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# *Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection*

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The author critically analyzes the derisory manner in which Canadian courts have regarded Canada's international human rights treaty obligations. More specifically, relying on the recent Canadian judicial pronouncements in *Ahani v. Canada*, the author questions the usual justifications put forth by domestic courts to disregard requests for interim measures of protection made by the Human Rights Committee.

As a human rights adjudicative body of last resort, the Human Rights Committee was established by states via the *International Covenant on Civil and Political Rights* ("ICCPR") and provides safeguards for the protection of individual rights and liberties when domestic remedies have been exhausted. Simply because the ICCPR cannot be enforced in the manner that domestic measures can does not make the ICCPR any less binding.

In its annual reports and its views in individual cases, the Human Rights Committee has made it clear that the failure of a state to respect a request for interim measures is a serious breach of that state's obligations under the ICCPR regime. Additional support for the proposition that interim measures are binding can be found in the landmark *LaGrand Case*, which was heard before the International Court of Justice, and in various Caribbean cases heard by the Judicial Committee of the Privy Council.

Consequently, for not providing adequate protection of human rights by respecting the request for interim measures made by the Human Rights Committee, and for not considering the cases where other legal venues have found requests for interim measures binding on states, Canada acts in bad faith with respect to its international human rights treaty obligations.

L'auteur analyse de façon critique la manière dérisoire par laquelle les tribunaux canadiens ont considéré les obligations du Canada découlant des traités internationaux des droits de la personne. Se basant sur le récent arrêt *Ahani c. Canada*, l'auteur remet en question les justifications habituelles employées par les tribunaux domestiques pour ne pas tenir compte des demandes de mesure de protection temporaire formulées par le Comité des droits de l'homme.

Établi par le *Pacte international relatif aux droits civils et politiques* («PIRDGP») en tant que corps judiciaire de dernière instance en matière de droits de la personne, le Comité des droits de l'homme prévoit certaines garanties de protection des droits et libertés individuels lorsque tous les recours domestiques ont été épuisés. Le fait que l'on ne puisse faire respecter le PIRDGP au même titre que d'autres règles domestiques n'enlève rien à sa force contraignante.

Par ses rapports annuels et ses interventions dans divers cas individuels, le Comité des droits de l'homme a clairement fait savoir que le défaut d'un État de faire suite à une demande de mesure de protection temporaire constitue une grave violation des obligations de l'État sous le PIRDGP. L'argument selon lequel les mesures temporaires de protection ont force contraignante peut trouver appui dans l'arrêt *LaGrand*, entendu par la Cour internationale de justice, ainsi que plusieurs décisions des Caraïbes rendues par le Comité judiciaire du Conseil privé.

Par conséquent, en ne fournissant pas de protection adéquate des droits de la personne par le non-respect des demandes de mesure temporaire formulées par le Comité des droits de l'homme, et en ne tenant pas compte des décisions et juridictions ayant reconnu l'aspect contraignant de ces demandes de protection temporaire, le Canada agit de mauvaise foi face à ses obligations internationales relatives aux droits de la personne.

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## Introduction

After a nine-year battle in Canada's courts, Mansour Ahani, the alleged Iranian assassin, terrorist, and Convention refugee,<sup>1</sup> lost his bid to remain in Canada. On 16 May 2002, the Supreme Court of Canada dismissed Ahani's application for leave to appeal the decision of the Ontario Court of Appeal and finally paved the way for his deportation to Iran on grounds of terrorism and national security.<sup>2</sup> In so doing, both courts enabled the government of Canada to ignore once again the requests made by an international forum for a stay of proceedings while a claim against Canada is currently pending before that forum, thereby frustrating the very purpose of the right of individual petition that was granted by states such as Canada to operate at the international level.

The forum in question in Ahani's case is the Human Rights Committee, the United Nations (UN) body established by one of the world's most important human rights treaties, the *International Covenant on Civil and Political Rights*,<sup>3</sup> and authorized by that treaty to monitor its implementation within the states that have consented to be bound by its terms. After having lost on the merits of his case in an earlier judgment by the Supreme Court of Canada,<sup>4</sup> Ahani lodged a petition (or "communication") with the Human Rights Committee alleging that Canada was in violation of its obligations under the *ICCPR* by deporting him to a country where he might face a risk of torture or death. He also invoked the Committee's *Rules of Procedure*,<sup>5</sup> asking the Committee to exercise its power to make what is known as a request for interim measures of protection. Interim measures are essentially the international law equivalent of a domestic interlocutory injunction issued to avoid irreparable harm to a party while a case is *pendente lite*. The Committee made such a request, asking Canada to refrain from deporting Ahani while his case was pending, but Canada declined to abide by this request, prompting Ahani to make one last but unsuccessful visit to court to force Canada to respect the Committee's request for interim measures of protection.

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<sup>1</sup> Under the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150, Can. T.S. 1969 No. 6 (entered into force 22 April 1954).

<sup>2</sup> *Ahani v. Canada (A.G.)* (2002), 58 O.R. (3d) 107, 91 C.R.R. (2d) 145 (Ont. C.A.), leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 62 (Q.L.) [*Ahani* (Ont. C.A.)].

<sup>3</sup> 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

<sup>4</sup> *Ahani v. Canada (Minister of Citizenship and Immigration)* (2002), 208 D.L.R. (4th) 57, 2002 SCC 2 [*Ahani* (S.C.C.)].

<sup>5</sup> *Revised Rules of Procedure of the Human Rights Committee*, UN Doc. CCPR/C/3/Rev.6, reprinted in *Report of the Human Rights Committee*, UN GAOR, 56th Sess., Supp. No. 40, UN Doc. A/56/40, vol. 1 (2001) annex III.B at 168 [*Rules of Procedure*]. See also *Compilation of Rules of Procedure Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/3 (2001) [*Rules Compilation*]. Both documents are available online: Office of the UN High Commissioner for Human Rights (Treaty Body Database) <<http://www.unhchr.ch/tbs/doc.nsf>> [Treaty Body Database].

Judicial consideration of the domestic effect of an interim measures request by an international forum such as the Human Rights Committee is novel in Canada<sup>6</sup> and worth further examination. In light of the Supreme Court of Canada's refusal to grant leave, this article will focus on the judgment of the Ontario Court of Appeal. It will also examine the jurisprudence of the Human Rights Committee on the legal import of its requests for interim measures, before examining a landmark judgment by the International Court of Justice and a series of constitutional law cases from the Judicial Committee of the Privy Council that support the principle that interim measures requests must carry some connotation of obligation if they are to fulfill their function of ensuring some efficacy to the final outcome of the proceedings.

## I. The Case of *Ahani v. Canada*

We begin with an overview of the *Ahani* case. Mansour Ahani is a citizen of Iran. He came to Canada in October 1991 and was granted Convention refugee status in April 1992. By June 1993, the government of Canada had declared him a terrorist and a danger to national security. According to the Canadian Intelligence Security Service (CSIS), Ahani was a trained assassin who worked with the Iranian Ministry of Intelligence Security (MOIS), an organization that CSIS considered responsible for a wide range of terrorist activities, including the assassination of Iranian political dissidents. CSIS also reported that Ahani had travelled to various destinations in Europe shortly after his refugee hearing in 1992 to meet with a MOIS agent and possibly take part in an assassination plot. In response to these reports, Canada commenced deportation proceedings against Ahani.<sup>7</sup>

Deportation of a non-national from Canada on national security grounds is essentially a four-part process.<sup>8</sup> The process begins with the filing by the Solicitor General and the Minister of Citizenship and Immigration of a security certificate under section 40.1 of the *Immigration Act*,<sup>9</sup> claiming in Ahani's case that he should be removed from Canada because of his membership in a terrorist organization and because he had engaged or would engage in terrorism. With the filing of the certificate, Ahani was immediately arrested and detained in custody, where he would remain for eight years. The next step required the Federal Court of Canada (Trial Division) to determine whether the certificate was reasonable, which it so held in

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<sup>6</sup> The issue has been raised, but not fully discussed, in two other cases. See *Bhatti v. Canada (Minister of Citizenship and Immigration)* (1996), 120 F.T.R. 123, 35 Imm. L.R. (2d) 192 and *Singh v. Canada (Minister of Citizenship and Immigration)* (1991), 140 F.T.R. 213.

<sup>7</sup> See *Ahani* (Ont. C.A.), *supra* note 2 at paras. 6-9.

<sup>8</sup> The constitutionality of this four-part process was upheld in *Suresh v. Canada (Minister of Citizenship and Immigration)* ((2002), 208 D.L.R. (4th) 1, 2002 SCC 1 [*Suresh*]), which was decided concurrently with *Ahani* (S.C.C.) (*supra* note 4).

<sup>9</sup> R.S.C. 1985, c. 1-2. Ahani launched an unsuccessful challenge to the constitutional validity of section 40.1. See *Ahani v. Canada*, [1995] 3 F.C. 669, 32 C.R.R. (2d) 95 (T.D.), *aff'd* (1996), 37 C.R.R. (2d) 181, 201 N.R. 233 (F.C.A.), leave to appeal to S.C.C. refused, [1997] 2 S.C.R. v.

Ahani's case after hearing evidence led by CSIS to show that Ahani was a threat to Iranian dissidents.<sup>10</sup> This led to the third step in the deportation process, namely, the holding of a deportation hearing before an immigration adjudicator who subsequently found that reasonable grounds did exist to believe that Ahani was a member of a terrorist organization and that he had engaged or would engage in terrorism.<sup>11</sup> As a result, a deportation order was issued on 28 April 1998.

The minister then took the fourth and final step in the deportation process, advising Ahani that she intended to issue a "danger opinion" under paragraph 53(1)(b) of the *Immigration Act*, indicating that Ahani constituted a danger to the security of Canada. At the minister's invitation, Ahani made written submissions. He denied that he was an assassin and further claimed that he would be at risk of torture in Iran for having made a refugee claim and for having disclosed information to Canadian authorities about his work with MOIS. These submissions, together with other relevant documents, were considered and ultimately rejected by the minister, who issued the opinion that Ahani was a danger to Canada on 12 August 1998.<sup>12</sup> The minister also rejected Ahani's claim that he would be at risk of torture upon deportation to Iran, concluding that his deportation would only expose him to a "minimal risk of harm" and that the danger to the security of Canada outweighed this minimal risk.<sup>13</sup>

Ahani then challenged the minister's decision in the Federal Court,<sup>14</sup> and ultimately the Supreme Court of Canada,<sup>15</sup> requesting a new deportation hearing and raising several constitutional issues similar in substance to those raised in the case of *Suresh v. Canada (Minister of Citizenship and Immigration)*,<sup>16</sup> a case involving the deportation on national security grounds of an alleged fundraiser for the Sri Lankan Tamil Tigers. Like Ahani, Suresh also claimed that he faced a risk of torture upon deportation to the receiving state.

Both cases were decided on 11 January 2002 by the Supreme Court of Canada, which used the *Suresh* case to establish the applicable analytical framework. Applying the *Suresh* framework to Ahani's case, the Court concluded that there was no basis to interfere with the minister's decision to deport. While the Court acknowledged that "the issue of deportation to risk of torture engages s. 7 of the *Charter* and hence possesses a constitutional dimension," it also held that the minister's decision was "largely fact-based," requiring the consideration of "issues ... largely outside the

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<sup>10</sup> *Re Ahani* (1998), 146 F.T.R. 223, 42 Imm. L.R. (2d) 219.

<sup>11</sup> Referred to in *Ahani* (Ont. C.A.), *supra* note 2 at para. 11.

<sup>12</sup> *Ibid.* at para. 13.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ahani v. Canada (Minister of Citizenship and Immigration)* (2000), 73 C.R.R. (2d) 156, 252 N.R. 83 (F.C.A.), *aff'd* (1999), 170 F.T.R. 153.

<sup>15</sup> *Ahani* (S.C.C.), *supra* note 4.

<sup>16</sup> (1999), 173 F.T.R. 1, 65 C.R.R. (2d) 344, *aff'd* [2000] 2 F.C. 592, 183 D.L.R. (4th) 629 (C.A.), *aff'd Suresh*, *supra* note 8.

realm of expertise of reviewing courts,” and therefore deserving of “considerable deference”.<sup>17</sup> The issues required to be considered, according to the Court, were “the human rights record of the home state, the personal risk faced by the claimant, any assurances that the claimant will not be tortured and their worth and, in that respect, the ability of the home state to control its own security forces, and more.”<sup>18</sup> The Court concluded that there was ample support for the minister’s decision that Ahani was a danger to the security of Canada.<sup>19</sup> It also held, based on the following considerations, that there was no basis to interfere with the minister’s decision:<sup>20</sup> First, the Court determined that the minister’s decision on the question of the risk of harm to Ahani was “unassailable”,<sup>21</sup> drawing attention to the advice given to the minister, which noted that Ahani’s risk submissions were found to be suspect during the hearing prescribed by section 40.1 of the *Immigration Act*. Second, the Court observed that these submissions referred to conditions in Iran that were applicable to opponents of the regime and not to persons such as Ahani. Finally, it noted that Ahani was in contact with the Iranian government after his refugee hearing.<sup>22</sup> The Court also concluded that beyond there being no basis to interfere with the minister’s decision, Ahani had been accorded adequate procedural protections during the danger opinion process.<sup>23</sup> Ahani’s deportation was set to go ahead.

Having exhausted all his domestic remedies,<sup>24</sup> Ahani filed a complaint with the Human Rights Committee, alleging that his deportation to Iran would violate Canada’s obligations under the *ICCPR*, specifically the right to life (article 6), the right to be free from torture and other forms of serious ill-treatment (article 7), the right to be free from arbitrary detention (article 9), and the right to a fair trial (article 14). Ahani also requested and received from the Committee a request for interim measures; in essence, a request from the Committee to Canada asking Canada not to deport Ahani until it had an opportunity to consider Ahani’s claims, especially those relating to torture, ill-treatment, or even death as a consequence of the deportation.<sup>25</sup>

Canada refused the Committee’s request, prompting Ahani to return to court to seek an injunction to restrain his deportation while his case was pending for

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<sup>17</sup> *Ahani* (S.C.C.), *supra* note 4 at para. 17. See Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* at para. 18.

<sup>20</sup> *Ibid.* at para. 22.

<sup>21</sup> *Ibid.* at para. 19.

<sup>22</sup> *Ibid.* at para. 20.

<sup>23</sup> *Ibid.* at para. 26.

<sup>24</sup> It is a well-established rule of customary international law that local remedies must be exhausted before international proceedings may be instituted. See *Interhandel Case (Switzerland v. United States of America) (Preliminary Objections)*, [1959] I.C.J. Rep. 6 at 27, 27 I.L.R. 475. See also Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 496-510.

<sup>25</sup> *Ahani* (Ont. C.A.), *supra* note 2 at para. 18.

consideration by the Human Rights Committee. By two votes to one, the Ontario Court of Appeal denied Ahani's request, primarily on the basis that neither the *ICCPR* nor its *Optional Protocol*<sup>26</sup> (the side-agreement to the *ICCPR* specifically providing for the right of individual petition) was incorporated into Canadian law. As stated by Laskin J.A. for the majority, "neither has any legal effect in Canada,"<sup>27</sup> and so Ahani could not, as Laskin viewed it, "use s. 7 [of the *Charter*, in particular the principles of fundamental justice] to enforce Canada's international commitments in a domestic court."<sup>28</sup> Laskin J.A. also noted that "neither the Committee's views nor its interim measures requests are binding on Canada as a matter of international law, much less as a matter of domestic law,"<sup>29</sup> and he therefore concluded that it would be "an untenable result"<sup>30</sup> to "convert a non-binding request, in a Protocol, which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice."<sup>31</sup> In short, according to Laskin J.A., Ahani's right to remain in Canada had ended with the Supreme Court of Canada's decision on the merits of his claim and he was "not entitled to any more than that."<sup>32</sup> He buttressed his conclusions by invoking the memory of the events of 11 September 2001, noting that Canada has many international obligations to balance, "not the least of which ... is to ensure that it does not become a safe haven for terrorists."<sup>33</sup>

## II. Bringing a Complaint to the Human Rights Committee

### A. Functions of the Human Rights Committee

Since few lawyers in Canada are aware of the right to bring individual complaints against Canada before the Human Rights Committee, an explanation of the Committee's creation, role, and the nature of its functions is in order. This explanation must begin with the adoption of the *ICCPR*<sup>34</sup> (referred to as "CCPR" in UN

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<sup>26</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 302, Can. T.S. 1976 No. 47 (entered into force 23 March 1976) [*Optional Protocol*].

<sup>27</sup> *Ahani* (Ont. C.A.), *supra* note 2 at para. 31.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* at para. 32.

<sup>30</sup> *Ibid.* at para. 33.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* at para. 41.

<sup>33</sup> *Ibid.* at para. 48.

<sup>34</sup> *Supra* note 3. For the leading commentary on the *ICCPR*, see Sarah Joseph *et al.*, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2000). For earlier works, see Manfred Nowak, *CCPR Commentary: UN Covenant on Civil and Political Rights* (Kehl: N.P. Engel, 1993); Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1994); P.R. Ghandhi, *The Human Rights Committee and the Right*

documentation), one of the most important treaties of general application to be drafted by states under the auspices of the UN.<sup>35</sup>

Adopted by the member states of the UN General Assembly in 1966, the *ICCPR*, along with its sister treaty, the *International Covenant on Economic, Social and Cultural Rights*,<sup>36</sup> essentially codifies into law the rights found in the *Universal Declaration of Human Rights*,<sup>37</sup> a non-binding<sup>38</sup> declaration adopted by the UN General Assembly in 1948 in reaction to the horrors of World War II and the Holocaust. Both treaties came into force in 1976, after each received the required ratifications and accessions<sup>39</sup> from thirty-five states.<sup>40</sup> The *ICCPR* has since been ratified by 149 of the 190 states in the UN,<sup>41</sup> and, given the extent of its ratification record, it can be said with confidence that the rights it protects “represent the basic minimum set of civil and political rights recognized by the world community.”<sup>42</sup> Specifically, the *ICCPR* contains an absolute prohibition on torture and cruel, inhuman, or degrading treatment or punishment (article 7).

Canada acceded to the *ICCPR* on 19 May 1976. By acceding to or ratifying the *ICCPR*, a state accepts a binding obligation under international law to respect and to ensure to all individuals within its territory and jurisdiction the rights guaranteed by the treaty and to take the necessary steps to adopt such measures as may be necessary to give effect to these rights (article 2). The wording of this obligation makes it clear that the citizenship of the individual is irrelevant to the guarantee of the treaty right,

*of Individual Communication: Law and Practice* (Brookfield, Vt.: Ashgate, 1998). For commentary from a Canadian perspective, see Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992); William Schabas, *International Human Rights Law and the Canadian Charter*, 2d ed. (Scarborough, Ont.: Carswell, 1996).

<sup>35</sup> The *ICCPR* was one of twenty-five treaties to be singled out by the Office of the Secretary General of the UN as being basic to a comprehensive international legal framework. See UN, *Millennium Summit Multilateral Treaty Framework: An Invitation to Universal Participation* (New York: UN, 2000).

<sup>36</sup> 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 3 January 1976) [*ICESCR*].

<sup>37</sup> GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

<sup>38</sup> The *Universal Declaration of Human Rights* is “not a legal instrument,” although “some of its provisions either constitute general principles of law or represent elementary considerations of humanity” (Brownlie, *supra* note 24 at 574-75).

<sup>39</sup> The effect of ratification and accession is the same; a state becomes bound to the particular treaty to which it has ratified or acceded. Ratification is the means by which a state expresses its consent to be bound by a treaty after the treaty’s signature and adoption. Accession is the means available for a state to become bound to a treaty when, for whatever reason, it did not sign the treaty. See Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000) at 81, 88.

<sup>40</sup> See *ICCPR*, *supra* note 3, art. 49; *ICESCR*, *supra* note 36, art. 27.

<sup>41</sup> See “Status of Ratifications of the Principal International Human Rights Treaties”, online: Office of the UN High Commissioner for Human Rights <<http://www.unhchr.ch/pdf/report.pdf>>.

<sup>42</sup> McGoldrick, *supra* note 34 at para. 1.34.

much like those rights in Canada's *Charter*<sup>43</sup> that are written to benefit everyone<sup>44</sup> rather than every citizen.<sup>45</sup> As for the obligation "to respect and to ensure", this wording in article 2 suggests that the protection of *ICCPR* rights is primarily a domestic matter for a state. Ratification of the *ICCPR*, however, also indicates a state's acceptance of the supervisory mechanisms written into the treaty that monitor the treaty's implementation, and the supervisory body established for this purpose is the Human Rights Committee.<sup>46</sup>

The Human Rights Committee is a treaty-based body established in 1976 whose composition, status, functions, and procedures are set out in part IV of the *ICCPR*. It must not be confused with the far more political UN Commission on Human Rights, a separate and distinct body with a very different role.<sup>47</sup> As prescribed by the provisions of the *ICCPR*, the Human Rights Committee is an independent body comprised of eighteen individuals<sup>48</sup> chosen from various legal systems and geographical regions. The Committee meets three times a year to consider both reports<sup>49</sup> and complaints—known in *ICCPR* parlance as "communications"<sup>50</sup>—submitted by state parties to the *ICCPR*. The expertise of the Committee members varies. It can be noted, however, that two current judges of the International Court of Justice (or World Court) have served on the Human Rights Committee: Thomas Buergenthal of the United States (1995-1999) and Rosalyn Higgins of the United Kingdom (1985-1996). Three

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<sup>43</sup> *Supra* note 17.

<sup>44</sup> See *e.g. ibid.*, s. 7.

<sup>45</sup> See *e.g. ibid.*, ss. 3, 6.

<sup>46</sup> Article 28 of the *ICCPR* (*supra* note 3) provides: "There shall be established a Human Rights Committee ... " On the Committee generally, see the texts cited *supra* note 34. See also Torkel Opsahl, "The Human Rights Committee" in Philip Alston, ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992) at 369-443; Henry J. Steiner, "Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?" in Philip Alston & James Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) at 15-53.

<sup>47</sup> The UN Economic and Social Council established the Commission in 1946. See Howard Tolley, *The U.N. Commission on Human Rights* (Boulder: Westview Press, 1987). A similar warning against confusing the two bodies was included in *Ahani* (Ont. C.A.) (*supra* note 2 at para. 39), although there is an incorrect reference to "Commission" instead of "Committee" (*ibid.* at para. 37).

<sup>48</sup> Article 28(2) of the *ICCPR* (*supra* note 3) provides that the members of the Human Rights Committee must be "persons of high moral character and recognised competence in the field of human rights." They need not be legally trained, although consideration must be given "to the usefulness of the participation of some persons having legal experience." Many members have been former judges and professors of law, or diplomats with legal training. Once elected, the Committee members "serve in their personal capacity."

<sup>49</sup> *Ibid.*, art. 40.

<sup>50</sup> *Ibid.*, art. 41. The competence of the Human Rights Committee to consider interstate communications is, however, dependent on the state parties making a specific declaration to that effect.

Canadians have also served on the Committee, including the late Ontario Court of Appeal Justice Walter Tarnopolsky (1976-1983).<sup>51</sup>

The Human Rights Committee is also authorized by states to consider communications from individuals claiming to be victims of violations of the *ICCPR* who have exhausted their domestic remedies, but only if the state concerned has elected to ratify an additional treaty: the *ICCPR*'s first *Optional Protocol*<sup>52</sup> which specifically provides for this right of individual (as opposed to state) petition under international law. As of 6 November 2002, 102 of the 149 state parties to the *ICCPR* had either ratified or acceded to the *Optional Protocol*, including Canada,<sup>53</sup> thereby granting the right of individual petition to over a billion people in the world. As a result, the Human Rights Committee has not been bereft of individual complaints for its consideration,<sup>54</sup> and in fact, Canada ranks second in the tally of individual communications lodged with the Committee against a particular state.<sup>55</sup>

This in turn has led to the development of a body of jurisprudence on the *ICCPR*, consisting of the views adopted by the Human Rights Committee in the various

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<sup>51</sup> See Walter S. Tarnopolsky, "The Canadian Experience with the International Covenant on Civil and Political Rights Seen from the Perspective of a Former Member of the Human Rights Committee" (1987) 20 *Akron L. Rev.* 611. The other two Canadians are Laval University law professor Gisèle Côté-Harper (1983-1984) and former diplomat and past Chief Commissioner of the Canadian Human Rights Commission Maxwell Yalden (1997-present).

<sup>52</sup> *Supra* note 26. A second optional protocol, known as the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, 15 December 1989, GA Res. 44/28, UN GAOR, 44th Sess., Supp. No. 49, UN Doc. A/44/49, vol. 1 (1989) 206, 29 I.L.M. 1465 (entered into force 11 July 1991), supplements the Covenant's provisions on the right to life by prohibiting the death penalty.

<sup>53</sup> Canada acceded to the *Optional Protocol* on 19 May 1976. It entered into force with respect to Canada on 19 August 1976.

<sup>54</sup> The Human Rights Committee registered its one thousandth communication in July 2001. See "Executive Summary", in *Report of the Human Rights Committee*, UN GAOR, 56th Sess., Supp. No. 40, UN Doc. A/56/40, vol. 1 (2001) 12.

<sup>55</sup> See "Statistical Survey of Individual Complaints Dealt With by the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights (6 November 2002)", online: Office of the UN High Commissioner for Human Rights <<http://www.unhchr.ch/html/menu2/8/stat2.htm>> ["Statistical Survey"]. Of course, the mere lodging of a complaint does not equate to finding Canada in violation of the *ICCPR*. As of 6 November 2002, Canada was the state party concerned in 107 of the 1132 communications registered with the Human Rights Committee. Forty-nine of these cases, however, were later declared inadmissible, 23 were discontinued, and 17 are "living cases". Only 18 of the 107 cases against Canada have proceeded to a determination on the merits, with Canada being found in violation of the *ICCPR* in 9 of these 18 cases (*ibid.*). Jamaica is the state that has logged the highest number of communications, with a total of 177 cases out of 1132 (*ibid.*). In January 1998, Jamaica withdrew its acceptance of the right of individual petition under the *Optional Protocol*. See further, Natalia Schiffrin, "Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights" (1998) 92 *Am. J. Int'l L.* 563.

individual complaints.<sup>56</sup> While there is some debate as to whether or not the Human Rights Committee can be properly described as a judicial authority,<sup>57</sup> it does decide cases in an adjudicative fashion, providing both the state and the individual complainant with an opportunity to fully present their case. It later makes a reasoned ruling on the issues in the complaint, and while its views do not bind the state concerned, they do acquire persuasive authority from the personal standing of the members of the Human Rights Committee and their judicial qualities of impartiality, objectivity, and restraint.<sup>58</sup> Moreover, the fact that views are not legally binding in the literal sense does not mean that they are without legal consequences. If the Committee, as the body competent to do so by the terms of the *ICCPR*, has found a violation, then under article 2 of the *ICCPR* the state has a legal obligation to provide an effective remedy for that violation. To this end, a standard paragraph now appears in the Committee's findings of a violation that reads:

Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to Art. 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days information about the measures taken to give effect to its views.<sup>59</sup>

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<sup>56</sup> A summary of the communications examined and the official text of the views adopted are included in the annual *Report of the Human Rights Committee*, reproduced since 1978 as "Supp. No. 40" of the Official Records of the UN General Assembly. The Committee's first report in 1977 can be found in Supp. No. 44. Views are also obtainable online (Treaty Body Database, *supra* note 5).

<sup>57</sup> See e.g. the decision of the Judicial Committee of the Privy Council in *Tangiara v. Wellington District Legal Services Committee*, [2000] 1 W.L.R. 240, [2000] 1 N.Z.L.R. 17 (P.C.) [*Tangiara* cited to W.L.R.], cited in *Ahani* (Ont. C.A.), *supra* note 2 at paras. 92, 94, Rosenberg J.A., dissenting. Judge Rosalyn Higgins describes the Human Rights Committee as a "quasi-judicial monitoring body" but questions how important it is that the *ICCPR* have such a body rather than a court. See Rosalyn Higgins, "Role of Litigation in Implementing Human Rights" (1999) 5:2 *Australian Journal of Human Rights* 4 at 11 (Aust LII).

<sup>58</sup> *Tangiara*, *ibid.* at 244H. See also *Ahani* (Ont. C.A.), *ibid.* at para. 94, Rosenberg J.A., dissenting.

<sup>59</sup> Elizabeth Evatt, "The Impact of International Human Rights on Domestic Law" in Grant Huscroft & Paul Rishworth, eds., *Litigating Rights: Perspectives from Domestic and International Law* (Oxford: Hart, 2002) 281 at 301, n.124. See also Markus G. Schmidt, "Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond" in Anne F. Bayefsky, ed., *The UN Human Rights System in the 21<sup>st</sup> Century* (Cambridge, Mass.: Kluwer Law International, 2000) at 234-35 [Bayefsky, *The UN Human Rights System*]; Anne F. Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Ardsley, N.Y.: Transnational, 2001) at 31 [Bayefsky, *Universality at the Crossroads*].

### **B. Human Rights Committee Requests for Interim Measures of Protection**

Under article 39, the state parties to the *ICCPR* have expressly granted the Human Rights Committee the power to write its own rules of procedure.<sup>60</sup> Included within the first set of rules to be adopted by the Committee was rule 86.<sup>61</sup> Rule 86 stipulates that the Committee “may, prior to forwarding its views on the communication to the State party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation,” and further stipulates that “[i]n doing so, the Committee shall inform the State party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication.” Similar provisions can be found in the procedural rules for many international courts, commissions, and committees,<sup>62</sup> and so it is hardly surprising that the Human Rights Committee would recognize the need for such a rule to protect the interests of the parties and to facilitate the proper conduct of the proceedings *pendente lite*. State practice also supports the existence of the rule, since few states fail to comply with a duly communicated rule 86 request,<sup>63</sup> Canada being an exception.

Nevertheless, while the rule may be commonplace, its use is not. Requests for interim measures of protection are not issued as of right, nor as a matter of course. As the Committee has made clear in its views in *Stewart v. Canada*<sup>64</sup> and *Canepa v.*

<sup>60</sup> *Rules of Procedure*, *supra* note 5.

<sup>61</sup> *Ghandhi*, *supra* note 34 at 57.

<sup>62</sup> The likely precedent for rule 86 is article 41 of the *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7, online: International Court of Justice <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>> (entered into force 24 October 1945). Interim measures have been requested in the European human rights regime since 1957, but were not codified until 1974 (see *European Court of Human Rights: Rules of Court*, 38 I.L.M. 208, r. 39). The equivalent provisions in the Inter-American human rights regime are article 63(2) of the *American Convention on Human Rights* (22 November 1969, 1144 U.N.T.S. 123, O.A.S.T.S. 1970 No. 36, 9 I.L.M. 673 (entered into force 18 July 1978)) and article 25 of the *Rules of Procedure of the Inter-American Commission on Human Rights* (OAS, Inter-Am. Comm. H.R., 109th Sess., OAS/ser.L/V/1.4 rev 8 (2001), 40 I.L.M. 752). Other UN committees have since adopted similar rules. See *e.g.* Committee Against Torture, *Rules of Procedure*, UN GAOR, 1998, UN Doc. CAT/C/3/Rev. 3, r. 108(9), reprinted in *Rules Compilation*, *supra* note 5 at 135.

<sup>63</sup> While reports by the Human Rights Committee do not state how many of these requests have been honoured, “the success rate”, according to Professor Bayefsky, “is reportedly more than 90%” (Bayefsky, *Universality at the Crossroads*, *supra* note 59 at 30). Professor Byrnes also reports that “[i]n general, these requests appear to have been observed by states parties” (Andrew Byrnes, “An Effective Complaints Procedure in the Context of International Human Rights Law” in Bayefsky, *The UN Human Rights System*, *supra* note 59 at 147).

<sup>64</sup> “Communication No. 538/1993” in *Report of the Human Rights Committee*, UN GAOR, 52d Sess., Supp. No. 40, UN Doc. A/52/40, vol. 2 (1997) annex VI.G (views adopted on 1 November 1996), UN Doc. CCPR/C/58/D/538/1993 [*Stewart*].

*Canada*<sup>65</sup> (both concerning the deportation of long-term residents from Canada because of extensive criminal records), the granting of a request for interim measures is only justified when the consequences of the state's action will cause irreparable damage to the individual concerned in the enjoyment of his or her rights.<sup>66</sup> While it may be difficult to determine what, in general, constitutes irreparable damage, the Committee has held that the essential criterion is the irreversibility of the consequences, in the sense of an individual's inability to secure his or her rights, should there later be a finding of a violation of the *ICCPR*.<sup>67</sup> A request for interim measures will therefore be refused in cases where compensation would be an adequate remedy or in deportation cases where the author of the communication would be able to return should there be a favourable finding on the merits.<sup>68</sup>

This latter situation is exemplified by the facts of *Canepa*, where the applicant, having claimed that his deportation to Italy would make his rehabilitation impossible and would interfere with his right to family life, was refused an interim measures request because he had failed to establish that his deportation would bar his re-entry to Canada in the event that a violation was found. In contrast, individuals sentenced to death and awaiting execution who claim that they were denied a fair trial typically fare much better in seeking requests for interim measures where, given the irreparable consequences of the death penalty, the Human Rights Committee will use rule 86 to ask the state party concerned to issue a stay of execution. The Committee has also used rule 86 in a similar fashion in cases of imminent deportation or extradition where it is alleged that irreparable harm to life or physical integrity will occur once the individual is surrendered.<sup>69</sup>

### III. Effects of Interim Measures Requests

#### A. The Position of the Human Rights Committee

As to the legal status of an interim measures request, states such as Canada consider such requests to be non-binding,<sup>70</sup> and in the past many commentators

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<sup>65</sup> "Communication No. 558/1993" in *Report of the Human Rights Committee*, UN GAOR, 52d Sess., Supp. No. 40, UN Doc. A/52/40, vol. 2 (1997) annex VI.K (views adopted on 3 April 1997), UN Doc. CCPR/C/59/D/558/1993 [*Canepa*].

<sup>66</sup> *Stewart*, *supra* note 64 at para. 7.7; *Canepa*, *ibid.* at para. 7.

<sup>67</sup> *Stewart*, *ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> See *e.g. Cox v. Canada*, "Communication No. 539/1993" in *Report of the Human Rights Committee*, UN GAOR, 50th Sess., Supp. No. 40, UN Doc. A/50/40, vol. 2 (1995) annex X.M (views adopted on 31 October 1994), UN Doc. CCPR/C/52/D/539/1993.

<sup>70</sup> Whether binding or not, some states respond with greater respect for requests for interim measures than Canada. Australia, for example, has responded to requests with which it disagrees by making an application to have the interim measures request withdrawn. See *A.R.J. v. Australia*, "Communication No. 692/1996" in *Report of the Human Rights Committee*, UN GAOR, 52d Sess.,

assumed this was the case.<sup>71</sup> After all, the very wording of rule 86 suggests that interim measures, when requested, are merely desirable rather than binding, although it must be acknowledged that many international instruments adopt language with a diplomatic flavour to avoid offence to the susceptibilities of states. Nonetheless, a state arguing for non-binding effect might also bolster its position by observing that no mention is made of any requests for interim measures in the text of the treaty, thus arguing that rule 86 has only the status of a rule of procedure drawn up by the Committee and that as such, it cannot be considered to give rise to a binding obligation on the state parties. Support for this position can be found in the 1991 judgment of the European Court of Human Rights in the case of *Cruz Varas v. Sweden*,<sup>72</sup> where a closely divided court found that “[i]n the absence of a provision in the Convention for interim measures an indication given under Rule 36 [the European equivalent of rule 86] cannot be considered to give rise to a binding obligation on Contracting Parties.”<sup>73</sup> The drafting history of the *European Convention on Human Rights*,<sup>74</sup> however, shows that the contracting parties have twice declined to include a provision on interim measures in the treaty text: the first time when the original 1950 text was drafted and the second time when the convention system was restructured in the 1990s by *Protocol 11*.<sup>75</sup> Moreover, the court in *Cruz Varas* acknowledged that state practice revealed an almost total compliance with rule 36 indications,<sup>76</sup> lending weight

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Supp. No. 40, UN Doc. A/52/40, vol. 2 (1997) annex VI.T (views adopted on 28 July 1997) at para. 5.1, UN Doc. CCPR/C/60/D/692/1996; *G.T. v. Australia*, “Communication No. 706/1996” in *Report of the Human Rights Committee*, UN GAOR, 53d Sess., Supp. No. 40, UN Doc. A/53/40, vol. 2 (1998) annex XI.U (views adopted on 4 November 1997) at para. 4.2, UN Doc. CCPR/C/61/D/706/1996.

<sup>71</sup> Ghandhi notes, “[I]t is clear that the Committee’s views on the desirability of interim measures is not binding on the State Party concerned” (Ghandhi, *supra* note 34 at 58); McGoldrick notes, “[I]nterim measures indicated by the HRC are non-binding as a matter of law and depend totally on the co-operation and good faith of the State party concerned” (McGoldrick, *supra* note 34 at para. 4.128); Robertson and Merrills note, “Although interim measures are not binding, they have a moral force ...” (A.H. Robertson & J.G. Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights*, 4th ed. (Manchester: Manchester University Press, 1996) at 57).

<sup>72</sup> (1991), 201 E.C.H.R. (Ser. A), 14 E.H.R.R. 1, 108 I.L.R. 283 [*Cruz Varas*].

<sup>73</sup> *Ibid.* at para. 98. However, this must now be reconsidered in light of the court’s judgment in *Mamatkulov and Abdurasulovic v. Turkey* (App. Nos. 46827/99 and 46951/99 (6 February 2003), online: European Court of Human Rights <<http://www.echr.coe.int>>), that interim measures are binding, released while this article was going to press.

<sup>74</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222, Eur. T.S. No. 5 (entered into force 3 September 1953) [*European Convention on Human Rights*].

<sup>75</sup> *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the central machinery established thereby*, 11 May 1994, Eur. T.S. 155 [*Protocol 11*]. See Hannah R. Garry, “When Procedure Involves Matters of Life and Death: Interim Measures and the European Convention on Human Rights” (2001) 7:3 *European Public Law* 399 at 407-09.

<sup>76</sup> A statistical survey undertaken in 2000 shows that this is still the case (Garry, *ibid.* at 417).

to the argument that such requests have developed a customarily binding nature. This would also accord with the legal character given by states to other procedural rules adopted by international fora, such as the rules determining the form and due dates for the delivery of submissions.

This movement towards recognizing the binding nature of interim measures requests is reflected in the jurisprudence of the Human Rights Committee. Since the mid-1990s, the Committee has taken an increasingly stronger stance on the issue of the effect of interim measures requests, and what were once seen as mere “failures to cooperate”<sup>77</sup> are now viewed as violations of a state’s very obligations under the *ICCPR* regime. The capital punishment case of *Bradshaw v. Barbados*,<sup>78</sup> where an execution warrant was issued after the receipt of a rule 86 request, illustrates the more robust view of the Committee, although the actual execution had yet to occur, and the decision concerned the inadmissibility of Bradshaw’s communication due to his failure to exhaust domestic remedies.<sup>79</sup> According to the Committee, by ratifying the *ICCPR* and the *Optional Protocol*, Barbados had accepted a legal obligation to make their provisions effective, although it recognized that the *ICCPR* was not part of the domestic law of Barbados, which could be applied directly by the courts.<sup>80</sup> Nevertheless, “[t]o this extent,” held the Committee, there was “an obligation for the State party to adopt appropriate measures to give legal effect to the views of the Committee as to the interpretation and application of the Covenant in particular cases arising under the *Optional Protocol*.”<sup>81</sup> The Committee added that “[t]his includes the Committee’s views under rule 86 of the rules of procedure on the desirability of interim measures of protection, to avoid irreparable damage to the victim of the alleged violation.”<sup>82</sup>

One week later, after Trinidad and Tobago executed death row prisoner Glen Ashby the day after receiving a rule 86 request and then subsequently declined to provide an explanation for its actions, the Committee adopted what it described as “a formal decision on the matter during a public meeting held on 26 July 1994, expressing its indignation at the State party’s failure to comply with the request under rule 86, calling upon the State party to ensure that situations similar to that

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<sup>77</sup> *Report of the Human Rights Committee*, UN GAOR, 48th Sess., Supp. No. 40, UN Doc. A/48/40 (1993) at para. 796.

<sup>78</sup> “Communication No. 489/1992” in *Report of the Human Rights Committee*, UN GAOR, 49th Sess., Supp. No. 40, UN Doc. A/49/40 (1994) annex X.L (decision adopted on 19 July 1994), UN Doc. CCPR/C/51/D/489/1992 [*Bradshaw*].

<sup>79</sup> For a similar holding, see *Roberts v. Barbados*, “Communication No. 504/1992” in *Report of the Human Rights Committee*, UN GAOR, 49th Sess., Supp. No. 40, UN Doc. A/49/40 (1994) annex X.P (decision adopted on 19 July 1994), UN Doc. CCPR/C/51/D/504/1992.

<sup>80</sup> *Bradshaw*, *supra* note 78 at para. 6.3.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

surrounding the execution of Mr. Ashby do not recur.”<sup>83</sup> This special two-page decision, published in the Committee’s annual report to the UN General Assembly, was used to emphasize the Committee’s “indignation at the failure of the State party’s authorities to comply with the Committee’s request,”<sup>84</sup> while also noting that “the attitude displayed by the State party [had] no precedent in the Committee’s practice in capital cases under the Optional Protocol ...”<sup>85</sup> The Committee further “recall[ed] that the State party, upon ratifying the Optional Protocol, undertook to cooperate with the Committee under the procedure, and emphasise[d] that the State party [had] failed to comply with its obligations, both under the Optional Protocol and under the Covenant.”<sup>86</sup> Four years later, the Committee adopted an almost word-for-word replica of this special two-page decision, after Sierra Leone executed twelve of the eighteen authors of the very first communication to be lodged against it, six days after the communication’s registration and the dispatch of a request for interim measures.<sup>87</sup>

Then, in October 2000, the Human Rights Committee adopted its strongest position to date with respect to the status of requests for interim measures, using the opportunity afforded by the adoption of views in *Piandiong v. The Philippines*<sup>88</sup> to spell out its position. This case was brought by three men on death row who claimed they had been denied a fair trial. As in previous death penalty cases, the Committee made a rule 86 request shortly after receiving the communication, asking the Philippines not to carry out the death sentences while the case was under consideration. The Philippines responded to this request by informing the Committee that the executions would go ahead as scheduled, since it was of the opinion that the three men had received a fair trial. Then, as in *Ahani*, counsel for the three men filed a petition with the Philippine Supreme Court seeking an injunction, but this was refused, and later that day the three men were executed by lethal injection. The case then proceeded towards a determination on the merits of the claims made in the communication.

In views later adopted on 19 October 2000, the Human Rights Committee stated that “it [could not] make a finding of a violation of any of the articles of the

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<sup>83</sup> *Report of the Human Rights Committee*, UN GAOR, 49th Sess., Supp. No. 40, UN Doc. A/49/40, vol. 1 (1994) at para. 411.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* at 86. This position was confirmed in the Committee’s recent views on the merits of the Glen Ashby case, released after the *Ahani* decision. See *Ashby v. Trinidad and Tobago*, Communication No. 580/1994, UN Doc. CCPR/C/74/D/580/1994 (views adopted on 21 March 2002, reported on 19 April 2002), online: Treaty Body Database, *supra* note 5 [*Ashby*].

<sup>87</sup> “Decision of 4 November 1988 of the Human Rights Committee concerning the execution of persons in Sierra Leone” in *Report of the Human Rights Committee*, UN GAOR, 55th Sess., Supp. No. 40, UN Doc. A/55/40 (2000) annex X.

<sup>88</sup> “Communication No. 869/1999” in *Report of the Human Rights Committee*, UN GAOR, 56th Sess., Supp. No. 40, UN Doc. A/56/40, vol. 2 (2001) annex X.R (views adopted on 19 October 2000), UN Doc. CCPR/C/70/D/869/1999.

International Covenant on Civil and Political Rights,” but concluded that the Philippines had “committed a grave breach of its obligations under the [Optional] Protocol by putting the alleged victims to death before the Committee had concluded its consideration of the communication.”<sup>89</sup> Four paragraphs from the text of the Committee’s views provide the rationale for the Committee’s finding that a state party will be in breach of its obligations under the *Optional Protocol* by disregarding a duly communicated rule 86 request. These four paragraphs read as follows:

By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and Article 1). Implicit in a State’s adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (Article 5(1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

Quite apart, then, from any violation of the Covenant charged to a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In respect of the present communication, the authors allege that the alleged victims were denied rights under Articles 6 and 14 of the Covenant. Having been notified of the communication, the State party breaches its obligations under the Protocol, if it proceeds to execute the alleged victims before the Committee concludes its consideration and examination, and the formulation and communication of its Views. It is particularly inexcusable for the State to do so after the Committee has acted under its rule 86 to request that the State party refrain from doing so.

The Committee also expresses great concern about the State party’s explanation for its action. The Committee cannot accept the State party’s argument that it was inappropriate for counsel to submit a communication to the Human Rights Committee after they had applied for Presidential clemency and this application had been rejected. There is nothing in the Optional Protocol that restricts the right of an alleged victim of a violation of his or her rights under the Covenant from submitting a communication after a request for clemency or pardon has been rejected, and the State party may not unilaterally impose such a condition that limits both the competence of the Committee and the right of alleged victims to submit communications. Furthermore, the State party has not shown that by acceding to the Committee’s request for interim measures the course of justice would have been obstructed.

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<sup>89</sup> *Ibid.* at para. 7.4.

Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.<sup>90</sup>

These four paragraphs were reproduced in the Human Rights Committee's annual report to the UN General Assembly in November 2001 under the heading "Breach of Optional Protocol Obligations",<sup>91</sup> thereby putting all UN member states, including Canada, on notice as to the severity with which the body created by states to supervise them now viewed a state's failure to abide by a request for interim measures. Any act that has the effect of preventing or frustrating consideration by the Committee of a communication alleging a violation of the *ICCPR*, or that renders such examination by the Committee moot and the expression of its views nugatory and futile, will be seen as a serious breach of the *Optional Protocol* and as a failure to demonstrate even the most elementary good faith required of a state party to the *ICCPR* regime.<sup>92</sup> In light of these developments and the ready availability of this information on the internet, it is disturbing that no mention is made of this line of jurisprudence from the Human Rights Committee in the *Ahani* decision, and more disturbing that Canada continues to simply decline to abide by a rule 86 request rather than, at a minimum, making an application to have the request withdrawn. It is also disturbing that Canada routinely accepts the Committee's rules of procedure on relatively minor issues, such as the form and due date for its submissions, but disregards the procedure developed by the Committee for the preservation of an individual's life or physical integrity.

### **B. Turning to the International Court of Justice for Guidance**

Equally surprising is the absence of any mention in *Ahani* of the landmark judgment by the International Court of Justice (ICJ)<sup>93</sup> on the very topic of orders for provisional measures (the ICJ equivalent to requests for interim measures). On 27 June 2001, the ICJ issued its judgment on the merits in the *LaGrand Case*,<sup>94</sup> involving

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<sup>90</sup> *Ibid.* at paras. 5.1–5.4.

<sup>91</sup> *Report of the Human Rights Committee*, UN GAOR, 56th Sess., Supp. No. 40, UN Doc. A/56/40, vol. 1 (2001) at paras. 128–30.

<sup>92</sup> As summarized most recently in *Ashby*, *supra* note 86 at para. 10.9.

<sup>93</sup> The ICJ, based in the Netherlands, is the international community's principal judicial organ. Created in 1945, it is in essence a continuation of the Permanent Court of International Justice that was established in 1920. Together they are known as the World Court.

<sup>94</sup> *LaGrand Case (Germany v. United States of America)* (2001), 40 I.L.M. 1069, online: International Court of Justice <<http://www.icj-cij.org>> [*LaGrand*]. For commentary, see William J. Aceves, "Case Report: *LaGrand* (Germany v. United States)" (2002) 96 *Am. J. Int'l L.* 210; Martin Mennecke & Christian J. Tams, "*LaGrand Case* (Germany v. United States of America)", *Case Comment* (2002) 51:2 *I.C.L.Q.* 449 [Mennecke & Tams, "*LaGrand Case*"]; Gino J. Naldi, "International Court of Justice Declares Provisional Measures of Protection Binding" (2002) 118 *Law*

a claim brought by Germany against the United States concerning the application of the *Vienna Convention on Consular Relations*.<sup>95</sup> This is the first time in the World Court's eighty-year history that it has given a definitive ruling on whether or not orders for provisional measures have binding effect. The Court replied strongly in the affirmative, partially as a result of principles applicable to other fora involved in the peaceful settlement of international disputes, thereby making the decision worthy of further review.

The *LaGrand Case* arose from the conviction and execution in the state of Arizona of the LaGrand brothers, two German nationals. Although permanent residents of the United States since childhood, Walter and Karl LaGrand had never secured American citizenship and were in fact German citizens by birth and parentage. They were arrested in Arizona in 1982 on suspicion of armed robbery and murder, and subsequently convicted and sentenced to death. At no point during either their arrest or trial, however, were the LaGrands ever notified of their right as foreign nationals to receive consular assistance, nor was the German consulate ever informed of their arrest as required by article 36 of the *Consular Convention*, a multilateral treaty to which both Germany and the United States are parties.<sup>96</sup>

Ten years later, Germany found out that two of its nationals were sitting on Arizona's death row and supported the unsuccessful efforts by counsel to reopen the case, relying on treaty non-compliance as a ground. Subsequent efforts to resolve the matter on a diplomatic level also failed and on 24 February 1999, Karl LaGrand was executed. Then, on 2 March 1999, on the eve of Walter LaGrand's scheduled execution, Germany lodged its case with the ICJ, instituting proceedings against the United States for violations of the *Consular Convention* and requesting the court to issue an "order indicating provisional measures" to stop the execution. The next day, on its own motion and without oral hearings, the ICJ issued an order for provisional measures requesting the United States to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings ..."<sup>97</sup> Walter LaGrand, however, was executed later that same day and on schedule.

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Q. Rev. 35; Howard S. Schiffman, "The LaGrand Decision: The Evolving Legal Landscape of the Vienna Convention on Consular Relations in US Death Penalty Cases" (2002) 42 Santa Clara L.R. 1099. See also Jennifer Lynne Weinman, "The Clash Between US Criminal Procedure and the Vienna Convention on Consular Relations: An Analysis of the International Court of Justice Decision in the *LaGrand Case*" (2002) 17 Am. U. Int'l L. Rev. 857; "Symposium: Reflections on the ICJ's *LaGrand* Decision" (2002) 27 Yale J. Int'l L. 423.

<sup>95</sup> 24 April 1963, 596 U.N.T.S. 261, Can. T.S. 1974 No. 25 (entered into force 19 March 1967) [*Consular Convention*].

<sup>96</sup> The United States acknowledged that the required notifications did not take place (*LaGrand*, *supra* note 94 at para. 67).

<sup>97</sup> *Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America) (Provisional Measures)*, Order of 3 March 1999, [1999] I.C.J. Rep. 9 at para. 29, 38 I.L.R. 308, 118 I.L.R. 37. For commentary on the order, see Michael K. Addo, "Vienna Convention on Consular Relations (*Paraguay v. United States of America*) ("*Breard*") and *LaGrand (Germany v.*

With both brothers dead, one might argue the case was moot.<sup>98</sup> Germany, however, opted to proceed with the case, alleging violations of international law by the United States with respect to both Germany's interest in the diplomatic protection of its nationals and the obvious interests of the executed brothers. Germany also submitted that the United States had violated a legal obligation to comply with the order of provisional measures issued by the court. This particular submission met with vigorous opposition from the United States, which contested its very admissibility on the grounds that Germany's last minute appeal to the ICJ had not given the United States an opportunity to contest the provisional measures or to comply with them. The ICJ acknowledged that Germany's timing was open to criticism, but nevertheless recognized the irreparable prejudice that appeared to be imminent at the time Germany made its request and so held that Germany was entitled to challenge the United States' failure to comply with the provisional measures order.

As for the merits of the claim, by a clear majority of thirteen votes to two, the ICJ held that its orders indicating provisional measures are binding on states.<sup>99</sup> The court's authority for issuing orders for provisional measures derives from article 41 of the *Statute of the International Court of Justice*<sup>100</sup> (the treaty that established the court). Article 41, however, does not clearly state that interim orders have binding effect. The English version of article 41 reads as follows:

1. The Court shall have the power to *indicate* if it considers that circumstances so require, any provisional measures which *ought* to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures *suggested* shall forthwith be given to the parties and to the Security Council.<sup>101</sup>

The United States argued that the three words italicized above would have to be replaced with "order", "must" or "shall", and "ordered", respectively, for article 41 to be understood as implying that provisional measures have mandatory effect.<sup>102</sup> The ICJ, however, interpreted the original French text of article 41 as having this possible

*United States of America*, Applications for Provisional Measures" (1999) 48 I.C.L.Q. 673; Martin Mennecke & Christian Tams, "The Right to Consular Assistance Under International Law: The *LaGrand* Case Before the International Court of Justice" (1999) 42 German Yearbook of International Law 192. This was not the first time the ICJ had indicated provisional measures to suspend an execution. See *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Order of 9 April 1998, [1998] I.C.J. Rep. 248, 37 I.L.M. 812, 118 I.L.R. 1 [Paraguay]; Eva Reiter, "Interim Measures by the World Court to Suspend the Execution of an Individual: The Breard Case" (1998) 16 Nethl. Q.H.R. 475.

<sup>98</sup> The previous case before the ICJ involving similar facts had been withdrawn after the execution. See *Paraguay, ibid.*

<sup>99</sup> *LaGrand, supra* note 94 at para. 109. The court's discussion of provisional measures is at paras. 92-109.

<sup>100</sup> *Supra* note 62.

<sup>101</sup> *Ibid.* [emphasis added by ICJ in *LaGrand, supra* note 94 at para. 100].

<sup>102</sup> *LeGrand, ibid.*

meaning and so, faced with two equally authentic texts not in total harmony, the court turned to a consideration of the object and purpose of the statute and article to determine the meaning to be adopted.<sup>103</sup>

According to the ICJ, the object and purpose of its statute is to enable the court to fulfil the functions provided therein, including “the basic function of judicial settlement of international disputes by binding decisions ...”<sup>104</sup> Viewed within this context, article 4I operates so as “to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved.”<sup>105</sup> It follows, according to the ICJ, that

the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.<sup>106</sup>

As a result, “[t]he contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.”<sup>107</sup>

This conclusion admittedly rests on the interpretation of article 41, a provision not applicable to the work of the Human Rights Committee, but nevertheless the inspiration for rule 86. The ICJ, however, also made note of “a related reason”, to which the court expressly attached importance,<sup>108</sup> and that points to the binding character of interim orders generally.<sup>109</sup> This related reason was “the existence of a principle”<sup>110</sup> that had been recognized by the court’s predecessor, the Permanent Court of International Justice, as early as 1939, and which was seen at that time as being “universally accepted by international tribunals and likewise laid down in many conventions ...”<sup>111</sup> This principle was that “the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.”<sup>112</sup> In light of its rationale and long-standing acceptance, this principle could well extend to other international fora used for the settlement of disputes between states, or between states and individuals where the state has consented to the right of individual petition, even when the final outcome of

<sup>103</sup> *Ibid.* at para. 101.

<sup>104</sup> *Ibid.* at para. 102.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.* at para. 103.

<sup>109</sup> A point also made in William A. Schabas, “The ICJ Ruling Against the United States: Is it Really About the Death Penalty?” (2002) 27 *Yale J. Int’l L.* 445 at 449.

<sup>110</sup> *LaGrand*, *supra* note 94 at para. 103.

<sup>111</sup> *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Order of 5 December 1939, P.C.I.J. (Ser. A/B) No. 79 at 199 [*Electric Company*], quoted in *LaGrand*, *ibid.*

<sup>112</sup> *Electric Company*, *ibid.*, quoted in *LaGrand*, *ibid.*

the state versus individual process is a non-binding view, since that is the form of outcome to which the state has consented.

The ICJ then went on to note, almost by way of postscript, that the preparatory work for article 41, while not proving conclusive as to the binding force of such orders,<sup>113</sup> did show that the linguistic choices made in drafting article 41 were motivated by concern for the fact that the court did not have the means to assure the execution of its decisions.<sup>114</sup> As emphatically stated by the ICJ, however, “the fact that the Court does not itself have the means to ensure the execution of orders ... is not an argument against the binding nature of such orders.”<sup>115</sup> An order is no less binding because we lack the means for its enforcement, particularly in international law, which by its very nature lacks the means of enforcing compliance other than through moral suasion and diplomacy, a point that was overlooked by the majority of the Ontario Court of Appeal in *Ahani*.

In short, the ICJ held in *LaGrand* that, at the very least, the court’s orders for provisional measures are not mere exhortations to states, but legally binding obligations. It did not equivocate on this point, nor did it narrow the application of its holding to death penalty cases, nor even danger to life cases. Instead, it gave a final and binding judgment that attributes legal effect to all its orders for provisional measures, irrespective of content and context.<sup>116</sup> The court also dismissed the arguments made by the United States at the merits stage that such a position was not borne out by the text of the court’s enabling statute, the drafting history, the weight of academic commentary,<sup>117</sup> and the subsequent practice of states. Instead, the court preferred a purposive interpretation that took into account the overall function of international dispute settlement. In its view, the court could only exercise its role as a dispute settlement organ if it had the power to protect, by way of a kind of interim injunction, the rights of the parties that formed the subject of the dispute—an approach supported by a long-recognized principle that parties must abstain from measures that would aggravate a pending dispute.

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<sup>113</sup> *LaGrand*, *supra* note 94 at para. 104.

<sup>114</sup> *Ibid.* at para. 107.

<sup>115</sup> *Ibid.*

<sup>116</sup> This point is also made in Mennecke & Tams, “*LaGrand Case*”, *supra* note 94 at 454.

<sup>117</sup> See e.g. Jerzy Sztucki, *Interim Measures in the Hague Court: An Attempt at a Scrutiny* (Boston: Kluwer Law, 1983); Rudolf Bernhardt, ed., *Interim Measures Indicated by International Courts* (Berlin: Springer-Verlag, 1994). But see Jerome B. Elkind, *Interim Protection: A Functional Approach* (The Hague: Martinus Nijhoff, 1981). See also Lawrence Collins, “Provisional and Protective Measures in International Litigation” (1992) 234 *Rec. des Cours* 9. For the earliest work on interim measures under international law, see E. Dumbauld, *Interim Measures of Protection in International Controversies* (The Hague: Martinus Nijhoff, 1932).

### C. The View of the Privy Council on Interim Measures

Equally supportive of this principle of international law are the views<sup>118</sup> of the Judicial Committee of the Privy Council in a series of domestic constitutional law cases from the Commonwealth Caribbean to the effect that the interests of justice and due process require a state to respect requests for interim measures while a case is pending before the Human Rights Committee. During the decolonization movement of the 1960s, many former British colonies, including the island states of the West Indies, marked their emergence as independent states with the adoption of a written constitution.<sup>119</sup> These constitutions invariably contain a bill of rights,<sup>120</sup> the content of which draws inspiration from domestic sources of law<sup>121</sup> and from international sources of law, such as the *European Convention on Human Rights*.<sup>122</sup> The *Constitution of the Republic of Trinidad and Tobago Act, 1976*,<sup>123</sup> for example, clearly borrows from the *Canadian Bill of Rights*<sup>124</sup> of 1960. Having been retained as the final court of appeal for many of these states, the Privy Council has accumulated some forty years of experience in interpreting and applying these bills of rights<sup>125</sup> and as a result, its views should carry some weight.

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<sup>118</sup> This description is chosen deliberately since the decisions of the Judicial Committee, being a committee of the Privy Council, are technically “delivered in the form of advice to Her Majesty” (Philip S. James, *Introduction to English Law*, 12th ed. (London: Butterworths, 1989) at 44). See also S.H. Bailey & M.J. Gunn, *Smith and Bailey on the Modern English Legal System*, 3d ed. (London: Sweet & Maxwell, 1996) at 443.

<sup>119</sup> See generally S.A. de Smith, *The New Commonwealth and its Constitutions* (London: Stevens & Sons, 1964).

<sup>120</sup> This is in contrast to those of the “senior Members of the Commonwealth” (to use Professor de Smith’s description of Canada, Australia, New Zealand, and South Africa) that followed the British pattern of constitutionalism in that a general statement of human rights and safeguards against the abuse of individual rights were excluded as they were thought to be a matter of ordinary law rather than constitutional law (*ibid.* at 170).

<sup>121</sup> See Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (London: Cavendish, 1999) at 75-77.

<sup>122</sup> *Supra* note 74. One can in fact find the same provisions in many of these constitutions, starting with the Nigerian Constitution of 1959 (*Nigeria (Constitution) (Amendment No. 3)* (U.K.), S.I. 1959-1772, s. 69 and sch.), which was based on the *European Convention on Human Rights* (see de Smith, *supra* note 119 at 163, 177-80). Although Amendment No. 3 was revoked in the Nigerian Constitution of 1960 (*Nigeria (Constitution) Order in Council, 1960* (U.K.), S.I. 1960-1652), chapter 3 of the newer constitution (*ibid.*, sch. 2) maintained fundamental similarities to the *European Convention on Human Rights* and was then used as a model by other states (de Smith, *ibid.* at 183-85, 193).

<sup>123</sup> (Trinidad and Tobago) 1976, Act. 4, reprinted in Albert P. Blaustein & Gisbert H. Flanz, eds., *Constitutions of the Countries of the World*, vol. 18 (Dobbs Ferry, N.Y.: Oceana Publications, 1988) [*Constitution of Trinidad and Tobago*].

<sup>124</sup> S.C. 1960, c. 44, Part I, reprinted in R.S.C. 1985, App. III.

<sup>125</sup> See Nicholas Roberts, “The Law Lords and Human Rights: The Experience of the Privy Council in Interpreting Bills of Rights” (2000) 2 Eur. H.R.L. Rev. 147 (WL).

The factual context for the Privy Council's series of cases on the legal effect of requests for interim measures is capital punishment. Commonwealth Caribbean states retain the death penalty and because their constitutions typically contain a savings clause expressly preserving their pre-independence laws,<sup>126</sup> it is not possible to argue against the constitutionality of the death penalty *per se*. One can, however, make a constitutional argument regarding the manner of it being put into effect, a position bolstered by the landmark judgment of *Pratt v. Jamaica (A.G.)*,<sup>127</sup> in which the Privy Council held that a delay of more than five years from sentence to execution will likely render that execution unconstitutional on the ground of inhuman treatment.<sup>128</sup> This five-year target has since generated additional constitutional appeals to the Privy Council and, upon exhausting that option, to the Human Rights Committee and its regional equivalents, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.<sup>129</sup> This in turn eventually brought the issue of whether a state is obliged to abide by an international human rights body's request for interim measures before the Privy Council.

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<sup>126</sup> See Margaret DeMerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (Bridgetown, Barbados: University of the West Indies Faculty of Law Library, 1992) at 53-58. See also Antoine, *supra* note 121 at 78.

<sup>127</sup> [1994] 2 A.C. 1, [1993] 3 W.L.R. 995, [1993] 4 All E.R. 769 (P.C.). For commentary, see John Hatchard, "A Question of Humanity: Delay and the Death Penalty in Commonwealth Courts" (1994) 20 Commonwealth L. Bull. 309; Simeon C.R. McIntosh, "Cruel, Inhuman and Degrading Punishment: A Re-Reading of Pratt and Morgan" (1998) 8 Caribbean Law Review 1; Barry Phillips, "Pratt & Morgan v. Attorney-General for Jamaica", Case Comment (1994) 88 Am. J. Int'l L. 775; William A. Schabas, "Execution Delayed, Execution Denied" (1994) 5 Crim. L.F. 180. See also William A. Schabas, "Soering's Legacy: The Human Rights Committee and the Judicial Committee of the Privy Council Take a Walk Down Death Row" (1994) 43 I.C.L.Q. 913.

<sup>128</sup> For a detailed study of the evolution of the Privy Council's case law on capital punishment, see Sir Louis Blom-Cooper & Christopher Gelber, "The Privy Council and the Death Penalty in the Caribbean: A Study in Constitutional Change" (1998) 4 Eur. H.R.L. Rev. 386 (WL). See also Roberts, *supra* note 125 at 153-60.

<sup>129</sup> Not all Commonwealth Caribbean states are subject to the jurisdiction of these three international bodies with respect to individual petitions. Only states that have ratified the *American Convention on Human Rights* are subject to the jurisdiction of the Inter-American Court of Human Rights. However, all states that are members of the Organization of American States are subject to the jurisdiction of the Inter-American Commission on Human Rights through ratification of the *Charter of the Organization of American States* (30 April 1948, 119 U.N.T.S. 3, O.A.S.T.S. Nos. 1-C and 61 (entered into force 13 December 1951)) and the normative effect of the often forgotten *American Declaration of the Rights and Duties of Man* (2 May 1948, O.A.S. Res. XXX, OEA/Ser. L.V/11.82, doc. 6, rev. 1, reprinted in Ian Brownlie & Guy S. Goodwin-Gill, eds., *Basic Documents on Human Rights*, 4th ed. (Oxford: Oxford University Press, 2002) at 665). The Inter-American Commission on Human Rights has been in operation since 1960; the Inter-American Court of Human Rights since 1979. See generally David J. Harris & Stephen Livingstone, eds., *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998).

The Privy Council's view on the legal effect of such requests has evolved rapidly. In *Fisher v. Minister of Public Safety and Immigration (No. 2)*,<sup>130</sup> decided on 5 October 1998, the Privy Council split three to two on whether the appellant had a legitimate expectation that the government of the Bahamas would allow a reasonable amount of time for the completion of the petition process before the Inter-American Commission on Human Rights. While the majority ruled against such a legitimate expectation, the minority, comprised of Lord Slynn of Hadley and Lord Hope of Craighead, felt that it was "hard to imagine a more obvious denial of human rights than to execute a man, after many months of waiting for the result, while his case is still under legitimate consideration by an international human rights body."<sup>131</sup>

Three months later, the majority's view in *Fisher (No. 2)* was open to challenge in light of the Privy Council's decision in *Thomas v. Baptiste*,<sup>132</sup> where it was held by a majority of three to two that it would be a breach of the applicants' domestic constitutional rights to carry out a death sentence before the final disposal of an application to the Inter-American human rights regime. Lord Millett, with the concurrence of Lord Browne-Wilkinson and Lord Steyn, recognized "the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation"<sup>133</sup> (noting but without deciding the point that "[i]t is ... sometimes argued that human rights treaties form an exception to this principle").<sup>134</sup> He went on to hold, however, that the applicants' claim did not infringe this principle since it was on the basis of the common law, as affirmed in the due process clause of the *Constitution of Trinidad and Tobago*, that he found a "general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by executive action."<sup>135</sup> Lord Millett continued:

The applicants [were] not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. By ratifying a treaty which provides for individual access to an international body, the government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution.<sup>136</sup>

The above excerpt from *Thomas* was cited and discussed in *Ahani*.<sup>137</sup> Laskin J.A., however, "confess[ed] to having difficulty understanding the reasoning in this

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<sup>130</sup> [2000] 1 A.C. 434, [1999] 2 W.L.R. 349 (P.C.) [*Fisher (No. 2)* cited to A.C.].

<sup>131</sup> *Ibid.* at 452E-F.

<sup>132</sup> [2000] 2 A.C. 1, [1999] 3 W.L.R. 249 (P.C.) [*Thomas* cited to A.C.]. The decision was delivered on 27 January 1999 with reasons following on 17 March 1999.

<sup>133</sup> *Ibid.* at 23A-B.

<sup>134</sup> *Ibid.* at 23C.

<sup>135</sup> *Ibid.* at 23D-E.

<sup>136</sup> *Ibid.* at 23E-F.

<sup>137</sup> *Ahani (Ont. C.A.)*, *supra* note 2 at para. 55.

paragraph, and especially in the last sentence,<sup>138</sup> and preferred the reasons proffered by the dissent of Lord Goff of Chieveley and Lord Hobhouse of Woodborough, which he saw as being “more in line with [Canadian] law.”<sup>139</sup> And yet, the due process clause contained in section 4(a) of the *Constitution of Trinidad and Tobago* is in line with Canadian law. It is in fact a near exact copy of the due process clause in the *Canadian Bill of Rights*<sup>140</sup> of 1960, a point overlooked by the Court of Appeal that raises an additional argument for further consideration of the interpretation given to this provision by the Privy Council, given that the *Canadian Bill of Rights* of 1960 has never been repealed. Moreover, for anyone concerned with the Privy Council’s apparent “about face”<sup>141</sup> in its rulings in *Fisher (No. 2)* and *Thomas*, it can be noted that unlike Trinidad and Tobago (and Canada), the constitution of the Bahamas does not contain a due process clause, a distinction suggested in *Thomas*<sup>142</sup> and later adopted by the Privy Council in *Higgs v. Minister of National Security*.<sup>143</sup> *Higgs* also contains a discussion<sup>144</sup> of the very paragraph with which Laskin J.A. had difficulty, with the Privy Council coming to the conclusion that “the ratio decidendi of *Thomas v. Baptiste* is that the due process clause in section 4(a) of the Trinidad and Tobago Constitution gave the Crown power to accept an international jurisdiction as part of the domestic criminal justice system.”<sup>145</sup>

Since *Thomas* and *Higgs*, the Privy Council has spoken once again on the issue of interim measures while petitions are pending before international human rights bodies. In *Lewis v. Jamaica (A.G.)*,<sup>146</sup> the Privy Council, in a four to one decision, confirmed that an individual has a constitutional right to a stay of proceedings while a

<sup>138</sup> *Ibid.* at para. 56. Rosenberg J.A., dissenting, also found “some of the reasoning strained” (*ibid.* at para. 99).

<sup>139</sup> *Ibid.* at para. 56.

<sup>140</sup> Section 1(a) of the *Canadian Bill of Rights* of 1960 reads as follows:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist ... the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law ...

Section 4(a) of the *Constitution of Trinidad and Tobago* differs only in its reference to “fundamental human rights and freedoms” versus the Canadian “human rights and fundamental freedoms” (*supra* notes 123, 124).

<sup>141</sup> The Judicial Committee of the Privy Council is technically not bound by its own decisions (Bailey & Gunn, *supra* note 118 at 444; James, *supra* note 118).

<sup>142</sup> *Thomas*, *supra* note 132 at 23F-G.

<sup>143</sup> [2000] 2 A.C. 228 at 245G-46C, [2000] 2 W.L.R. 1368 (P.C.) [*Higgs* cited to A.C.]. *Higgs* is cited in *Ahani* (Ont. C.A.), *supra* note 2 at para. 91, Rosenberg J.A., dissenting. For commentary on *Fisher (No. 2)*, *Thomas*, and *Higgs*, see Derek O’Brien & Vaughan Carter, “Constitutional Rights, Legitimate Expectations and the Death Penalty” [2000] P.L. 573.

<sup>144</sup> *Higgs*, *ibid.* at 243H-45E.

<sup>145</sup> *Ibid.* at 245E.

<sup>146</sup> (2000), [2001] 2 A.C. 50, [2000] 3 W.L.R. 1785 (P.C.) [*Lewis* cited to A.C.]. For commentary, see Ivan Hare, “*Lewis v. Attorney General of Jamaica*” (2001) 60 Cambridge L.J. 1.

petition is pending before either the Inter-American Commission on Human Rights or the Human Rights Committee on grounds of due process or its equivalent.<sup>147</sup> However, since this case involved Jamaica, which is a country that does not accept the jurisdiction of the Inter-American Court of Human Rights, it raised directly the issue of requests for stays of proceedings from international human rights bodies that produce non-binding reports or views rather than binding judgments. Their Lordships held that

when Jamaica acceded to the American Convention and to the International Covenant and allowed individual petitions the petitioner became entitled under the protection of the law provision in section 13 [of the *Constitution of Jamaica*] to complete the human rights petition procedure and to obtain the reports of the human rights bodies for the Jamaican Privy Council to consider before it dealt with the application for mercy and to the staying of execution until those reports had been received and considered.<sup>148</sup>

So important was this case that the attorneys-general from Trinidad and Tobago and the Bahamas were granted leave to intervene, as were five petitioners from Belize, and yet no mention is made of *Lewis* in the majority's judgment in *Ahani*.<sup>149</sup> Moreover, it is important to note that beyond the issue of interim measures, the Privy Council expressly held that the reports of international human rights bodies must be considered by the state's relevant executive body when they become available and further imposed a legal obligation to provide an explanation if that body, after considering the report, decides not to accept the report's recommendations.<sup>150</sup>

Presumably, Laskin J.A. would prefer the reasons of the dissenting judgment of Lord Hoffman in *Lewis*, who described the above use of due process as a "philosopher's stone undetected by generations of judges which can convert the base metal of executive action into the gold of legislative power," but noted that "[the majority] does not ... explain how the trick is done."<sup>151</sup> For Lord Hoffman, there was still "no explanation of how, in the domestic law of Jamaica, the proceedings before the Commission constitute a legal process (as opposed to the proceedings of any other non-governmental body) which must be duly completed."<sup>152</sup>

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<sup>147</sup> See *Jamaica (Constitution) Order in Council 1962* (U.K.), S.I. 1962-1550, sch. 2, reprinted in Albert P. Blaustein & Gisbert H. Flanz, eds., *Constitutions of the Countries of the World*, vol. 9 (Dobbs Ferry, N.Y.: Oceana Publications, 1983) [*Constitution of Jamaica*]. Section 13(a) of the *Constitution of Jamaica* provides a "protection of the law" clause, rather than an express due process clause.

<sup>148</sup> *Lewis*, *supra* note 146 at 85B-C.

<sup>149</sup> A brief reference to *Lewis* is found in the dissenting judgment. *Ahani* (Ont. C.A.), *supra* note 2 at para. 97.

<sup>150</sup> *Lewis*, *supra* note 146 at 79E-F, 85C.

<sup>151</sup> *Ibid.* at 88G, Lord Hoffman, dissenting.

<sup>152</sup> *Ibid.* at 88H.

#### IV. Further Criticisms of the *Ahani* Decision

This division between domestic and international law is a constant theme throughout the majority's reasons in *Ahani*, with Laskin J.A. making repeated reference to the fact that Canada has neither incorporated the *ICCPR* nor the *Optional Protocol* into its domestic law.<sup>153</sup> Relying *inter alia* on the Supreme Court of Canada's recent decision in *Baker v. Canada (Minister of Citizenship and Immigration)*,<sup>154</sup> Laskin J.A. clearly endorses the principle that "international treaties and conventions not incorporated into Canadian law have no domestic legal consequences ..."<sup>155</sup> This position can be criticized for Laskin J.A.'s odd phrasing of "treaties and conventions", as if they were two different species of international law,<sup>156</sup> for his failure to note that recent Privy Council decisions have called into question whether this principle applies to treaties dealing with human rights,<sup>157</sup> and for the fact that *Baker* has been the subject of academic criticism.<sup>158</sup> However, the real irritant here is the failure to take into account the practical realities of the *Optional Protocol*, with those realities suggesting that a distinction should be drawn in applying the above principle to treaties creating international complaint procedures. The *Optional Protocol* provides for a procedural right to petition an international forum for its views on a particular claim that rests on the substantive rights in the *ICCPR*. If the procedure is allowed to run its course, the final result will be a non-binding view with no automatic domestic legal consequences. Domestic legislation to incorporate the *Optional Protocol* into Canadian law is therefore unnecessary since the principle espoused in *Baker* and recognized years ago by the Privy Council in the *Labour Conventions Case*<sup>159</sup> only applies to treaties "if they entail alteration of the existing domestic law ..."<sup>160</sup>

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<sup>153</sup> The lack of domestic incorporation is mentioned in no less than six paragraphs of the 67-paragraph decision. See *Ahani* (Ont. C.A.), *supra* note 2 at paras. 2, 16, 31, 34, 49, 54, Laskin J.A. The dissent mentions this point only once (*ibid.* at para. 73).

<sup>154</sup> [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker*].

<sup>155</sup> *Ahani* (Ont. C.A.), *supra* note 2 at para. 34.

<sup>156</sup> L'Heureux-Dubé J. uses the same phrasing in *Baker* (*supra* note 154 at para. 69). As explained, however, by Anthony Aust, Legal Counsellor at the British Foreign and Commonwealth Office, "there is no consistent practice in the naming of treaties. Whereas Agreement, Convention and Treaty are perhaps the most common names given to treaties, other terms such as Act, Charter, Covenant, Pact and Protocol are also used" (Aust, *supra* note 39 at 333).

<sup>157</sup> See *Thomas*, *supra* note 132 at 23C (a case discussed by Laskin J.A. in *Ahani*); *Lewis*, *supra* note 146 at 84H (a case not discussed by Laskin J.A. in *Ahani*).

<sup>158</sup> See Stephen J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001) 50 U.N.B.L.J. 11 at 18-22; William A. Schabas, "Twenty-five Years of Public International Law at the Supreme Court of Canada" (2000) 79 Can. Bar Rev. 174 at 182. But see also Hugh M. Kindred, "The Use of Unimplemented Treaties in Canada: Practice and Prospects in the Supreme Court," in Chi Carmody *et al.*, eds., *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (Washington, D.C.: American Society of International Law) [forthcoming in 2003].

<sup>159</sup> *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326 (P.C.) [*Labour Conventions Case*].

<sup>160</sup> *Ibid.* at 347.

Moreover, since current statistics<sup>161</sup> show that individuals in Canada have exercised this right of petition over the past twenty-five years in over a hundred cases, one may rightly ask what legal incoherence, from a practical perspective, would the enactment of domestic legislation actually resolve?

The *Ahani* judgment raises further concerns about the court's appreciation of the very nature of international law. Much of international law lacks an enforcement mechanism of the kind we are accustomed to seeing in domestic law, but this lack of a world policeman does not make a treaty any less binding on a state that has voluntarily agreed to become a party through ratification or accession. Moreover, using passages on the non-binding nature of the views of the Human Rights Committee as his support, Laskin J.A. comes to the conclusion that "[t]he international community has agreed to binding obligations in other treaties. But in the Covenant and the Protocol, it made a policy decision to do otherwise."<sup>162</sup> He also states that "Canada agreed to sign an international covenant and protocol that was not binding."<sup>163</sup> This is incorrect. A treaty is an international agreement concluded between states, whatever its particular designation, and it is an accepted principle of international law that every treaty in force is binding upon the parties and must be performed by them in good faith.<sup>164</sup> Neither the covenant or protocol nomenclature nor the non-binding nature of the views of the Human Rights Committee make these treaty commitments any less binding under international law than those in say a trade agreement.

Laskin J.A. also states that it is an "undisputed fact" that "neither the Committee's views nor its interim measures requests are binding on Canada as a matter of international law ..."<sup>165</sup> and he further states that "the Government of Canada would have every reason to hold a good faith belief that deporting Ahani now would not breach its obligations under the Covenant."<sup>166</sup> In taking this position, Laskin J.A. lumps together the status of views with the status of interim measures requests, relying in part on references to weak secondary sources<sup>167</sup> and overlooking entirely the current jurisprudence of the Human Rights Committee expressly on the issue of the status of its interim measures requests under international law. Unfortunately, counsel

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<sup>161</sup> "Statistical Survey", *supra* note 55.

<sup>162</sup> *Ahani* (Ont. C.A.), *supra* note 2 at para. 37.

<sup>163</sup> *Ibid.* at para. 49.

<sup>164</sup> See *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 U.N.T.S. 331, art. 26, Can. T.S. 1980 No. 37 (entered into force 27 January 1980), confirming the customary international law position.

<sup>165</sup> *Ahani* (Ont. C.A.), *supra* note 2 at para. 32.

<sup>166</sup> *Ibid.* at para. 46.

<sup>167</sup> Despite the availability of a current and outstanding work on the *ICCPR* by Sarah Joseph *et al.*, published in 2000 by a leading academic press that is well respected in the international law field (Joseph *et al.*, *supra* note 34), Laskin J.A. relies on an excerpt from the Committee's 1990 introduction to the second volume of its occasional report series and a passage from a text on the Committee Against Torture published in 1988. See *Ahani* (Ont. C.A.), *supra* note 2 at paras. 38, 39.

for Ahani must bear some responsibility here since the judgment states that Ahani acknowledged that he could not point to any case law supporting his position.<sup>168</sup>

Apart from the likelihood that Canada will and should be found to have acted in bad faith and in breach of its obligations under the *Optional Protocol*, the Court of Appeal also fails to acknowledge that Canada's lack of respect for rule 86 requests has been the subject of past criticism. In both *Kindler v. Canada*<sup>169</sup> and *Ng v. Canada*,<sup>170</sup> the two well-known extradition cases that went before the Human Rights Committee after the Supreme Court of Canada ruled that Canada could extradite a fugitive to the United States without first requesting assurances that the death penalty would not be applied,<sup>171</sup> Canada ignored the Committee's requests for interim measures and was later criticized for its "failure to cooperate".<sup>172</sup> Moreover, in *Ng* the consequences of this failure to cooperate were far more serious than in *Kindler*. Laskin J.A. stated: "The evidence before this court suggests that Canada has always abided by the Committee's views."<sup>173</sup> Canada, however, was found to be in violation of its obligations under the *ICCPR* in *Ng*,<sup>174</sup> but because it had disregarded the interim measures request and extradited *Ng* while his petition was pending, all the Committee could do was ask Canada "to make such representations as might still be possible to avoid the imposition of the death penalty"<sup>175</sup> and "to ensure that a similar situation [did] not arise in the future."<sup>176</sup>

Canada has also come under criticism for its position on requests for interim measures under the state reporting process before the Human Rights Committee. Pursuant to article 40 of the *ICCPR*, all state parties are required to submit periodic reports to the Human Rights Committee on the measures they have adopted to give effect to the rights set out in the *ICCPR* and on the progress made in the enjoyment of those rights. These state reports are then individually examined by the Committee at

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<sup>168</sup> *Ahani* (Ont. C.A.), *ibid.* at para. 30. A review of the facts for the appellant, respondent, and intervenor Amnesty International revealed that none of the counsel made reference to either *LaGrand* or the recent interim measures jurisprudence of the Human Rights Committee.

<sup>169</sup> "Communication No. 470/1991" in *Report of the Human Rights Committee*, UN GAOR, 48th Sess., Supp. No. 40, UN Doc. A/48/40, vol. 2 (1993) annex XII.U (views adopted on 30 July 1993), UN Doc. CCPR/C/48/D/470/1991, reprinted in 98 I.L.R. 426 [*Kindler*].

<sup>170</sup> "Communication No. 469/1991" in *Report of the Human Rights Committee*, UN GAOR, 49th Sess., Supp. No. 40, UN Doc. A/49/40, vol. 2 (1994) annex IX.CC (views adopted on 5 November 1993), UN Doc. CCPR/C/49/D/469/1991, reprinted in 98 I.L.R. 479 [*Ng*].

<sup>171</sup> For the current position on this point, see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7.

<sup>172</sup> *Report of the Human Rights Committee*, UN GAOR, 48th Sess., Supp. No. 40, UN Doc. A/48/40, vol. 1 (1993) at para. 796.

<sup>173</sup> *Ahani* (Ont. C.A.), *supra* note 2 at para. 43.

<sup>174</sup> *Ng* was extradited to stand trial in the state of California, one of the few states (at that time) to execute by way of cyanide gas asphyxiation. Because this method of execution does not result in a swift and painless death, the Committee found Canada in violation of the prohibition on cruel and inhuman treatment in article 7 of the *ICCPR*.

<sup>175</sup> *Ng*, *supra* note 170 at para. 18.

<sup>176</sup> *Ibid.*

one of its thrice-yearly sessions. The Committee later adopts what are called “concluding observations”, setting out in summary form the Committee’s principal areas of concern and recommendations with respect to the particular state. In its concluding observations on Canada’s most recent state report,<sup>177</sup> the Human Rights Committee “expresse[d] its concern that the State party considers that it is not required to comply with requests for interim measures of protection issued by the Committee” and “urge[d] Canada to revise its policy so as to ensure that all such requests are heeded so that implementation of Covenant rights is not frustrated.”<sup>178</sup> It also expressed concern that Canada was taking the position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman, or degrading treatment and recommended that Canada revise this policy in order to comply with the requirements of the *ICCPR*.<sup>179</sup>

A year later, Canada received further criticism for its policy on interim measures from the Committee Against Torture, another treaty monitoring body established by states under the auspices of the UN. In the case of *T.P.S. v. Canada*,<sup>180</sup> involving the deportation of a convicted Sikh hijacker (known in Canada to be Tejinder Pal Singh) on grounds of national security, the Committee Against Torture adopted views stating that it was deeply concerned about Canada’s failure to comply with its request for interim measures.<sup>181</sup> It also took the position that Canada, “in ratifying the [applicable] Convention and voluntarily accepting the Committee’s competence [to hear individual complaints] ... , undertook to cooperate with [the Committee] in good faith in applying the procedure ... ”<sup>182</sup> The Committee Against Torture further held that “[c]ompliance with the provisional measures called for by the Committee in cases it considers reasonable is essential to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee.”<sup>183</sup> Ironically, Laskin J.A. compared Ahani to Singh, making note of the fact that Canada did not accede to the interim measures request in Singh’s case, but

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<sup>177</sup> Human Rights Committee, *Fourth Periodic Reports of States Parties Due in 1995: Canada*, UN GAOR, 52d Sess., UN Doc. CCPR/C/103/Add.5 (submitted by the government of Canada on 1 April 1997 and published by the UN on 15 October 1997). Canada’s fifth periodic report is due in April 2004.

<sup>178</sup> “Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Canada” in *Report of the Human Rights Committee*, UN GAOR, 54th Sess., Supp. No. 40, UN Doc. A/54/40, vol. 1 (1999) at para. 223 (observations adopted on 6 April 1999).

<sup>179</sup> *Ibid.* at para. 235.

<sup>180</sup> “Communication No. 99/1997” in *Report of the Committee Against Torture*, UN GAOR, 55th Sess., Supp. No. 44, UN Doc. A/55/44 (2000) annex VIII.A.4 (views adopted on 16 May 2000), UN Doc. CAT/C/24/D/99/1997 [*T.P.S.*].

<sup>181</sup> *Ibid.* at para. 16.1.

<sup>182</sup> *Ibid.* The applicable convention was the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36 (entered into force 26 June 1987) [*UNCAT*]. Canada ratified *UNCAT* on 24 June 1987.

<sup>183</sup> *T.P.S.*, *ibid.*

failed to take note of the subsequent response from the relevant treaty supervisory body, the Committee Against Torture.<sup>184</sup>

These reports also make it clear that no exception to a request for interim measures has been recognized for the deportation of terrorists. While Canada must not become a safe haven for terrorists, the memory of the events of 11 September 2001 does not justify downgrading long-standing treaty law commitments in the field of human rights to ineffective exhortations. Nor does it explain why the balance between Canada's human rights obligations and its anti-terrorism obligations is not best achieved by simply keeping Ahani in jail while his case is pending before the Human Rights Committee, particularly when, by definition, requests for interim measures are only issued when there is a risk of irreparable harm to an individual's life or limb.

## Conclusion

The *Ahani* decision is a most regrettable and undesirable precedent and one that runs counter to the very principles and spirit of international dispute settlement, a phenomenon that now extends beyond interstate disputes to include those between states and individuals where a state has given its consent. By allowing Canada to disregard requests for interim measures from a body such as the Human Rights Committee, the Ontario Court of Appeal and the Supreme Court of Canada have, in essence, gutted the right of individual petition of all utility, since any subsequent finding of a violation will be impossible to remedy with the individual outside Canada's jurisdiction. The *Ahani* decision is also incorrect on principle given the existence of a general right to be accorded to all litigants not to have the outcome of an appellate or other legal process pre-empted by the actions of one of the parties such that the outcome, albeit in the form of a non-binding view, is rendered meaningless. By acceding to the *Optional Protocol*, Canada granted individual litigants the right to petition and ultimately to receive a non-binding view from the Human Rights Committee. Notwithstanding any concerns one might have about the inherent weaknesses of a non-binding view, Canada is therefore acting in bad faith with respect to its treaty commitments when it engages in acts that have the effect of preventing or frustrating the consideration of a communication by the Committee and rendering the outcome nugatory.

As for the fate of Mansour Ahani, newspaper reports reveal that Canada deported him to Iran in June 2002,<sup>185</sup> only a week or so after Iran's Council of Guardians vetoed

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<sup>184</sup> *Ahani* (Ont. C.A.), *supra* note 2 at para. 62.

<sup>185</sup> Stanislaw Oziewicz, "Suspected Assassin Deported to Tehran," *The Globe and Mail* (21 June 2002) A16.

proposed legislation to limit the widespread practice of torture in the Islamic Republic.<sup>186</sup> His case remains pending before the Human Rights Committee.

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<sup>186</sup> Human Rights Watch, Press Release, “Iran: Veto on Torture Bill Condemned” (12 June 2002), online: <<http://www.hrw.org/press>>.