Exhibit "G"
Letter on Mr. Abou-Elmaati, 6 November 2003

This is Exhibit "G" referred to in the
affidavit of Alex Neve
sworn before me, this 14th
day of March 2007

A COMMISSIONER FOR TAKING AFFIDAVITS

Amnesty International
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The Honourable Bill Graham
Minister of Foreign Affairs
125 Sussex Drive
Ottawa, Ontario
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November 6, 2003

Dear Minister,

I am writing with respect to the case of Ahmad Abou-Elmaati, a dual Canadian and Egyptian national who has been imprisoned in Abou Zaabal prison outside Cairo, for close to two years.

Mr. Elmaati has not been charged with any offence, and has been ordered released on three separate occasions by Egypt's Supreme Court. Egyptian authorities have refused to comply with those court orders. Amnesty International has also received reports that prior to his detention in Egypt, Mr. Elmaati was imprisoned for several months in Syria, during which time he may have been subjected to severe torture. We are concerned that information obtained under torture may now serve as the basis for his detention in Egypt. These allegations that Mr. Elmaati may have been tortured in Syria, as well as his detention without charge or trial in Egypt since January 2002, constitute serious violations of his basic human rights.

It is our understanding that he is being held under Article 3 of Egypt's Emergency Law, which grants the Minister of the Interior the right to arrest and detain, without a judicial warrant, suspected persons or persons who endanger public order or security. Amnesty International has documented that thousands of people have been detained in Egypt, many for years, without charge or trial or after having been acquitted by a court of law. We are aware that several thousand administrative detainees remain held, some for over a decade. Many have been issued with release orders but despite this are not released from detention. We have urged that all administrative detainees either be charged immediately with a recognizable criminal offence and then given a trial which complies with international standards for fair trial, or be released.

Amnesty International has pressed the Egyptian government to take immediate steps to ensure that:

- Ahmad Abou-Elmaati is charged with a recognizable criminal offence and brought promptly before fair judicial proceedings or is released in accordance with court orders to that effect;

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- That any information that may have originated from Syria and may have been obtained under torture is not used as a basis for Ahmad Abou-Elmaati's detention and is not used in any proceedings that may be brought against him.

Amnesty International urges that the government of Canada raise Mr. Elmaati's case at the highest possible levels with the Egyptian government and insist upon the two points mentioned above. It is unclear at this stage whether Canadian law enforcement agencies possess any evidence that Mr. Elmaati may have been involved in criminal actitivies. If that is the case, proceedings could and should be launched in Canada. Continuing detention without charge or trial is not the answer.

Beginning with his arrest in Syria on November 11, 2001, the possibility that he experienced severe torture during several months of detention in Syria and now the continuing injustice of close to two years of imprisonment without charge or trial in Egypt, Mr. Elmaati's basic human rights have been cruelly disregarded. Canada must spare no effort in ensuring that those rights are now restored to him.

Sincerely,

Alex Neve
Secretary General

Exhibit "H"
Briefs to United Nations Committee Against Torture and Human Rights Committee

This is Exhibit "H" referred to in the
affidavit of Alex Neve
sworn before me, this 14th
day of March 2017

A COMMISSIONER FOR TAKING AFFIDAVITS

REDOUBLING THE FIGHT AGAINST TORTURE

Amnesty International's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report From Canada

October 8, 2004

Amnesty International Canada
(English-speaking branch)
www.amnesty.ca

Amnistie Internationale Canada
(Francophone)
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Zahra Kazemi, who had been arrested on 23 June in connection with taking photos outside Tehran's Evin Prison, died from a blow to her skull while in police custody.

- Amnesty International, August 1, 2003.[1]

The worst that I endured of it at the time was being hung upside down and beaten across the backside, the feet, the scrotum. The pain from that is just incredible. I just felt like my entire body was about to explode out of my ears and my eyes… The pain stays and it only builds for the next session, and even when they stop the beating and chain you back to the door, then you have the next few hours standing on your feet, in my case which are swollen and bloody, which are in agony but you can't do anything to relieve them, so they're actually getting more sensitive by the minute, and you know you've only got this to go back to the next day or the day after.

- William Sampson, Interview on CBC TV, September 30, 2003

The next day I was taken upstairs again. The beating started that day and was very intense for a week, and then less intense for another week. That second and the third days were the worst... They used the cable on the second and third day, and after that mostly beat me with their hands, hitting me in the stomach and on the back of my neck, and slapping me on the face. Where they hit me with the cables, my skin turned blue for two or three weeks, but there was no bleeding. At the end of the day they told me tomorrow would be worse. So I could not sleep.

- Maher Arar, Statement at Press Conference, November 3, 2003

INTRODUCTION

There is credible and detailed evidence that the three Canadian citizens highlighted above, Maher Arar, William Sampson, and Zahra Kazemi, were subjected to torture while in detention abroad in Syria, Saudi Arabia and Iran respectively. Zahra Kazemi died as a result. Those cases garnered intense public concern, extensive media coverage and continue to be the subject of substantial political debate. Other cases have arisen since these three as well; including Muayyed Nurredin who has also provided detailed testimony as to torture in detention in Syria.[2] The result has been an unprecedented amount of attention in Canada to the issue of torture, since the Committee's last review of Canada's record of compliance with the United Nations Convention against Torture.

Amnesty International welcomes Canada's submission of its fourth periodic report to this Committee. Cases such as the three referred to above illustrate that it comes at a time when a vigorous response from the Canadian government to the global phenomenon of torture is very much required. This brief highlights concerns and makes

[1] Amnesty International, *Iran: Only an independent investigative body can serve justice and human rights*, August 1, 2003, AI Index: MDE 13/026/2003.

[2] Amnesty International, Letter to Prime Minister Paul Martin, 17 February 2004.

recommendations as to steps the government should take to better protect Canadian citizens from the risk of torture abroad. However, Amnesty International is also of the view that Canada can and must do more to improve the country's own domestic record with respect to obligations under the Convention against Torture. Canadian leadership in fulfilling those obligations would make an important contribution to the global campaign to eradicate torture.[3]

This brief outlines concerns and offers recommendations in seven different areas: justice; return to torture; torture abroad; Indigenous peoples; the use of taser guns; federally-sentenced women prisoners and ratification of the Optional Protocol.

1. JUSTICE IN THE FACE OF TORTURE; (ARTICLES 5, 14)

Torturers thrive because of the impunity they enjoy. The UN Special Rapporteur on Torture has stated that "the single most important factor in the proliferation and continuation of torture is the persistence of impunity, be it of a de jure or de facto nature."[4] The provisions in the Convention against Torture requiring states to bring torturers to justice and also obligating states to ensure that survivors of torture are able to obtain redress, provide a critical framework for combating this culture of impunity. Amnesty International is concerned that Canada's laws and practice are not in conformity with these obligations. In particular, Amnesty International is concerned that Canada fails to exercise universal jurisdiction with respect to alleged torturers who are or have been present in Canada and that survivors of torture are not able to access Canadian courts to obtain compensation for torture suffered abroad.

When it is alleged that a torturer is physically present in Canada, article 5 of the Convention requires the government to either extradite him or her to a country that would be willing and able to launch a prosecution or, failing that possibility, to launch a prosecution in Canada. Section 7(3.7) of the Canadian Criminal Code[5] properly provides for jurisdiction.

However, Amnesty International is not aware of any criminal prosecution having yet been launched in Canada under this provision, despite the fact that many cases have been brought to the government's attention. For instance, Amnesty International has, for several years, pressed Canadian officials to take action with respect to a number of cases of Lebanese nationals, resident in Canada. Serious allegations have been made that these individuals, former members of the South Lebanon Army, were responsible for torture and other human rights violations, including at the notorious Khiam Detention Centre. According to reports received by Amnesty International, many of the former guards, and

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[3] In a recent letter to Prime Minister Paul Martin (May 12, 2004), Amnesty International reiterated the importance of Canada taking "the lead in launching a concerted effort to finally eradicate the vicious plague of torture from this planet."

[4] Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/56/156, 3 July 2001, para. 26.

[5] R.S. 1985, c. C-46, as amended.

at least one former director of Khiam, have taken refuge in Canada over the years. Some are now Canadian citizens.

Amnesty International has frequently expressed concern that Canada's preferred route appears to be to pursue immigration remedies, such as deportation, rather than securing extradition or launching a prosecution.[6] In 2000 the Committee urged Canada to "prosecute every case of an alleged torturer in a territory under its jurisdiction where it does not extradite that person and the evidence warrants it, and prior to any deportation."[7] Amnesty International is concerned that Canadian practice continues to be to consider deportation as a remedy prior to extradition or prosecution and that this does not comply with Canada's obligations under the Convention.

Recommendation 1

Canada should adopt a clear policy preferring extradition or prosecution over deportation in every case of an alleged torturer who is present in a territory under the jurisdiction of Canada, where the evidence warrants it.

Accountability and justice in the face of torture is not only a criminal law issue. The Special Rapporteur on Torture has highlighted as well the critical importance of the right of survivors of torture to obtain reparations for what they have suffered. He notes that:

> ...reparation, beyond the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts, has an inherent preventive and deterrent aspect.[8]

The Canadian government has taken the position in recent litigation that the concept of state immunity prevents torture victims from obtaining redress in Canadian courts against governments responsible for the torture they have experienced. They have also asserted that universal jurisdiction, which applies to the criminal prosecution of torture, does not extend to civil suits for redress.

Houshang Bouzari is a Canadian citizen who is suing the government of Iran for torturing him in 1993, prior to his arrival in Canada. His attempt to obtain redress has encountered an obstacle in Canada's *State Immunity Act*, which limits lawsuits against foreign

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[6] Amnesty International Canada, *New Millennium, Third Term: A Human Rights Agenda for the Canadian Government*, December 10, 2000. Amnesty International Canada, *Real Security: A Human Rights Agenda for Canada*, May 7, 2002. Amnesty International Canada, *At Home and Abroad: Amnesty International's human rights agenda for Canada*, October 2003. Individual cases that have been brought to Canada's attention have included José Barrera Martínez, a Honduran national deported from Canada to Honduras in 2001, despite evidence that he may have been implicated in the torture and death in custody of José Eduardo López. Amnesty International is not aware of any investigation or judicial proceeding that has subsequently been launched in Honduras: see, Amnesty International, *Honduras: José Eduardo López – 20 years later, it is time for justice*, 1 April 2001, AI Index: 37/002/2001.

[7] Conclusions and Recommendations of the Committee against Torture: Canada, U.N. Doc. CAT/C/XXV/Concl.4, 22 November 2000, para. 6(c).

[8] Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/55/290, 11 August, 2000, para. 28.

governments except in very narrow circumstances, such as lawsuits based on commercial activities, criminal activities, or injuries and losses occurring in Canada.

Mr. Bouzari has challenged this restriction on his ability to seek compensation by arguing that Canada's *State Immunity Act* does not accord with the Canadian *Charter of Rights and Freedoms* or with Canada's international obligations. He relies in particular on Article 14(1) of the Convention against Torture, which states:

> Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible...

The Canadian government has argued that article 14 is restricted to acts of torture that occur within a state's jurisdiction, despite the absence of any language in the article requiring this territorial limitation. Amnesty International notes, by contrast, that territorial limitations are present in articles 11 and 13 of the Convention. The drafting history of the Convention also supports the view that there is no territorial limitation to this article. An earlier draft of article 14 contained the phrase "committed in any territory under its jurisdiction", however this was dropped without an explanation.

Amnesty International takes the position that the absence of a territorial limitation in article 14 of the Convention should be interpreted to provide torture victims with the widest possible opportunity to obtain redress for torture. This would be consistent with the Convention's goal of bringing torturers to justice. Amnesty International considers it to be unreasonable to interpret the Convention so as to allow states to prosecute torturers for torture committed abroad, but not allow reparation for torture committed abroad.

The Ontario Court of Appeal accepted the Canadian government's position, stating:

> A full textual analysis of the provisions for the Convention shows that the absence of explicit territorial language does not necessarily mean the absence of territorial limitation. The text of the Convention itself simply provides no answer to the question.[9]

The matter is currently being appealed to the Supreme Court of Canada.

Recommendation 2

The Canadian government should enact the necessary legal provisions to recognize universal jurisdiction with respect to civil suits brought in Canadian courts seeking reparation for torture suffered abroad at the hands of foreign governments and to ensure that any such suits cannot be defended on the basis of state immunity.

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[9] *Bouzari v. Iran*, Quicklaw cite: [2004] O.J. No. 2800 (Quick Law), Docket C38295, para.76, June 30, 2004.

2. RETURN TO TORTURE; (ARTICLE 3)

Article 3 of the Convention states that "[n]o State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Amnesty International is concerned that Canadian law and practice does not conform to this obligation.

In June 2002, Canada passed new legislation, the *Immigration and Refugee Protection Act*[10] ("IRPA"), which directly impacts on this country's obligations under Article 3 of the Convention.

Although a number of the new provisions provide greater protection against return to torture, the law still allows for such removals in some circumstances. Among the improvements is a provision stipulating that IRPA "is to be construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory."[11]

Another significant change in the new legislation is an expanded category of persons who are entitled to refugee protection. In addition to finding persons to be Convention refugees, Canada's Immigration and Refugee Board ("IRB") can now determine claimants to be "persons in need of protection".[12] Included in the definition of "person in need of protection" are those "whose removal to their country… would subject them personally to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture."[13] Persons facing a risk of torture may be recognized, and given protection, at either a refugee determination hearing, or in the course of a pre-removal risk assessment ("PRRA")[14], an evaluation that did not exist prior to IRPA.

All of these are positive measures, improvements over the former *Immigration Act*. However, in Amnesty International's view, they do not go far enough, as there are *exceptions* to the general rule that persons facing a risk of torture will not be removed from Canada.

Although article 3 of the Convention provides for absolutely no exceptions to the prohibition against return to torture, the IRPA does set out circumstances where this may indeed occur. The exceptions concern persons who are inadmissible to Canada on grounds of security, violating human or international rights, serious criminality or organized criminality. Such persons, although ineligible to have their asylum claims determined by the IRB, may be granted a stay of removal from Canada through a PRRA application. Stays, however, will *not* be granted where the dangers posed to the public or to the security of Canada are found to outweigh the risk faced by such applicants if

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[10] S.C. 2001, c. 27, in force June 28, 2002.
[11] *Immigration and Refugee Protection Act*, s. 3 (3) (f).
[12] *Immigration and Refugee Protection Act*, s. 95 (1) (b).
[13] *Immigration and Refugee Protection Act*, s. 97 (1) (a).
[14] *Immigration and Refugee Protection Act*, sections 112 (1), 113 (c).

returned to their country.[15] In such cases, IRPA allows Canada to remove persons to countries where they would be in danger of being subjected to torture.

Similarly, persons alleged to have committed serious crimes, who are subject to an authority to proceed under Canada's *Extradition Act,* are ineligible for refugee determination by the IRB or for PRRA .[16] If ordered surrendered for extradition, the legislation allows for the possibility that such persons could also be removed from Canada to face a risk of torture.

Article 3 of the Convention clearly establishes an absolute prohibition on removal to torture, from which no derogation is permitted under any circumstances. By allowing for the possibility of such removals in its legislation, Canada is in contravention of its obligations under the Convention.[17]

In January 2002, the Supreme Court of Canada decided the case of *Suresh v. Canada (Minister of Citizenship and Immigration)*[18] that considered, among other issues, Canada's obligations under Article 3 of the Convention. The case involved a Sri Lankan refugee, Manickavasagam Suresh, whom Canada had determined to be inadmissible to Canada on grounds of security. Mr. Suresh argued that, if removed from Canada to Sri Lanka, he would be subjected to torture.

With respect to this issue, the Court applied section 7 of the *Canadian Charter of Rights and Freedoms*, which states that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Although holding that "deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the Charter", the Court found that such a removal could still occur in "exceptional circumstances".[19]

The Court stated: "We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified".[20] What those "exceptional circumstances" might be, however, the Court did not say. "The ambit of an exceptional discretion to deport to torture, if any," it stated, "must await future cases."[21]

In no decision subsequent to *Suresh* has a Court found "exceptional circumstances" to exist that would justify a person's removal from Canada to face a risk of torture. Nor has there been much jurisprudence that tries to define the ambit of "exceptional circumstances". In one decision, the Federal Court Trial Division found that "before deciding to return a refugee to torture, there must be evidence of a serious threat to

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[15] *Immigration and Refugee Protection Act*, s. 113 (d).
[16] *Immigration and Refugee Protection Act*, sections 105, 112 (2) (a).
[17] In 2000 this Committee reminded Canada that the obligation under article 3(1) prohibits *refoulement* to torture "whether or not the individual is a serious criminal or security risk." Conclusions and Recommendations of the Committee against Torture: Canada, Supra, footnote 7, para. 6(a).
[18] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.
[19] *Suresh*, supra, at paragraph 76.
[20] *Suresh*, supra, at paragraph 78.
[21] *Suresh*, supra, at paragraph 78.

national security."[22] That same decision held that in the balancing exercise contemplated by the PRRA, immigration authorities must consider any alternatives to deportation to torture.[23] It is clear that in a number of decisions, Courts have taken very seriously the general prohibition against removal to a risk of torture set out in *Suresh*.[24] Still, Amnesty International has serious concerns that the highest court in Canada has left open the possibility that returning someone to torture can go ahead in "exceptional circumstances."

Amnesty International has made representations to the Canadian government with respect to a number of cases where individuals are facing deportation from Canada under the "security certificate" process of the IRPA.[25] Under that process the individuals concerned are not provided full access to the evidence being brought against them, nor an opportunity to question the witnesses who are the source of that information. Amnesty International has raised concern that these individuals face a substantial risk of torture if removed from Canada and has urged that other steps be taken to bring the individuals to justice if there is credible evidence that they may have been involved in criminal acts. The Canadian government is still proceeding toward the eventual goal of deportation.

Recommendation 3

The Canadian government should amend Canada's Immigration and Refugee Protection Act to recognize the absolute nature of the obligation under article 3 of the Convention against Torture to refrain from deporting, extraditing, surrendering or otherwise removing from Canada any person to a country where he or she faces a substantial risk of torture.

3. TORTURE ABROAD; (ARTICLES 3, 5(1)(C), 10)

As highlighted in the introduction to this brief, a number of high profile cases of Canadians who have been subjected to torture abroad has generated unprecedented public concern in Canada. It has sparked considerable discussion about Canada's role in protecting Canadians from the risk of torture in other countries. Questions about Canada's role have, in some of the cases, highlighted concerns that Canada's security and intelligence practices may directly or indirectly expose Canadian citizens and other individuals to a serious risk of torture in other countries.

When Canadians are detained abroad, Canadian consular officials seek access so that they can offer consular advice and assistance to the individual concerned. Sometimes access is granted, sometimes not. Cases in which the detainee holds multiple

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[22] *Sogi v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1080 (QL), at paragraph 20.
[23] *Sogi*, supra, at paragraph 18.
[24] For example, see *Thuraisingam v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 746 (QL), *Romans v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1941 (QL), *Liang v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 970 (QL), and *Dinita v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 290 (QL), all decisions of the Federal Court Trial Division.
[25] Amnesty International has made representations with respect to the cases of Adil Charkaoui, Mahmoud Jaballah, Hassan Almrei, and Mohamed Harkat. The concerns are summarized in the organization's letter to Deputy Prime Minister Anne McLellan, 31 March 2004.

nationalities are particularly problematic. If the government which is holding the individual also considers him or her to be a national, access is often summarily denied. The Syrian and Iranian governments took this position, for instance, with respect to Maher Arar and Zahra Kazemi, respectively.

Consular access can be a critical means of preventing or monitoring for torture, as it is likely the only external access available to the individual, if he or she is denied visits with legal counsel and family. Even when access is granted, the visits are often not private and prison guards or other local government officials may be present, meaning that a frank exchange between the detainee and the consular official is unlikely. Visits in such circumstances are complex and particular skills are needed to be able to competently assess whether the detainee has been subjected to torture. This was an issue with respect to both William Sampson and Maher Arar. Amnesty International has urged Canada to press vigorously for consular access when Canadians are detained abroad, including when the detainee carried multiple nationalities.

Recommendation 4

The Canadian government should implement a comprehensive program of training for consular officers so as to better equip them to be able to conduct interviews with and make assessments of detainees who may be at risk of torture.

A number of the recent cases of Canadians who have experienced torture abroad have arisen in a national security context. Unspecified and classified allegations exist that the individuals concerned may be involved in or support "terrorist" activities of some description. However, the individuals have not been charged with any offence in Canada. Instead, they have, in varying circumstances, found themselves detained outside Canada where they have been held without charge or trial and subjected to torture.

Amnesty International has made extensive representations to the government about a number of such cases. In two instances the organization's representations to the government have been made public: Maher Arar and Muayyed Nureddin. Both were held in detention in Syria, Maher Arar for one year and Muayyed Nureddin for one month. Both have provided detailed and credible evidence as to torture they experienced while detained. Maher Arar was clandestinely rendered[26] to Syria by U.S. authorities, who had arrested him in New York City while Mr. Arar was in transit to his home in Canada following an extended family vacation in Tunisia. Muayyed Nureddin was arrested at the Syria/Iraq border while he was traveling to Damascus to catch a flight back to Canada after visiting his family in northern Iraq.

[26] Amnesty International has repeatedly expressed concern about the U.S. practice of "rendition", often termed extra-legal or extraordinary rendition, through which detainees are transferred secretly to or from U.S. custody, bypassing formal legal and human rights protections. Amnesty International has called on U.S. authorities to cease this practice, which the organization is concerned has led to serious human rights violations, including torture. Amnesty International, *United States of America – The threat of a bad example: Undermining international standards as "war on terror" detentions continue*, 19 August 2003.

Among the questions that arise in these cases are concerns that Canada may be either directly or indirectly putting individuals, including Canadian citizens, at risk of torture abroad through the sharing of security and intelligence information with other governments. With respect to the case of Maher Arar Amnesty International highlighted that the concerns were of sufficiently grave importance that a public inquiry was needed to ensure a full and independent investigation. The government agreed to convene such an inquiry in January 2004 and hearings began in June 2004. Amnesty International is an intervening party to that inquiry.

Amnesty International has urged that Canada take steps to ensure that Canada's human rights obligations, including the protection against torture, are at the heart of the country's security laws, policies and practices. The sharing of intelligence and information plays a critical role in ensuring security, fighting crime, and protecting human rights. Shared intelligence can play an important role in identifying and forestalling human rights abuses before they take place. Shared intelligence can play a role in apprehending individuals who have committed human rights abuses and ensuring they face justice. But shared intelligence, be it reliable or wholly lacking in credibility, can also lead to serious human rights violations, particularly when that information is further shared with security agencies in countries which regularly practice torture.

Amnesty International believes that it is time for governments around the world to look closely at this issue. Canada should take the lead, by putting in place a human rights protocol that will govern the country's intelligence-sharing relationships. Such a protocol should address, *inter alia*, the following points:

- Given that it is difficult to know where information will end up and who will make use of it once it is shared, extra care should be taken to ensure reliability before allowing information to be passed to officials in another country.
- Information that is shared should be clearly identified according to the degree to which it is considered trustworthy and has been corroborated.
- Mechanisms should be put in place to monitor the subsequent use of shared information.
- There should be a binding means for Canada to object to any intended further use of the information that is likely to lead to torture or other serious human rights violations.
- Specific and obligatory assurances should be obtained from the other government, by Canada, that shared information will not serve as the basis for or be used in any way that causes serious human rights violations, including torture.
- Canada should obtain a clear commitment from any country with which it shares information that Canadian consular officials will be granted immediate and unhindered access when a Canadian national (including a Canadian national who may hold multiple nationalities) is taken into detention.
- Canada should obtain a clear commitment from any country with which it shares information that that the practice of "extra-legal renditions" will cease, and that the procedures used and decisions taken to deport or exclude anyone from either country will be in full accord with applicable national and international legal

standards, including the prohibition on sending anyone to a serious risk of being tortured.

Recommendation 5

The Canadian government should implement a Human Rights Protocol that would be applied in all security and intelligence sharing agreements and arrangements. The Protocol should specifically implement Canada's obligation to refrain from committing or being complicit in committing torture as well as the obligation to actively prevent torture from occurring.

4. INDIGENOUS PEOPLES; (ARTICLES 1, 11, 12, 16)

In Amnesty International's submission to the Committee in 2000 the organization noted that "the way in which Canada's [Indigenous] people are dealt with in the justice and policing system often gives rise to human rights concerns. Some of those concerns involve provisions of the Convention against Torture."[27] The submission highlighted a number of cases in Canada in which Amnesty International was concerned that allegations of human rights violations against Indigenous peoples by police and other law enforcement officials, including possible instances of torture or ill-treatment, had not been impartially and fully investigated. In response to these and other concerns, the Committee recommended that Canada:

> Consider the creation of a new investigative body for receiving and investigating complaints regarding the Convention … including allegations related to members of the indigenous population.[28]

Amnesty International is concerned that Canada has not taken steps toward implementing this recommendation, which the organization believes would strengthen accountability and oversight within Canada with respect to allegations of torture and ill-treatment, but could also serve as a model to the rest of the world.

Developments in Canada since 2000 highlight continued need for greater independent oversight of police and other state agents.

In its brief to the Committee in 2000 Amnesty International highlighted the case of Dudley George, killed by an Ontario Provincial Police officer in the midst of a land claims protest on September 6, 1995.[29] Dudley George himself was killed. However there are concerns that his brother, Bernard George and other protesters were beaten by police in circumstances that may amount to torture or to ill-treatment. On 12 November 2003, the province of Ontario announced that a full public inquiry would be held into the events surrounding the death of Dudley George. The inquiry is also tasked to make

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[27] Amnesty International Canada, *It's Time: Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada*, November 2000, p. 8.
[28] Footnote 7, para. 6(e).
[29] Footnote 27, p.9.

recommendations directed to the avoidance of violence in similar circumstances. That inquiry is currently underway.

Amnesty International remains concerned that -- despite public outcry and a call by the UN Human Rights Committee in 1999 to establish such an inquiry -- it took eight years and a change of government in Ontario to call an inquiry that all along has been obviously and urgently needed. Amnesty International also notes that the province of Ontario already has an independent civilian body, the Special Investigations Unit ("SIU"), mandated to investigate all cases of civilian deaths or serious injuries possibly resulting from criminal offences committed by police officers. However, the organization's review of the events of September 6, 1995 and the subsequent investigation raises questions about whether the SIU has sufficient powers to do its job effectively.

In investigating the severe beating of Bernard George and other protestors during the confrontation in which Dudley George was shot, the SIU initially attempted to gain access to photographs of the officers who were on scene to show to Bernard George and other witnesses. However, the Ontario Province Police Association objected and sought a court injunction to prevent the release of the photographs. The SIU then dropped its attempts to get the photographs. There were never any charges laid in connection with these beatings.[30]

On October 4, 2001 the British Columbia Provincial Police Complaint Commissioner called for a coroner's inquest into the death of Frank Joseph Paul, a Mi'Kmaq man who was found dead in an alley in Vancouver's Downtown Eastside early in the morning on December 6, 1998, after twice being arrested by city police.[31] On January 16, 2004, a new Provincial Police Complaint Commissioner called for a public inquiry into Mr. Paul's death, noting that "the troubling circumstances of Mr. Paul's death are... in need of full public examination to determine what factors led to his death and how a similar tragedy might be avoided in the future."[32] Amnesty International is concerned that the allegations about how Mr. Paul was treated before his death raise concerns about possible torture or ill-treatment.

Both the Vancouver Police and the government of British Columbia have indicated they do not agree with the Complaint Commissioner's recommendation. The government has therefore failed to convene the inquiry.[33]

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[30] Amnesty International, *Canada: Why there must be a public inquiry into the police killing of Dudley George*, 4 September 2003, AI Index: 20/002/2003, p.8.

[31] Letter to Don Morrison, Police Complaint Commissioner from the Honourable R.T. Coleman, Solicitor General, 20 December 2001.

[32] Office of the Police Complaint Commissioner, *Frank Joseph Paul: Reasons for Decision*, 16 January 2004, p.1.

[33] Vancouver Police Department, Office of the Chief Constable, Media Release, *Death of Frank Paul*, 28 April 2004, p.3, CBC News, *No inquiry into death of Frank Paul*, 18 March 2004, http://vancouver.cbc.ca/regional/servlet/View?filename=bc_coleman_two20040318.

A postmortem examination had determined that Mr. Paul had died of hypothermia, accelerated by rain soaked clothing. Police had arrested Mr. Paul on the previous evening for public intoxication and taken him to a police jail where he was held just over 6½ hours and then released. Two hours later he was placed in custody a second time after police found him again intoxicated and unable to walk or take care of himself. According to the Provincial Police Complaint Commissioner, five minutes after he was brought in for the second time, "the jail surveillance video depicts the [police] wagon driver and a Provincial Correctional Guard dragging a still rain-soaked, motionless Frank Paul from the elevator to the police wagon along the floor of the wagon bay area...Mr. Paul was placed in a nearby alley. Mr. Paul's lifeless body was found at 2:41 early the next morning at that same location.[34]

Recommendation 6

The Canadian government should work with all provincial and territorial governments in Canada to ensure that independent, expert bodies with sufficient power to initiate and conduct thorough and impartial investigations of any allegations of grave human rights abuses by police exist in every jurisdiction in the country.

A recent Amnesty International report about discrimination and violence against Indigenous women in Canada notes that there are significant gaps in the way police record and share information about the ethnicity of missing persons and victims of violent crime.

> Reports of violent crimes or missing persons may be investigated by municipal police forces, provincial forces, Indigenous police forces or the national police force, the Royal Canadian Mounted Police (RCMP). Police have said that they don't necessarily record the ethnicity of crime victims or missing persons when entering information into the Canadian Police Information Centre database, the principle mechanism for sharing information among police forces in Canada. According to the Canadian Centre for Justice Statistics, in 11 percent of homicides in 2000, Canadian police did not record or report on whether or not the victim was an Indigenous person.
>
> An RCMP task force is currently investigating 40 unsolved murders and 39 long term missing persons cases in the province of Alberta. All but three of the victims are women. These cases were identified in the course of what the RCMP describes as a "comprehensive analysis" meant to identify possible links and create a profile of common risk factors. A spokesperson for the project interviewed by Amnesty International was unable to say how many of the missing women are Indigenous saying there was "not a lot of focus on this.[35]

[34] Footnote 32, p.2.

[35] Amnesty International, *Stolen Sisters: Discrimination and violence against Indigenous women in Canada, A Summary of Amnesty International's Concerns*, 4 October 2004, AI Index: AMR 20/001/2004, pp.2-3.

Amnesty International is concerned that the failure to systematically record such information may mask serious patterns of violence against Indigenous women and reduce the capacity of both police and social service organizations to respond effectively to prevent violence. The report does not allege that police forces themselves have committed the acts of violence against Indigenous women. It highlights however the duty of governments in Canada to demonstrate due diligence in responding to and preventing human rights abuses committed by private individuals, including acts of violence against Indigenous women which could constitute torture or ill-treatment. A failure to fulfill this duty of due diligence may raise concerns about possible "acquiescence" by the state under article 1 of the Convention. As an important component of fulfilling the duty of due diligence, Amnesty International has urged the Canadian government to ensure that adequate statistical information is gathered and analyzed so as to understand and properly respond to patterns of violence against Indigenous women in Canada.

Recommendation 7

The Canadian government should provide funding for comprehensive national research on violence against Indigenous women, including the creation of a national registry to collect and analyze statistical information from all jurisdictions.

Amnesty International has received reports regarding a number of federally sentenced Indigenous prisoners who allege that they have been unable to receive adequate access to elders and ceremonies. Amnesty International is concerned that this lack of access may either be arbitrary or may have been used as a punitive measure.

In the section of its report to this Committee dealing with article 11 of the Convention against Torture, the Canadian government highlights section 3 of the *Corrections and Conditional Release Act*[36] and its focus on rehabilitation of offenders and their reintegration in to the community as law-abiding citizens.[37] Amnesty International considers that in order for Indigenous offenders to receive the necessary support for their rehabilitation and reintegration into society they must have regular and reliable access in prison to culturally appropriate services.

Amnesty International considers that Commissioner's Directive 702: Aboriginal Programming, adopted by Correctional Service Canada, is a strong blueprint for the protection of the basic rights of Indigenous inmates. However, the reports Amnesty International has received give rise to the concern that this Directive may not be well understood within Correctional Services, may not receive adequate funding, and that staff may not be adequately trainied and actively support its implementation. Amnesty International has been informed that Correctional Services is undertaking a review of the implementation of Directive 702.[38] It is not yet clear how widely Indigenous

[36] S.C. 1992, c.20.

[37] Fourth periodic report of Canada to the Committee against Torture, U.N. Doc. CAT/C/55/Add.8, 9 January 2004, para.91.

[38] Letter to Amnesty International from Don Head, Acting Commissioner, Correctional Service Canada, 31 August 2004.

organizations and communities will be consulted in that review process. We have been informed that they will not be consulted if the changes being contemplated are technical in nature but will be consulted with respect to any "content and/or significant change." Amnesty International is of the view that the issues at stake in this Directive are not merely technical in nature and should be the subject of broad consultation with Indigenous organizations and communities.

Recommendation 8

The Canadian government must put in place a system to consistently monitor the implementation of Directive 702: Aboriginal Programming, and ensure that all staff are adequately trained in the Directive to support its full and effective implementation.

5. THE USE OF TASER GUNS; (ARTICLE 16)

Since April 2003, in Canada, nine people have died following the use of a taser gun by police. Inquests into those deaths have not yet been completed. There are therefore no definitive findings as to whether tasers were a primary or contributing cause of any of the nine deaths. There have also been numerous reports of use of tasers in circumstances where allegations have been made that there use was excessive or inappropriate, including against people not actively resisting arrest and nonviolent protesters.[39]

In one high profile case, a complaint was made to the Office for Public Complaints against the RCMP, involving an incident that took place during demonstrations at the Summit of the Americas in Quebec City in April 2001. The individual against whom the taser was used was "not struggling and represented no threat to the members, to himself, to the public or to property." The Commission found that in these circumstances the use of the taser was a "clear abuse of authority."[40] Official reports such as this raise the concern that if not properly regulated, tasers can be used in circumstances tantamount to ill-treatment.

Amnesty International has followed with concern the growing use of taser guns by police forces in Canada. Amnesty International does encourage police forces to make use of non-lethal means when deploying appropriate levels of force. This is in keeping with international standards with respect to the use of force by law enforcement officials. The organization is concerned, however, that the taser may be open to misuse and further that the effects of its use are not yet fully understood. In particular, Amnesty International has pointed to concerns that individuals with weakened hearts and those under the influence of drugs may be particularly susceptible to harm and even death when subdued with a taser. The organization has therefore called on police forces across Canada to temporarily suspend the use of tasers until comprehensive and independent research is conducted. On the basis of that research, governments in Canada should decide whether tasers should be used by police and if so, what rules, safeguards and oversight procedures would be put in place to prevent misuse of the weapon.

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[39] Amnesty International Annual Report, *Canada*, 2004, p.104.

[40] Commission for Public Complaints against the RCMP, Chair's Interim Report, File No. PC-2001-0409, 29 October 2003, p.13.

Amnesty International does welcome the review called for by the Canadian Association of Chiefs of Police,[41] but the organization remains concerned that the review will be limited to existing research. Amnesty International is of the view that the research to date is inadequate and contradictory. New research is required, as noted above.

Recommendation 9

The Canadian government should ensure that the use of tasers in Canada is suspended pending comprehensive and independent research to determine whether they should be used and if so, what rules, safeguards and oversight procedures are required.

6. FEDERALLY-SENTENCED WOMEN PRISONERS; (ARTICLE 11)

Amnesty International has expressed concern that significant reforms are needed to ensure stronger protection of the fundamental rights of federally-sentenced women prisoners in Canada, including the right to be protected from torture and ill-treatment.[42]

Referring to a Commission of Inquiry into the situation of federally-sentenced women prisoners at the now-closed Prison for Women in Kingston, the Canadian government's report to the Committee against Torture states that "... the majority of then-Madame Justice Louise Arbour's recommendations were accepted by Correctional Services and have since been implemented."[43] Amnesty International is concerned, however, that a number of important recommendations from the Arbour Inquiry remain unimplemented.

Among the many issues of concern highlighted in the Arbour Inquiry is the practice of segregation. The report notes that: "[i]t is not surprising that the prolonged deprivation and isolation associated with the segregation of these inmates was seriously harmful to them."[44] A recent report from the Canadian Human Rights Commission outlines several areas of concern with respect to the protection of the basic rights of federally sentenced women.[45] This includes issues with respect to segregation and the support, rehabilitation and reintegration of Aboriginal federally sentenced women.

Recommendation 10

The Canadian government should put in place structures and processes to ensure that the power to segregate inmates, particularly federally sentenced women and Aboriginal inmates, is only exercised when absolutely necessary and when all other alternatives have been exhausted.

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[41] Canadian Association of Chiefs of Police, News Release, 10 August 2004.

[42] Amnesty International Canada, *Equal Rights: A brief to the United Nations Committee on the Elimination of Discrimination against Women*, December 2002, pp.5-7.

[43] Footnote 37, para.99. See also, Commission of Inquiry into certain events at the Kingston Prison for Women, 1996.

[44] Commission of Inquiry, Ibid., para. 2.8.3.5.

[45] Canadian Human Rights Commission, "Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women ," December 2003.

7. RATIFICATION OF THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Amnesty International welcomed the adoption by the United Nations in December 2002 of the Optional Protocol to the Convention against Torture. This important new instrument, which establishes a national and international level system for the inspection of places of detention, stands to make a critical contribution to efforts to prevent torture.[46]

Amnesty International has repeatedly called on the Canadian government to ratify the Optional Protocol. The organization has highlighted that this is necessary both as a means of ensuring there is a system of oversight in place for centres of detention in Canada, but equally as an important step towards securing sufficient ratifications worldwide so that the Optional Protocol enters into force[47] and begins to provide global oversight in countries where national-level efforts to prevent torture are inadequate.

At present discussions are underway among federal, provincial and territorial governments in Canada about the possibility of Canadian ratification. Amnesty International has raised the issue with each of those 14 governments. Some governments have expressed concern that it would be costly or cumbersome to establish the necessary national level inspection bodies in each of those 14 jurisdictions. Amnesty International's research, however, indicates that bodies already exist in all or most jurisdictions in Canada that could readily assume the obligation to carry out the necessary investigations, including correctional investigators and ombudspersons' offices.

Recommendation 11

The Canadian government should ratify the Optional Protocol to the Convention against Torture without any further delay.

[46] Amnesty International, *UN Adopts Protocol to Prevent Torture*, IOR 40/042/2002, 18 December 2002.
[47] Pursuant to article 28(1) of the Optional Protocol, 20 ratifications are required. As of 5 October, 2004, there are 29 signatures but only 5 ratifications.

SUMMARY OF RECOMMENDATIONS

1. Canada should adopt a clear policy preferring extradition or prosecution over deportation in every case of an alleged torturer who is present in a territory under the jurisdiction of Canada, where the evidence warrants it.

2. The Canadian government should enact the necessary legal provisions to recognize universal jurisdiction with respect to civil suits brought in Canadian courts seeking reparation for torture suffered abroad at the hands of foreign governments and to ensure that any such suits cannot be defended on the basis of state immunity.

3. The Canadian government should amend Canada's Immigration and Refugee Protection Act to recognize the absolute nature of the obligation under article 3 of the Convention against Torture to refrain from deporting, extraditing, surrendering or otherwise removing from Canada any person to a country where he or she faces a substantial risk of torture.

4. The Canadian government should implement a comprehensive program of training for consular officers so as to better equip them to be able to conduct interviews with and make assessments of detainees who may be at risk of torture.

5. The Canadian government should implement a Human Rights Protocol that would be applied in all security and intelligence sharing agreements and arrangements. The Protocol should specifically implement Canada's obligation to refrain from committing or being complicit in committing torture as well as the obligation to actively prevent torture from occurring.

6. The Canadian government should work with all provincial and territorial governments in Canada to ensure that independent, expert bodies with sufficient power to initiate and conduct thorough and impartial investigations of any allegations of grave human rights abuses by police exist in every jurisdiction in the country.

7. The Canadian government should provide funding for comprehensive national research on violence against Indigenous women, including the creation of a national registry to collect and analyze statistical information from all jurisdictions.

8. The Canadian government must put in place a system to consistently monitor the implementation of Directive 702: Aboriginal Programming, and ensure that all staff are adequately trained in the Directive to support its full and effective implementation.

9. The Canadian government should ensure that the use of tasers in Canada is suspended pending comprehensive and independent research to determine whether they should be used and if so, what rules, safeguards and oversight procedures are required.

10. The Canadian government should put in place structures and processes to ensure that the power to segregate inmates, particularly federally sentenced women and Aboriginal inmates, is only exercised when absolutely necessary and when all other alternatives have been exhausted.

11. The Canadian government should ratify the Optional Protocol to the Convention against Torture without any further delay.

Amnesty
International

PROTECTION GAP:
STRENGTHENING CANADA'S COMPLIANCE WITH ITS INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Amnesty International Canada's Submission to the
United Nations Human Rights Committee
on the occasion of the consideration of the Fifth Periodic Report of Canada

Amnesty International Canada
English branch
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Amnistie Internationale
Section Canadienne francophone
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Canada prides itself, with considerable justification, on its record of protecting human rights domestically, as well as its commitment to promoting stronger human rights protection worldwide. Amnesty International recognizes that Canada has done much in both regards.

The occasion of the review of Canada's record of compliance with its obligations under the International Covenant on Civil and Political Rights (ICCPR), however, provides an important reminder that there are still a number of areas where significant improvements in Canada's human rights performance are needed. Some, such as the protection of the basic rights of Indigenous peoples, are longstanding and very serious areas of concern. The need to address these shortcomings is critical; both to ensure the protection of the fundamental rights of those individuals and sectors of Canadian society who are effected, and also to ensure that Canada's human rights record stands strong as an example to other countries and helps bolster human rights protection the worldover.

This briefing elaborates in more detail on some of the issues outlined in Amnesty International's summary of concerns submitted to the Committee prior to the pre-sessional meeting on Canada, held during its 84th session last July. It highlights Amnesty International's concerns and recommendations for improvement in seven principal areas:

- The compliance and implementation gap
- Civil remedies for human rights violations
- Protecting the rights of Indigenous peoples
- Protecting the rights of refugees
- Human rights and counter-terrorism
- Human rights and law enforcement
- Ratification of the Second Optional Protocol to the ICCPR

I. THE COMPLIANCE AND IMPLEMENTATION GAP – ICCPR article 2

Amnesty International continues to have serious concerns about the lack of coordination among the federal, provincial and territorial governments in Canada when it comes both to the ratification of human rights treaties and the subsequent implementation of and compliance with international human rights obligations, including the provisions of the ICCPR. Amnesty International is also concerned that the processes in place with respect to ratification and implementation lack public transparency.

Decisions with respect to ratification of human rights instruments are made either entirely by the federal government or when it is felt that the treaty touches on areas that fall within provincial level constitutional jurisdiction, consultations are launched within the Continuing Committee of Federal, Provincial and Territorial Officials on Human Rights, an inter-governmental group established in 1975. The committee, which is comprised of bureaucrats, meets behind closed doors and has not permitted civil society representatives to participate, observe or even make occasional limited submissions.

More recently, for treaties that do not come within provincial jurisdiction, but which may implicate a number of different federal government ministries, a cross-departmental process of occasional meetings at the level of Deputy Ministers has been initiated. Again the proceedings are not publicly accessible and it is not possible for civil society groups to attend or make submissions. Amnesty International is aware, for instance, that the Deputy Ministers have

recently discussed Canada's possible ratification of the Second Optional Protocol to the ICCPR, but was not able to attend or contribute to that meeting.

Amnesty International recognizes that government officials may need opportunities to meet and discuss issues with respect to the ratification of human rights treaties in confidence. However, it is also important that discussions and decisions regarding treaty ratification be as broadly open and accessible to the public as possible. There is no other committee or governmental process charged with responsibility for treaty ratification that is open to the public. Furthermore, it is notable that there has been no ministerial level meeting within Canada of federal, provincial and territorial ministers responsible for human rights since 1988.)

These concerns about the lack of public transparency with regard to ratification of human rights treaties apply equally to the crucial step of ensuring full implementation of and compliance with Canada's obligations, such as the ICCPR. Contentious questions about divided federal/provincial jurisdiction or overlapping responsibility among various federal departments frequently arise when UN human rights treaty bodies issue Concluding Observations following the review of periodic reports from Canada, or publish their views regarding an individual petition brought against Canada. In such instances it is unclear which officials, if any, are taking the lead in ensuring Canadian compliance. Discussions may occur within the Continuing Committee or among the Deputy Ministers, but are not in any way open to the public.

Civil society groups have suggested that once Concluding Observations or Views on an individual petition have been issued by a body such as the Human Rights Committee, the government should prepare a public Plan of Action that outlines the steps to be taken to ensure compliance and specify which government departments bear responsibility. The need for such a process is particularly acute in cases where there is a failure, sometimes longstanding, to comply with UN-level recommendations, but where there is no public reporting at the national level about the non-compliance. That has been the case, for example with the Human Rights Committee's views issued with regard to the petition brought on behalf of the Lubicon Cree (discussed later in this brief, in section II(d)); and also in cases where Canadian authorities have chosen not to comply with requests for interim measures made by UN treaty bodies and special procedures, such as the request made by this Committee for a suspension of the deportation of Mansour Ahani to Iran in 2002.[1]

The lack of transparency in these processes is particularly problematic because the federal government has frequently asserted that even though it is responsible for ratification of and compliance with human rights treaties, it cannot ensure implementation when provincial level powers are implicated. This was the case for instance with respect to the Human Rights Committee's recommendation to Canada in 1999 to establish a public inquiry into the 1995 police killing of Dudley George.[2] This Committee has highlighted that a national level government cannot "point to the fact that an action incompatible with the provisions with the ICCPR was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility."[3] Given that such disputes between levels and departments of government within Canada often become obstacles to implementation and compliance, it is crucial that there be processes in place that are publicly accessible so as to ensure broad public understanding of and debate about these disputes.

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[1] Communication No. 1051/2002, U.N. Doc. CPR/C/80/D/1051/2002(2004).
[2] *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105, 7 April 1999, para. 11.
[3] UN Human Rights Committee, General Comment No. 31, para. 4.

Amnesty International has asked Canada to take steps to improve the coordination and public transparency regarding ratification of and compliance with international human rights treaties.[4] A meeting of federal, provincial and territorial ministers with responsibility for human rights issues, long overdue, would provide a valuable forum for agreeing to a new approach. A report published in December 2001 from the Standing Committee on Human Rights of the Senate of Canada highlighted these same concerns and made similar recommendations. The Committee noted that "there appears to be a significant democratic deficit with respect to human rights in Canada, particularly in the area of the acceptance and implementation of Canada's international human rights commitments."[5] The report calls for a parliamentary human rights committee to be established, with broad powers to oversee Canada's compliance with international human rights obligations.

Decisions about ratifying human rights treaties and measures to ensure compliance with international human rights obligations are matters deserving of serious public consideration. Canada's approach at present is opaque and difficult for members of the public to understand. An improved approach would certainly stand to strengthen Canada's overall commitment to human rights protection.

Amnesty International believes that the Canadian government should establish a publicly accountable and authoritative intergovernmental body to monitor and coordinate compliance with Canada's international human rights obligations.

II. THE RIGHT TO A REMEDY – ICCPR article 2

Amnesty International is concerned that the Canadian government has taken the position that the concept of state immunity prevents victims of serious human rights violations from obtaining redress in Canadian courts against governments responsible for the violations they have experienced. They have also asserted that universal jurisdiction, which applies to the criminal prosecution of certain human rights violations such as torture, does not extend to civil suits for redress.[6] However, accountability and justice in the face of torture and other crimes subject to universal jurisdiction is not only a criminal law issue.

The Special Rapporteur on Torture has highlighted the critical importance of the right of survivors of torture to obtain reparations for what they have suffered. He notes that:

> "beyond the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts, has an inherent preventive and deterrent aspect."[7]

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[4] *Above all Else: A Human Rights Agenda for Canada*, Amnesty International Canada, December 2004, pp. 17-18.

[5] *Promises to Keep: Implementing Canada's International Human Rights Obligations*, Report of the Standing Senate Committee on Human Rights, December 2001, pg. 17.

[6] *Bouzari v. Iran*, Quicklaw cite: [2004] O.J. No. 2800 (Quick Law), Docket C38295, June 30, 2004.

[7] Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/55/290, 11 August, 2000, para. 28.

Houshang Bouzari is a Canadian citizen who attempted in a Canadian court to sue the government of Iran for torturing him in 1993, prior to his arrival in Canada. His attempt to obtain redress encountered an obstacle in Canada's *State Immunity Act*, which limits lawsuits against foreign governments except in very narrow circumstances, such as lawsuits based on commercial activities, criminal activities, or injuries and losses occurring in Canada. Mr. Bouzari challenged this restriction on his ability to seek compensation by arguing that Canada's *State Immunity Act* does not accord with the Canadian *Charter of Rights and Freedoms* or with Canada's international obligations.

Mr. Bouzari relied on a number of international human rights provisions in advancing his case, most particularly Article 14(1) of the Convention against Torture, which states:

> "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible..."

The Canadian government has argued that article 14 is restricted to acts of torture that occur within a state's jurisdiction, despite the absence of any language in the article requiring this territorial limitation. Amnesty International has taken the position that the absence of a territorial limitation in Article 14 of the Convention should be interpreted to provide torture victims with the widest possible opportunity to obtain redress for torture. In our view that position is bolstered by the provisions of Article 2(3)(a) of the ICCPR:

> "... any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity".

Amnesty International considers it to be unreasonable to interpret international human rights obligations so as to allow states to prosecute torturers for torture committed abroad, but not allow reparation for torture committed abroad (footnote: ref to AI docs)[8]. The Ontario Court of Appeal accepted the Canadian government's position,[9] and the Supreme Court of Canada declined to hear an appeal of the matter. Earlier this year, however, the Committee against Torture called on Canada to:

> "review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture."[10]

Amnesty International believes that the Canadian government should enact the necessary legal provisions to recognize jurisdiction with respect to civil suits brought in Canadian courts seeking reparation for crimes against humanity, war crimes, torture and other human rights violations subject to universal jurisdiction suffered abroad at the hands of foreign governments and to ensure that any such suits cannot be defended on the basis of state immunity.

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[8] *Redoubling the Fight Against Torture – Amnesty International's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report from Canada*, 8 October 2004, pp. 3-4.

[9] *Bouzari v. Iran*, footnote 6, para.76.

[10] *Conclusions and recommendations of the Committee against Torture – Canada*, U.N. Doc. CAT/C/CO/34/CAN, 34th session, May 2005, para. 5(f).

III. PROTECTING THE RIGHTS OF INDIGENOUS PEOPLES

When Canada appeared before the UN Human Rights Committee in 1999, government officials acknowledged that the plight of Indigenous peoples was "the most pressing human rights issue facing Canadians."[11] Sadly, six years later that assessment almost certainly still holds true. Amnesty International has serious concerns about the protection of the basic rights of Indigenous peoples in a wide number of areas.

a) Violence against Indigenous women – ICCPR articles 2, 3

According to a 1996 Canadian government statistic, Indigenous women between the ages of 25 and 44 with status under the federal Indian Act, are five times more likely than other women of the same age to die as the result of violence.[12] Unfortunately, there are significant gaps in available information, including the fact that police often fail to record when the victims of violent crimes are Indigenous. Incomplete information about the true scale or the circumstances of violence against Indigenous women in Canada results in public policy based on questionable assumptions rather than fact.

Amnesty International's own research points to the role of discrimination in fuelling violence against Indigenous women, in denying Indigenous women the legal protection they deserve or in allowing the perpetrators to escape justice. More specifically, Amnesty International's research has indicated three critical factors: 1) a history of government policies that have broken up and dispossessed Indigenous families and communities has contributed to large numbers of Indigenous women living in situations of extreme economic and social marginalization where they face an increased risk of violence; 2) various levels of government have failed to provide stable, adequate funding to culturally appropriate services to assist the growing numbers of Indigenous women living in urban centers escape the threat of violence; and 3) police forces across Canada have largely failed to recognize and respond adequately to the specific threats faced by Indigenous women.[13]

Amnesty International believes that the Canadian government should:

- **Ensure collection of accurate information on the extent of violence against Indigenous women.**
- **Provide adequate sustained funding to services assisting Indigenous women escape situations of violence or access the justice system.**
- **Ensure that all police forces work with Indigenous women's organizations to develop policies and protocols that will ensure an appropriate and effective response to reports of missing persons or other threats to the safety of Indigenous women and girls.**

b) Indigenous children in state care – ICCPR articles 18(1), 27

The 1996 Canadian Royal Commission on Aboriginal Peoples recognized the disastrous consequences of past policies aimed at the destruction of Indigenous cultures, including the forced removal of Indigenous children from their families and communities to attend residential

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[11] Concluding observations of the Human Rights Committee: Canada, footnote 2, para. 7.

[12] Aboriginal Women: A Demographic, Social and Economic Profile, Indian and Northern Affairs Canada, Summer 1996.

[13] *Canada, STOLEN SISTERS – Discrimination and Violence Against Indigenous Women in Canada, A Summary of Amnesty International's Concerns*, October 2004, AI Index AMR 20/001/2004.

schools.[14] It has been estimated that there are now three times the number of Indigenous children in state care than at the peak of the residential school era.[15] The federal government, Indigenous children are four to six times more likely than non-Indigenous children to be removed from their families and placed in the care of the state[16] while a recent study of three sample provinces found that First Nations children with status under the Indian Act were fifteen times more likely than other children to be removed from their families.[17]

While removal of children from their families is sometimes necessary to guarantee their health and safety, it is acknowledged in international human rights law that it is preferable, whenever possible, to ensure children's welfare within their culture and community to help foster the sense of identity, belonging and self-worth that is a vital part of growing up.[18] This is particularly important for Indigenous children who may lose the opportunity to learn the traditions and values of their own culture if they are removed from their families for too long.

In 2000, the federal government acknowledged that chronic underfunding of child and family services in Indigenous communities mean that Indigenous communities were often denied access to services that could provide for Indigenous children's welfare while keeping them within their families and communities.[19] Of particular concern was the lack of adequate funding for preventative and early intervention programs that could address emerging problems before the situation necessitated the removal of children from their families. In 2000, the average federal funding for Indigenous child and family services was 22% lower per child than what provincial governments provided for non-Indigenous children. This is despite the higher costs of providing services in small and remote communities and the ongoing impacts of the residential school experience and other federal policies on the stability of Indigenous communities. Amnesty International is concerned that the federal government has not taken sufficient measures to address this gap and many Indigenous child and family service organizations believe that the gap has continued to widen over as there has been no adjustment to keep pace with increases in the cost of living over the last ten years.[20]

Amnesty International believes that the Canadian government must act immediately to end the disparity in funding for Indigenous child welfare services and ensure that the best interests of Indigenous children are protected by effective preventative and early intervention programs.

c) Arbitrary detention and inhumane treatment of persons in mental distress – ICCPR articles 7, 9, 10

On the night of 28 January 2000, Darrell Night, a 34-year-old member of the Saulteaux First Nation, was picked up by Saskatoon police, driven to an industrial park on the outskirts of town

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[14] Report of the Royal Commission on Aboriginal Peoples (RCAP), 1996.
[15] First Nations Child and Family Caring Society of Canada. UNCRC Day of General Discussion: Children without Parental Care - The Chance to Make a Difference for this Generation of Indigenous Children: Learning from the Lived Experience of First Nations Children in the Child Welfare System in Canada. 16 August 2005. www.fncfcs.com
[16] "Building a Brighter Future for Urban Aboriginal Children: Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities," June 2003, p.17.
[17] The First Nations Child and Family Caring Society of Canada. *Wen: de- We are coming to the light of day*. October 2005. p. 44. www.fncfcs.com
[18] Convention on the Rights of the Child, articles 20 and 30.
[19] First Nations Child and Family Services Joint National Policy Review, June 2000.
[20] *Wen: de- We are coming to the light of day*. Supra footnote 17.

and abandoned. Night was intoxicated and the temperature was far below zero: it is unlikely that he would have survived if he had not been lucky enough to get the help of a security guard at a nearby power plant. Night's testimony led to inconclusive investigations into the deaths of three other Indigenous men found on the outskirts of Saskatoon, as well as to a provincial plan to reform the treatment of Indigenous persons by the justice system.[21]

There are disturbing similarities between the arbitrary detention and reckless abandonment of Darryl Night and the death of Frank Joseph Paul who died of hypothermia in an alley in Vancouver's Downtown Eastside on the morning on December 6, 1998 after twice being in the custody of Vancouver City police the previous night. Picked up for public intoxication on the night of December 5, Mr. Paul was held for just over 6 hours in the "drunk tank" of a police jail and then released. Two hours later he was placed in custody a second time after police again found him intoxicated and unable to walk or take care of himself. This time he was at the jail only five minutes before his unconscious and rain soaked body was dragged out again, reportedly on the instruction of an officer to "breach Mr. Paul out of the area".[22] Despite the requests of two successive Police Complaints Commissioners the provincial government has refused to hold a public inquiry into his death.

In Saskatchewan, some police have used the term "starlight tours" to describe the practice of picking up apparently intoxicated individuals and then dropping them off at a remote location.[23] In other jurisdictions, similar practices of forcibly removing intoxicated individuals to out of the way places is reportedly referred to as "breaching," the term used by the officer who ordered the removal of Frank Joseph Paul. The fact that such terms have entered police terminology is one indication that the practice is likely not restricted to a few isolated incidents and deserves careful consideration.

Police officers have a general duty to uphold the rights and safety of the public at large and a specific duty to ensure the welfare of individuals in their custody. Officers who encounter a person who is severely intoxicated or in mental distress must act not only to prevent this person causing harm to others but also to ensure that this person receives the assistance he or she may require for his or her own welfare and safety. It is unacceptable – and contrary to Canadian laws – for officers to bring severely intoxicated or mentally distressed individuals into their custody without an intention to ensure they receive the medical assistance they require, much less to deliberately transport that person to a place where they face continued or even greater risk.

Because the practice of breaching is informal, there may be no record of the individual being in custody. As a consequence, officers may enjoy virtual impunity for abuse they may commit in the course of the breach. The lack of accountability is compounded by systemic barriers of discrimination that may prevent Indigenous witnesses coming forward and by the fact that in almost all jurisdictions in Canada, allegations of abuses by police are investigated by the implicated police force.

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[21] *Creating a Healthy, Just, Prosperous and Safe Saskatchewan: A response to the Commission on First Nations and Métis Peoples and Justice Reform*, Government of Saskatchewan, May 2005.

[22] Frank Joseph Paul: Reasons for the Decision. Dirk Ryneveld, Police Complaint Commissioner, 16 January, 2004.

[23] Federation of Saskatchewan Indian Nations Justice Secretariat. Final Submission. Commission on First Nations and Métis Peoples and Justice Reform. February 3, 2004.

Amnesty International believes that the Canadian government should:

- **Ensure the provision of effective and culturally appropriate alternatives to the arrest of individuals in agitated states due to alcohol or substance abuse.**
- **Strengthen police capacity to fulfill their duty to ensure that persons presenting a danger to themselves or others due to intoxication or other forms of mental distress receive appropriate care, including by providing core operational training which addresses the contexts in which police officers encounter such individuals, and establishing appropriate procedures enabling police officers to readily draw upon expertise and assistance from medical professionals.**
- **Require that police document all instances of individuals being brought into police custody, whether or not police choose to proceed to process their arrest or instead choose to release them.**
- **Ensure the creation of independent civilian oversight bodies to investigate allegations of human rights abuse at the hands of police.**

d) Lubicon Cree – ICCPR article 27

In March 1990, the Human Rights Committee concluded that logging and oil and gas development taking place in the hunting and trapping territory of the Lubicon Cree without the community's consent constituted an ongoing violation of the Lubicon's right to maintain and practice their Indigenous culture.[24] At the time, the Canadian government assured the Committee that it was seeking a settlement that would protect the rights of the Lubicon.[25]

To date, however, no such settlement has been reached. In fact, it has been almost two years since there were any substantial negotiations between the Lubicon and the Canadian government. In the meantime, licenses continue to be granted to allow resource extraction on or near the disputed territories. Fifteen years since the Human Rights Committee issued its views, the Lubicon Cree still await protection of their fundamental rights.

The situation of the Lubicon Cree is not unique. The 1996 report of the Canadian Royal Commission on Aboriginal Peoples (RCAP) stated that Indigenous peoples have lost access to almost two-thirds of their lands since the formation of the Canadian state in 1867 and that those lands which have been set aside for Indigenous peoples have been largely stripped of their natural resources. RCAP stated:

> Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.[26]

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[24] UN Human Rights Committee, U.N. Doc. CCPR/C/38/D/167/1984.

[25] For background information and a more detailed overview of the concerns Amnesty International has raised in this regard see: *Canada, "Time is wasting": Respect for the land rights of the Lubicon Cree long overdue*, 1 April 2003, AI Index: AMR 20/001/2003.

[26] Royal Commission on Aboriginal Peoples. Supra footnote 14.

In 1998, the UN Committee on Economic, Social and Cultural Rights called on the Canadian government to "to take concrete and urgent steps to restore and respect an Aboriginal land and resource base adequate to achieve a sustainable Aboriginal economy and culture."[27] In 1999, the UN Human Rights Committee called for "decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation." [28]

Despite these urgings, little progress has been made to resolve the vast majority of outstanding Indigenous land and resource disputes in Canada. In the report of his 2004 mission to Canada, the U.N. Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, noted that the mechanisms and processes to resolve disputes over Indigenous lands and territories are slow, adversarial and generally inadequate to resolve the problems highlighted by RCAP:

> Métis land claims have not been dealt with in any significant way, except partially in Alberta, leaving the Métis without a land and resource base and with no way of settling their grievances at the national level. Some Aboriginal nations have not received any land allocations and there have been few mechanisms to allow for the extension of the land and resource base of First Nations as their populations and needs grow. In other cases, the lands concerned are being denuded of natural resources before Aboriginal claims are recognized and can be addressed.... Their inherent right over natural resources is in many instances not recognized by the various orders of government and frequently the authorities apply other laws and statutes that limit the exercise of such Aboriginal rights.[29]

Amnesty International believes that the Canadian government should:

- **Collaborate with Indigenous peoples to establish effective, non-adversarial approaches to the timely resolution of disputes over lands and territories guided by the goal of upholding the human rights of Indigenous peoples and restoring and protecting restoring a land base sufficient to ensure their well being and cultural survival**
- **Immediately resume negotiations with the Lubicon Cree with the aim of achieving a timely settlement of the land dispute that fully respects their rights under national and international law.**
- **Ensure that unless the Lubicon give their free, prior informed consent, no activities are undertaken on the disputed land that could jeopardize the fulfillment of Lubicon rights**

e) The death of Dudley George – ICCPR article 6

Dudley George was fatally wounded by a police sniper on September 6, 1995 when the Ontario Provincial Police attacked a small group of unarmed Indigenous protestors occupying land that

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[27] Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada. 10/12/98. E/C.12/1/Add.31

[28] Concluding observations of the Human Rights Committee: Canada, footnote 11.

[29] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen , Addendum: Mission to Canada. 2 December 2004 E/CN.4/2005/88/Add.3.

the federal government expropriated from their community decades earlier and never returned.[30] In April 1999, the Human Rights Committee called for "a public inquiry into all aspects of this matter, including the role and responsibility of public officials."[31] However, it was not until a new provincial government was elected in Ontario in 2003 that such an inquiry was called.

In contrast to Canada's slow progress in recognizing and restoring the lands and resource rights of Indigenous peoples (as noted in the section above), Indigenous communities that exercise what they believe to be their legitimate land and resource rights in opposition to views and policies of federal and provincial governments have often been subjected to swift and sometimes aggressive enforcement actions. Amnesty International believes that when legal uncertainty exists over the exercise of Indigenous rights, Canadian officials have an obligation to seek a peaceful and just resolution of the dispute through an appropriate legal process in which the rights of Indigenous peoples can be given full consideration. Any deployment of police officers in the context of an unresolved dispute needs to be undertaken with great care to ensure that the police fulfill their duty to uphold the rights of all and are not encouraged to abuse their powers to aid the political agenda of the government.

The just resolution of Indigenous land and resource disputes and the appropriate role of police in such disputes are central issues in the now ongoing inquiry into the death of Dudley George. Amnesty International is concerned that the federal government, which had ignored repeated calls by U.N. treaty bodies to establish the inquiry, has declined to participate directly in the inquiry convened by the government of Ontario. This detracts from the capacity of the inquiry to examine the underlying issue of whether the dispute could have been resolved peacefully, and in accordance with the rights of Indigenous peoples, before the provincial police resorted to violent force. The fact-finding phase of the inquiry is currently underway. A second phase examining the underlying policy issues is expected to begin later this year or early next year.

Amnesty International believes that the Canadian government should uphold its responsibilities under the Covenant and its constitutional and treaty-based obligations to ensure the protection of the basic rights of Indigenous peoples, by participating in the second phase of the inquiry into the death of Dudley George.

IV. PROTECTING THE RIGHTS OF REFUGEES

Over the years and decades Canada has made important contributions to global refugee protection, both through initiatives that have responded to crises in other countries and also through the development of a strong quasi-independent national refugee determination system. Developments in recent years, however, have raised serious concerns about Canada's commitment to refugee protection and have led to laws and policies which put refugees at risk of experiencing serious human rights violations.

a) Deportation to Torture - ICCPR article 7

Amnesty International has repeatedly pressed Canada to comply with its binding international human rights obligation to refrain from deporting, extraditing or otherwise returning individuals

[30] For background information and Amnesty International's previously voiced concerns see: Canada, *Why there must be a public inquiry into the police killing of Dudley George*, 4 September 2003, AI Index: AMR 20/002/2003.

[31] Concluding observations of the Human Rights Committee: Canada, footnote 2, para. 11.

to countries where there is a substantial risk of being tortured.[32] The Canadian government maintains that it should be allowed to do so in cases involving serious criminality or security concerns. The Supreme Court of Canada, in the case of *Suresh v. Canada*, has affirmed that normally no one should be deported to face a substantial risk of torture, but has left open the possibility that such deportations might be justified in exceptional circumstances. The Court did not go on to enumerate or describe what would constitute such exceptional circumstances.[33]

International law is very clear. The UN Committee against Torture, in its concluding observations with regard to review of Canada's third, fourth and fifth periodic reports in 2000 and 2005 has repeatedly reminded Canada that the international legal protection against torture, including removal to face torture, is absolute and applies in all circumstances, and that Canadian law and practice must be reformed accordingly.[34] Amnesty International has highlighted that if there are security concerns in a particular case, the appropriate response is to pursue justice through lawful investigations, charges and trial, not to breach international law and create further injustice by exposing an individual to a serious risk of torture.

Amnesty International believes that the Canadian government should amend Canada's Immigration and Refugee Protection Act to recognize the absolute and unconditional nature of the international legal obligation not to remove any individual to a country where he or she faces a substantial risk of torture.

b) No meaningful appeal – ICCPR article 14

Amnesty International welcomed the decision to establish Canada's Immigration and Refugee Board in 1988. However, the organization at that time noted a significant flaw in the new system: there was no independent appeal on the merits of a decision refusing a claimant refugee status. That remains the case, seventeen years later. There is an option of limited judicial review for legal errors by the Federal Court of Canada, and limited review processes carried out by immigration officers. But there is no full, independent review of a negative decision, a decision that can after all have serious life and death consequences.

Amnesty International and numerous other Canadian refugee and human rights organizations have, for many years, pressed Canada to remedy this distressing shortcoming in Canada's refugee determination system. The Inter-American Commission on Human Rights has strongly recommended that a merit-based review be part of the Canadian refugee determination system.[35] The UN Committee against Torture has recently called for a "judicial review of the merits" of any decision to expel where there is a substantial risk of torture.[36] In June 2002, a new *Immigration and Refugee Protection Act* was passed, which did at long last do so, as it included provisions that establish a new Refugee Appeal Division of the Immigration and Refugee Board. However, although the Act was passed in its entirety by Parliament, for the past three years the government

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[32] See, for example: *Redoubling the Fight Against Torture*, footnote 8, pp. 5-8; *It's Time: Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada,* November 2000, pp. 1-4.

[33] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at paragraphs 76-78.

[34] *Conclusions and recommendations of the Committee against Torture – Canada*, footnote 10, para. 5(a); *Conclusions and recommendations of the Committee against Torture – Canada*, U.N. Doc. CAT/C/XXV/ Concl.4, 25th session, November 2000, para. 6(a).

[35] *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System,* Inter-American Commission on Human Rights, OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000, section V(C)(2).

[36] *Conclusions and recommendations of the Committee against Torture – Canada*, footnote 10, para. 5(c).

has failed to enact the provisions that would lead to the establishment of the new Refugee Appeal Division.

Amnesty International believes that the Canadian government should immediately enact the provisions of the *Immigration and Refugee Protection Act* relevant to the establishment of the Refugee Appeal Division of the Immigration and Refugee Board, and take steps to ensure that the Refugee Appeal Division begins hearing appeals as soon as possible.

c) Canada/US Safe Third Country Agreement – ICCPR articles 2(3), 7

In December 2004, after several years of negotiations, the Canadian and US governments entered into an agreement whereby most refugee claimants passing through one country before seeking entry to make a refugee claim in the other, will be barred from making a refugee claim in the country of their choice. Instead, they will be forced to remain in the country of first arrival and make a refugee claim there.

In practice this will overwhelmingly affect refugee claimants who pass through the United States on their way to making refugee claims in Canada. Thousands of refugee claimants pass through the United States on their way to making claims in Canada every year. For those who travel overland from Latin America, there is no way to avoid the United States. For those who come by air from all parts of the world, it is often necessary to fly to the United States, which is more directly accessible by air than Canada is, and then continue on to Canada. The majority of these claimants will now be forced to make their claims in the United States instead of in Canada.

The Canadian and US governments assert that this new agreement is a means for them to "share the responsibility of providing protection to genuine refugees."[37] Amnesty International agrees that governments should strive to improve their cooperation with regard to refugee protection, as a means of ensuring the strongest possible levels of protection are provided worldwide. However, any approach to responsibility sharing must be fully consistent with international legal standards. Amnesty International is concerned that refugee claimants who are forced to make their claims in the United States will be treated in a manner that does not conform to international law and may experience serious human rights violations, including arbitrary and lengthy detention, imprisonment in prison conditions which may constitute cruel treatment, and the possibility that refugee women making gender-specific refugee claims on the basis of such forms of persecution as domestic violence, female genital mutilation or honour crimes, will be denied protection and subjected to *refoulement*.[38] The organization has repeatedly urged Canada not to operationally the agreement until measures have been adopted to guard against any such abuses.[39]

Amnesty International believes that the Canadian government should suspend the Safe Third Country Agreement with the United States and should launch a public review to

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[37] *Fact Sheet – The Safe Third Country Agreement*, Citizenship and Immigration Canada, December, 2004, http://www.cic.gc.ca/english/policy/safe-third-fact.html.

[38] For recent overviews of Amnesty International's concern regarding refugee protection in the United States see: The REAL ID Act of 2005 and Its Negative Impact on Asylum Seekers, Amnesty International USA, March 2005 ; Attorney General Ashcroft Declines to Act on Domestic Abuse Asylum Claim, Amnesty International USA, January 27, 2005; REFUGEE UPDATE: *US Treatment of Refugees and Asylum-seekers Has Recently Become Much Harsher*, Amnesty International USA, January 2005.

[39] *Above all Else*, footnote 4, pp. 8-9; *At Home and Abroad: Amnesty International's Human Rights Agenda for Canada*, Amnesty International Canada, October 2003, pp. 13-14; *Real Security: A Human Rights Agenda for Canada*, Amnesty International Canada, May 2002, pp. 21-22.

determine whether safeguards could be introduced to ensure that it can be implemented in a manner that does not lead to human rights violations.

V. HUMAN RIGHTS AND COUNTER-TERRORISM

Human rights and security: there is and can be no trade-off. Human rights will always be precarious if security is not assured, and security will inevitably be tenuous at best if not firmly grounded in human rights. Amnesty International has frequently reminded Canada of the importance of ensuring that the country's counter-terrorism practices are wholly consistent with Canada's international human rights obligations. Laws and policies adopted in the name of security cannot be allowed to cause or facilitate human rights violations. This is of vital importance in ensuring the protection of the basic rights of individuals, be they Canadian citizens or not, who may be impacted by these laws. It is doubly important however in that Canada must set a model for other nations to follow. Amnesty International considers Canada's counter-terrorism practices to be in need of reform in at least three significant respects, in order to ensure compliance with the country's human rights obligations.

a) Security Certificates - ICCPR articles 9, 14

Non-citizens can be arrested, detained and ordered deported from Canada pursuant to security certificates issued under the Immigration and Refugee Protection Act. The certificates are used when two government ministers (Minister of Citizenship and Immigration; and the Minister of Public Safety and Emergency-Preparedness) agree that the person concerned poses a threat to Canada's national security.

At the present time four individuals are in detention pending deportation in Toronto and Ottawa pursuant to security certificates.[40] One other individual has recently been released from detention in Montreal but is subject to stringent conditions on his release.[41] Amnesty International is of the view that the security certificate process may very well result in arbitrary detention and thus violate the fundamental right to liberty of these individuals, and has been calling on the Canadian government to reform this process for many years.[42]

The process does not conform to a number of essential international legal standards, which are meant to safeguard against the very possibility of arbitrary detention. Detainees are not informed of the precise allegations against them. They see only a summary of the evidence that is being used against them. Evidence may be presented in court in the absence of the detainee or his or her counsel. The detainee is not afforded a right to examine any and all witnesses who have been the source of that evidence. Furthermore, the Federal Court considers only the "reasonableness" of the decision to issue a security certificate and does not substantively review it.

Amnesty International recognizes that special measures may need to be taken in cases involving security matters, but any such measures must be consistent with international law. We realize, for example, that the government may have concerns about protecting the identity of certain sources

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[40] Hassan Almrei, Syrian, held since October 20, 2001; Mohamed Harkat, Algerian, held since December 10, 2002; Mahmoud Jaballah, Egyptian, held for 9 months in 1999, cleared of allegations, held again since August 2001; and Mohammad Mahjoub, Egyptian, held since June, 2000.

[41] Adil Charkaoui, Moroccan, arrested May, 2003, released on bail February, 2005.

[42] Most recently in *Security through Human Rights*, Amnesty International Canada's Submission to the Special Senate Committee on the Anti-Terrorism Act and House of Commons Sub-Committee on Public Safety and National Security as part of the Review of Canada's Anti-Terrorism Act, May 16, 2005.

or witnesses. If so, specific and targeted measures should be taken to address those particular concerns, rather than through the wide sweeping approach of the current legislation. In any case, in view of the potential for a wide interpretation by the detaining authorities of security information which may be the basis for a decision to detain, and because decisions to detain in such cases are often based on a prediction about an individual's future actions, it is imperative that there be full and effective judicial scrutiny of such decisions, beyond the test of "reasonableness" that is the present standard.

Amnesty International has repeatedly drawn attention, worldwide, to instances where the failure to comply with international human rights standards regarding fair trials has led to wrongful detention and other human rights violations. In the present circumstances Amnesty International considers that individuals detained pursuant to a security certificate are effectively denied their right to prepare a defence and mount a meaningful challenge to the lawfulness of their detention. This is in contravention of Canada's obligations under articles 9 and 14 of the ICCPR.

While some of the provisions in articles 9 and 14 apply specifically to individuals who have been formally charged with a criminal offence, which is not the case in the issuance of a security certificate, they are nevertheless widely recognized as reflecting general principles of law and are relevant in so far as they set out the basic essential elements of a fair hearing. Furthermore some of the provisions apply to all detainees, such as those guaranteeing the right to challenge the lawfulness of their detention. That right to challenge must be in accord with recognized international fair trial standards.

Other international standards highlight the importance of ensuring that all detainees enjoy the same level of fairness. The *UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment*[43] establish that anyone who is detained shall be given an "effective opportunity" to be heard by a judicial or other authority, has the right to defend him or herself, and shall receive "prompt and full communication" of any order of detention "together with the reasons therefore."[44] The *Basic Principles on the Role of Lawyers*[45] underscore that lawyers must be given access to "appropriate information, files and documents" so that they can provide their clients with "effective legal assistance."[46] Amnesty International considers that these standards require that the detainee be given detailed reasons as to why he or she is detained, access to the full evidence that is being used against them, and a substantive hearing to examine the lawfulness of the detention.

Amnesty International believes that the Canadian government should reform the security certificate process so as to bring it into line with Canada's international human rights obligations, including by ensuring a substantive review of the reasons for detention and by making all evidence available to the individual detained so that any potentially unfounded allegations can be effectively and meaningfully challenged.

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[43] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the U.N. General Assembly, 1988, U.N. Doc. A/43/49.
[44] *Ibid.*, Principle 11.
[45] Basic Principles on the Role of Lawyers, adopted at the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118.
[46] *Ibid.*, Principle 21.

b) National Security Detentions Abroad – ICCPR article 7

Arrested in an airport, abducted in a foreign country, detained at a border crossing – and then bundled off to jail cells in foreign countries where torture is the norm and where the rule of law quite simply does not apply. One very significant human rights concern that has emerged post-September 11 is a practice that has existed for some time in the shadows of law enforcement and security operations, but is now becoming more commonplace and well-documented: *extraordinary rendition.*

Most international attention to date has focused on the U.S. practice of extraordinary rendition.[47] There are growing numbers of reports of individuals against whom allegations of involvement in or support for terrorist activities have been made, being arrested or detained directly by U.S. officials or with their tacit involvement, sometimes in the United States and sometimes abroad. These individuals then find themselves dealt with outside existing legal frameworks, certainly denied due process and other essential human rights protections. They ultimately end up being furtively sent to countries with abysmal human rights records, where they are subjected to extensive interrogation frequently marked by torture and cruel treatment. The inevitable conclusion in such cases is that U.S. officials may have turned to other regimes to commit torture on their behalf.

One such case which has received considerable attention in Canada is that of Canadian citizen Maher Arar, who was stopped by U.S. officials while transiting through New York's John F. Kennedy Airport on his way home to Canada on September 26, 2002. However, rather than allow him to return to Canada or even deport him back to Canada, after nearly two weeks of detention in the United States, Mr. Arar was reportedly taken out of his prison cell in the middle of the night and flown halfway around the world on a private jet, leading to one year of detention without charge or trial in Syria, where he was reportedly subjected to extensive interrogations, severe torture and inhumane prison conditions.

Amnesty International is concerned that Mr. Arar's case, along with at least three other cases involving the arrest, detention and alleged torture of Canadian citizens in Syria, raise troubling, yet-unanswered questions as to whether Canadian law enforcement and security agencies may have conducted their own version of extraordinary renditions.[48] In all four of these cases there are allegations of contact between Canadian officials and Syrian authorities before and/or during the detention. The allegations raise the prospect that Canadian officials may have provided information that directly led to their arrests and may have even done so with the expectation or with wilful blindness to the likelihood that it would result in their arrests - despite the well-documented practice of torture and arbitrary detention in similar cases in Syria. It also appears that information provided by Canadian sources likely served as the basis for the interrogation sessions in Syria during which these individuals were subjected to torture. There are further concerns that information coming out of these interrogations was then transferred back to Canada and may have been used by Canadian officials in the course of ongoing investigations of these

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[47] Amnesty International, *United States of America: The threat of a bad example – Undermining international standards as "war on terror" detentions continue*, AI Index AMR 51/114/2003, 19 August 2003.

[48] Ahmad Abou El Maati, arrested in Syria November 12, 2001, transferred to Egypt early 2002, released January 2003. Abdullah Almalki, arrested in Syria May 3, 2002, released March 2004. Muayyed Nureddin, arrested in Syria December 11, 2003, released January 11, 2004. Amnesty International has made representations to the Canadian government about all of these cases, and has been actively participating as an intervening party in the public inquiry underway regarding Maher Arar's case.

four men and other individuals. International law makes it very clear that information obtained under torture should not be relied upon and that it is illegal to make use of such information in the course of legal proceedings.[49]

There is a public inquiry underway looking at the question of what role Canadian officials may have played in what happened to Maher Arar. It is not yet clear how widely that inquiry will look at the broader pattern suggested by these other cases. Amnesty International and other organizations have encouraged the Commissioner of the inquiry to do so.[50] However, even if the inquiry examines the question of pattern expansively, more will be needed to ensure a full accounting of the other cases. Amnesty International has repeatedly made that suggestion to the Canadian government over the past year.

Amnesty International believes that the Canadian government should:

- **Extend the mandate of the existing Commission of Inquiry or appoint an Independent Expert to conduct a full review of all instances of Canadian citizens who have been "of interest" in the course of Canadian national security investigations, who have been detained abroad in countries where the protection of their basic human rights was at risk, and where circumstances suggest that Canadian officials may have directly or indirectly facilitated or tolerated their arrest and imprisonment. The results of the review should be reported publicly and should include recommendations regarding the discipline or criminal prosecution of anyone whose conduct has breached policies or protocols or broken any laws. The review should also include an appropriate mechanism for awarding compensation.**
- **Develop human rights protocols that will govern information and intelligence sharing arrangements with foreign governments.**
- **Explicitly prohibit any law enforcement or security practices that intentionally or recklessly expose individuals to the risk of serious human rights violations such as torture, in Canada or abroad.**

c) Secrecy, Counter-Terrorism and International Relations – ICCPR article 14

The Anti-Terrorism Act adopted in Canada in late 2001 included significant revisions to the Canada Evidence Act. In particular the Act established a draconian and highly secretive procedure whereby the government can, in any proceeding, block the public disclosure of "potentially injurious information" or "sensitive information." Potentially injurious information is "information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security." Sensitive information is defined as "information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard." The hearing as to whether the information should be disclosed is held *in camera* and in fact, the mere fact that the hearing is

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[49] Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment,, article 15: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

[50] *Restoring his rights, Addressing the Wrongs*, Amnesty International's Closing submissions to the Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, September 10, 2005; *Joint submissions of the Intervening Organizations in respect of the Notice of Hearing – May 3, 2005*, Submitted to the Commission of Inquiry into the Action of Canadian Officials in relation to Maher Arar, April 28, 2005.

even being held cannot be publicly disclosed. Ultimately, if the government disagrees with the court's ruling it can issue a certificate that simply forbids the disclosure of the information.[51] Amnesty International is concerned that these provisions fail to conform to the ICCPR in three important respects.

First, including "international relations" in the definition of potentially injurious or sensitive information exceeds the limits on fair trial rights established in international human rights law. It raises the prospect of information being withheld from the public, from the accused in a criminal trial, and the parties to other types of legal proceedings, simply because it might embarrass Canada in its dealings with another government or become an inconvenience in international negotiations dealing with a trade or other issue.

Article 14(1) of the *International Covenant on Civil and Political Rights* establishes the important right to a public trial and envisions the possibility of excluding the public from a criminal proceeding only for reasons of "morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Protecting international relations is not included and does not therefore in itself justify excluding the public.

Second, the undue secrecy involved in this process and the fact that ultimately a government decision to prohibit disclosure, through the issuance of a certificate under s. 38.13 of the Canada Evidence Act, is subject to very little judicial oversight.

The provisions bar the public from the court's review of the potentially injurious or sensitive information and also prohibit disclosure of the mere fact that a court proceeding has been launched. This has recently been sharply criticized by the Chief Justice of the Federal Court, who has asked that the current review of the anti-terrorism legislation reconsider the necessity of these provisions out of concern that they may "unnecessarily fetter the open court principle."[52] Amnesty International is of the view that the process does not conform with the requirements of article 14(1) of the ICCPR that court proceedings normally be open to the public.

Finally, if the government issues a certificate under s. 38.13, it must be upheld as long as the Federal Court of Appeal is of the view that the information at issue *relates to* information obtained in confidence from, or in relation to, a foreign entity, or *relates to* national defence or national security.[53] The standard of "relates to" is a very low threshold and risks decisions that in Amnesty International's view do not properly accord with the requirements of article 14(1).

Amnesty International has called on the Canadian government to ensure that the Canada Evidence Act is fully in line with international human rights standards. In particular by:

- **Deleting "international relations" from section 38 of the Act.**
- **Amending section 38 of the Act to ensure that the public is only excluded in instances strictly in keeping with the limitations recognized in article 14(1) of the ICCPR. Similarly there should be no ban on public disclosure of the mere fact that the court proceeding is underway unless it can be convincingly demonstrated that a ban on public notification of that fact conforms to article 14(1).**

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[51] Canada Evidence Act, ss. 38-38.15.

[52] *Ottawa Citizen Group v. Canada (A-G)*, [2004] F.C. 1052, para. 45. Lutfy C.J. raises serious concerns about the s. 38 scheme in a portion of his judgement entitled "*Post scriptum: too much secrecy??*"

[53] Canada Evidence Act, s. 38.131

- **Amending section 38.13 of the Canada Evidence Act so as to require the government to demonstrate *on a balance of probabilities* that disclosure of disputed information *would* be injurious to national defence or national security.**

VI. HUMAN RIGHTS AND LAW ENFORCEMENT – ICCPR article 7

Since April 2003, in Canada, thirteen people have died following the use of a taser gun by police. Inquests into those deaths have not yet been completed. There are therefore no definitive findings as to whether tasers were a primary or contributing cause of any of the thirteen deaths. There have also been numerous reports of use of tasers in circumstances where allegations have been made that their use was excessive or inappropriate, including against people not actively resisting arrest and non-violent protesters.[54] Tasers are a trademarked brand of conducted energy device (CED) which fires two barbed darts up to a distance of 15-35 feet and delivers a 50,000-volt electric shock (or series of shocks) intended to cause instant incapacitation. The device can also be used as a direct contact stun gun.

In one high profile case, a complaint was made to the Office for Public Complaints against the Royal Canadian Mounted Police (RCMP), involving an incident that took place during demonstrations at the Summit of the Americas in Quebec City in April 2001. The Commission found that the individual against whom the taser was used was "not struggling and represented no threat to the members, to himself, to the public or to property" and that in these circumstances the use of the taser was a "clear abuse of authority."[55] Official reports such as this raise the concern that, if not properly regulated, tasers can be used in circumstances tantamount to ill-treatment.

Amnesty International has followed with concern the growing use of taser guns by police forces in Canada.[56] Amnesty International does encourage police forces to make use of non-lethal means when deploying appropriate levels of force. This is in keeping with international standards with respect to the use of force by law enforcement officials. The organization is concerned, however, that electro-shock weapons, including tasers, are particularly open to misuse as they can cause severe pain at the push of a button without leaving substantial marks. There is also serious concern about health risks associated with tasers whose effects are not yet fully understood. In particular, Amnesty International has pointed to concerns that individuals with weakened hearts and those under the influence of drugs may be particularly susceptible to harm and even death when subdued with a taser.

Amnesty International has therefore called on police forces across Canada to suspend the use of tasers until comprehensive and independent research is conducted. On the basis of that research, governments in Canada should decide whether there are limited circumstances in which tasers might be deployed in order to save life and, if so, what rules, safeguards and oversight procedures should be put in place to prevent misuse. To date, however, police officers have not suspended taser use. Instead, the use of tasers has grown considerably over the past several years.

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[54] Amnesty International Annual Report, *Canada*, 2004, p.104.

[55] Commission for Public Complaints against the RCMP, Chair's Interim Report, File No. PC-2001-0409, 29 October 2003, p.13.

[56] See Amnesty International Reports: *Canada: Excessive and lethal force? Amnesty International's concerns about deaths and ill-treatment involving police use of tasers*, AMR 20/002/2004, November 2004; and *United States of America: Excessive and lethal force? Amnesty International's concerns about deaths and ill-treatment involving police use of tasers*, AMR 51/139/2004, November 2004.

Amnesty International has welcomed recent reviews of taser use carried out by the Office of the Police Complaint Commissioner in British Columbia[57] and the review carried out by the Canadian Police Research Centre on behalf of the Canadian Association of Chiefs of Police.[58] However those studies have been limited to reviews of existing research, which Amnesty International considers to be inadequate. New research is required, as noted above.

Amnesty International believes that the Canadian government should ensure that the use of tasers in Canada is suspended pending comprehensive and independent research to determine whether they should be used and if so, what rules, safeguards and oversight procedures are required.

VII. RATIFICATION OF THE SECOND OPTIONAL PROTOCOL TO THE ICCPR REGARDING ABOLITION OF THE DEATH PENALTY

As global consensus that the death penalty should be abolished began to mount, in 1989 the UN General Assembly adopted the Second Optional Protocol to the ICCPR. Over fifty governments have ratified that document and guaranteed that there will be no executions in those countries. Canada, which began firmly abolitionist in 1998 when provisions of the National Defence Act allowing for the death penalty were abolished, is notable for its failure to ratify the protocol.

Some officials within government are of the view that if Canada were to ratify the Second Optional Protocol it would make it difficult for Canada to extradite or deport criminals to a country where they would face the death penalty. But the Supreme Court of Canada has already ruled that Canada would only be able to do so in exceptional circumstances[59] and the UN Human Rights Committee has stressed that extradition or deportation should never go ahead unless reliable assurances are received from the other state that the death penalty will not be used.[60] Canada should stand firm as an abolitionist state and ensure that criminals face justice through fair proceedings that do not include the possibility of execution. Over the past year Canada's Minister of Foreign Affairs has twice publicly indicated that Canada is seriously considering ratification, in an address to the Second World Congress against the Death Penalty in October 2004, and then again speaking to the UN Commission on Human Rights earlier this year, where the Minister stated:

> "Canada has already ratified a large number of international instruments. We plan to examine very seriously the possibility of ratifying others, including the Second Optional Protocol to the International Covenant on Civil and Political Rights (aiming at the abolition of the death penalty)."[61]

Amnesty International believes that the Canadian government should take immediate steps to ensure the speedy ratification of the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.

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[57] *Taser Technology Review, Final Report*, Office of the Police Complaint Commissioner, OPCC File No. 2474, June 14, 2005.
[58] *Review of Conducted Energy Devices*, Technical Report TR-01-2006, Canadian Police Research Centre, August 22, 2005.
[59] United States v Burns, [2001] 1 SCR. 283.
[60] UN Human Rights Committee, Communication No. 829/1998: Canada, Roger Judge *v* Canada, 20 October 2003.
[61] *Notes for an Address by the Honourable Pierre Pettigrew, Minister of Foreign* Affairs, 61st Session of the Commission on Human Rights, March 14, 2005.

SUMMARY OF RECOMMENDATIONS

Amnesty International believes that the Canadian government should take the following steps, to improve its record of compliance with its international human rights obligations.

I. THE COMPLIANCE AND IMPLEMENTATION GAP

1. Establish a publicly accountable and authoritative intergovernmental body to monitor and coordinate compliance with Canada's international human rights obligations.

II. A CIVIL REMEDY FOR HUMAN RIGHTS VIOLATIONS

2. Enact the necessary legal provisions to recognize jurisdiction with respect to civil suits brought in Canadian courts seeking reparation for crimes against humanity, war crimes, torture and other human rights violations subject to universal jurisdiction suffered abroad at the hands of foreign governments and to ensure that any such suits cannot be defended on the basis of state immunity.

III. PROTECTING THE RIGHTS OF INDIGENOUS PEOPLES

3. a) Ensure collection of accurate information on the extent of violence against Indigenous women.

   b) Provide adequate sustained funding to services assisting Indigenous women escape situations of violence or access the justice system.

   c) Ensure that all police forces work with Indigenous women's organizations to develop policies and protocols that will ensure an appropriate and effective response to reports of missing persons or other threats to the safety of Indigenous women and girls.

4. Act immediately to end the disparity in funding for Indigenous child welfare services and ensure that the best interests of Indigenous children are protected by effective preventative and early intervention programs.

5. a) Ensure the provision of effective and culturally appropriate alternatives to the arrest of individuals in agitated states due to alcohol or substance abuse.

   b) Strengthen police capacity to fulfill their duty to ensure that persons presenting a danger to themselves or others due to intoxication or other forms of mental distress receive appropriate care, including by providing core operational training which addresses the contexts in which police officers encounter such individuals, and establishing appropriate procedures enabling police officers to readily draw upon expertise and assistance from medical professionals

   c) Require that police document all instances of individuals being brought into police custody, whether or not police choose to proceed to process their arrest or instead choose to release them.

   d) Ensure the creation of independent civilian oversight bodies to investigate allegations of human rights abuse at the hands of police.

6. a) Collaborate with Indigenous peoples to establish effective, non-adversarial approaches to the timely resolution of disputes over lands and territories guided by the goal of upholding the human rights of Indigenous peoples and restoring and protecting restoring a land base sufficient to ensure their well being and cultural survival

   b) Immediately resume negotiations with the Lubicon Cree with the aim of achieving a timely settlement of the land dispute that fully respects their rights under national and international law.

   c) Ensure that unless the Lubicon give their free, prior informed consent, no activities are undertaken on the disputed land that could jeopardize the fulfillment of Lubicon rights

7. Uphold its responsibilities under the Covenant and its constitutional and treaty-based obligations to ensure the protection of the basic rights of Indigenous peoples, by participating in the second phase of the inquiry into the death of Dudley George.

IV. PROTECTING THE RIGHTS OF REFUGEES

8. Amend Canada's Immigration and Refugee Protection Act to recognize the absolute and unconditional nature of the international legal obligation not to remove any individual to a country where he or she faces a substantial risk of torture.

9. Immediately enact the provisions of the *Immigration and Refugee Protection Act* relevant to the establishment of the Refugee Appeal Division of the Immigration and Refugee Board, and take steps to ensure that the Refugee Appeal Division begins hearing appeals as soon as possible

10. Suspend the Safe Third Country Agreement with the United States and launch a public review to determine whether safeguards could be introduced to ensure that it can be implemented in a manner that does not lead to human rights violations.

V. HUMAN RIGHTS AND COUNTER-TERRORISM

11. Reform the security certificate process so as to bring it into line with Canada's international human rights obligations, including by ensuring a substantive review of the reasons for detention and by making all evidence available to the individual detained so that any potentially unfounded allegations can be effectively and meaningfully challenged.

12. a) Extend the mandate of the existing Commission of Inquiry in the Maher Arar case or appoint an Independent Expert to conduct a full review of all instances of Canadian citizens who have been "of interest" in the course of Canadian national security investigations, who have been detained abroad in countries where the protection of their basic human rights was at risk, and where circumstances suggest that Canadian officials may have directly or indirectly facilitated or tolerated their arrest and imprisonment. The results of the review should be reported publicly and should include recommendations regarding the discipline or criminal prosecution of anyone whose conduct has breached policies or protocols or broken any laws. The review should also include an appropriate mechanism for awarding compensation.

b) Develop human rights protocols that will govern information and intelligence sharing arrangements with foreign governments.

c) Explicitly prohibit any law enforcement or security practices that intentionally or recklessly expose individuals to the risk of serious human rights violations such as torture, in Canada or abroad.

13. Ensure that the Canada Evidence Act is fully in line with international human rights standards by:

a) Deleting "international relations" from section 38 of the Act.

b) Amending section 38 of the Act to ensure that the public is only excluded in instances strictly in keeping with the limitations recognized in article 14(1) of the ICCPR. Similarly there should be no ban on public disclosure of the mere fact that the court proceeding is underway unless it can be convincingly demonstrated that a ban on public notification of that fact conforms to article 14(1).

c) Amending section 38.13 of the Canada Evidence Act so as to require the government to demonstrate *on a balance of probabilities* that disclosure of disputed information *would* be injurious to national defence or national security.

VI. HUMAN RIGHTS AND LAW ENFORCEMENT

14. Ensure that the use of tasers in Canada is suspended pending comprehensive and independent research to determine whether they should be used and if so, what rules, safeguards and oversight procedures are required.

VII. RATIFICATION OF THE SECOND OPTIONAL PROTOCOL TO THE ICCPR

15. Take immediate steps to ensure the speedy ratification of the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.

Exhibit "I"
UN Human Rights Committee, Recommendations to Canada, 20 April 2006

UNITED NATIONS

CCPR

International covenant on civil and political rights

Distr.
GENERAL

CCPR/C/CAN/CO/5
20 April 2006

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Eighty-fifth session

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Concluding observations of the Human Rights Committee

CANADA

1. The Human Rights Committee considered the fifth periodic report of Canada (CCPR/C/CAN/2004/5) at its 2312th and 2313th meetings (CCPR/C/SR.2312-2313), on 17 and 18 October 2005, and adopted the following concluding observations at its 2328th and 2330th meetings (CCPR/C/SR.2328 and 2330), on 27 and 28 October 2005.

A. Introduction

2. The Committee welcomes the timely submission of Canada's fifth periodic report, which was elaborated in conformity with the reporting guidelines, and contains information on national jurisprudence and relating to the Committee's previous concluding observations.

3. The Committee further appreciates the attendance of a delegation composed of experts in various fields relevant to the Covenant, some of them coming from Canadian provinces, and welcomes their efforts to answer to the Committee's written and oral questions.

B. Positive aspects

4. The Committee notes with appreciation that Canada acceded to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women in 2002, and ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography in 2005.

5. The Committee appreciates the fact that Canada has a vigorous civil society, which plays an important role in the promotion of human rights, both at the national and international levels.

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C. Principal subjects of concern and recommendations

6. The Committee notes with concern that many of the recommendations it addressed to the State party in 1999 remain unimplemented. It also regrets that the Committee's previous concluding observations have not been distributed to members of Parliament and that no parliamentary committee has held hearings on issues arising from the Committee's observations, as anticipated by the delegation in 1999 (art. 2).

The State party should establish procedures, by which oversight of the implementation of the Covenant is ensured, with a view, in particular, to reporting publicly on any deficiencies. Such procedures should operate in a transparent and accountable manner, and guarantee the full participation of all levels of government and of civil society, including indigenous peoples.

7. The Committee notes with concern the State party's reluctance to consider that it is under an obligation to implement the Committee's requests for interim measures of protection. The Committee recalls that, in acceding to the Optional Protocol, the State party recognized the Committee's competence to receive and examine complaints from individuals under the State party's jurisdiction. Disregard of the Committee's requests for interim measures is inconsistent with the State party's obligations under the Covenant and the Optional Protocol.

The State party should adhere to its obligations under the Covenant and the Optional Protocol, in accordance with the principle of *pacta sunt servanda*, and take the necessary measures to avoid similar violations in future.

8. The Committee, while noting with interest Canada's undertakings towards the establishment of alternative policies to extinguishment of inherent aboriginal rights in modern treaties, remains concerned that these alternatives may in practice amount to extinguishment of aboriginal rights (arts. 1 and 27).

The State party should re-examine its policy and practices to ensure they do not result in extinguishment of inherent aboriginal rights. The Committee would also like to receive more detailed information on the comprehensive land claims agreement that Canada is currently negotiating with the Innu people of Quebec and Labrador, in particular regarding its compliance with the Covenant.

9. The Committee is concerned that land claim negotiations between the Government of Canada and the Lubicon Lake Band are currently at an impasse. It is also concerned about information that the land of the Band continues to be compromised by logging and large-scale oil and gas extraction, and regrets that the State party has not provided information on this specific issue (arts. 1 and 27).

The State party should make every effort to resume negotiations with the Lubicon Lake Band, with a view to finding a solution which respects the rights of the Band under the Covenant, as already found by the Committee. It should consult with the Band before granting licences for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant.

10. The Committee, while noting the responses provided by the State party in relation to the preservation, revitalization and promotion of Aboriginal languages and cultures, remains concerned about the reported decline of Aboriginal languages in Canada (art. 27).

The State party should increase its efforts for the protection and promotion of Aboriginal languages and cultures. It should provide the Committee with statistical data or an assessment of the current situation, as well as with information on action taken in the future to implement the recommendations of the Task Force on Aboriginal Languages and on concrete results achieved.

11. The Committee regrets that its previously expressed concern relating to the inadequacy of remedies for violations of articles 2, 3 and 26 of the Covenant remains unaddressed. It is concerned that human rights commissions still have the power to refuse referral of a human rights complaint for adjudication and that legal aid for access to courts may not be available.

The State party should ensure that the relevant human rights legislation is amended at federal, provincial and territorial levels and its legal system enhanced, so that all victims of discrimination have full and effective access to a competent tribunal and to an effective remedy.

12. The Committee, while noting the existence of a social protest protection clause, expresses concern about the wide definition of terrorism under the Anti-Terrorism Act.

The State party should adopt a more precise definition of terrorist offences, so as to ensure that individuals will not be targeted on political, religious or ideological grounds, in connection with measures of prevention, investigation or detention.

13. The Committee notes with concern that the amendments to the Canada Evidence Act introduced by the Anti-Terrorism Act (sect. 38), relating to the non-disclosure of information in connection with or during the course of proceedings, including criminal proceedings, which could cause injury to international relations, national defence or national security, do not fully abide by the requirements of article 14 of the Covenant.

The State party should review the Canada Evidence Act so as to guarantee the right of all persons to a fair trial, and in particular, to ensure that individuals cannot be condemned on the basis of evidence to which they, or those representing them, do not have full access. The State party, bearing in mind the Committee's general comment No. 29 (2001) on states of emergency, should in no case invoke exceptional circumstances as justification for deviating from fundamental principles of fair trial.

14. The Committee is concerned by the rules and practices governing the issuance of "security certificates" under the Immigration and Refugee Protection Act, enabling the arrest, detention and expulsion of immigrants and refugees on grounds of national security. The Committee is concerned that, under such rules and practices, some people have been detained for several years without criminal charges, without being adequately informed about the reasons for their detention, and with limited judicial review. It is also concerned about the mandatory detention of foreign nationals who are not permanent residents (arts. 7, 9 and 14).

The State party should ensure that administrative detention under security certificates is subject to a judicial review that is in accordance with the requirements of article 9 of the Covenant, and legally determine a maximum length of such detention. The State party should also review its practice with a view to ensuring that persons suspected of terrorism or any other criminal offences are detained pursuant to criminal proceedings in compliance with the Covenant. It should also ensure that detention is never mandatory but decided on a case-by-case basis.

15. The Committee is concerned by the State party's policy that, in exceptional circumstances, persons can be deported to a country where they would face the risk of torture or cruel, inhuman or degrading treatment, which amounts to a grave breach of article 7 of the Covenant.

The State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance to be found between society's interest and the individual's rights under article 7 of the Covenant. No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment. The State party should clearly enact this principle into its law.

16. While appreciating the firm denial by the delegation, the Committee is concerned by allegations that Canada may have cooperated with agencies known to resort to torture with the aim of extracting information from individuals detained in foreign countries. It notes that a public inquiry is under way regarding the role of Canadian officials in the Maher Arar case, a Canadian citizen arrested in the United States of America and deported to the Syrian Arab Republic where he was reportedly tortured. The Committee regrets however that insufficient information was provided as to whether cases of other Canadians of foreign origin detained, interrogated and allegedly tortured are the subject of that or any other inquiry (art. 7).

The State party should ensure that a public and independent inquiry review all cases of Canadian citizens who are suspected terrorists or suspected to be in possession of information in relation to terrorism, and who have been detained in countries where it is feared that they have undergone or may undergo torture and ill-treatment. Such inquiry should determine whether Canadian officials have directly or indirectly facilitated or tolerated their arrest and imprisonment.

17. The Committee is concerned about information that, in some provinces and territories, people with mental disabilities or illness remain in detention because of the insufficient provision of community-based supportive housing (arts. 2, 9, 26).

The State party, including all governments at the provincial and territorial level, should increase its efforts to ensure that sufficient and adequate community based housing is provided to people with mental disabilities, and ensure that the latter are not under continued detention when there is no longer a legally based medical reason for such detention.

18. The Committee expresses concern about the situation of women prisoners, in particular Aboriginal women, women belonging to ethnic minorities and women with disabilities. While welcoming the information provided by the State party on measures adopted or planned in response to the findings of the Canadian Human Rights Commission, the Committee remains concerned by the decision of the authorities to maintain the practice of employing male front-line staff in women's institutions (arts. 2, 3, 10 and 26).

The State party should put an end to the practice of employing male staff working in direct contact with women in women's institutions. It should provide substantial information on the implementation of the recommendations of the Canadian Human Rights Commission as well as on concrete results achieved, in particular regarding the establishment of an independent external redress body for federally sentenced offenders and independent adjudication for decisions related to involuntary segregation, or alternative models.

19. The Committee notes with concern that the Youth Criminal Justice Act enables imprisonment of persons under 18 with adults if serving an adult sentence (arts. 10 and 24).

The State party should ensure that no person under 18 years of age is tried as an adult, and that no such person can be held together with adults in correctional facilities, whether federal, provincial or territorial.

20. The Committee is concerned about information that the police, in particular in Montreal, have resorted to large-scale arrests of demonstrators. It notes the State party's responses that none of the arrests in Montreal have been arbitrary since they were conducted on a legal basis. The Committee, however, recalls that arbitrary detention can also occur when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by the Covenant, in particular under articles 19 and 21 (arts. 9, 19, 21 and 26).

The State party should ensure that the right of persons to peacefully participate in social protests is respected, and ensure that only those committing criminal offences during demonstrations are arrested. The Committee also invites the State party to conduct an inquiry into the practices of the Montreal police forces during demonstrations, and wishes to receive more details about the practical implementation of article 63 of the Criminal Code relating to unlawful assembly.

21. The Committee expresses concern about the State party's responses relating to the Committee's Views in the case *Waldman v. Canada* (Communication No. 694/1996, Views adopted on 3 November 1999), requesting that an effective remedy be granted to the author eliminating discrimination on the basis of religion in the distribution of subsidies to schools (arts. 2, 18 and 26).

The State party should adopt steps in order to eliminate discrimination on the basis of religion in the funding of schools in Ontario.

22. The Committee notes with concern that the Canadian Human Rights Act cannot affect any provision of the Indian Act or any provision made under or pursuant to that Act, thus allowing discrimination to be practised as long as it can be justified under the Indian Act. It is concerned that the discriminatory effects of the Indian Act against Aboriginal women and their children in matters of reserve membership have still not been remedied, and that the issue of matrimonial real property on reserve lands has still not been properly addressed. While stressing the obligation of the State party to seek the informed consent of indigenous peoples before adopting decisions affecting them and welcoming the initiatives taken to that end, the Committee observes that balancing collective and individual interests on reserves to the sole detriment of women is not compatible with the Covenant (arts. 2, 3, 26 and 27).

The State party should repeal section 67 of the Canadian Human Rights Act without further delay. The State party should, in consultation with Aboriginal peoples, adopt measures ending discrimination actually suffered by Aboriginal women in matters of reserve membership and matrimonial property, and consider this issue as a high priority. The State party should also ensure equal funding of Aboriginal men and women associations.

23. The Committee is concerned that Aboriginal women are far more likely to experience a violent death than other Canadian women. While noting the State party's numerous programmes aimed at addressing the issue, the Committee regrets the lack of precise and updated statistical data on violence against Aboriginal women, and notes with concern the reported failure of police forces to recognize and respond adequately to the specific threats faced by them (arts. 2, 3, 6, 7 and 26).

The State party should gather accurate statistical data throughout the country on violence against Aboriginal women, fully address the root causes of this phenomenon, including the economic and social marginalization of Aboriginal women, and ensure their effective access to the justice system. The State party should also ensure that prompt and adequate response is provided by the police in such cases, through training and regulations.

24. The Committee is concerned by information that severe cuts in welfare programmes have had a detrimental effect on women and children, for example in British Columbia, as well as on Aboriginal people and Afro-Canadians (arts. 3, 24 and 26).

The State party should adopt remedial measures to ensure that cuts in social programmes do not have a detrimental impact on vulnerable groups.

25. The Committee sets 31 October 2010 as the date for the submission of Canada's sixth periodic report. It requests that the State party's fifth periodic report and the present concluding observations be published and widely disseminated in Canada, to the general public

as well as to the judicial, legislative and administrative authorities, and that the sixth periodic report be circulated for the attention of the non-governmental organizations operating in the country.

26. In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the State party should submit within one year information on the follow-up given to the Committee's recommendations in paragraphs 12, 13, 14 and 18 above. The Committee requests the State party to include in its next periodic report information on its remaining recommendations and on the implementation of the Covenant as a whole. The State party is encouraged to increase its efforts to provide the Committee with more detailed information on concrete results achieved.

Exhibit "J"
Opening Submissions to Arar Inquiry, 14 June 2004;
Final Submission to Arar Inquiry, 10 September 2005

Securing a Commitment to Human Rights In Canada's Security Laws and Practices

This is Exhibit "J" referred to in the affidavit of Alex Neve sworn before me, this 14th day of March, 2007

A COMMISSIONER FOR TAKING AFFIDAVITS

Opening Submissions of Amnesty International Canada

To the *Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*

June 14, 2004

Global Context and Global Opportunity:
The Inquiry Should Strive to Strengthen International Human Rights Protection

The *Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar* (hereafter "the Inquiry") opens at a time when the international community faces some stark and troubling realities about human rights. Over the course of the close to three years since the devastating attacks of September 11th the world has grappled with the impact and consequences of a new security paradigm. Without a doubt the attacks that day, and other violent incidents of terrorism such as the bombings in Bali and Madrid, and ongoing suicide attacks in Israel, the Occupied Territories and the Palestinian Authority, constitute grave assaults on basic human rights. At the same time, Amnesty International is deeply concerned that the counter-terrorism response of governments around the world has further imperiled fundamental human rights and freedoms. Governments have directly asserted or indirectly implied that the imperative of fighting against "terrorism" requires a new understanding of human rights, and that it should be considered legitimate to infringe some rights in the name of bolstering security.

In this climate, some governments have exploited the rhetoric of security as an excuse for intensifying campaigns of persecution directed at political opponents, minority groups and civil society. Amnesty International has pointed to this concern in countries on every continent, from China to Colombia, and Israel to Zimbabwe. Some governments have willingly set aside universal human rights protections and the rule of law in the course of adopting new security laws and practices. That concern has received considerable attention, for example, with regard to the United States, including the failure to comply with international law at Guantánamo Bay and the systematic torture that has taken place at the Abu Ghraib detention center in Iraq. Millions of individuals around the world have spoken out about these very worrying developments and demanded that human rights not be sold short. At the same time, much of the general public has been complacent, as hard-won universal human rights safeguards have been eroded.

Maher Arar's case dramatically illustrates that there is a very real and very heavy potential human cost at the centre of this debate about security and human rights. It is not about abstraction and theoretical possibilities. Amnesty International, United Nations human rights experts and countless international and national-level human rights organizations have sought to remind governments and the public that human rights do not stand in the way of achieving real global security. Rather, human rights stand at the very heart of doing so. If anything, the insecurity that has preoccupied the international geo-political agenda over the past three years must become a catalyst for reinforcing and strengthening the global human rights system like never before. .

The international human rights system was developed by governments in the wake of the shock and horror of World War II. Those governments were only too aware of the fragile state of their own citizens' security and the devastating degree to which that security could be suddenly and brutally shattered. The declarations and treaties that have been elaborated in the decades since that time therefore carefully consider and incorporate recognition of the responsibility governments bear to provide security. The human rights

system itself relies upon there being a foundation of security, without which the enjoyment of those rights will inevitably remain a fragile illusion.

Some rights, therefore, are expressly formulated in terms that allow for some restriction. This is the case, for example, with the right to freedom of expression, which can be narrowly limited if necessary "for the protection of national security."[1] Other rights are formulated in absolute terms but may be subject to a more general provision allowing for exceptional, time-limited derogation in times of an officially proclaimed "public emergency which threatens the life of the nation."[2] That is so, for instance, with the right to liberty and security of the person. And there are a number of human rights which governments have recognized to be so central to the notion of human dignity that lies at the core of universal human rights that they can never be restricted or subjected to derogation. The prohibition of torture is one such right.[3]

This is a framework that understands security and lays out the means of achieving it. Undermining and ignoring these safeguards, be it in countenancing torture, promoting discrimination, or locking people up without trial, is not about strengthening security, it is simply about weakening human rights.[4]

This Commission of Inquiry must examine closely the human rights consequences of Canada's security laws and practices, on their own terms and the manner in which those laws and practices intersect with and rely upon the laws and practices of other countries. In Mr. Arar's situation, and more generally, have those laws or practices in any way facilitated the commission of human rights violations? While the evidence and legal provisions under consideration clearly arise in a Canadian context, Amnesty International highlights that the work of this Commission of Inquiry will be of tremendous significance around the world. To our knowledge, this is the first time that a government has launched an independent review that examines the concern about post-September 11th security practices leading to human rights abuses. The lessons learned could go far in addressing that issue in many other countries and may provide recommendations that should be taken up in multilateral fora as well. Amnesty International urges you, Commissioner O'Connor, to approach your work with this wider global perspective in mind.

Major Themes

It is Amnesty International's submission that in order to address the crucial contextual reality described above the Commission of Inquiry should actively explore evidence with respect to the following seven themes.

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[1] International Covenant on Civil and Political Rights, article 19(3)(b).
[2] *Ibid*, article 4(1).
[3] *Ibid*, article 4(2).
[4] There are two major international human rights treaties of particular significance in this case. The first, the International Covenant on Civil and Political Rights (ICCPR) has been ratified by each of Canada, Jordan, Syria and the United States. The second, the Convention against Torture, has been ratified by all but Syria. Notably though Syria is still subject to the absolute ban on torture by virtue of its ratification of the ICCPR.

i) Truth and Accountability for Maher Arar

Last year, following his release from jail and return to Canada, Mr. Arar provided the nation with detailed testimony about what happened to him over the course of over one year in detention in the United States, Jordan and Syria. He described treatment that directly violated a wide range of his basic human rights, including the rights to be free from torture, cruel treatment, discrimination, arbitrary arrest and arbitrary imprisonment, as well as his right to have consular assistance while in detention. He forcefully underscored the importance for him of understanding how and why that happened. He indicated that he wants those answers because of his desire for justice for himself and his family. He also indicated he wants those answers to guard against this happening to others. Amnesty International underscores how important it is, Commissioner O'Connor, that you probe deeply in seeking the answers to Mr. Arar's fundamentally important questions. It is his right to know the truth.

Beyond uncovering the truth about what happened to Mr. Arar, Amnesty International urges the Inquiry to carry out its work in a manner that ensures justice and accountability. International and national human rights law requires governments to ensure a remedy for human rights violations.[5] As such, recommendations as to appropriate compensation for the harm Mr. Arar has experienced, as well as advice as to whether discipline or criminal prosecution of particular individuals is warranted should be included in the final report.

There are many dimensions to the question of Canada's role in Mr. Arar's situation. Six which Amnesty International considers to be of substantial importance are described below.

ii) Canada's Role Should be Examined Widely and in Depth

The Terms of Reference for this Commission of Inquiry focus on the role of Canadian officials in Mr. Arar's case. Amnesty International submits that it is important to consider that role across government - including the Canadian Security Intelligence Service (CSIS), the Royal Canadian Mounted Police (RCMP), the Department of Foreign Affairs, and the Prime Minister's Office – and at all levels of government, from the Prime Minister through to officials who were involved in the case on an operational basis.

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[5] "[A]ny person whose rights or freedoms as herein recognized are violated shall have an effective remedy…", International Covenant on Civil and Political Rights, article 2(3)(a); "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation…", United Nations Convention against Torture and and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 14(1); "Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years", Criminal Code of Canada, section 269.1.

Amnesty International also stresses that the proceedings should look at Canada's role in a wide sense. What actions were taken by Canadian officials, including by virtue of sharing information or encouraging other governments to take certain actions that may have contributed to violations of Mr. Arar's human rights? But also, were there instances in which a failure to act contributed to human rights violations, such as the possibility that some officials knew that his rendition to Syria was a likelihood yet did not intervene to forestall that from occurring?

This latter point is vitally important. This inquiry should not only look at action taken, but also the issue of knowledge. It is critical, in looking at Canada's role, to understand what information was known to Canadian officials at what time and whether it was appropriately shared across government. This is particularly so with respect to knowledge about two matters:

- the decision in the United States to detain Mr. Arar and the subsequent related decision to send him to Syria; and
- the fact that Mr. Arar was being interrogated in detention in Syria and very likely experiencing torture in the course of those interrogations.

The Inquiry has the mandate and authority to look at the actions of Canadian officials. There were of course other governments involved, namely the United States and Syria, and to a lesser extent Jordan. Amnesty International urges the Inquiry to seek as much information as possible about the role played by officials of those other governments. That is an integral part of understanding the actions taken by Canadian officials. Efforts should be made to obtain that information directly from those governments, including through witnesses and documents from those countries. In addition, Canadian witnesses and documents should be examined closely in an effort to garner as much information as possible about the role of other governments.

iii) The Importance of Examining Related and Similar Cases

Three other Canadian citizens who have also recently been detained in Syria and who allege that they were tortured while in detention, sought standing in front of this Commission of Inquiry: Muayyed Nureddin, Ahmad Abou El-Maati and Abdullah Almalki. While they were not granted standing, Amnesty International urges that they be brought before the Commission of Inquiry as witnesses and that their evidence be closely examined.[6]

Mr. El-Maati and Mr. Almalki's cases have been linked to Mr. Arar's and their evidence will obviously be of substantial probative value in developing a full understanding of what happened to Mr. Arar. Commissioner O'Connor's Ruling on Standing and Funding of May 4, 2004 indicates an intention to call them as witnesses. Amnesty International strongly encourages that that happen.

[6] Which in Mr. Almalki's case will likely only be possible if and when he is able to return to Canada.

While there is no apparent link between Mr. Arar and Mr. Nureddin, it is telling that these two men, who it appears have never met, were held in the same detention centre in Damascus, Syria (not at the same time) and provide information about conditions, treatment and officials in that detention centre, including alleged torturers, that is consistent and corroborative. Amnesty International has had the opportunity to hear directly from both Mr. Arar and Mr. Nureddin about their experiences and is of the view that Mr. Nureddin's testimony is of essential importance in considering the possibility that what happened to Mr. Arar might have been part of a wider practice.

iv) Canada's Intelligence Sharing Practices

It is evident that information of some description about Mr. Arar was shared between and among a number of governments. Canadian officials almost certainly provided information to the United States and received information from Syria. The extent of the intelligence sharing and the number of governments involved remains unknown. Clearly intelligence sharing is a necessary intergovernmental function in today's world. Among other benefits, effective and reliable intelligence sharing can help to prevent human rights violations and identify the whereabouts of suspected perpetrators of human rights violations.

It is essential, though, that intelligence be shared in ways that guard against human rights violations. Amnesty International urges this Commission of Inquiry to examine the ways in which intelligence was shared by and with Canadian officials in Mr. Arar's case to determine whether there were adequate human rights safeguards in place. This should include an assessment of the nature of the information shared: for instance was uncorroborated or speculative information shared which may have led other governments to draw unwarranted conclusions about Mr. Arar which led to the human rights violations he experienced. This should also include an assessment of the human rights record of countries with which information was shared: for instance what is Canada's policy regarding intelligence sharing with a country like Syria where the prevalence of torture in detention has been well documented by Amnesty International and by the U.S. Department of State.[7]

v) The Understanding of and Commitment to Canada's Absolute Obligation to Prohibit Torture

Amnesty International considers it to be vitally important that this Commission of Inquiry serve to unequivocally remind the Canadian government of its binding obligation to

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[7] In the Amnesty International Annual Report released in May 2002 (four months before Mr. Arar was arrested in the United States and sent to Syria), the concern about torture in Syria is succinctly described: "Torture and ill-treatment continued to be inflicted routinely on political prisoners, especially during incommunicado detention at the Palestine Branch and Military Interrogation Branch detention centres." The U.S. Department of State Country Report on Human Rights Practices for Syria, released in March 2002, noted that: "Although torture occurs in prisons, torture is most likely to occur while detainees are being held at one of the many detention centers run by the various security services throughout the country, and particularly while the authorities are attempting to extract a confession or information regarding an alleged crime or alleged accomplices."

prohibit torture. In the wake of the disturbing images of torture from the Abu Ghraib detention centre, the international community's concern about the continuing prevalence of torture around the world has intensified. A timely report from this inquiry, reaffirming that governments carry a broad responsibility to combat torture, would make a valuable contribution to the ongoing global struggle to eradicate torture.

Canada's obligation is not limited to ensuring that torture does not happen in Canadian jails. It includes an obligation to prohibit complicity in torture.[8] Complicity is the troubling unanswered question that has always lingered in Maher Arar's case. Who within the Canadian government knew what about torture and when?

There a number of elements related to the broad concern about complicity, all of which should be examined closely in the course of the inquiry proceedings:

- At the outset, who within the Canadian and/or U.S. government knew or ought to have known that Mr. Arar faced a serious risk of torture if sent to Syria?
- While Mr. Arar was in detention in Syria, who knew or ought to have known that he was being subjected to torture?
- If and when information from the interrogation sessions Mr. Arar underwent in Syria made its way back to Canadian law enforcement and/or security agencies, who knew or ought to have known that those sessions were tainted by torture?
- Following Mr. Arar's release and return to Canada it appears that information from his file, including information from those interrogation sessions, was leaked to the media. Who felt it was appropriate to publicly leak information that they knew or ought to have known was obtained under torture?

vi) Canada's Diplomatic and Consular Practices

While in detention in the United States and in Syria, Mr. Arar and his family relied in large part on the efforts of the Canadian government to safeguard his basic rights and secure his release. Those efforts were overseen by officials within the Department of Foreign Affairs' Consular Affairs Bureau. Throughout the year that Mr. Arar spent in custody there was considerable public debate about the approach taken by Canadian officials, often termed one of "quiet diplomacy." The public debate was often framed as being between two opposite extremes, quiet diplomacy on one end, and loud, angry diplomacy on the other. Amnesty International is of the view that the best strategy for protecting the human rights of any detainee almost always lies in the middle of these two extremes, involving a mix of quiet and public approaches to the government concerned. This inquiry should seek information from government officials as to the nature of the

[8] The UN Convention against Torture requires Canada to criminally prohibit torture, including complicity in torture, article 4(1): "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."

strategy that was used in this case and should assess whether the decisions that were made about that strategy were made for the right reasons.

While Mr. Arar was still in detention, his family, Amnesty International, and many other groups and individuals frequently pressed Canada to exert pressure on the U.S. government to intervene in a positive and forceful manner with Syrian authorities. Canada appeared reluctant to press that request with U.S. officials. That is a point that should be examined more closely.

Another issue that arose while Mr. Arar was in detention was the need for the Canadian government to speak with one, unified voice about his case. It was often apparent that Foreign Affairs officials were prepared to press harder than they did, and were held back by officials within CSIS and/or the RCMP. This issue of effective coordination across government in safeguarding the rights of a Canadian detained abroad should also be examined more closely.

Finally, it was of grave concern that Canadian officials were never allowed a private consular visit with Mr. Arar while he was in detention. All of those visits were conducted with the presence of Syrian officials. This made it impossible for a conclusive assessment to be made of whether Mr. Arar was being tortured or mistreated. International law gives Canada the right to visit Canadian nationals detained in a foreign country, but is silent as to whether or not those visits are to be in private.[9] Syrian officials stressed that they did not consider the right to consular visits to be applicable in Mr. Arar's case because he was also a Syrian citizen, by virtue of his birth in that country. They indicated that they granted permission for visits only as a favour to Canada. Amnesty International urges the Commission of Inquiry to look at Canada's efforts to press for regular access to Mr. Arar while he was in detention, including private access.

vii) Diplomacy After the Fact: Where is the Protest and Pursuit of Justice?

Lastly, Amnesty International very much hopes that the Commission of Inquiry will interpret its mandate to look at the actions of Canadian officials with respect to Maher Arar right up to the present day. Canada's role in this case did not end with Mr. Arar's release from detention. Over the course of the eight months since his release there have been dramatic and disturbing revelations about the nature of Mr. Arar's treatment in the United States, Jordan and Syria. Yet there has been very little public indication that Canadian officials have actively and forcefully raised and pursued those concerns with officials of those three governments. Amnesty International considers it important that the Commission of Inquiry consider questions such as:

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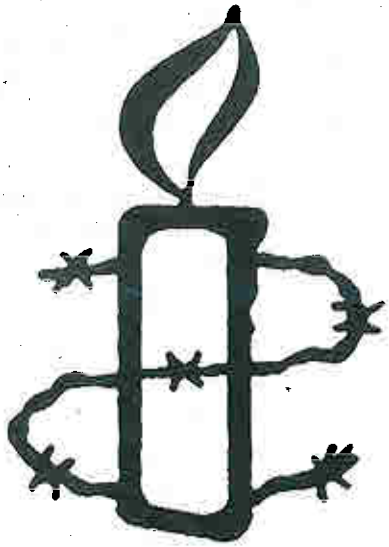
[9] The Vienna Convention on Consular Relations, article 36(1)(c): "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation."

- Have Canadian officials continued to press for an explanation as to why U.S. officials refused to honour Mr. Arar's Canadian passport and sent him to Syria instead?
- Have Canadian officials pressed the U.S. government to launch an independent inquiry into what happened to Mr. Arar in the United States?
- Have Canadian officials pressed the Syrian government to impartially investigate Mr. Arar's detailed and credible allegations of torture leading to anyone responsible being identified and brought to justice?

If the answer to any of these questions is *no* or if Canada's ongoing efforts are minimal, Amnesty International urges the Commission of Inquiry to examine the reasons for Canada's failure to press these and related concerns.

Conclusion

Across the globe, ordinary men, women and children fall victim both to the brutality of terrorism and the insidious and growing web of counter-terrorism. They face death and they face torture, they face discrimination and they face fear. At a time when people the worldover crave and deserve both justice and security, the result, sadly, has been a double assault on both of those fundamental values. That has most certainly been Maher Arar's experience. This Commission of Inquiry can play an important role in pointing a way forward that underscores the direct relationship between security and human rights and reminds governments that one is not possible without the other.



Amnesty
International

Restoring his Rights, Addressing the Wrongs

Amnesty International's
Closing Submissions to the
Commission of Inquiry into the Actions of Canadian Officials
in Relation to Maher Arar

September 10, 2005

Amnesty International Canada
English branch
www.amnesty.ca

I. INTRODUCTION

These are the closing submissions of Amnesty International to the factual phase of the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*. Given that there is an extensive amount of testimony and documentary evidence that has been heard and reviewed *in camera*, some of which might be further disclosed over the coming months, Amnesty International reserves the right to make additional submissions at a later date.

Over the course of the past fourteen months, the Commission has heard extensive testimony – both in public and *in camera* – and reviewed thousands of pages of documents. Before offering observations and recommendations with respect to what has emerged through that evidence, Amnesty International considers it important to underscore two critically important dimensions of the context within which this Commission has taken place: the individual lives at stake, and the global backdrop of the war on terror.

a) The lives behind the issues

The Commission's mandate has been to examine what happened to one particular Canadian citizen: Maher Arar. In the course of proceedings, however, it has become distressingly apparent that what happened to him, has happened to numerous other Canadian citizens as well, including two men who were acquaintances of Mr. Arar – Abdullah Almalki and Ahmad El Maati – and one man who Mr. Arar had never met – Muayyed Nureddin.

The inquiry has spent a great deal of time reviewing policies and documents, examining minutes and memos describing meetings between various government officials, considering the nature of briefings provided to relevant ministers, and debating how much information about police investigations can and cannot be publicly disclosed. Behind all of that, however, is a harsh reality of serious human rights violations that has had a devastating impact on the lives of these men and their families. Their experiences are a tragic reminder that that debate about human rights and counter-terrorism that has emerged around the world since September 11, 2001, is very much a Canadian issue and that it is not just about abstractions and possibilities – there is a very real human cost.

On September 26, 2002 Maher Arar was pulled aside by an immigration officer while transiting through JFK Airport in New York City. Over the coming 12 months he was imprisoned in the United States, then briefly in Jordan and finally in Syria: lost in a nightmare of lawlessness, torture and abuse. Never told what specific allegations had been made against him, he endured extensive interrogations in the United States and Syria, none of which were carried out in the presence of legal counsel. Never given a chance to confront his accusers, or refute the allegations, he was severely tortured in Syria and held in abysmal prison conditions without access to natural or artificial light for months on end. To bring the agonizing torture and mistreatment to an end, he confessed to anything that his Syrian captors demanded of him.

On November 12, 2001 Ahmad El Maati was arrested upon arrival at the airport in Damascus, Syria, where he was travelling to join his new wife. He was held in incommunicado detention, his whereabouts never disclosed to his family, and subjected to brutal torture and extensive interrogation in Syria until January 25, 2002 at which point in time he was secretly transferred to Egypt. He remained in detention in Egypt until his release on January 11, 2004. His Egyptian jailors refused to release him, despite a number of court orders requiring his release. In Egypt, interrogations and torture continued.

On May 3, 2002 Abdullah Almalki was arrested upon arrival at the airport in Damascus, Syria. Having heard that his grandmother was ill, he was returning to Syria for the first time since his family had emigrated to Canada 15 years earlier. He remained in prison until March 10, 2004. He was tortured extensively. He was interrogated relentlessly. He was never allowed legal representation or consular assistance.

On December 11, 2003 Muayyed Nureddin was arrested when he sought to cross the border between Iraq and Syria, en route back to Canada after a visit with his family in northern Iraq. He was imprisoned until January 13, 2004, given no consular or legal assistance, and like the others before him was interrogated and subjected to torture.

Throughout their time in detention and then increasingly following their return to Canada, all of these men have been haunted by the very disturbing likelihood that Canadian officials – directly or indirectly, actively or passively, officially or unofficially – had a hand in what had happened to them. That of course is the central issue being examined in the course of this Commission.

The human rights concerns that arise in all of these cases are serious and wide-ranging, including the rights to be protected from torture, not to be arbitrarily arrested and detained, to have a fair trial, to be free from discrimination and not be treated unequally due to religion, ethnicity or national origin, to be held in humane prison conditions, to have consular access, and to have privacy. All of these men face the long-term challenge of recovering from torture. They feel that their public reputations have been sorely damaged by allegations that they have been involved in or supported terrorist activities, and have not been able to defend themselves as the specifics of the allegations have never been disclosed to them.

Having suffered serious human rights violations these men have understandably looked for justice, for there to be remedy for what they have been through. Justice can play an important role in the healing process for survivors of grave abuses such as torture. But justice has not been there for them. The prospect of turning to the courts of Jordan, Syria or Egypt for accountability and redress is illusory. The Canadian government takes the position that they cannot use the Canadian courts to sue those foreign governments because Canada's *State Immunity Act* shields other governments from civil suits (even for

harm as egregious and universally criminal as torture).[1] This Commission offers what can potentially be a profoundly important means of justice for Mr. Arar. The other three men will understandably look to the report from this Commission to advance their own call for justice.

The human rights impact of these cases does not end with these four men. They have family. Both Mr. Arar and Mr. Almalki are married and have young children. They have close friends. All of these individuals too have been traumatized and deeply effected by what has happened. Many lives have been shattered.

b) The global context: counter-terrorism and human rights

> ... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[2]

Fifty-seven years ago, in the wake of the carnage, devastation and insecurity of the Second World War, the United Nations rightly established that the protection of fundamental human rights must be at the very heart of how we live our lives and govern ourselves. The eloquent opening to the *Universal Declaration of Human Rights* highlights that "freedom, justice and peace" depend entirely on there being full respect for basic human rights. Freedom, justice and peace are of course in turn the very values that are at stake in the current global debate about security. Security is about freedom, about justice, and certainly about peace.

This first crucial universal human rights document was adopted at a time when the world was painfully aware of the depths of depravity to which human beings can descend, and the extent to which it is overwhelmingly civilians who are the primary victims of the violence and insecurity that results. When governments established the global human rights order they knew that they are often forced to confront horrifying events and take decisive action. They agreed however that their actions must always proceed within a binding human rights framework, which would bar them from violating fundamental rights directly and also require them to take steps to protect their citizens from human rights abuses that others might commit. In taking this step, governments were not somehow selling security short. Rather, they expressly noted that it is "disregard and contempt for human rights" that have "resulted in barbarous acts."[3] Security would come by embracing and committing to human rights like never before.

As the international human rights system developed, more detailed and comprehensive treaties continued to grapple with these fundamentally intertwined imperatives to protect human rights and ensure security. Some rights were therefore drafted in terms that

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[1] *Bouzari v. Iran*, Quicklaw cite: [2004] O.J. No. 2800 (Quick Law), Docket C38295, para.76, June 30, 2004.

[2] Universal Declaration of Human Rights, adopted by the United Nations General Assembly, 10 December 1948, first preambular paragraph.

[3] *Ibid.*, second preambular paragraph.

recognize an inherent balancing which takes into account the need to safeguard national security, public order or the protection of the rights of other people.[4] Other rights are not open to balancing, but can be suspended temporarily if necessary "in time of public emergency which threatens the life of the nation."[5] Finally, a number of human rights are specifically identified as being of such importance as to never be subject to restriction or derogation, such as the right to life, the protection against torture and cruel treatment, the prohibition of slavery and freedom of religion.[6]

Despite the careful crafting of treaties, declarations and resolutions that recognize and accommodate the responsibility of governments to act to ensure the security of their citizens and the obligation of governments to intervene to protect individuals from human rights abuses at the hands of others, governments around the world have consistently used arguments about security as an excuse for violating the full range of universally protected human rights. Throughout more than four decades of investigating, documenting and reporting human rights violations around the world, and long before the events of September 11, 2001 brought the issue to the forefront of global debate, Amnesty International has highlighted this concern in countries on every continent.

Faced with widespread armed opposition, sporadic violent protests or vicious acts of terrorism; with sweeping peaceful opposition, active political agitation or limited underground dissent, governments have used "security" as an excuse for mass arrests of ethnic or religious minorities, for the torture of political opponents, and for launching military action that results in huge numbers of civilian deaths. Invariably the abuses have served only to create further resentment, grievance, opposition, violence and insecurity. In the end, neither human rights nor security have been advanced.

It is perhaps auspicious that we present these submissions to you on the eve of the fourth anniversary of the September 11th attacks in the United States. Following those attacks and in the aftermath of later terrorist attacks in Spain, Russia, Indonesia and elsewhere, including recently in the United Kingdom, Amnesty International has repeatedly underscored the central role that human rights must play in all laws, policies and practices that governments adopt to counter terrorism and enhance security. We have highlighted that the debate about human rights *versus* security is a false debate. This has been reiterated and affirmed again and again over the past four years by other organizations,[7] by international[8] and national-level[9] political leaders,

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[4] International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations General Assembly, 16 December 1966, acceded to by Canada, May 1976. The ICCPR allows restrictions of this nature on the exercise of such rights as freedom of expression (article 19), peaceful assembly (article 21) and association (article 22) on such grounds, as long as the restrictions are prescribed by law and are strictly necessary in a democratic society.

[5] *Ibid.*, article 4(1). The public emergency must be one which threatens the life of the nation and it must be officially proclaimed. The resulting suspension of or derogation from rights can only be to the extent strictly required by the exigencies of the situation, must be consistent with other international legal obligations and cannot be applied in a discriminatory manner. This would apply to rights such as the protection against arbitrary arrest and detention (article 9) and the right to a fair trial (article 14).

[6] *Ibid.*, article 4.

[7] The Berlin Declaration, The International Commission of Jurists' Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, adopted 28 August, 2004, fifth preambular paragraph:

and in important court decisions.[10] Human rights will always be precarious if security is not assured, and security will inevitably be tenuous at best if not firmly grounded in human rights.

It is from this global perspective that Amnesty International makes this submission to the Commission. Of course Canada must have laws, policies and practices in place to ensure thorough investigation of and effective responses to any threat to public safety, most certainly including concerns about possible terrorist activities. Canada also has a wider responsibility to contribute globally to efforts to curb terrorism in other countries. Canada's laws, policies and practices, adopted in the name of security, cannot however in any way be allowed to cause or facilitate human rights violations. This is of vital importance in ensuring the protection of the basic rights of individuals, be they Canadian citizens or not, who may be impacted by these laws. It is doubly important however in that Canada must set a model for other nations to follow. Canada is frequently recognized and often lauded on the world stage for its commitment to the protection of fundamental human rights, at home and abroad. It is all the more critical therefore to ensure that Canada's laws and practices demonstrate clearly that security can and must be pursued in a manner wholly consistent with international human rights obligations.

RECOMMENDATION 1: The Commission should assess the evidence and formulate recommendations in a manner that firmly recognizes that Canada's counter-terrorism laws, policies and practices must be wholly consistent with international human rights standards.

"There is no conflict between the duty of states to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other rights. On the contrary, safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the state."

[8] UN High Commissioner for Human Rights, Louise Arbour, Biennial Conference of the International Commission of Jurists, 27 August 2004: "For even though it may be painted as an obstacle to efficient law enforcement, support for human rights and the rule of law actually works to improve human security."

[9] Minister of Foreign Affairs Bill Graham, Speech to the Canadian Bar Association, 12 August 2002: "Our most compelling challenge in responding to terrorism, apart from containing it, is to uphold the values and norms we cherish - democracy, respect for the rule of law and human rights."

[10] Such as in the recent decision of the House of Lords with respect to provisions of the United Kingdom's anti-terrorism legislation, *A and others v Secretary of State for the Home Department* [2004] UKHL 56, 16 December 2004, per Lord Hoffman at para 97: "The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for parliament to decide whether to give the terrorists such a victory." Or in an eloquent Israeli Supreme Court ruling that predates 2001, *Public Committee Against Torture in Israel v The State of Israel*, HCJ 5100/94, at para. 39: "This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties."

II. THE "PUBLIC" INQUIRY

Amnesty International actively supported the call for a public inquiry to be convened into Mr. Arar's case. Writing to former Prime Minister Chrétien on November 4, 2003, the day that Mr. Arar spoke about his ordeal in a national press conference, we noted that:

> ... it has become evident that the only effective way to provide a venue for Mr. Arar to obtain justice, as well as to examine what measures need to be put in place to guard against this happening again in the future, is through a public, independent inquiry. Other options are either restricted in their scope or limited in their effectiveness. The day after Mr. Arar's return to Canada you stated that you felt there was no need for an inquiry. In light of Mr. Arar's public testimony today, I urge you to reconsider your position and convene an inquiry without further delay.

We welcomed the government's decision to establish the inquiry. We have actively participated in the inquiry as an Intervenor. We have made submissions at various stages. We have provided input to Commission Counsel as to areas that we felt should be explored during *in camera* sessions. We have made submissions to and participated in the policy phase of the Commission as well.

While we continue to support and have confidence in the Commission, we have been deeply dismayed and found that our ability to participate effectively has been significantly impaired by the widesweeping approach the government has taken to national security confidentiality.

We always recognized that there would be aspects of the inquiry that would not be open and accessible to the public. We were, however, surprised that the *in camera* phase extended over a period of close to eight months, while the public phase was less than half that long. It became apparent that the government and the Commissioner had differing views as to how national security confidentiality should be interpreted.[11] That was further underscored by the cautionary remarks made by the Commission's *amicus curiae*, Ron Atkey in submissions in May, describing an excessive "culture of secrecy" on the part of the government.[12]

This is, after all, a "public" inquiry. The government rightly decided it should be public, but has, unfortunately, significantly curtailed the public's ability to participate in and follow the proceedings through what appear to have been excessive and overly-broad claims of national security confidentiality. Maintaining a strong public dimension is critical, and not because it is important to cater to a public appetite for prurient details about shady allegations of terrorism. The Canadian and indeed a wider international

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[11] Points 66 to 106, Justice O'Connor's "Ruling on National Security Confidentiality," December 20, 2004.

[12] "I fear that the public disclosure, your interim public report, to be submitted next fall, may never see the light of day, because of continued national security claims," Mr. Atkey said in a formal submission at the commission's first public hearing in nine months....This is fair neither to Mr. Arar, nor the Canadian public," "Expert warns 'culture of secrecy' may block truth about Arar case," Michael Den Tandt, *Globe and Mail*, May 4, 2005.

public, have been engaged with and followed this case because people understand that crucial principles are at stake: fundamental human rights and the rule of law, tolerance and equality in security and policing practices, freedom of expression and information. Those are the values that are at stake when the public is excluded from significant portions of these proceedings.

Our disquiet about how national security confidentiality has been handled grew when the disclosure of one particular document at two different times in the inquiry, differently redacted in each instance, revealed some of what is being withheld. In one version it had been considered appropriate to black-out the fact that a memo describing the first consular visit with Mr. Arar in Syria referred to his answers during the interview having been "dictated to him in Arabic by the Syrians."[13] The only possible explanation for the redaction is that someone considered it to be covered by the broad category of being something that might harm international relations, as it would be an embarrassment to Syria. At the same time, of course, it is information of obvious advantage to Mr. Arar.

Amnesty International has frequently expressed concern that "international relations" is not a recognized reason under international law for limiting public access and disclosure of evidence in the course of judicial proceedings. It raises the prospect of information being withheld from the public, from the accused in a criminal trial, and the parties to other types of legal proceedings, simply because it might embarrass Canada in its dealings with another government or become an inconvenience in international negotiations dealing with a trade or other issue. Article 14(1) of the *International Covenant on Civil and Political Rights* establishes the important right to a public trial and envisions the possibility of excluding the public from a criminal proceeding only for reasons of "morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."[14] Protecting international relations is not included and does not therefore in and of itself justify excluding the public.

Amnesty International made submissions at the outset of the Commission urging that a human rights-based approach be applied in formulating and applying the definition of national security confidentiality. With respect to the issue of "international relations" we noted specifically:

> To meet the test of a legitimate national security interest, a NSC claim must have, as its genuine purpose and demonstrable effect, protection of Canada's, or an allied country's, existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. A National Security Confidentiality claim may not be justified on the ground of national security if its genuine purpose or demonstrable effect is to protect interests unrelated to national security; including, for example, to protect a

[13] Exhibit P-193: Memo fromPillarella to HQ DFAIT of October 23, 2002 re: Consular Visit to Mr. Arar.
[14] ICCPR, *Supra*, footnote 4.

government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions. Moreover, a claim of NSC status on the grounds of "international relations" not tied to the sorts of harms anticipated in the definition of a legitimate national security interest does not, in Amnesty International's submission, comply with international standards. [15]

RECOMMENDATION 2: Claims of national security confidentiality should only be allowed in the final report to the extent that they are consistent with international human rights standards and should disclose the maximum amount of information possible to the public. In the adjudication of national security confidentiality claims, the term "international relations" should be confined to instances demonstrably linked to concerns of a degree of seriousness equivalent to the use or threat of force against another nation and should not be used to protect another government from embarrassment, inconvenience or criticism.

III. MAHER ARAR

This Commission of Inquiry must answer one central question: what was the role of Canadian officials in relation to the case of Maher Arar. This is *his* inquiry. It comes in the wake of the remarkable and courageous public campaigning carried out by his wife, Monia Mazigh, during the year that Mr. Arar spent in prison in Syria. It comes following Mr. Arar's remarkable and courageous decision to open his life and his harrowing experience to the Canadian public, with a demand that there be full transparency and accountability. In doing so he has been subjected to anonymous leaks from unnamed government sources, which were clearly designed to tarnish his reputation and diminish his credibility. In doing so he and his family have become the subjects of relentless media attention throughout the nearly two years since his return to Canada.

Mr. Arar pressed for a public inquiry for a number of reasons. He wanted to clear his name. He wanted to know why this had happened to him and who was responsible. He wanted those responsible to be held accountable. He wanted redress for the harm he suffered. He wanted to be sure that this would not happen to anyone else in the future. The final report of the Commission must grapple with these important points.

Amnesty International has not been able to review evidence that has been presented *in camera*, some of which likely seeks to explain or justify why Mr. Arar became part of a Canadian national security investigation. We are therefore not in a position to reach conclusions as to the nature and reliability of any such evidence. We approach this case, however, with full regard for the fundamental principle of the presumption of innocence, enshrined in Canadian and international law. We are also struck that after two years of unprecedented public interest in this case, the in-depth investigative coverage of numerous national journalists, several leaks of information about the case, and fourteen months of hearings (four of which were held in public), all that has emerged suggests that

[15] A Human Rights Approach to National Security Confidentiality, Amnesty International's Submission to the Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar, made Pursuant to Section 37 of the Draft Rules of Procedure and Practice, May 28, 2004, at page 19.

at the very most Mr. Arar was a person of peripheral[16] interest, likely primarily because of his acquaintanceship with other people, such as Mr. El Maati and Mr. Almalki. There have been no specific allegations that Mr. Arar was involved in planning, financing, assisting or otherwise supporting any terrorist activities. It is of course important to recall as well that the concerns at stake in this case do not revolve around guilt or innocence. Even if there had been evidence against Mr. Arar or any of the other men, they should have been treated in full accord with fundamental human rights and basic precepts of justice and the rule of law, which would entail criminal charges and a fair trial, not arbitrary arrest, extraordinary rendition and torture.

The nature and reliability of any evidence and allegations that exists in turn against the other men has similarly not been made public. Amnesty International is however deeply disturbed by recent revelations that one central piece of evidence in Mr. El Maati's case – a map that was often described as hand-drawn and which served as the basis for accusations that it was a guide for a planned campaign of bombings in the Ottawa region – has been shown to have been an innocuous government-issue map of an office complex in western Ottawa.[17] This raises questions about the integrity of the investigations in all of these cases and casts considerable doubt as to the reliability of the extensive amounts of evidence and testimony that have been provided *in camera* and not been tested through cross-examination by lawyers for these men or the public assessment that comes through a public judicial process.

RECOMMENDATION 3: Given the failure to charge Mr. Arar with criminal acts of any description, including terrorist-related offences or to bring any allegations to his attention and provide him an opportunity to refute, the Commission should call on the government to issue a clear public statement indicating that there is no evidence linking him to such offences.

Amnesty International awaits the report from the Commission's Fact-Finder, Stephen Toope, as to his findings with regard to Mr. Arar's treatment, including possible torture, in Syria. We have to date found Mr. Arar's allegations of torture to be detailed, credible and consistent with other information.

Throughout the course of the inquiry, evidence (some of which has been confusing, contradictory and contested) has emerged pointing to a variety of ways in which acts and omissions on the part of a wide variety of Canadian officials directly and indirectly led to the circumstances that resulted in Mr. Arar's arbitrary arrest, interrogations, torture, and year-long imprisonment. Some of these points are discussed in further detail in the next section and include:

- concerns that Mr. Arar's experience was quite possibly part of a wider Canadian policy or practice and not simply a result of a series of mistakes;

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[16] Superintendent Michel Cabana, Officer in charge of Project AO Canada (RCMP) describes Mr. Arar as having become a person of interest, and/or a potential "witness," and/or a potential "associate" of a main target, of the RCMP's investigation (June 30, 2005 transcript, pages 8159-8165).

[17] "It was hyped as a TERRORIST map It was cited by Egyptian TORTURERS It is a VISITOR'S GUIDE to Ottawa," Jeff Sallot and Colin Freeze, *Globe and Mail,* September 6, 2005, page A1.

- sharing information with police and security agencies in the United States and in Syria without the proper caveats being attached to indicate the reliability of the information;
- inadequate policies and safeguards to ensure information would not be shared with governments in ways likely to lead to human rights violations such as torture;
- showing active interest in interrogation sessions in Syria in a way that may have encouraged those sessions to continue while failing to insist that Mr. Arar be protected from torture and mistreatment;
- shortcomings, including possible negligence, in the efforts of Canadian diplomatic representatives in Syria; and
- disagreements and poor coordination among Canadian governmental departments and agencies which may have slowed and impaired high-level diplomatic efforts to secure Mr. Arar's release.

International and Canadian law requires that if the acts or omissions of Canadian officials contributed to the torture of Mr. Arar in Syria, those officials and the Canadian government may bear both criminal and civil liability. Mr. Arar has launched a lawsuit in Canada making precisely those allegations. The Commission can and should make recommendations now, however, which clarify whether any officials acted improperly, ensure accountability and pave the way for the compensation that is Mr. Arar's right.

RECOMMENDATION 4: The Commission should recommend that those responsible for what happened to Mr. Arar be held accountable through relevant disciplinary or criminal procedures. This should include responsibility for what happened to Mr. Arar in the United States, Jordan and Syria, as well as responsibility for orchestrating media leaks that took place before and after his release. Furthermore, the government should publicly acknowledge its responsibility, apologize publicly and award appropriate compensation to Maher Arar and his family.

IV. KEY CONCERNS

a) A wider pattern? A Canadian version of extraordinary rendition?

This inquiry has been established to deal with the case of Maher Arar. Amnesty International and all other intervening organizations have highlighted however, since the outset of the inquiry, that there must be careful examination of the possibility that what happened to him was not an isolated, exceptional instance, but rather might have been part of a wider pattern. The pattern might have even been tantamount to a Canadian variation of the notorious U.S. practice of extraordinary rendition, whereby individuals are transferred by one government into the hands of police and jailers in another country, outside of the usual framework of legal and human rights safeguards.

The concern arises because of information that has come to light about what has happened to three other Canadian citizens: Abdullah Almalki, Ahmad El Maati and

Muayyed Nureddin.[18] All three of these men are, like Mr. Arar, Canadian citizens, Muslim, dual nationals, born in Arab countries. They have all been arrested and detained in Syria. They have all, like Mr. Arar, made allegations of being interrogated under torture. And critically, information that arises in each of these four cases raises questions about the scope and nature of the relationship between Canadian law enforcement and security agencies and their Syrian counterparts (and in Mr. El Maati's case, additionally, with Egyptian counterparts). Did their arrests come about as a result of information that was provided by Canadian agencies? Did their arrests come about as a result of some sort of request made by Canadian agencies? Did information from Canada form the basis of the interrogations they experienced in jail in Syria? Did Canadian interest in the results of the interrogation sessions interfere in any way with diplomatic efforts to protect the fundamental rights of these men while they were in detention? What use was made of the confessions and information obtained during the various interrogation sessions and in particular, did information from one interrogation flow into any of the other cases?

Amnesty International's concern about the possible nature and scope of the pattern that may lie behind these cases is outlined in the joint submission on this issue that has been made by all of the intervening organizations.[19]

The allegations that have been made by these other men have not been proven, but they are serious allegations. It defies belief that this was a series of unfortunate coincidences. Canadians need to know what was at play. Canadians need to know whether there was willingness to skirt or overlook Canada's human rights obligations – obligations to protect and certainly not expose people to abuses such as torture and arbitrary detention.

Amnesty International has repeatedly pressed the government to undertake independent review of these other cases. The government has not yet agreed to do so. Notably, however, Prime Minister Martin has stated that one reason that a further process is not needed is that the Commission is not only looking at the "specific instance" of Mr. Arar's case, but is "also looking at the broader issue" that involves these additional cases.[20]

RECOMMENDATION 5: The Commission should go as far as the evidence allows with respect to determining whether what happened to Mr. Arar can be linked to a Canadian policy or practice of having or allowing Canadian citizens to be detained, and/or interrogated on their behalf in countries known for practicing torture, including whether there is *prima facie* reason to believe such a link exists.

We recognize that the Commission may not have seen enough evidence to be able to make conclusive findings of fact with respect to what happened to Mr. El Maati, Mr. Almalki and Mr. Nureddin, or with respect to issues of accountability and redress in their cases. However, if the Commissioner finds that a pattern exists or that there are *prima*

[18] Chronologies submitted on behalf of Almalki, El Maati and Nureddin.
[19] Joint Intervenors' Submission to the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, September 10, 2005.
[20] *Martin rules out expanded probe of Ottawa's role in torture cases, The Globe and Mail,* September 9, 2005, p. A-1.

facie grounds to believe such a pattern exists it is vitally important that he recommends the thorough and independent assessment of those other cases. Amnesty International is of the view that at the very least, *prima facie* grounds do exist.

RECOMMENDATION 6: The Commission should call for a further process of independent, impartial and expert review of the cases of Abdullah Almalki, Ahmad El Maati and Muayyed Nureddin, through a second phase of this public inquiry, through the appointment of an independent expert, or through any other kind of effective independent process that the Commissioner considers sufficient to ensure full and public accountability.

b) In the face of torture: Has there been Canadian complicity, equivocation or negligence?

There are many serious human rights concerns that arise in Maher Arar's case, but none has attracted as much concern and attention as the issue of torture. Amnesty International was gravely concerned, from the early days of Mr. Arar's case, during the period he had been "disappeared" after being held in the United States and not yet re-emerged in Syrian custody, that he faced a very real risk of being tortured. We have documented the longstanding and extensive practice of torture in Syrian prisons, certainly including security-related cases.[21] We repeatedly stressed this concern in dealings with Canadian officials, public campaigning on the case and extensive media interviews – all during the period Mr. Arar was imprisoned in Syria.

The concern became greater in July 2003, when a report emerged from the Syrian Human Rights Committee, indicating that they had received information that Mr. Arar had in fact been tortured. In retrospect now, we are also aware that in July 2002, Canadian consular officials, in their first visit with Ahmad El Maati in prison in Egypt, heard his allegation that he had been tortured in Syria.[22] This information, coming almost three months before Mr. Arar was imprisoned in the same Syrian military intelligence building , should certainly have dramatically heightened concern for Mr. Arar's susceptibility to being tortured, as well as concerns about Mr. Almalki who was already in custody by that time, and Mr. Nureddin, who was imprisoned the following year.

Given this background, it is of central importance that the Commission examine the role of Canadian law enforcement, security, diplomatic and other officials, as well as government ministers, to ensure that all possible and appropriate steps were taken to protect Mr. Arar from the risk of torture and to refrain from doing anything that would increase the risk that he would be tortured. There have, of course, been no allegations that any Canadian official was present during an episode of torture, or that any Canadian official gave specific orders or made a direct request that Mr. Arar be tortured. However, possible responsibility and liability does not end there. The Commission must consider whether there was any complicity on the part of Canadian officials, either in what was done or what was not done.

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[21] Exhibit P-29: Amnesty International Report for Syria, 2002.

[22] Exhibit P-192: August 12, 2002 DFAIT Camant note regarding consular visit to El Maati.

Amnesty International is of the view that there are a number of areas where policy gaps, poor training, wilful blindness and negligence may very well have contributed to the risk that Mr. Arar would be tortured. What follows are a series of concerns drawn from Amnesty International's review of evidence and testimony that has been publicly disclosed. Given the extensive amount of information that is not publicly accessible, much of which likely bears directly on these points, we are in most instances not able to draw specific conclusions.

- There were inadequate policies in place during 2002 and 2003 to govern information sharing with other governments so as to safeguard against the possibility of any such information exposing anyone to a risk of serious human rights violations, including torture.
- There were inadequate policies in place during 2002 and 2003 to govern the nature of collaboration and cooperation with foreign security agencies that are known to commit serious human rights violations, including torture.
- Canadian officials did not act to forestall the possibility that Mr. Arar would be sent to Syria from the United States, despite Mr. Arar having expressed that fear in a visit with a consular official.[23]
- The actions of various government officials, including then Ambassador Pillarella and CSIS officials who visited Syria in November 2002, conveyed an impression to Syrian officials that there was considerable Canadian interest in the results of interrogations and no Canadian concern about the possibility of torture.[24]
- Canadian Embassy officials in Syria, including the Ambassador and the consular officer assigned to Mr. Arar's case, failed to take the risk of torture seriously. This included an unacceptably poor degree of understanding about Syrian human rights concerns on the part of the Ambassador, and an attitude on the part of both men that they would only take torture seriously if they had conclusive proof of its occurrence. Apparent and possible signs of torture, including the fact that Mr. Arar had been held incommunicado for close to two weeks, that he had been submissive in his first visit, and was never allowed private visits were given little weight.[25] When the Ambassador learned that the Syrian Human Rights Committee had reported in the summer of 2003 that it had evidence that Mr. Arar had been tortured, he wrote in a memo to Ottawa that "a visit to Mr. Arar should help us rebut the recent charges of torture."[26]

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[23] Exhibit P-42, Tab 31 and May 11, 2005 testimony by Consular Officer Maureen Girvan (transcript pages 1850-1851).

[24] See for example Exhibits P-137 and P-138, which contain reports from then Ambassador Pillarella about his discussions with General Khalil, say "they would continue to interrogate" Mr. Arar, and that "General Khalil has promised to pass on to me any information they may gather on Arar's implication in terrorist activities." Ambassador Pillarella testified that he did not remember if he had asked for the information, but said that "the information that he promised to provide would be something welcome because we would know everything that we needed to know if we wanted to defend Mr. Arar's interests" (June 14, 2005 transcript page 6799).

[25] Ambassador Pillarella's June 14, 2005 testimony, transcript pages 6786-6794).

[26] Exhibit P-42, Tab 502: Memo from Mr. Pillarella to Graeme McIntyre.

- The consular officer carrying out visits with Mr. Arar did not press for private access to or legal representation for Mr. Arar because he knew that Syrian officials would refuse, given his dual nationality, and it was therefore pointless to make the request.[27]
- The consular officer considered that the appropriate test he was to use during consular visits was to determine whether Mr. Arar was being treated any worse than other prisoners, rather than to determine whether any of Mr. Arar's basic rights were being infringed.[28]
- Information that was provided to the Ambassador from Mr. Arar's interrogation sessions, and then delivered to Canadian intelligence officials in Ottawa was never qualified as being the possible and even likely product of torture.
- Some of the information from Mr. Arar's interrogation sessions appears to have been leaked to media by unnamed government sources during the late autumn of 2003, despite the fact that it was a possible and even likely product of torture.[29]
- Syrian officials appeared to be under the impression that CSIS officials did not want Mr. Arar to be returned to Canada.[30]
- Disagreements, poor communication and a lack of clear political authority among various government departments and agencies, obstructed the formulation of a unified Canadian government statement to Syrian officials regarding Mr. Arar's case, and may have delayed high-level diplomatic efforts to secure his return to Canada.[31]
- The allegations of torture in Syria that were conveyed by Mr. El Maati during a consular visit in Egypt in July 2002 do not appear to have been circulated to all appropriate officials and do not appear to have influenced how subsequent cases such as Mr. Almalki, Mr. Arar and Mr. Nureddin were approached.[32]
- Mr. Nureddin did receive medical attention after his release from prison, but there is no evidence of medical assistance being provided any of the other men – in Syria, Egypt or after return to Canada – or even of them being advised of the importance of seeking medical and psychological treatment for the torture they had experienced.
- There is no evidence of the Canadian government assisting Mr. Arar or any of the other men after their release to pursue accountability or compensation from Syrian or Egyptian authorities. Instead, the Canadian government has taken the position that Canadian courts cannot be used to pursue civil redress from those governments.[33]

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[27] August 31, 2005 transcript pages 11629-11635.
[28] August 30, 2005 testimony by Leo Martel, transcript pages 11158-11157 and 11162-11163.
[29] See, for example, Exhibit P-80, page 5: Article by Juliet O'Neill, *Ottawa Citizen,* November 8, 2003.
[30] We have seen from several sources, including Marlene Catteral and Gar Pardy, that Syrian authorities believed that CSIS had informed them that they did not want Mr. Arar returned to Canada. The frequency of this assertion leaves us questioning CSIS'denial that they ever said that.
[31] Commission counsel summarized some of the problems on June 3, 2005 (transcript page 5367-5378).
[32] Leo Martel testified on August 31, 2005 that he had not received the consular report containing Mr. El Maati's allegations of torture in Syria (transcript page 11471-11473).
[33] See *Bouzari,* footnote 1.

RECOMMENDATION 7: The Commission should assess the actions and omissions of Canadian officials at all stages of Mr. Arar's case and determine whether through direct intent, wilful blindness or negligence, there is any responsibility for having caused of contributed to any of the human rights violations he experienced, including torture, arbitrary arrest, and detention without charge or trial.

RECOMMENDATION 8: The Canadian government should develop Human Rights Protocols to be integrated into all information sharing agreements and arrangements with foreign governments. The Protocols should contain express limitations and prohibitions on the sharing of information in circumstances where it is likely to contribute to a risk of torture.

RECOMMENDATION 9: The Criminal Code should be amended to make it an offence for any person, including a law enforcement or security officer, to do or fail to do anything with the knowledge of or wilfully blind to the fact that is likely to expose someone to a risk of torture, in Canada or abroad.

RECOMMENDATION 10: Appropriate Canadian legislation, including the *Canada Evidence Act* and the *Criminal Code* should be amended to make it clear that information that there is reasonable grounds to believe may have been obtained under torture, in Canada or abroad, will not be used in the course of police or security investigations or in judicial or other legal proceedings, except investigations or proceedings regarding criminal or civil responsibility for the acts of torture. Any such information should very clearly be labelled as having possibly been obtained under torture and shall never be provided to any other person or any other agency, without that *proviso* clearly attached.

RECOMMENDATION 11: The Parliamentary Secretary responsible for Canadians Abroad should be designated as politically responsible for the development and implementation of strategies and action plans, as well as the coordination of and the development of all efforts related to the protection of Canadians imprisoned in situations where there is a serious risk of human rights violations. Any reports received of the torture of a Canadian detained abroad shall be immediately brought to the Parliamentary Secretary's attention, and shall be circulated widely to any other relevant officials, in Canada and at posts abroad. In high risk cases, where a disagreement or dispute arises among government departments or agencies with respect to the strategy to be pursued, the matter should be referred to the Prime Minister for immediate resolution.

RECOMMENDATION 12: When there is credible evidence that a Canadian detained abroad is experiencing or has experienced torture, it should receive high-level political attention, including from both the Minister of Foreign Affairs and the Prime Minister.

RECOMMENDATION 13: There should be a review of the nature of the training and continuing education with respect to human rights issues that diplomatic staff,

including Ambassadors, receive before taking up and throughout the duration of a foreign posting.

RECOMMENDATION 14: Consular officers posted to countries where there is a serious possibility that imprisoned Canadians may experience torture should receive training on how to carry out interviews in prison settings so as to best detect whether torture has in fact occurred. A specialized team of experts should be established to provide advice or guidance as needed, and for flexible deployment abroad when urgent or difficult cases arise.

RECOMMENDATION 15: In all cases of detained Canadians, including those with dual nationality, consular officials should regularly press for private visits and for detainees to be afforded the full range of their rights, including access to medical care and legal counsel, even when the foreign government is unlikely to accede to such requests.[34]

RECOMMENDATION 16: In carrying out prison visits with detained Canadians, consular officials should seek to determine: a) whether the detainee may be experiencing treatment that is any worse than other detainees, and b) whether the detainee may be experiencing any violations of internationally protected human rights. Concerns about either of these points should be immediately raised with the detaining authorities.

RECOMMENDATION 17: Canadian citizens who are tortured abroad should receive immediate and urgent referral to expert medical and psychological treatment upon release.

RECOMMENDATION 18: Canada should amend the *State Immunity Act* so as to allow civil suits against foreign governments for compensation in situations where the alleged harm would be subject to universal criminal jurisdiction, including torture, war crimes and crimes against humanity.

RECOMMENDATION 19: Canada should immediately ratify the Optional Protocol to the United Nations Convention against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment, which seeks to establish a global system of inspections of places of detention with the goal of preventing torture.

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[34] A recent report from the UN Committee against Torture makes this same recommendation: "... The State party should insist on unrestricted consular access to its nationals who are in detention abroad, with facility for unmonitored meetings and, if required, of appropriate medical expertise." Conclusions and recommendations of the Committee against Torture : Canada, CAT/C/CR/34/CAN, at para. 5(d).

IV. CONCLUSION

Ever since his return to Canada Maher Arar has stressed that one of his paramount concerns is to ensure that what happened to him does not happen to anyone else. Amnesty International believes that this Commission can make a tremendous contribution to ensuring that will be the case by:

- Offering exoneration, accountability and redress for Maher Arar
- Examining as widely as possible the likelihood that his case arose as part of a wider pattern and making recommendations for a process of further independent review to examine that pattern.
- Detailing specific changes and reform that are needed to Canadian law, policy and practice to ensure that the actions or omissions of Canadian officials at all times offer the maximum possible protection against torture and do not in any way knowingly or negligently expose individuals to the risk of torture.

This case does not stand in any way for the proposition that Canada should not take concerns about terrorism – domestic and international – seriously. Preventing terrorism and protecting civilians are crucial human rights imperatives. What has happened to Maher Arar, and also to Ahmad El Maati, Abdullah Almalki and Muayyed Nureddin is, however, a stark and very human reminder of the consequences of pursuing counter-terrorism strategies that are not firmly grounded in respect for basic human rights. The result is a legacy of injustice that has shattered the lives of these men and their families, and left a cloud of fear and disenfranchisement hovering over Canada's Arab and Muslim communities. There is no security in that result. There is only injustice.