

**International Civil Liberties Monitoring Group (ICLMG)
Individual UPR Submission – Canada, February 2009**

**Submission of Information by the ICLMG
to the Office of the High Commissioner for Human Rights (OHCHR)
in relation to the Human Rights Council’s Universal Periodic Review (UPR)
of Canada to take place in February 2009**

**Canada’s Anti-Terrorism Laws in Violation
of International Human Rights Standards**

The ICLMG

1. The ICLMG is a pan-Canadian coalition of civil society organizations that was established in the aftermath of the September 11th, 2001 terrorist attack in the United States. The coalition brings together 38 international development and human rights NGO’s, unions, professional associations, faith groups, environmental and refugee organizations. Its purpose is to monitor the impact of anti-terrorism legislation on human rights standards, to advocate against abuses and violations, and in certain cases, to take up the cause of those who have become innocent victims of such abuses.

Methodology and Consultation

2. The ICLMG, with its 38 member organizations, serves as a round-table for discussion and exchange, and to provide a point of reflection and cooperative action. The ICLMG has participated in many conferences, advocated with government officials and before parliamentary committees, was an intervenor before the Supreme Court of Canada in the Security Certificate case (Adil Charkaoui versus A.G. Canada), an intervenor in the O’Connor Commission relating to Maher Arar and the Iacobucci Commission relating to Messrs. Almalki, El Maati and Nurreidin.

Canada’s Human Rights Framework

3. Canada is a member of the United Nations and has ratified the following international human rights instruments which relate to the issues dealt with in this submission;

- *The International Covenant on Civil and Political Rights*
- *The Convention Against Torture*
- *The Convention to Eliminate Racial Discrimination*
- *The Convention on the Rights of the Child*
- *The Geneva Convention – Treatment of Prisoners of War*

4. Canada is also an elected member of the U.N. Human Rights Council and made certain human rights commitments in order to obtain membership in that body.

5. Canada has a constitutionally entrenched *Charter of Rights and Freedoms* and there are human rights acts and commissions at both the federal and provincial levels of jurisdictions in Canada.

Submission Summary

6. The ICLMG submits that Canada, in adopting certain anti-terrorism laws and policies, has contravened its obligations under the U.N. Charter, several international human rights treaties and certain provisions of its own *Charter of Rights and Freedoms*. These laws have expanded police and intelligence-gathering powers, restricted human rights, all without adequate oversight and corrective mechanisms. Specific examples of these contraventions are set out in the paragraphs to follow and include failure to respect due process and the rule of law, arbitrary arrest, preventive detention, racial profiling and suspension of the principle of innocence until proven guilty.

7. The ICLMG supports all legitimate efforts to combat terrorism which is in itself a serious attack on human rights, but argues that these efforts must always respect human rights norms. We do not properly defend democracy, the rule of law and a culture of human rights by abdicating these very principles. Security and freedom are not opposites. Respect for fundamental rights is an essential condition, a vital component of security.

The Anti-Terrorism Act

8. The *Anti-Terrorism Act* (C-36) was adopted by the Canadian Parliament in late 2001. It contained provisions dealing with preventive detention, arbitrary arrest, investigative hearings, listing of alleged terrorist groups, delisting of charitable organizations, suspension of the right to remain silent, and the principle of innocence until proven guilty. Many of these provisions are in contravention of the *International Covenant on Civil and Political Rights* (ICCPR), in particular, Art. 9, 14, 17 and 18. While Art. 4 of the ICCPR allows for derogation of these articles in times of emergency (“... to the extent strictly required by the exigencies of the situation ...”), the ICLMG argues that the measures go beyond what is strictly required and the Canadian government should be questioned about them.

9. These provisions in the *Canadian Anti-Terrorism Act* are also in contravention of Art. 7, 8, 9, 10 and 11 of the *Canadian Charter of Rights and Freedoms* and are not legitimized by Art. 1 of said Charter.

10. While certain articles of *Canada’s Anti-Terrorism Act* have been altered by Court decisions (Khawaja – Definition of Terrorism; and O’Neill – *Security of Information Act*), parliamentary amendments (preventive detention and investigative hearings), and the Act has not yet been applied extensively or successfully, the attitude which inspired it and the threat of its use has had serious consequences. For instance, the original inclusion of reference to religion as a motivational factor in the definition of terrorism has led to people’s religious life being under investigation. Police, intelligence officers and other officials have carried out their duties with an approach of unwarranted suspicion and irresponsible labelling, including religious (racial profiling, especially against Arab and Muslim Canadians (see Arar Report, vol.1). Secondly, the very passage and continued promotion of these exceptional measures by the government has intimidated certain segments of the population with respect to their rights and has had a chilling effect on religious practice and on the funding and programs of civil society organizations dealing with international development and human rights advocacy.

The Public Safety Act

11. The *Public Safety Act* (C.17) adopted by the Canadian Parliament in 2004 was a companion to the *Anti-Terrorist Act* of 2001 and contained further measures to intensify national security activities, including increased information-sharing within and between governments as well as measures relating to aviation

11. (cont.) security, the control of toxins and other dangerous materials, terrorist financing, the disclosure of privacy information respecting airline passengers, expanded emergency measures and a substantial increase in intrusive investigative procedures –much of this exempted from the general rules of due process and transparency. Furthermore, under an obscure provision (Art. 81), there is a clause to legitimize the “No-Fly List” discussed more fully in the next section. Unlike the *Emergencies Act* of 1988, there is no clause stating the measures in question are subject to the *Charter of Rights and Freedoms*, and there are exemptions to exclude public and parliamentary oversight.

12. Like those in the *Anti-Terrorism Act* (ATA), many of these measures are in contravention of the ICCPR and in particular Art. 9, 14, 17 and 19, and they go beyond what is strictly required for an emergency under Art. 4.

The “No-Fly List”

13. Passenger Protect, Canada’s “no-fly list” program, was introduced by the government in June 2007 under the authority of an obscure provision in the *Public Safety Act* (2004) granting discretionary powers to the minister of Transport. The program allows the government to place the names of persons on a list of specified individuals prevented from boarding flights, without any judicial process or authorization and without notice to the listed person. The individual learns of the listing upon arriving at the airport but is not given the reasons for the listing. The information providing the basis for the listing is furnished by the police and intelligence authorities. The individual in question can apply to have his/her name removed from the list but has no access to the information forming the basis of the listing. While it is unknown how many individuals have been barred from boarding a flight since the program’s inception, more than 100 individuals have been the subject of false positives which has caused them to be intercepted and delayed at airports each time they travel. Many listings appear to have been influenced by racial and religious profiling.

14. The ICLMG argues that this “No-Fly Program” contravenes the ICCPR, and in particular, Art. 9, 12, 14, 17, 18 and 19 – and Art. 2 (equality rights). These contraventions go beyond what is strictly required for an emergency under Art. 4. There has been a serious loss of freedom without any trial, due process or transparency.

Security Certificates

15. Security Certificates (or Certificate of Inadmissibility) are provided for in the *Canadian Immigration and Refugee Protection Act* (IRPA). The Act allows the Minister of Immigration and the Minister of Public Safety to issue such a Certificate leading to the detention and deportation of a permanent resident or a foreign national deemed to be inadmissible on security or certain criminality grounds. The definition of security inadmissibility is extremely broad, including people who are not alleged to represent any security danger (for example, who are merely members of an organization that is believed to have committed terrorist acts). The information used to issue such a Certificate is provided by the police or the intelligence services. The Certificate is subject to review by a judge to determine if it is reasonable (a very low level of proof) and the review is based on intelligence, not on evidence as generally required in a trial. The judge may hear evidence in secret (which is often the case) that is not disclosed to the person concerned or their lawyer, and use that evidence in deciding whether the certificate is reasonable. Security Certificates cannot be used against Canadian citizens.

16. On February 23rd, 2007, the Supreme Court of Canada ruled that this non-disclosure of evidence contravened the *Canadian Charter of Rights and Freedoms* and decreed that a fair hearing leading to detention must include the right to know the case put against one, and the right to answer that case. At the time of the

16. (cont.) ruling, five Muslim men had been in detention or under house arrest with control measures, without charge or a fair trial for a combined twenty-six years.

17. In February 2008, the Canadian Parliament passed a law to offset the 2007 Supreme Court ruling and to resurrect the Security Certificate process. The key difference between the new law and the one ruled unconstitutional is the provision of Special Advocates to protect the interests the persons named in the Certificates at the review process. However, these special advocates do not have the right to discuss the so-called evidence with the persons subject to the certificate. In these circumstances, the ICLMG argues that these Security Certificates still contravene both the *Canadian Charter of Rights and Freedoms* as well as the ICCPR (Art. 2, 9, 13 and 14). The person affected is still held in detention without trial, does not have the right to know the case against him, nor the right to answer that case. Four of the five Muslim men subject to the certificate have been released on bail under highly restrictive conditions (amounting to house arrest) and one remains in detention.

The Arar Commission

18. Maher Arar is a Canadian citizen who was a victim of extraordinary rendition. On September 26, 2002, while passing through JFK Airport in New York, Mr. Arar was arrested, detained by U.S. officials for twelve days and then removed against his will to Syria where he was imprisoned and tortured for nearly a year. He was released without any charge and returned to Canada on October 5th, 2003. On February 8th, 2004, in response to public pressure, the Canadian government appointed Mr. Justice Dennis O'Connor to conduct a public inquiry to investigate and report on the actions of Canadian officials in relation to Mr. Arar's experience and to make recommendations concerning an independent review mechanism for national security activities.

19. Justice O'Connor carried out his inquiry from February 8th, 2004 and tabled his first report in September 2006. He found that the Canadian police (R.C.M.P.), without any justification, had labelled Mr. Arar as an "Islamist extremist linked to Al Quaida", and the shared this inaccurate information with U.S. law enforcement agencies. Judge O'Connor concluded that it was likely that in arresting Mr. Arar in New York and sending him to Syria, the U.S. authorities relied on the false information provided to them by the R.C.M.P. In his first report, Judge O'Connor made 23 recommendations to correct the human rights abuses and failures which led to Mr. Arar's ordeal. Many of these recommendations were aimed at preventing disregard of the rule of law, deficient investigative practices, irresponsible labelling and sharing, racial profiling, arbitrary arrest and detention and the practice of torture, all contraventions of the ICCPR and the *Convention Against Torture* (CAT). At this date, more than two years after O'Connor's report, we have no report on the implementation of these recommendations.

20. On December 12th, 2006, Judge O'Connor released his second report, making strong recommendations to establish a comprehensive review and oversight mechanism for security and intelligence operations in Canada. While there were several review bodies already existing in Canada, they were narrowly focused, diverse in their mandates and powers, ineffective against joint force operations and unable to protect Mr. Arar from the abuse which he endured. O'Connor's recommendations would provide greater assurance that security and intelligence activities respected the rule of law, due process and human rights standards. To date, there is still no response from the Canadian government.

The Iacobucci Commission

21. During his inquiry, Judge O'Connor came across three other cases similar to that of Maher Arar. Three Arab-Canadians (A. Almalki, A. Abou-Elmaati and M. Nureddin) were all arrested in Syria, detained and tortured in the same prison as Mr. Arar and were subject to the same questioning and abuse. They were finally

21.(cont.) released without charge and returned to Canada. Since Judge O'Connor did not have a mandate to investigate these three cases, he recommended a new, separate enquiry to carry out this task. As a result, on December 11th, 2006, the Canadian government appointed former Supreme Court Justice Frank Iacobucci as a Commissioner to determine whether any Canadian officials were directly or indirectly responsible for the abuse suffered by these three Canadians. The Commission is now concluding its work and its report is expected on October 20th, 2008. There has been much criticism of this enquiry for its lack of transparency. Unlike the Arar Inquiry, much of its work was carried out *in camera* and there were very few public meetings, even on issues which did not touch on national security. Even the men affected and their lawyers were shut out of the process and have had no access to information.

Omar Khadr

22. Omar Khadr is a Canadian citizen who was captured by the U.S. forces following a firefight in Afghanistan in 2002 when he was fifteen years old. He was labelled an “enemy combatant” and accused of murdering an American soldier. He has been in prison at Guantanamo Bay for six years and is still awaiting a military trial. Serious allegations of torture and ill-treatment in his case remain uninvestigated. Although this detention and process have been condemned as illegal by several courts and a parliamentary committee, the Canadian government (unlike other states) has refused to intervene and request his return to face justice and rehabilitation in Canada. As a child combatant at the time of his arrest, Omar Khadr is entitled to special protection under the *Convention on the Rights of the Child* and the accompanying Optional Protocol on the involvement of children in armed conflict. Furthermore, the detention regime in Guantanamo Bay is in violation of the *Third Geneva Convention*, the *Convention Against Torture* and the ICCPR (art. 7, 9, 10 and 14).

Other Canadians Detained Abroad

23. The Canadian government has also demonstrated an unwillingness to intervene to repatriate other Canadian citizens detained or stranded abroad on security-related grounds. Among them is the case of Sudanese-born Abousfian Abdelrazik, arrested while visiting Sudan in 2003, apparently at the request of Canadian intelligence agents. Allegedly tortured while in detention, he has never been charged and was released from prison in 2005. He is presently taking safe haven at the Canadian embassy in Khartoum because airlines refuse to sell him a plane ticket and the Canadian government refuses to replace his expired passport, alleging he cannot fly back to Canada because as he is on the UN 1267 list. However, the travel ban accompanying such listing contains a specific exemption allowing an individual to return to his country of citizenship.

Conclusion

24. In this submission, the ICLMG requests the UNHRC to raise the above-cited issues with the Canadian government during Canada's review (UPR) in February 2009 and to recommend changes in its laws and policies which would require Canada to conduct its anti-terrorism campaign within the framework of international human rights norms and in accord with the UN Charter, the ICCPR and the CAT.

September 5, 2008

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