International Civil Liberties Monitoring Group

(ICLMG)

Submission
on the
Factual Inquiry

to the

Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar

September 2005

(the ICLMG has been granted "Intervenor Status"
by the Commission)

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Submitted by the
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Foreword

1. This is the written submission of the International Civil Liberties Monitoring Group (ICLMG) for the preparation of the interim report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar.

2. The Factual Inquiry is not finished, and it has been announced that other facts could be submitted as evidence following the submission of the preliminary report. What is more, because of the government's objections, we did not have access to all of the summaries of the evidence that was heard in-camera. Therefore, much like the general public, we are confronting facts that have often only been partially disclosed. It is in this context that we ask the Commission to be able to make further submissions later, if necessary.

I - The Heart of the Inquiry

3. At approximately the same period of time from November 2001 to January 2004, four Canadians (Ahmad Abou El Maati, Abdullah Almaki, Muayyed Nureddin and Maher Arar) find themselves imprisoned, tortured and interrogated in Syria, all under similar conditions. Other Canadians report having experienced the same torment in the same context.[1] The circumstances surrounding security intelligence sharing, the trips taken to Syria by the RCMP and by CSIS, the deportation to Jordan and then to Syria, the reticence of the intelligence agencies and of the RCMP to facilitate Maher Arar's return to Canada, and the attitude as well as the behavior of the ambassador to Syria and the Solicitor General cannot avoid suggesting a strategy aimed at extracting and exchanging information from Canadian individuals who were victims of torture and cruel and unusual treatment. In our opinion, the final report of the Inquiry must answer this question if it is to fulfill its mandate: do the facts made public in these four cases demonstrate that the Canadian government carried out a pattern of "subcontracting" torture?

4. Among the many examples of troubling similarities amongst these four cases, we highlight the following:

[1] "Nine Canadians convicted by the company they kept," Special Report, Shelley Page (with files from the Canadian News Services), *The Ottawa Citizen*, pp. A6-A7, December 15, 2004.

a. Like Mr. Arar, Mr. El Maati and Mr. Almaki were subjects of a linked investigation by integrated teams called "Project O Canada" and "Project AO Canada";

b. Before they left Canada, all four people were interrogated by investigators in Canada without their own lawyer's presence;

c. The four people concerned allege to have been detained and tortured by the Syrian intelligence service at the same location, known as the « Palestine Branch »;

d. The kind of questions including the specific questions asked by the torturers during the interrogations came from information transmitted by Canada and derived from investigations carried out by Canadian authorities. Furthermore, these questions were similar to questions asked of the victims, in Canada, by Canadian security agencies.

e. Mr. Arar, Mr. El Maati and Mr. Almaki were all interrogated about each other;

f. According to the evidence and the chronologies of Mr. El Maati and Mr. Almaki, General Hassan Khalil, who was responsible for the Syrian intelligence service, played an important role in the detention and interrogation of the four men;

g. Documents made public reveal that the RCMP and CSIS pursued their investigation of these four individuals, notably by means of direct or indirect communication with the Syrian intelligence services, as well as through meetings or information sharing with this latter party;

h. There was an expressed interest by the RCMP and CSIS to travel to Syria and Egypt to interrogate Mr. Arar, Mr. El Maati, and Mr. Almaki directly while they were detained;

i. We also note the persistence of the Canadian intelligence agencies and of consular staff in trying to access the statements obtained from these four individuals under torture; and the energy exerted by Mr. Pillarella, ambassador to Syria, to facilitate RCMP and CSIS meetings with highly-placed Syrian intelligence officials.

5. Even if Canadian officers or representatives had not participated directly in the imprisonment or in the ill-treatment to which these individuals were subjected, it remains the case that the Canadian officials were persistent in their efforts and repeatedly took steps to obtain the results of interrogations carried out under torture from the foreign agencies and the detainees themselves. Incompetence, or communication problems between ministries or state agencies can neither suffice to explain their behavior, nor the numerous denials of

government witnesses, particularly during the hearings of May through August 2005, nor the marked tendency of many witnesses to shift their responsibility to other government actors. Rather, the actions of the Canadian officials appear typical of tacit consent or of willful blindness to the situation of Canadians detained by states known to practice torture.

6. Improvements of communication within government agencies and between departments, and corrections to the training of state officers, as well as to the rules and regulations regarding information and security remain necessary. However, the Commission's report must not only deal with changes to operating standards, but it must identify and reveal Canada's strategy for extracting information from individuals who are detained and mistreated abroad. The public legitimately expects the Inquiry to answer this question.

7. The public legitimately expects that the state will examine the case of other Canadian victims of such an information-gathering strategy. Such an examination is possible without necessitating multiple public inquiries.

Recommendation No. 1: That the Inquiry shed light on the application, by Canadian authorities, of a policy, a pattern or a practice of subcontracting torture with the aim of extracting information from individuals detained in Syria and other countries.

Recommendation No. 2: If additional evidence is required to demonstrate a pattern of subcontracting torture, the Commission should:

a. Either order the reopening and prolongation of the factual inquiry;

b. Either recommend the nomination of an independent expert mandated to examine and publish a report on the responsibility of authorities, civil servants, and government agents in the case of Ahmad Abou El Maati, Abdullah Almaki and Muayyed Nureddin, all three detained by a foreign state and victims of torture and of cruel, unusual, inhuman or degrading treatment;

c. Either recommend any other kind of effective independent process to examine the cases of these three individuals and inform the public of the reasons behind their mistreatment.

II – ICLMG's Other Concerns

8. During its opening representation, presented to the Commission on June 14, 2004, the ICLMG highlighted six concerns that we considered important; we believe that it continues to be essential to address and to clarify these questions. The facts revealed in the course of the Inquiry raise an additional concern related to the subordination of the Canadian agencies to foreign agencies in integrated security and intelligence teams.

Recommendation No. 3: That the Commission's report address and clarify the following concerns:

a. The respect and concern for fundamental rights by all actors involved in the Arar case: respect for the constitutional rights of Maher Arar, respect for federal and provincial human rights legislation (including privacy rights), and respect for International Human Rights Instruments.

b. The obligation of responsible agencies to ensure that Mr. Arar's fundamental rights were respected, as well as the degree of knowledge and exercise of this obligation.

c. The precise role of each of the various branches of the Canadian government and the real motives for action or inaction.

d. The sharing of information between states, particularly between government security and intelligence agencies, as well as their genuine concern about the impacts of such sharing.

e. The level of real accountability on the part of all governmental actors.

f. The effectiveness and efficiency of intervention mechanisms, by Canadian authorities, when a Canadian citizen experiences a situation like that of Maher Arar, the impact and limitations of these mechanisms, as well as the capacity to benefit from the expertise of NGOs in such matters and to involve them in the search for solutions.

g. The role of the United States' agencies in the integrated intelligence and counter-terrorism teams, as well as the degree of autonomy or of subordination of Canadian agencies to American agencies in this investigative mechanism.

III - Information-Sharing between Agencies and between States

Obtaining Information at all Cost

9. The Inquiry confirms that information sharing is an important issue to be broached. Exchanges of information and intelligence about citizens between state agencies have augmented substantially since the events of September 11, 2001.[2] Michel Cabana of the RCMP and director of the integrated "A O Canada" team explained the obsession with maintaining the flow of information sharing with the United States, without regard for the rights of citizens. Testifying on the operation of the integrated teams, he recounted the constant presence of representatives of the FBI and other U.S. agencies without being able to reveal which ones (including, in all probability, the CIA) for reasons of national security. As reported, the meetings were frequent, more than once a week. Mr. Cabana explained that in order to conform to his superiors' directions, he and other Canadian members of the team carry out investigative work with the U.S. agencies on the "open book investigation" model. This sort of collaboration allows us to foresee the certain risk involved in a true integration with U.S. agencies.[3]

10. As Mr. Cabana reported, the transmission of certain information would have required the consent of Maher Arar himself: consequently, the other Canadian agencies or ministries should have been bound by the same obligation to obtain that consent. Again according to Mr. Cabana, the RCMP specifically authorized the U.S. Department of Immigration to use the intelligence on Maher Arar in order to ensure his illegal transfer to Syria. The RCMP also granted the authorization for the sharing of intelligence on Maher Arar between the United States and Syria.

11. Instead of being concerned with the conditions of Maher Arar's detention in Syria, the Canadian ambassador present there, Mr. Pillarella, organized a meeting for CSIS agents with Syrian intelligence agencies. What is more, Syrian authorities told Mr. Pillarella that CSIS agents were authorized to attend the interrogations. The meeting between CSIS and the Syrian intelligence services did in fact take place in Syria but the interrogation "observation" session did not

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[2] See the testimony of Ward Elcock (CSIS), W. John Hooper (CSIS), James Loeppky, June 21, 22, 23 and 30, and July 6, 2004. We draw your attention to the fact that the number of RCMP agents assigned to national security has risen to more than 2,000 since September 11, 2001: Mike Cabana's testimony, June 29, 2005.

[3] Michel Cabana, testimony of June 29 and 30, 2005. The number of FBI agents in Canada has apparently risen to an unprecedented number: Moira Welsh, *FBI Boosts Presence in Canada to Help RCMP*, Toronto Star, November 3, 2001, p. A6; Stephen W. Yale-Loehr and Matthew X. Vernon, *An Overview of U.S. Immigration Watchlists and Inspection Procedures, Including U.S.-Canadian Information Sharing*: S*ubmission to the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, May 31, 2005.

take place, for reasons still hidden from the public in the name of protecting international relations. In a memo dated November 3, 2002, the ambassador stressed the extent to which the Syrians in charge, who were providing them with information extracted from Maher Arar, were "unusually generous."[4] The expression used by the ambassador raises the question of Mr. Pillarella's true role in what happened to Maher Arar.

12. These practices raise several serious concerns to which the Commission must respond in order to fulfill its mandate.

Recommendation No. 4: That the Commission's report address and clarify the following questions:

a. Was the information sharing, the collaboration between Canada, the United States, and Syria, as well as the detention of Maher Arar an indirect way of obtaining information from that individual?

b. Did Maher Arar, and the information concerning him, serve as exchange currency in order to preserve the flow of information being shared by Syria and the United States with Canada?

The Integration of Databases

13. Information provided by the RCMP is found in one of the most important U.S. databases, the TECS (Treasury Enforcement Communication System).[5] This database is in fact a mega-file, as it combines at least 19 other databases, which are themselves formed by several others, each of which possess, on their own, an impressive amount of information.[6]

14. Although Maher Arar was considered to be only a "potential witness" by the RCMP, Michel Cabana confirms that in November 2001, Maher Arar was on a "Terrorist Watch List" used in airports in Canada.[7] Thus, from November 29, 2001, the transcript of the database relating to Maher Arar's travels through Canadian airports carries the remark "Terrorism". During that period, we can see two divergent perspectives: while Canada considers Maher Arar to be simply a

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[4] Franco Pillarella, testimony, June 15, 2005. Memo, Exhibit P-138*: Summary of meeting with General Khalil*.

[5] *An Overview of U.S. Immigration Watchlists…* Op. cit.,See note 3.

[6] By way of example, the FBI's database, the NCIC, contains information on 41 million criminals and 2.5 million terrorists or people suspected of terrorist connections.

[7] Michel Cabana, testimony, June 29, 2005. See also Exhibit P-174.

potential witness, the United States considers him to be a subject of investigation. Unless Canadian authorities automatically qualify a potential witness as "terrorist," the addition of Maher Arar's name to a "Watch List" used in Canada demonstrates the source of the remark. This raises important questions related to Canada's sovereignty. Indeed, who determines the content of the "Watch Lists" when even Canadian databases are made up of information from the United States?

Recommendation No. 5: That the Federal Government not renounce Canada's sovereignty with regard to the content of "Watch Lists", by modifying agreements and/or procedures such that the databases it uses in the country are developed by Canadian authorities according to their own criteria based on their own risk analysis.

Recommendation No. 6: That the databases used in airports are updated regularly by Canadian authorities, in order to correct them rapidly in accordance with the rights and freedoms of the targeted individuals.

N. B. : **The ICMLG is opposed to current proposals by the federal government to create a 'No Fly List'. The recommendations five (5) and six (6) above are not intended to imply an acceptance of the government's proposal.**

Fundamental Rights

15. Ward Elcock, director of CSIS for 10 years until 2004, admitted to having previously recommended to the Minister that he sign agreements on information-sharing with states that practice torture. What is more, he recognized that Canada could sign such agreements as well as receive intelligence and security documents that come from states that practice torture.[8] But one must ask whether security and the struggle against terrorism should take priority over everything, including human rights as set out in Canadian Constitution and International Human Rights Instruments? During an information-sharing process concerning individuals, what becomes of the rights guaranteed by the Constitution and the *Canadian Charter of Rights and Freedoms*? Of the provincial charters of human rights and the laws related to the protection of personal information? Of the fundamental rights recognized by the international community in treaties ratified by Canada, such as the *Charter of the United Nations*, the *Universal Declaration of Human Rights*, the *Convention Against Torture and Other Cruel, Inhuman, or Degrading Punishment or Treatment*? In an information-sharing process regarding an individual, within the framework of an integrated team of national and foreign agencies, what becomes of the right to life, to the integrity of the human person, to private life, to the protection against torture and cruel, unusual, inhuman, or degrading treatment?

[8] Ward Elcock, testimony, June 15, 2004, p. 213, 243, 249.

16. The impact of information sharing on rights and freedoms, the great difficulty of correcting erroneous information[9] and the lack of appropriate monitoring mechanisms worries many national and international NGOs.[10] What is more, information sharing and database-creation are at high-risk of violating the right to equality that prohibits illegal discrimination. Research for information about individuals is carried out by establishing profiles: place of birth, age, occupation, eating habits, etc. The risk of ethnic profiling is inherent in the use of databases and in information sharing. Profiling, notably ethnic or racial profiling, is now recognized as an illegal discriminatory practice.[11]

Recommendation No. 7: That the sharing of information on individuals be clearly subordinated to the fundamental rights guaranteed in the Canadian Constitution, the Canadian Charter of Rights and Freedoms, the provincial charters of human rights, the laws relating to the protection of personal information as well as to the *International Human Rights Instruments*.

Recommendation No. 8: That citizens should have the right, through a monitoring mechanism, to correct erroneous information contained in databases. Such a mechanism should have jurisdiction over all national security operations, in accordance with the recommendations of the International Civil Liberties Monitoring Group in its report to the Commission, which dealt with the policy review.

17. Canada has signed agreements with 247 foreign intelligence services.[12] We must emphasize the necessity of implementing an efficient oversight mechanism for inter-state information sharing, as we recommended in our report related to a monitoring mechanism for the RCMP submitted during the Policy Review (Phase II of the Inquiry). The McDonald Commission recommended that the relations between Canadian security and intelligence agencies and foreign services be the

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[9] *National Security and Rights and Freedoms*, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, December 10, 2004, p. 9.

[10] International Campaign Against Mass Surveillance/Campagne internationale contre la surveillance globale (ICAM), www. Statewatch.org/news/2005/apr/icams-report.pdf. See also the *Joint Declaration on the Necessity of an International Monitoring Mechanism of the Compatibility of the Means of Struggle against Terrorism with Human Rights* (*Joint declaration on the need for an international mechanism to monitor human rights and counter-terrorism*, December 2004).

[11] R. V. Brown, (2003-04-16) ONCA C37818; La Reine c. Campbell, Alexer, C.Q., Montreal, no 500-01-004657-042-00, January 27, 2005, J. Westmoreland-Traoré. *Le profilage racial: mise en contexte et definition*, Me Michèle Turenne, legal advisor, Commission on Human Rights and the Rights of Young People, Director of Research and Planning, Cat. 2.1.20-1.25, June 2005.

[12] Ward Elcock, testimony, June 21, 2004.

object of continual monitoring by an independent inspection body (Recommendation 56b).[13]

18. In December 2001, Canada and the United States signed the Smart Border Agreement ("Ridge-Manley Agreement") and adopted a 30-point action plan. This agreement deals quite openly with information sharing between the two states as well as the transfer of this information to third countries. The Progress Report, made public in December 2002, highlights the establishment of integrated teams in which U.S. agencies participate.[14] The information provided by the Canadian agencies ends up in the hands of U.S. authorities without any genuine monitoring. A memo addressed to Mr. Zaccardelli of the RCMP indicates that, in every instance, information transmitted to the United States is at risk of being transmitted to a third country (the name of the state is crossed out for reasons of international security).[15]

19. How many members of parliament are aware that the FBI and other foreign agencies participate in investigations and have significant weight in the decisions made in Canada? The authorities are only slightly, or not at all aware of the content of the multiple agreements related to information sharing. This feeds the culture of unaccountability of the agencies concerned with national security. Members of parliament are also unaware of the measures taken by these national and foreign agencies and are not in any position to implement measures that would protect human rights. At the heart of the problem, we find the culture of unaccountability and non-transparency of certain foreign agencies like the CIA. Political monitoring of the content of information-sharing agreements is therefore necessary.

Recommendation No. 9: That the Commission's report take up Recommendation 56 b) of the McDonald Commission by requiring a framework for and a monitoring of information sharing with foreign countries.

Recommendation No. 10: That Canadian authorities conduct an analysis of the impact of U.S. participation (CIA, FBI, or others) in investigations conducted in Canada. Such an analysis must fall under the jurisdiction of the

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[13] MCDONALD COMMISSION, Volume 2, August 1981, Recommendation 56b.

[14] *Action Plan for a Smart Border, Progress Report*, December 6 2002, Point 25: "INTEGRATED INTELLIGENCE: The Government of Canada has established Integrated National Security Enforcement Teams (INSETs), which will include representatives from federal enforcement and intelligence agencies, as well as international law enforcement partners such as the U.S., on a case-by-case basis. Canada has also been participating since April 9, 2002, in the U.S. Foreign Terrorist Tracking Task Force (FTTTF) in Washington, to detect, interdict, and remove foreign terrorist threats."

[15] Exhibit P-85, Volume 2, Tab 41: Memo of February 6, 2004: "… "a given that information shared by the RCMP directly or indirectly with agencies of the Government of the United States will find its way into the holding of the XXXXX and as such, have the potential of being used in an 'extraordinary rendition' process…Any 'third party rules' limiting dissemination or information that we apply will probably have little or no effect as to how our information is used or shared in this process."

new monitoring mechanism and/or the new parliamentary committee on national security, as recommended in the International Civil Liberties Monitoring Group's brief to the Commission regarding the Policy Review.
Recommendation No. 11: That a moratorium be imposed on the implementation of information-sharing measures with the United States within the framework of the Smart Border Agreement until that agreement is revised and approved by the Parliamentary Committee on National Security.

IV - The Primacy of Fundamental Rights

20. Michel Cabana, RCMP member in charge of the "A O Canada" project, indicated that the training given to members of the integrated counter-terrorism team didn't include any instruction on fundamental rights.[16] M. Elcock, a lawyer by training and the director of CSIS, demonstrated obvious difficulty grasping the legal definition of torture.[17] In spite of the publication of many detailed and damning reports on human rights in Syria[18] by Special United Nation Rapporteur on Torture, many NGOs, and the U.S Department of State, the director of CSIS maintained that there is no certain proof of torture in that country, which elicited strong criticism from Maher Arar's lawyer. [19]

21. With regard to the Canadian ambassador, Mr. Pillarella, he continued to maintain that there existed no proof of human rights violations in Syria. Much as it occurred to him that Maher Arar had been treated harshly at the time of his arrival in Syria, the ambassador did not know where Arar was detained, nor did he try to find out. According to Mr. Pillarella, there was no evidence or signs that Maher Arar had been tortured or that he had been detained incommunicado. The embassy did not transmit the information to Maher Arar's lawyer in Syria. The ambassador added that it would have been unreasonable to inquire into Maher Arar's detention conditions.[20]

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[16] Michel Cabana, testimony, June 29, 2005.

[17] Ward Elcock, June 21, 2004, p. 205 et al.: Mr. Elcock seemed not to know that the definition accepted by Canada is copied from the United Nations, nor did he already seem aware of the fact that the definition accepted by the U.S. State Department is markedly more restrictive.

[18] Exhibit P-26 and P-27. It must be emphasized that the United States' definition of torture is much more restrictive than the one applied in Canada.

[19] June 21, 2004, p. 234 (ll. 19-25), p. 235 (ll. 1-4): MR. WALDMAN : « Are you telling me that if the Department of State of the United States and its Human Rights Reports says that these countries engage in torture, you are still going to say " I'm not sure that they do "? Is that your position? Is your position then that " I am going to close my eyes to torture until I see the person putting the electric cattle prods on the individual "?»

[20] Franco Pillarella, testimony, June 14, 2005, p. 6897, ll. 1-8.

22. This so-called ignorance of the situation in Syria and this lack of concern for human rights are incredible and absolutely unacceptable in people placed in high-level positions. So little concern for human rights on the part of officials in such high-level positions cannot but generate repercussions all the way down the hierarchical ladder, and generate concrete negative impacts on the fulfillment of and the respect for human rights. The Commission must reveal to the public the real reasons for this so-called ignorance, maintained by officials in such position, officials in whom citizens should normally place their trust.

23. Ward Elcock explained his approach to human rights:

> "It will depend on each particular case what information we have that allow us to come to a view about whether or not that – what the human rights practices of that particular service are, and again back to the issue of balancing that against the issue of securing information that is necessary for the security of Canada.[21]
> …
> As you described it yourself, there is ultimately a balancing and if on balance we believe we should recommend to the Minister that an arrangement go ahead, even if we suspected that that country was using torture…[22]"

In striking the balance between national security and prohibiting torture, CSIS Director at the time, Ward Elcock, indicated that one must balance human rights against other overriding public interests, which is absolutely prohibited in international human rights conventions.

24. On May 20, 2005, the *Committee against Torture* declared its concern with regard to Canada's position on expelling to torture in exceptional circumstances. The United Nations Committee recommended that Canada clearly recognize the absolute character of the prohibition on torture and that it included that recognition in its legislation.[23] The Government of Canada's ambiguous position can only have a negative impact on the attitude taken by its civil servants.

25. The *Charter of the United Nations* stipulates that no agreement between states can derogate from the obligations under the Charter: thus, articles 55 and 56 require respect for respect for human rights and fundamental freedoms."[24] The

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[21] Ward Elcock, testimony, June 15, 2004, p. 245, ll. 4-11.

[22] Ward Elcock, testimony, June 15, 2004, p. 249, ll. 3-7.

[23] CAT/C/CO/34/CAN, May 20, 2005, 4(a), 5(a). *Convention against Torture…*, Art. 3.

[24] *Charter of the United Nations,* Arts. 55, 56 and 103.

Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment clearly stipulates that no exceptional circumstance (war, threat of war, internal political instability, or any other state of exception) can serve as a justification for torture.[25] Even "in time of public emergency which threatens the life of the nation", the *International Covenant on Civil and Political Rights* forbids:[26]

- The arbitrary deprivation of the right to life (Art. 6);
- The practice of torture, as well as cruel, inhuman, or degrading treatment (Art. 7);
- The suppression of the right to recognition as a person before the law (Art. 16);
- The negation of the freedom of thought, conscience, and religion (Art. 18).

26. While all laws and policies were revised in order to ensure that they were in accordance with Article 15, following the adoption of the *Canadian Charter of Rights and Freedoms*, did the Federal Government check all intelligence and security laws and policies to assure their conformity with the Canadian Charter and International Human Rights Instruments?

27. In adhering to the *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, Canada recognized its obligation to incorporate the prohibition on torture into "the rules or instructions issued in regard to the duties and functions" of its government officials.[27] Furthermore, it committed to offer them training on the topic of torture.[28]

28. Many government officials, such as those in certain ministries like Transport or Public Works, or in certain divisions of ministries, like the finance or information divisions of the Department of Foreign Affairs, lack an understanding of human rights. These officials appear to have a less marked interest in human rights and their application in Canada and abroad. Human rights training with respect to fundamental rights in Canada and abroad has been demonstrated to be necessary. Such training must necessarily include International Human Rights Instruments.[29] It is also important to remind officials that not only is

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[25] *Convention against Torture,* ,Art. 2.

[26] *International Covenant on Civil and Political Rights*, Art. 4.

[27] *Convention against Torture…*, Art. 10 (2).

[28] Ibid., Art. 10 (1).

[29] See the full list of Instruments on the Office of the High Commissioner for Human Rights website: http://www.unhchr.ch/html/intlinst.htm.

torture prohibited by international law but *cruel, inhuman, or degrading treatment or punishment* is prohibited as well.[30]

Recommendation No. 12: That the Commission's report reveal to the public the true reasons for the so-called lack of knowledge of the human rights situation in Syria in those officials placed in positions of high responsibility, and of their ignorance of the primacy of human rights, as well as their lack of any concrete concern for the fate of Maher Arar.

Recommendation No. 13: That all laws and policies of the Federal Government, related to security and intelligence, be reviewed in order to ensure their accordance with the fundamental rights set out in the Canadian Constitution and the International Human Rights Instruments, notably the *Universal Declaration of Human Rights,* the *Covenant on Civil and Political rights and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.*

Recommendation No. 14: That the government officials from the different ministries and agencies, particularly those from the RCMP, CSIS, the Canada Border Services Agency and the Department of Foreign Affairs, receive ongoing and up-to-date training respecting the primacy of human rights, including those recorded in the federal and provincial charters; the laws regarding the protection of personal information; and the International Human Rights Instruments, notably the rights set out in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

Recommendation No. 15: That training dealing specifically with the primacy of human rights with regard to information sharing be given to officials involved in such activity.

Recommendation No. 16: That all training on human rights include information on the status of those rights in Canada and in countries abroad.

V - Foreign Affairs and Consular Protection

29. Mr. Pillarella's record of service is instructive: after having been director of the human rights section of Department of Foreign Affairs, he became the director of the intelligence division of the same ministry. He never required that consular staff meet privately with Maher Arar while the latter was in detention in Syria.[31] In another memo dated October 22, 2002, the ambassador recalled General

[30] *Convention against Torture...*, Arts. 1, 2, 3, 16.

[31] During meetings with Canadian representatives, Maher Arar was always accompanied by Syrian officials and was only allowed to speak in Arabic, as English was forbidden to him.

Khalil's promise to transmit to him the information extracted from Maher Arar during the interrogations and Mr. Pillarela insisted on receiving that information quickly. What is more, Mr. Pillarella highlighted the fact that Syrian authorities would continue the interrogation sessions.[32] On November 3, 2002, the ambassador demonstrated concern with the fact that the documents submitted to him were only in Arabic.[33] Moreover, he played the role of liaison between the Canadian and Syrian intelligence services by arranging the visit of CSIS agents at the end of November 2002. In an e-mail dated August 2003, the ambassador stated: *"A meeting with Arar should help us to rebut the recent charge of torture."*[34] (authors' emphasis).

30. In the case of the ambassador, are we witnesses to a demonstrated lack of concern, inertia, negligence, absence of care, willful blindness, or rather, the application of a policy? Did the ambassador receive instructions from a superior?

31. Between ministries of Solicitor General and Foreign Affairs as much as within the Department of Foreign Affairs itself, Canada had multiple voices and many positions regarding Maher Arar. The remarks of Mr. Pardy and Mr. Pillarella are contradictory, as is the will to act in order to end Maher Arar's detention. The ambiguity of the Government of Canada's position and the belatedness with which it sent a clear message demanding Maher Arar's return prolonged his detention. It was only in July 2003 that a letter was sent that unequivocally demanded Maher Arar's return. This reveals, at the very least, a lack of political direction and leadership within the ministries, including Foreign Affairs. Or are we looking instead at a strategy for camouflaging genuine responsibility?

32. Neither the Minister, Mr. Graham, nor highly-placed officials would have been quickly alerted of the situation. While Gar Pardy noted they were signs of torture and transmitted this information to bureaucrats in the Mr. Graham office, both the Minister and one high-level official, Mr. Robert Fry, claim never to have received his report on the subject. This seems incredible, because both Mr. Pillarella and Mr. Pardy are high-level officials. We are faced with two hypotheses: either these close advisors of the Minister did not convey the information to him, or Mr. Pardy, Mr. Fry, or Mr. Graham have misrepresented the facts. It is necessary to shed light on this matter.

33. What is more, in light of this information about Maher Arar, it is unacceptable that rapid follow-up was not undertaken with the Minister and with his high-level officials, including the ambassador. It is also unacceptable that Foreign Affairs

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[32] Exhibit P-137: Memo, October 22, 2002.

[33] Exhibit P-164: Fax, November 4, 2002, containing the memo of November 3, 2002.

[34] Exhibit P-134, Tab 23, p. 7-8/10: Memo written August 12, 2003, from Pillarella to Graimi McIntyre.

did not undertake a more effective follow-up process in regard to Canadians detained by states recognized to practice torture or ill-treatment.

34. On May 20, 2005, the *Committee against Torture* formally recommended to Canada the following:

> 5 (d) the State party should insist on unrestricted consular access to its nationals who are in detention abroad, with the facility for unmonitored meetings and, if required, appropriate medical expertise;[35]

35. The insensitivity of certain consular officials to signs of torture and ill-treatment, which were nonetheless visible in Maher Arar, recalls the necessity of appropriate training in the observation of symptoms of torture or ill-treatment, as well as the establishment of an emergency intervention process when a Canadian is a victim of such treatment.

Recommendation No. 17: That the Commission's report deal publicly with the so-call lack of knowledge and ignorance with respect to the case demonstrated by all the actors, including the Minister of Foreign Affairs, and that it report on the causes and recommend the correctives to be made.

Recommendation No. 18: That the Commission report to the public the genuine reasons for the belatedness of the Minister of Foreign Affairs and his officials in ensuring the return of Maher Arar.

Recommendation No. 19: That the Canadian government quickly implement Recommendation No. 5 d) of the *Committee against Torture*, dated May 20, 2005, notably by using all necessary means to obtain unrestricted and unsupervised access to Canadians detained in a foreign state and by offering them the required medical care.

Recommendation No. 20: That government officials at Foreign Affairs receive appropriate training with regard to the observation of symptoms of torture or mistreatment, and that an emergency intervention procedure be planned when a Canadian is the victim of such treatment.

VII - The Responsibility of the Solicitor General (RCMP and CSIS)

36. During Maher Arar's detention in Syria, many sources, particularly officials in the Department of Foreign Affairs, received information from the Syrians in charge that CSIS had stated to them that they did not wish to see Maher Arar return. However, during his testimony, Mr. Wayne Easter,

[35] CAT/C/34/CAN, May 20, 2005, Recommendation 5(d). See appended document.

the Solicitor General at the time, again maintained that CSIS did everything in its power to obtain Maher Arar's return to Canada. On the contrary, the following facts were set out by one of the attorney of the Commission, Mr. Cavalluzzo:[36]

1. On January 16, 2003, Mr. Graham contacts the Syrian Minister of Foreign Affairs in order to try to convince him that Canada has only one point of view with regard to the file;

2. On March 21, Syria's ambassador to Canada asserts to two members of parliament that CSIS does not desire Maher Arar's return;

3. On May 3, a note from Gar Pardy of the Department of Foreign Affairs refers to the CSIS agents' trip to Syria, their meeting with their Syrian counterparts, and stresses that the Syrians in charge informed Foreign Affairs that CSIS did not desire Maher Arar's return;

4. Following meetings between Foreign Affairs, CSIS, the RCMP, and the Privy Council Office on May 8th and 12th, the idea of a joint letter signed by the Minister of Foreign Affairs and the Solicitor General is ruled out;

5. On May 9th, a briefing note from CSIS to the Solicitor General emphasizes that the United States might question Canada's "motives and resolve" given the deportation "because of concerns about alleged terrorist connections" (authors' emphasis);

6. The letter proposed by the RCMP and CSIS states that Maher Arar "is currently the subject of a National Security Investigation", that he "remains a subject of interest" but that "there is no Canadian impediment to Mr. Arar's return to Canada" (authors' emphasis).

37. CSIS denied having stated to the Syrian intelligence services that it did not desire Maher Arar's return. Mr. Wayne Easter admitted that he could have ordered CSIS to communicate with the Syrian authorities in order to clarify their position with Maher Arar but he did not and maintains that he was never informed whether CSIS did it or not. Such a refusal to assume his ministerial responsibility is unacceptable, particularly in such a situation in which the life and security of a citizen are directly at stake.

Recommendation No. 21: That the Commission take the position in its report that the behavior of the Solicitor General at the time was

[36] Wayne Easter, testimony, June 3, 2005, p. 5367 to 5378.

unacceptable by virtue of his inaction with respect to his ministerial responsibilities toward the RCMP and CSIS.

Recommendation No. 22: That the Commission publicly attribute responsibility to the Solicitor General and make clear that he had a ministerial obligation to constantly make sure that the police corps and intelligence agencies respect the Constitution, the laws of Canada, as well as the general policies of the government and the ministries.

VII. Secret Evidence and Unresolved Questions

38. It is essential to reveal what happened on the basis of the evidence heard in public and in-camera. The credibility of the Commission is at stake in this matter. It is preferable to allow the government oppose the publication of the Commission's conclusions than to unduly restrain their accessibility to the public.

39. Those responsible must be specifically named and held accountable, including those who acted out of negligence as much as those who acted in a premeditated manner. None responsible for Maher Arar's arrest, prolonged detention and torture should be spared.

Recommendation No. 23: That the Commission maintain its position that the public character of the Inquiry be preserved in order to fully reveal what truly happened and who was responsible.

Conclusion

40. The public, as much as Maher Arar, will not be able to regain confidence in the Canadian government and its intelligence agencies unless they unequivocally and publicly recognition of their responsibility, as well as compensation.

Recommendation No. 24: That the Government of Canada recognize publicly its involvement and responsibility, that it apologize publicly and award compensation to Maher Arar for the ill-treatment that he endured and for its extension over one year.

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RECOMMENDATIONS
of the
International Civil Liberties Monitoring Group (ICLMG)

Recommendation No. 1: That the Inquiry shed light on the application, by Canadian authorities, of a policy, a pattern or a practice of subcontracting torture with the aim of extracting information from individuals detained in Syria and other countries.

Recommendation No. 2: If additional evidence is required to demonstrate a pattern of subcontracting torture, the Commission should:

a. Either order the reopening and prolongation of the factual inquiry;

b. Either recommend the nomination of an independent expert mandated to examine and publish a report on the responsibility of authorities, civil servants, and government agents in the case of Ahmad Abou El Maati, Abdullah Almaki and Muayyed Nureddin, all three detained by a foreign state and victims of torture and of cruel, unusual, inhuman or degrading treatment;

c. Either recommend any other kind of effective independent process to examine the cases of these three individuals and inform the public of the reasons behind their mistreatment.

Recommendation No. 3: That the Commission's report address and clarify the following concerns:

a. The respect and concern for fundamental rights by all actors involved in the Arar case: respect for the constitutional rights of Maher Arar, respect for federal and provincial human rights legislation (including privacy rights), and respect for International Human Rights Instruments.

b. The obligation of responsible agencies to ensure that Mr. Arar's fundamental rights were respected, as well as the degree of knowledge and exercise of this obligation.

c. The precise role of each of the various branches of the Canadian government and the real motives for action or inaction.

d. The sharing of information between states, particularly between government security and intelligence agencies, as well as their genuine concern about the impacts of such sharing.

e. The level of real accountability on the part of all governmental actors.

f. The effectiveness and efficiency of intervention mechanisms, by Canadian authorities, when a Canadian citizen experiences a situation like that of Maher Arar, the impact and limitations of these mechanisms, as well as the capacity to benefit from the expertise of NGOs in such matters and to involve them in the search for solutions.

g. The role of the United States' agencies in the integrated intelligence and counter-terrorism teams, as well as the degree of autonomy or of subordination of Canadian agencies to American agencies in this investigative mechanism.

Recommendation No. 4: That the Commission's report address and clarify the following questions:

a. Was the information sharing, the collaboration between Canada, the United States, and Syria, as well as the detention of Maher Arar an indirect way of obtaining information from that individual?

b. Did Maher Arar, and the information concerning him, serve as exchange currency in order to preserve the flow of information being shared by Syria and the United States with Canada?

Recommendation No. 5: That the Federal Government not renounce Canada's sovereignty with regard to the content of "Watch Lists", by modifying agreements and/or procedures such that the databases it uses in the country are developed by Canadian authorities according to their own criteria based on their own risk analysis.

Recommendation No. 6: That the databases used in airports are updated regularly by Canadian authorities, in order to correct them rapidly in accordance with the rights and freedoms of the targeted individuals.

N. B. : **The ICMLG is opposed to current proposals by the federal government to create a 'No Fly List'. The recommendations five (5) and six (6) above are not intended to imply an acceptance of the government's proposal.**

Recommendation No. 7: That the sharing of information on individuals be clearly subordinated to the fundamental rights guaranteed in the Canadian Constitution, the Canadian Charter of Rights and Freedoms, the provincial charters of human rights, the laws relating to the protection of personal information as well as to the *International Human Rights Instruments*.

Recommendation No. 8: That citizens should have the right, through a monitoring mechanism, to correct erroneous information contained in databases. Such a mechanism should have jurisdiction over all national security operations, in accordance with the recommendations of the International Civil Liberties Monitoring Group in its report to the Commission, which dealt with the policy review.

Recommendation No. 9: That the Commission's report take up Recommendation 56 b) of the McDonald Commission by requiring a framework for and a monitoring of information sharing with foreign countries.

Recommendation No. 10: That Canadian authorities conduct an analysis of the impact of U.S. participation (CIA, FBI, or others) in investigations conducted in Canada. Such an analysis must fall under the jurisdiction of the new monitoring mechanism and/or the new parliamentary committee on national security, as recommended in the International Civil Liberties Monitoring Group's brief to the Commission regarding the Policy Review.

Recommendation No. 11: That a moratorium be imposed on the implementation of information-sharing measures with the United States within the framework of the Smart Border Agreement until that agreement is revised and approved by the Parliamentary Committee on National Security.

Recommendation No. 12: That the Commission's report reveal to the public the true reasons for the so-called lack of knowledge of the human rights situation in Syria in those officials placed in positions of high responsibility, and of their ignorance of the primacy of human rights, as well as their lack of any concrete concern for the fate of Maher Arar.

Recommendation No. 13: That all laws and policies of the Federal Government, related to security and intelligence, be reviewed in order to ensure their accordance with the fundamental rights set out in the Canadian Constitution and the International Human Rights Instruments, notably the *Universal Declaration of Human Rights,* the *Covenant on Civil and Political rights and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.*

Recommendation No. 14: That the government officials from the different ministries and agencies, particularly those from the RCMP, CSIS, the Canada Border Services Agency and the Department of Foreign Affairs, receive ongoing and up-to-date training respecting the primacy of human rights, including those recorded in the federal and provincial charters; the laws regarding the protection of personal information; and the International Human Rights Instruments, notably the rights set out in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

Recommendation No. 15: That training dealing specifically with the primacy of human rights with regard to information sharing be given to officials involved in such activity.

Recommendation No. 16: That all training on human rights include information on the status of those rights in Canada and in countries abroad.

Recommendation No. 17: That the Commission's report deal publicly with the so-call lack of knowledge and ignorance with respect to the case demonstrated by all the actors, including the Minister of Foreign Affairs, and that it report on the causes and recommend the correctives to be made.

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Recommendation No. 21: That the Commission take the position in its report that the behaviour of the Solicitor General at the time was unacceptable by virtue of his inaction with respect to his ministerial responsibilities toward the RCMP and CSIS.

Recommendation No. 22: That the Commission publicly attribute responsibility to the Solicitor General and make clear that he had a ministerial obligation to constantly make sure that the police corps and intelligence agencies respect the Constitution, the laws of Canada, as well as the general policies of the government and the ministries.

Recommendation No. 23: That the Commission maintain its position that the public character of the Inquiry be preserved in order to fully reveal what truly happened and who was responsible.

Recommendation No. 24: That the Government of Canada recognize publicly its involvement and responsibility, that it apologize publicly and award compensation to Maher Arar for the ill-treatment that he endured and for its extension over one year.

APPENDICE – I

OFFICE OF THE HIGH COMMISSIONER
FOR HUMAN RIGHTS

CAT/C/CO/34/CAN
Committee against Torture
34th session

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Conclusions and recommendations of the Committee against Torture

Canada

1. The Committee considered the fourth and fifth periodic reports of Canada (CAT/C/55/Add.8 and CAT/C/81/Add.3, respectively) at its 643rd and 646th meetings, held on 4 and 6 May 2005 (CAT/C/SR.643 and 646) and adopted, at its 658th meeting, the following conclusions and recommendations:

A. Introduction

2. The fourth periodic report of Canada was due on 23 July 2000 and was submitted on 20 August 2002, while the fifth periodic report was due on 23 July 2004 and was submitted on 11 October 2004, each in accordance with the Committee's reporting guidelines. The Committee welcomes the open and inclusive participation in the reporting process of institutions and non-governmental organizations concerned with the protection of human rights, as well as the inclusion within the reports of diverging views of civil society.

B. Positive aspects

3. The Committee notes:

(a) the definition of torture in the Canadian Criminal Code that is in accordance with the definition contained in article 1 of the Convention, and the exclusion in the Criminal Code of defences of superior orders or exceptional circumstances, including armed conflict, as well as the inadmissibility of evidence obtained by torture;

(b) the direct application of the criminal norms cited in paragraph (a) to the State party's military personnel wherever located worldwide by means of the National Defense Act;

(c) the general inclusion, in the Immigration and Refugee Protection Act 2002 of torture within the meaning of article 1 of the Convention, believed on substantial grounds to exist, as an independent ground qualifying a person as in need of protection (section 97, subsection 1 of the Act), and as a basis for non-refoulement (section 115, subsection 1);

(d) the careful constitutional scrutiny of the powers conferred by the Anti-Terrorism Act 2001;

(e) the recognition of the Supreme Court of Canada that enhanced procedural guarantees have to be made available, even in national security cases, and the State party's subsequent decision to extend enhanced procedural protections to all cases of persons challenging, on grounds of risk of torture, Ministerial expulsion decisions;

(f) the changes to Corrections policy and practice implemented to give effect to the recommendations of the Arbour Report on treatment of female offenders in the federal prison system;

(g) the requirements that body cavity searches be carried out by medical rather than correctional staff, in a non-emergency situation and after provision of written consent and access to legal advice; and

(h) the efforts made by the State party, in response to the issue of over-representation of indigenous offenders in the correctional system previously identified by the Committee, to develop innovative and culturally-sensitive alternative criminal justice mechanisms, such as the use of healing lodges.

C.Subjects of concern

4. The Committee expresses its concern at:

(a) the failure of the Supreme Court of Canada in Suresh v Minister of Citizenship and Immigration to recognise, at the level of domestic law, the absolute nature of the protection of article 3 of the Convention that is subject to no exceptions whatsoever;

(b) the alleged roles of the State party's authorities in the expulsion of Canadian national Mr. Maher Arar, expelled from the United States to Syria where torture was reported;

(c) the blanket exclusion by the Immigration and Refugee Protection Act 2002 (section 97) of the status of refugee or person in need of protection, for persons falling within the security exceptions set out in the Convention on the Status of Refugees and its Protocols; as a result, such persons' substantive claims are not considered by the Refugee Protection Division or reviewed by the Refugee Appeal Division;

(d) the explicit exception of certain categories of persons posing security or criminal risks from the protection against refoulement provided by the Immigration and Refugee Protection Act 2002 (section 115, subsection 2, of the Act);

(e) the State party's apparent willingness, in the light of the low number of prosecutions for terrorism and torture offences, to resort in the first instance to immigration processes to remove or expel individuals from its territory, thus implicating issues of article 3 of the Convention more readily, rather than subject him or her to the criminal process;

(f) the State party's reluctance to comply with all requests for interim measures of protection, in the context of individual complaints presented under article 22 of the Convention;

(g) the absence of effective measures to provide civil compensation to victims of torture in all cases;

(h) the still substantial number of "major violent incidents", defined by the State party as involving serious bodily harm and/or hostage-taking, in the State party's federal corrections facilities; and

(i) continued allegations of inappropriate use of chemical, irritant, incapacitating and mechanical weapons by law-enforcement authorities in the context of crowd control.

D. Recommendations

5. The Committee recommends that:

(a) the State party should unconditionally undertake to respect the absolute nature of article 3 in all circumstances and fully to incorporate the provision of article 3 into the State party's domestic law;

(b) the State party should remove the exclusions in the Immigration and Refugee Protection Act 2002 described in paragraphs (d) and (e) above, and thus extend to currently excluded persons entitlements of status as a protected person and protection against refoulement on account of a danger of torture;

(c) the State party should provide for judicial review of the merits, rather than simply of the reasonableness, of decisions to expel an individual where there are substantial grounds to believe the person faces a risk of torture;

(d) the State party should insist on unrestricted consular access to its nationals who are in detention abroad, with the facility for unmonitored meetings and, if required, appropriate medical expertise;

(e) given the absolute nature of the prohibition against refoulement contained in article 3 of the Convention, the State party should provide the Committee with details on how many cases of extradition or removal subject to receipt of "diplomatic assurances" or guarantees have occurred since 11 September 2001, what the State party's minimum contents are for such assurances or guarantees, what measures of subsequent monitoring it has undertaken in such cases and the legal enforceability of the assurances or guarantees;

(f) the State party should review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture;

(g) the State party should take steps to ensure a progressive decrease in the frequency of "major violent incidents" in its federal corrective facilities;

(h) the State party should conduct a public and independent study and policy review of the crowd control methods, at federal and provincial levels, described in paragraph 4(j), above;

(i) the State party should fully clarify, if necessary legislatively, the competence of the Commission for Public Complaints Against the RCMP (Royal Canadian Mounted Police) to investigate and report on all activities of the RCMP falling within its complaint mandate; and

(j) the State party should consider becoming party to the Optional Protocol to the Convention.

6. The Committee requests that the State party provide, within one year, information in response to the Committee's recommendations in paragraph 5, sub-paragraphs (d), (e) and (g).

7. The Committee requests that the State party submits its sixth periodic report by the due date of 23 July 2008.
