafting of the Convention seemed to be shared by members of the Inter-American Commission and the Inter-American Court. As long as it is drafted in a way that is compatible with the object and purpose of the Convention, a reservation can be justified. Senior Canadian officials argued that Canada's credibility was at stake. However, Canada may be losing more credibility by giving the impression that it is using its position on reservations as an excuse not to ratify the Convention.

Recommendations:

The Committee recommends that the Government of Canada consider making an interpretive declaration to article 13 to express its understanding that the expression “public entertainment” includes, *inter alia*, the Internet. The declaration could also include Canada's understanding that the provisions of article 13 do not affect Canadian hate propaganda legislation, if deemed necessary.

The Committee further recommends that the Government of Canada consider making an interpretive declaration to express its understanding that the right of reply under article 14 is not absolute and that it is exercised according to applicable provincial legislation.

The Committee also recommends that Canada consider making a reservation to article 4(1) in order to address concerns related to the preservation of the status quo, in Canadian law, with respect to abortion. This reservation should be drafted so as to make it clear that Canada does not seek to deprive the right to life as a whole of its basic purpose, but merely to restrict certain aspects of it, as suggested by the Inter-American Court of Human Rights.

Finally, although Canada claims to be an active participant in the Inter-American system for the protection of human rights, it has done little at home to promote the system. The fiftieth anniversary of the *American Declaration of the Rights and Duties of Man* went virtually unnoticed in Canada. Several witnesses before the Committee admitted to having only recently become interested in the *American Convention* only because they knew little about it until

recently. The Committee had difficulty finding Canadian experts on the Inter-American system and the Convention. Although the Study of this Committee has fostered some interest, more needs to be done, especially if all sectors of civil society are to be able to participate in public discussions concerning the *American Convention*.

Recommendation:

The Committee recommends that as the Government of Canada takes appropriate steps towards ratification of the *American Convention*, it should actively engage in the promotion of the Convention and of the entire Inter-American system for the protection of human rights.

APPENDIX A: WITNESSES

First Session, Thirty-Seventh Parliament

March 18, 2002 *From the Department of Foreign Affairs and International Trade:*
 Alexandra Bugailiskis, Director General, Latin America and
 Caribbean Bureau
 John Holmes, Director, United Nations, Criminal and Treaty Law
 Division

From the Department of Justice:
 Elisabeth Eid, Acting Director, Human Rights Law Section

As an individual:
 Timothy Ross Wilson

April 15, 2002 *As individuals:*
 The Right Honourable Antonio Lamer, P.C.
 The Very Reverend the Honourable Lois Wilson
 Professor A. Wayne MacKay, President, Mount Allison University
 Professor Pierre Foucher, Faculty of Law, University of Moncton
 Professor Martha Jackman, Faculty of Law, University of Ottawa

April 29, 2002: *From Rights & Democracy:*
 The Honourable Warren Allmand, P.C., Q.C., President
 Geneviève Lessard, Assistant Coordinator, Democratic
 Development Programme

As an individual:
 Douglas Cassel, Director, Centre for International Human Rights,
 Northwestern University, Illinois

May 6, 2002 *As an individual:*
 Professor Lucie Lamarche, Faculty of Law, University of
 Quebec at Montreal

From the Canadian Foundation for the Americas (FOCAL):
 John W. Graham, Chairman of the Board of Directors
 Sharon O'Regan, Deputy Director

May 27, 2002 *From the Fédération des femmes du Québec:*
 Diana Matte, Coordinator, World March of Women
 Gisèle Bourret, Representative

From the National Association of Women and the Law:
Andrée Côté, Director of Legislation and Law Reform

As an individual:

John W. Foster, Principal Researcher (Civil Society), North-South
Institute

From Amnesty International Canada:

Alex Neve, Secretary General
Andrew Thompson, Chile / Peru Coordinator

June 3, 2002

From Action Canada for Population and Development:

Jennifer Kitts, Senior Advisor, Sexual and Reproductive Rights
Katherine McDonald, Executive Director

From the National Action Committee on the Status of Women:

Sungee John, Secretary, Executive Board

As an individual:

Dinah L. Shelton, University of Notre Dame Law School, Indiana

June 17, 2002

As an individual:

Peter Leuprecht, Dean, Faculty of Law, McGill University

From the Grand Council of the Crees (Eeyou Istchee):

Roméo Saganash, Director of Quebec Relations
Brian Craik, Director of Federal Relations
Robert Epstein, Consultant

Fact-Finding Visit to San José, Costa Rica, September 4 to 7, 2002

September 4, 2002

From the Canadian Embassy in Costa Rica:

H.E. Louise Léger, Ambassador
Ted Mackay, First Secretary
David Morris, Counsellor, Development Aid
Sylvie Gariépy, First Secretary (Commercial)
David Smart, First Secretary (Administration) and Consul
Jean Sénécal, Third Secretary (Administration) and Vice-Consul
Elaine Iraegui, Attaché

Members of the Legal Affairs Committee:

José Miguel Corrales Bolaños, Chair
Ruth Montoya Rojas, Secretary
Emilia Maria Rodriguez Arias
Federico Malavassi Calvo

Laura Chinchilla Miranda
Carlos Benavides Jiménez
Federico Vaargas Ulloa
Gloria Valerin Rodriguez
Mario Redondon Poveda

Members of the International Affairs Committee:

Ligi Zúñiga Clachar
Maria des Rocio Ulloa Solana
Julián Watson Pomear
Juan José Vargas Fall
Frederico Malavassi Calvo

From the Inter-American Court of Human Rights:

Judges:

Antônio A. Cançado Trindade, President (Brazil)
Alirio Abreu Burelli, Vice President (Venezuela)
Oliver Jackman, Justice (Barbados)
Hernán Salgado Pesantes, Justice (Ecuador)
Sergio García Ramírez, Justice (Mexico)
Carlos Vicente de Roux Rengifo, Justice (Colombia)

Court Personnel:

Manuel E. Ventura Robles, Secretary
Pablo Saavedra Alessandri, Assistant Secretary

September 5, 2002

From the Inter-American Commission on Human Rights:

Commissioners:

Juan Méndez, President (Argentina)
Marta Atolaguirre Larraondo, First Vice-President (Guatemala)
José Zalaquett, Second Vice-President (Chile)
Robert K. Goldman, Commissioner (U.S.)
Clare Kamau Roberts, Commissioner (Antigua and Barbuda)
Julio Prado Vallejo, Commissioner (Ecuador)
Susana Villarána, Commissioner (Peru)

Commission Staff:

Santiago Canton, Executive Secretary
Ariel Dulitzky, Senior Specialist and Legal Director
Christina Cerna, Commission Specialist
Brian Tittlemore, Commission Specialist
Ignacio Alvarez, Commission Specialist
Mario Lopez, Commission Specialist

From the Office of the Ombudsman for Costa Rica:

José Manuel Echandi, Ombudsman (*Defensor de los habitantes*)
Max Esquivel, Assistant Ombudsman

From the Inter-American Institute of Human Rights:
Elizabeth Odio, Member of the Board of Directors
Gilda Pacheco, Interim Director
Gerardo Sánchez, Program Officer Ombudsman
Lorena González, Program Officer Ombudsman

From the Centre for Justice and International Law (CEJIL):

September 6, 2002 *Round table discussion – participating groups:*
Casa Alianza (Covenant House) - Street Children
Fundación Pan y Amor (Bread and Love Foundation) - Child Labour
CIDA Gender Coordinator
Office of the United Nations High Commissioner for Refugees
Mesa Indígena (National Indigenous Roundtable)

Second Session, Thirty-Seventh Parliament

March 17, 2003 *From Gowling Lafleur Henderson:*
Mark Bantey

On behalf of the Canadian Lawyers for International Human Rights:
Joanna Harrington, Assistant Professor, Faculty of Law, University
of Western Ontario
Allan McChesney, Consultant

March 31, 2003 *From the University of New Brunswick, Faculty of Law:*
Professor Don Fleming
Professor John McEvoy

APPENDIX B: SELECTED DOCUMENTS PREPARED FOR OR RECEIVED BY THE COMMITTEE DURING THIS STUDY

Briefs and Other Documents Received from Witnesses and Other Individuals

1. Action Canada for Population and Development, Presentation of Jennifer Kitts and Katherine MacDonald and accompanying documents, June 3, 2002
2. Action Canada for Population and Development, Article from the Globe and Mail, “Not telling them won’t help” by Katherine MacDonald
3. Action Canada for Population and Development, Canadian Medical Association Journal, April 30, 2002, Vol. 166, No. 9
4. Action Canada for Population and Development, Statement made by Gilbert Laurin, Minister Counsellor, Permanent Mission of Canada to the United Nations, at the 27th Special Session of the General Assembly, Special Session on Children, May 10, 2002
5. Amnesty International, Presentation of Alex Neve,
6. Canadian Foundation for the Americas (FOCAL), Presentation of John Graham and accompanying documents, May 6, 2002
7. Professor Douglass Cassell, Presentation and accompanying documents, April 29, 2002
8. Department of Foreign Affairs and International Trade, Presentations of Alexandra Bugailiskis and John Holmes and accompanying documents, March 18, 2002
9. John W. Foster, Presentation and accompanying documents, May 7, 2002
10. Professor Pierre Foucher, Presentation and accompanying documents, April 15, 2002
11. Grand Council of the Crees (Eeyou Istchee), Presentation of Roméo Saganash, June 17, 2002
12. Professor Martha Jackman, “What’s Wrong With Social and Economic Rights?”, (2000) *11 National Journal of Constitutional Law* 235-46
13. Department of Justice Canada, Presentation of Elisabeth Eid, March 18, 2002
14. Professor Lucie Lamarche, Presentation (French only)
15. Professor A. Wayne MacKay “The Legislature, the Executive and the Courts: The Delicate Balance of Power” or “Who Is Running This Country Anyway?”
16. National Association of Women and the Law, Presentation of Andrée Côté, May 27, 2002
17. Rassemblement canadien pour le Liban “Human Rights Abuse and Democracy Deterioration in Lebanon” February 2002
18. Rights & Democracy, Note on the “Baby Boy” case
19. Rights & Democracy, Letter from Professor Rebecca Cook of the University of Toronto to Rights & Democracy regarding Canadian ratification of the American Convention on Human Rights
20. Rights & Democracy, Paper prepared by John Foster on the San Salvador Protocol and its possible benefits for Canadians
21. Rights & Democracy, General Comment 28 of the International Covenant on Civil and Political Rights of the United Nations
22. Rights & Democracy, Short summary of the Awas Tingni case
23. Rights & Democracy, Brief to the Canadian government regarding ratification of the American Convention on Human Rights, May 19, 2000

24. Rights & Democracy, “Canadian Ratification of the American Convention on Human Rights” by William A. Schabas
25. Rights & Democracy, “Understanding and Reservations” by David Matas
26. Rights & Democracy, “Canadian Ratification of the American Convention on Human Rights: Draft Interpretative Declaration”, As proposed by Professor Rebecca Cook of the University of Toronto in February 2002
27. Rights & Democracy, Latin American women’s rights organizations’ representatives on Canadian ratification of the American Convention on Human Rights
28. Rights & Democracy, Letter from David Kilgour, Secretary of State (Latin America and Africa), Department of Foreign Affairs and International Trade, to Warren Allmand, President of Rights & Democracy
29. The Very Reverend the Honourable Lois Wilson, “Human Rights Linkages Initiative” Fall 1999 National Consultation, Final Report
30. Timothy Ross Wilson, Presentation, March 18, 2002

Other Documents

1. Canada’s position with respect to the American Convention on Human Rights
2. The American Convention on Human Rights
3. Report on the Fact-Finding Mission to Costa Rica, September 3-7, 2002
4. Study of the American Convention on Human Rights: Issues identified and concerns raised by the members of the Committee – Suggested topics of discussion
5. Summary of Testimony on the American Convention on Human Rights
6. The Inter-American System for the Protection of Human Rights: An overview through the 2000 Annual Reports of the Inter-American Commission and the Inter-American Courts of Human Rights
7. “Action Canada for Population and Development: 2001 Monitoring Report on Children and Adolescents”
8. c/o Action Canada for Population and Development: “International Sexual and Reproductive Rights Coalition; A Fact Sheet Series – Basic Information, Key Actions and International Commitments”
9. Amnesty International Canada – “Real Security: A Human Rights Agenda for Canada”
10. Canadian Foundation for the Americas – “Organization of American States: Inter-American Democratic Charter”
11. “Description, Analysis and Evaluation of the Interamerican Human Rights System from the Viewpoint of a Canadian and a Costa Rican” by Timothy Ross Wilson

APPENDIX C: SIGNATURES AND CURRENT STATUS OF RATIFICATIONS

AMERICAN CONVENTION ON HUMAN RIGHTS "PACT OF SAN JOSE, COSTA RICA"

(Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969)

ENTRY INTO FORCE: 18 July 1978, in accordance with Article 74.2 of the Convention.

DEPOSITORY: OAS General Secretariat (Original instrument and ratifications).

TEXT: OAS, Treaty Series, N° 36.

UN REGISTRATION: 27 August 1979, N° 17955 *

(* Source: www.cidh.org/basicos/basic4.htm)

SIGNATORY COUNTRIES	DATE DEPOSIT RATIFICATION OR ACCESSION	DATE OF ACCEPTANCE OF THE JURISDICTION OF THE COURT
1 - Argentina*	5 September 1984 a	5 September 1984
2 - Barbados	27 November 1982 b	4 June 2000
Bolivia	19 July 1979 c, w	27 July 1993
Brazil	25 September 1992 t	10 December 1998
3 - Chile*	21 August 1990 g	21 August 1990
Colombia*	31 July 1973 n	21 June 1985
Costa Rica*	8 April 1970 d	2 July 1980
Dominica	3 June 1993	
4 - Dominican Republic	19 April 1978 z	25 March 1999
5 - Ecuador*	28 December 1977 e	13 August 1984
El Salvador	23 June 1978 f, x	6 June 1995
6 - Grenada	18 July 1978	
Guatemala	25 May 1978 g	9 March 1987
Haiti	27 September 1977 c, y	20 March 1998

Honduras	8 September 1977	h	9 September	1981
7 - Jamaica*	7 August 1978	i		
Mexico	3 April 1982	c, j	16 December	1998
Nicaragua	25 September 1979	r	12 February	1991
Panama	22 June 1978	p	3 May	1990
Paraguay	24 August 1989	u	26 March	1993
8 - Peru*	28 July 1978	k	21 January	1981
Suriname	12 November 1987	o	12 November	1987
Trinidad y Tobago	28 May 1991	s	28 May	1991
9 - United States				
10 - Uruguay*	19 April 1985	l	19 April	1985
Venezuela*	9 August 1977	m	24 June	1981

* States that have accepted the competence of the Inter-American Court on Human Rights to receive and examine communications in which a State Party alleges that another State Party has violated the human rights set forth in the American Convention: Argentina (September 5, 1984); Chile (August 21, 1990); Colombia (June 21, 1985); Costa Rica (July 2, 1980); Ecuador (August 13, 1984); Jamaica (August 7, 1978); Peru (January 21, 1981); Uruguay (April 19, 1985) and Venezuela (August 9, 1977).

All States listed herein signed the Convention on 22 November 1969, with the exception of those indicated in the notes.

1. Argentina

Signed 2 February 1984 at the OAS General Secretariat.

2. Barbados

Signed 20 June 1978 at the OAS General Secretariat.

3. Chile:

(Declaration made at the time of signature)

The Delegation of Chile signs this Convention, subject to its subsequent parliamentary approval and ratification, in accordance with the constitutional rules in force. Such parliamentary approval was later granted and the instrument of ratification was deposited with the General Secretariat of the OAS.

4. Dominican Republic:

Signed 7 September 1977 at the OAS General Secretariat with the following declaration:

The Dominican Republic, upon signing the American Convention on Human Rights, aspires that the principle pertaining to the abolition of the death penalty shall become

purely and simply that, with general application throughout the states of the American region, and likewise maintains the observations and comments made on the aforementioned Draft Convention which it distributed to the delegations to the Council of the Organization of American States on 20 June 1969.

5. Ecuador:

(Declaration made at the time of signature)

The Delegation of Ecuador has the honour of signing the American Convention on Human Rights. It does not believe that it is necessary to make any specific reservation at this time, without prejudice to the general power set forth in the Convention itself that leaves the governments free to ratify it or not.

6. Grenada

Signed 14 July 1978 at the OAS General Secretariat.

7. Jamaica

Signed 16 September 1977 at the OAS General Secretariat.

8. Peru

Signed 27 July 1977 at the OAS General Secretariat.

9. United States

Signed 1 June 1977 at the OAS General Secretariat.

10. Uruguay:

(Reservation made at the time of signature)

Article 80.2 of the Constitution of Uruguay provides that a person's citizenship is suspended if the person is "under indictment on a criminal charge which may result in a penitentiary sentence." Such a restriction on the exercise of the rights recognized in Article 23 of the Convention is not envisaged among the circumstances provided for in Article 23, paragraph 2, for which reason the Delegation of Uruguay expresses a reservation on this matter.

a. Argentina:

(Reservation and interpretative declarations made at the time of ratification)

The instrument of ratification was received at the General Secretariat of the OAS on 5 September 1984 with a reservation and interpretative declarations. The notification procedure of the reservation was taken in conformity with the Vienna Convention on the Law of Treaties signed on 23 May 1969.

The texts of the above-mentioned reservation and of the interpretative declarations are the following:

I. Reservation:

Article 21 is subject to the following reservation: "The Argentine Government establishes that questions relating to the Government's economic policy shall not be subject to review by an international tribunal. Neither shall it consider reviewable anything the national courts may determine to be matters of 'public utility' and 'social interest', nor anything they may understand to be 'fair compensation'".

II. Interpretative Statements:

Article 5, paragraph 3, shall be interpreted to mean that a punishment shall not be applied to any person other than the criminal, that is, that there shall be no vicarious criminal punishment.

Article 7, paragraph 7, shall be interpreted to mean that the prohibition against "detention for debt" does not involve prohibiting the state from basing punishment on default of certain debts, when the punishment is not imposed for default itself but rather for a prior independent, illegal, punishable act.

Article 10 shall be interpreted to mean that the "miscarriage of justice" has been established by a national court.

Recognition of Competence:

In the instrument of ratification dated 14 August 1984 and deposited with the General Secretariat of the OAS on 5 September 1984, the Government of Argentina recognizes the competence of the Inter-American Commission on Human Rights and of the jurisdiction of the Inter-American Court of Human Rights. This recognition is for an indeterminate period and on condition of reciprocity on all cases related to the interpretation or application of the Convention cited, with the partial reservation and bearing in mind the interpretative statements contained in the Instrument of Ratification.

b. Barbados:

(Reservations made at the time of ratification)

The instrument of ratification was received at the General Secretariat of the OAS on 5 November 1981, with reservations. Notification of the reservations submitted was given in conformity with the Vienna Convention on the Law of Treaties, signed on 23 May 1969. The twelve-month period from the notification of said reservations expired on 26 November 1982, without any objection being raised to the reservations.

The text of the reservations with respect to Articles 4(4), 4(5) and 8(2)(e), is the following:

In respect of 4(4) the Criminal Code of Barbados provides for death by hanging as a penalty for murder and treason. The Government is at present reviewing the whole matter of the death penalty which is only rarely inflicted but wishes to enter a reservation on this point in as much as treason in certain circumstances might be regarded as a political offence and falling within the terms of section 4(4).

In respect of 4(5) while the youth or old age of an offender may be matters which the Privy Council, the highest Court of Appeal, might take into account in considering

whether the sentence of death should be carried out, persons of 16 years and over, or over 70 years of age, may be executed under Barbadian law.

In respect of 8(2)(e) Barbadian law does not provide, as a minimum guarantee in criminal proceeding, any inalienable right to be assisted by counsel provided by the state. Legal aid is provided for certain scheduled offences such as homicide and rape.

c. Bolivia, Haiti and Mexico:
Accession.

d. Costa Rica:

Recognition of Competence:

Deposited on 2 July 1980 at the General Secretariat of the OAS an instrument recognizing the competence of the Inter-American Commission on Human Rights and the jurisdiction of the Inter-American Court of Human Rights, in accordance with Articles 45 and 62 of the Convention.

e. Ecuador:

Recognition of Competence:

On 24 July 1984 recognized the applicability of Articles 45 and 62 of the American Convention on Human Rights, by Decree N° 2768 of 24 July 1984, published in the Registro Oficial N° 795 of said month and year. In addition, the Minister of Foreign Affairs of Ecuador made the following declaration on 30 July 1984, in conformity with Articles 45(4) and 62(2) of the above-mentioned Convention:

In keeping with the provisions of Article 45, paragraph 1, of the American Convention on Human Rights--Pact of San José, Costa Rica--(ratified by Ecuador on 21 October 1977, and in force since 27 October 1977), the Government of Ecuador recognizes the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a state party alleges that another state party has committed a violation of the human rights set forth in the Convention, under the terms provided for in paragraph 2 of that Article.

This recognition of competence is to be valid for an indefinite time and on condition of reciprocity.

As provided in Article 62, paragraph 1, of the Convention in reference, the Government of Ecuador declares that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the Convention.

This recognition of jurisdiction is for an indeterminate period and on condition of reciprocity. The Ecuadorian State reserves the right to withdraw its recognition of this competence and this jurisdiction whenever it may deem it advisable to do so.

f. El Salvador:

(Declaration and reservations made at the time of ratification)

The present Convention is ratified, its provisions being interpreted to mean that the Inter-American Court of Human Rights shall have jurisdiction to hear any case that can be submitted to it, either by the Inter-American Commission on Human Rights or by any state party, provided that the State of El Salvador, as a party to the case, recognizes or has recognized such jurisdiction, by any of the means and under the arrangements indicated in the Convention.

The American Convention on Human Rights, known as the "Pact of San José, Costa Rica", signed at San José, Costa Rica, on 22 November 1969, composed of a preamble and eighty-two articles, approved by the Executive Branch in the Field of Foreign Affairs by Agreement 405, dated June 14 of the current year, is hereby ratified, with the reservation that such ratification is understood without prejudice to those provisions of the Convention that might be in conflict with express precepts of the Political Constitution of the Republic.

The instrument of ratification was received at the General Secretariat of the OAS on 23 June 1978 with a reservation and a declaration. The notification procedure of the reservation was taken in conformity with the Vienna Convention on the Law of Treaties signed on 23 May 1969.

g. Guatemala:

(Reservation made at the time of ratification)

The Government of the Republic of Guatemala ratifies the American Convention on Human Rights, signed at San José, Costa Rica, on 22 November 1969, with a reservation as to Article 4, paragraph 4 thereof, since the Constitution of the Republic of Guatemala, in its Article 54, only excludes the application of the death penalty to political crimes, but not to common crimes related to political crimes.

The instrument of ratification was received at the General Secretariat of the OAS on 25 May 1978 with a reservation. The notification procedure of the reservation was taken in conformity with the Vienna Convention on the Law of Treaties signed on 23 May 1969.

Withdrawal of Guatemala's reservation:

The Government of Guatemala, by Government Agreement N° 281-86, dated 20 May 1986, has withdrawn the above-mentioned reservation, which was included in its instrument of ratification dated 27 April 1978, considering that it is no longer supported by the Constitution in the light of the new legal system in force. The withdrawal of the reservation will become effective as of 12 August 1986, in conformity with Article 22 of the Vienna Convention on the Law of Treaties of 1969, in application of Article 75 of the American Convention on Human Rights.

Recognition of Competence:

On 9 March 1987, presented at the General Secretariat of the OAS, the Government Agreement N° 123-87, dated 20 February 1987, of the Republic of Guatemala, by which

it recognizes the jurisdiction of the Inter-American Court of Human Rights, in the following terms:

"(Article 1) To declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the American Convention on Human Rights."

"(Article 2) To accept the competence of the Inter-American Court of Human Rights for an indefinite period of time, such competence being general in nature, under terms of reciprocity and with the reservation that cases in which the competence of the Court is recognized are exclusively those that shall have taken place after the date that this declaration is presented to the Secretary General of the Organization of American States."

h. Honduras:

Recognition of Competence:

On 9 September 1981, presented at the General Secretariat of the OAS, an instrument recognizing the jurisdiction of the Inter-American Court of Human Rights in accordance with Article 62 of the Convention.

i. Jamaica:

Recognition of Competence:

The instrument of ratification, dated 19 July 1978, states, in conformity with Article 45, paragraph 1 of the Convention, that the Government of Jamaica recognizes the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.

j. Mexico:

(Declarations and reservation made at the time of ratification)

The instrument of accession was received at the General Secretariat of the OAS on 24 March 1981, with two interpretative declarations and one reservation. Notification of the reservation submitted was given in conformity with the provisions of the Vienna Convention on the Law of Treaties, signed on 23 May 1969. The twelve-month period from the notification of said reservation expired on 2 April 1982, without any objection being raised to the reservation.

The texts of the interpretative declarations and the reservation are the following:

Interpretative Declarations:

With respect to Article 4, paragraph 1, the Government of Mexico considers that the expression "in general" does not constitute an obligation to adopt, or keep in force, legislation to protect life "from the moment of conception," since this matter falls within the domain reserved to the States.

Furthermore, the Government of Mexico believes that the limitation established by the Mexican Constitution to the effect that all public acts of religious worship must be performed inside places of public worship, conforms to the limitations set forth in Article 12, paragraph 3.

Reservation:

The Government of Mexico makes express reservation to Article 23, paragraph 2, since the Mexican Constitution provides, in Article 130, that ministers of denominations shall not have an active or passive vote, nor the right to associate for political purposes.

DECLARATION FOR RECOGNITION OF THE JURISDICTION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

1. The United States of Mexico recognizes as binding ipso facto the adjudicatory jurisdiction of the Inter-American Court of Human Rights on matters relating to the interpretation or application of the American Convention on Human Rights, in accordance with article 62.1 of the same, with the exception of cases derived from application of article 33 of the Political Constitution of the United States of Mexico
2. Acceptance of the adjudicatory jurisdiction of the Inter-American Court of Human Rights shall only be applicable to facts or juridical acts subsequent to the date of deposit of this declaration, and shall not therefore apply retroactively.
3. Acceptance of the adjudicatory jurisdiction of the Inter-American Court of Human Rights is of a general nature and shall continue in force for one year after the date of which the United States of Mexico gives notice it has denounced it.

k. Peru:

Recognition of Competence:

On 21 January 1981, presented at the General Secretariat of the OAS an instrument recognizing the competence of the Inter-American Commission on Human Rights and the jurisdiction of the Inter-American Court of Human Rights, in accordance with Articles 45 and 62 of the Convention.

l. Uruguay:

(Reservation made at the time of ratification)

With the reservation made at the time of signature. Notification of this reservation was given in conformity with the Vienna Convention on the Law of Treaties, signed on 23 May 1969.

Recognition of Competence:

In the instrument of ratification dated 26 March 1985 and deposited with the General Secretariat of the OAS on 19 April 1985, the Government of the Oriental Republic of Uruguay declares that it recognizes the competence of the Inter-American Commission on Human Rights for an indefinite period and of the Inter-American Court of Human

Rights on all matters relating to the interpretation or application of this Convention, on the condition of reciprocity, in accordance with Articles 45.3 and 62.2 of the Convention.

m. Venezuela:

(Reservation and declaration made at the time of ratification)

Article 60, paragraph 5 of the Constitution of the Republic of Venezuela establishes that: No one may be convicted in a criminal trial without first having been personally notified of the charges and heard in the manner prescribed by law. Persons accused of an offense against the res publica may be tried in absentia, with the guarantees and in the manner prescribed by law. Such a possibility is not provided for in Article 8, paragraph 1 of the Convention, and for this reason Venezuela formulates the corresponding reservations, and,

DECLARES: That, in accordance with the provisions of Article 45, paragraph 1 of the Convention, the Government of the Republic of Venezuela recognizes the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a State Party alleges that another State Party has committed violations of human rights set forth in that Convention, in the terms stipulated in paragraph 2 of that article. This recognition of competence is made for an indefinite period of time.

The instrument of ratification was received at the General Secretariat of the OAS on 9 August 1977 with a reservation and a declaration. The notification procedure of the reservation was taken in conformity with the Vienna Convention on the Law of Treaties signed on 23 May 1969.

Recognition of Competence:

On 9 August 1977 recognized the competence of the Inter-American Commission on Human Rights and on 24 June 1981 recognized the jurisdiction of the Inter-American Court of Human Rights, in accordance with Articles 45 and 62 of the Convention, respectively.

n. Colombia:

Recognition of Competence:

On 21 June 1985 presented an instrument of acceptance by which recognizes the competence of the Inter-American Commission on Human Rights for an indefinite time, on the condition of strict reciprocity and nonretroactivity, for cases involving the interpretation or application of the Convention, and reserves the right to withdraw its recognition of competence should it deem this advisable. The same instrument recognizes the jurisdiction of the Inter-American Court of Human Rights, for an indefinite time, on the condition of reciprocity and nonretroactivity, for cases involving the interpretation or application of the Convention, and reserves the right to withdraw its recognition of competence should it deem this advisable.

o. Suriname:
Accession.

Recognition of Competence:

On 12 November 1987, presented at the General Secretariat of the OAS, an instrument recognizing the jurisdiction of the Inter-American Court of Human Rights in accordance with Article 62 of the Convention.

p. Panama:

On May 9, 1990, presented at the General Secretariat of the OAS, an instrument, dated February 20, 1990, by which it declares that the Government of the Republic of Panama recognizes as binding, ipso facto, the jurisdiction of the Court on all matters relating to the interpretation or application of the American Convention on Human Rights.

q. Chile:

(Reservations made at the time of ratification)

a. The Government of Chile declares that it recognizes, for an indefinite period of time and on the condition of reciprocity, the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a State Party alleges that another State Party has committed a violation of the human rights established in the American Convention on Human Rights, as provided for in Article 45 of the Convention.

b. The Government of Chile declares that it recognizes as legally binding the obligatory jurisdiction of the Inter-American Court of Human Rights in cases dealing with the interpretation and application of this Convention pursuant to Article 62.

On formulating said declarations, the Government of Chile notes that the recognition of jurisdiction it has accepted refers to situations occurring subsequent to the date of deposit of this instrument of ratification, or, in any event, to circumstances which arose after March 11, 1990. Likewise the Government of Chile, on accepting the competence of the Inter-American Commission and the Inter-American Court of Human Rights declares that these organs, in applying Article 21(2) of the Convention, shall refrain from judgments concerning the concept of public use or social interest cited in cases involving the expropriation of an individual's property.

r. Nicaragua:

Recognition of Competence:

On February 12, 1991, presented at the General Secretariat of the OAS, an instrument dated January 15, 1991, by which the Government of Nicaragua declares:

I. The Government of Nicaragua recognizes as binding as of right with no special convention the competence of the Inter-American Court of Human Rights in all cases involving interpretation and application of the Inter-American Convention on Human Rights, "Pact of San Jose, Costa Rica," by virtue of Article 62(1) thereof.

II. The foregoing notwithstanding, the Government of Nicaragua states for the record that its acceptance of the competence of the Inter-American Court of Human Rights is given for an indefinite period, is general in character and grounded in reciprocity, and is subject to the reservation that this recognition of competence applies only to cases arising solely out of events subsequent to, and out of acts which began to be committed after, the date of deposit of this declaration with the Secretary General of the Organization of American States.

s. Trinidad and Tobago:

(Reservations made at the time of accession)

1. As regards Article 4(5) of the Convention the Government of The Republic of Trinidad and Tobago makes reservation in that under the laws of Trinidad and Tobago there is no prohibition against the carrying out a sentence of death on a person over seventy (70) years of age.

2. As regards Article 62 of the Convention, the Government of the Republic of Trinidad and Tobago recognizes the compulsory jurisdiction of the Inter-American Court of Human Rights as stated in said article only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that any judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen.

On May 26, 1998, the Republic of Trinidad and Tobago notified the Secretary General of the OAS of its denunciation of the American Convention. In accordance with Article 78(1) of the American Convention, the denunciation came into effect one year from the date of notification.

t. Brazil:

(Interpretative declaration made at the time of adhesion)

The Government of Brazil understands that Articles 43 and 48, (d) do not include the automatic right of on site visits and inspections by the Inter-American Commission on Human Rights, which will depend on the express consent of the State.

Recognition of Competence:

The Government of the Federative Republic of Brazil declares its recognition as binding, for an indefinite period of time, *ipso jure*, of the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the American Convention on Human Rights, according to Article 62 of that Convention, on the condition of reciprocity, and for matters arising after the time of this declaration.

u. Paraguay

Recognition of Competence:

On March 11, 1993, Paraguay presented to the General Secretariat of the OAS an instrument recognizing the jurisdiction of the Inter-American Court of Human Rights, "for an indefinite period of time and which should be interpreted in accordance with the principles of International Law in the sense that this recognition refers expressly to acts

that occurred after the deposit of this instrument and only for cases in which there exists reciprocity."

v. Dominica

On June 3, 1993, during the twenty-third regular session, held in Managua, Nicaragua, the Commonwealth of Dominica ratified the American Convention on Human Rights, with the following reservations:

1) Article 5. This should not be read as prohibiting corporal punishment administered in accordance with the Corporal Punishment Act of Dominica or the Juvenile Offenders Punishment Act.

2) Article 4.4. Reservation is made in respect of the words "or related common crimes".

3) Article 8.21 (e). This Article shall not apply in respect of Dominica.

4) Article 21.2. This must be interpreted in the light of the provisions of the Constitution of Dominica and is not to be deemed to extend or limit the rights declared in the Constitution.

5) Article 27.1. This must also be read in the light of our Constitution and is not to be deemed to extend or limit the rights declared by the Constitution.

6) Article 62. The Commonwealth of Dominica does not recognize the jurisdiction of the Court.

w. Bolivia

Recognition of competence:

On July 27, 1993 the instrument of recognition of the competence of the Inter-American Court of Human Rights was deposited with the OAS General Secretariat, in accordance with Article 62 of the American Convention on Human Rights, with the following declaration:

I. The constitutional Government of the Republic, in accordance with Article 59, paragraph 12 of the Political Constitution of the State, by law No. 1430 of February 11, provided for adoption and ratification of the American Convention on Human Rights "Pact of San Jose de Costa Rica," signed in San José, Costa Rica, on November 22, 1969 and also provided for recognition of the competence of the Inter-American Court of Human Rights, in accordance with Articles 45 and 62 of the Convention.

II. In exercise of the powers conferred upon it by Article 96, paragraph 2 of the Political Constitution of the State, this Instrument of Ratification of the American Convention on Human Rights "Pact of San Jose" is issued along with the recognition of the jurisdiction and competence of the Inter-American Court of Human Rights as unconditionally binding by law for an indefinite period, in accordance with article 62 of the Convention."

The Government of Bolivia in letter OAS/262/93, of July 22, 1993, made an interpretative declaration at the time of deposit of the instrument of recognition of the competence of the Inter-American Court of Human Rights. The text of the declaration is as follows:

"The Government of Bolivia declares that the norms of unconditionally and indeterminacy shall apply with strict observance to the Constitution of Bolivia, especially with respect to the principles of reciprocity, non retroactivity and judicial autonomy."

x. El Salvador

Recognition of Competence:

I. The Government of El Salvador declares as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Inter-American Court on Human Rights, pursuant to the provisions of Article 62 of the American Convention on Human Rights or "Pact of San Jose."

II. The Government of El Salvador, in recognizing that jurisdiction, notes that its acceptance applies to an undetermined period, under the condition of reciprocity and with the reservation that the cases for which the jurisdiction is recognized comprise solely and exclusively legal events or acts that are subsequent, or legal events or acts whose start of execution were subsequent, to the deposit of this Declaration of Acceptance, and reserves the right to nullify the jurisdiction at whatever moment it considers opportune.

III. The Government of El Salvador recognizes the jurisdiction of the Court insofar as this recognition is compatible with the provisions of the Constitution of the Republic of El Salvador.

y. Haiti

Recognition of Competence:

Having seen the Constitution of the Republic of 1987; and
Having seen the law dated August 18, 1979, whereby the Republic of Haiti ratified the American Convention on Human Rights.

Hereby declare that we recognize as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the Convention. This declaration has been issued for presentation to the General Secretariat of the Organization of American States, which shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court, pursuant to Article 62 of the Convention.

Attached to the present declaration is the law of August 18, 1979, whereby the Republic of Haiti ratified the American Convention on Human Rights, which was promulgated in the Official Journal of the Republic.

Done in the National Palace, in Port-au-Prince, on march 3, 1998, the 195th year of independence.

z. Dominican Republic

Recognition of Competence:

The Government of the Dominican Republic presented at the General Secretariat of the OAS an instrument by which it declares that the Dominican Republic recognizes as binding *ipso facto*, the Jurisdiction of the Inter-American Court on Human Rights on all matters relating to the interpretation of the American Convention on Human Rights.