

**International Civil Liberties Monitoring Group (ICLMG)**  
**Individual UPR Submission – Canada, May 2013**

**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 May 2013**

**The ICLMG**

1. The ICLMG is a pan-Canadian coalition of civil society organizations that was established in the aftermath of the September 11<sup>th</sup>, 2001 terrorist attacks in the United States. The coalition brings together 40 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 40 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 Messers. 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 *Geneva Convention – Treatment of Prisoners of War*

4. 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.

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### Submission Summary

5. 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.

6. 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

7. 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.

8. 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.

9. Two provisions of the Act – preventive detention and investigative hearings – became inoperative in 2006 due to a five-year sunset clause. The government tried to reintroduce these measures in 2007 but they were defeated in Parliament. Now with a majority, the government has introduced them once again in Bill S-7 and their passage is virtually assured.

10. These provisions in Bill S-7 not only contravene the *Canadian Charter of Rights and Freedoms* and the *International Covenant on Civil and Political Rights* (ICCPR) but also open the door to cruel and inhuman treatment and other treaty violations.

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### The “No-Fly List”

11. 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 have 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.

12. Through an agreement between the Canadian and U.S. governments, things are worse than what was reported in the 2009 UPR submission since Canadian citizens are now subject to the U.S. Secure Flight List regarding all flights that pass through U.S. airspace, even if the planes do not touch U.S. soil.

13. 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

14. Security Certificates (or Certificates 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.

15. On February 23<sup>rd</sup>, 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 (*Charkaoui vs Canada*). At the time of the 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.

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16. 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 of 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. Two men have had their Security Certificates quashed, two men are still under house arrest and one man is still on detention.

17. Additionally serious is information contained in a letter sent in 2008 by the Director of the Canadian Security and Intelligence Service (CSIS) to the Minister of Public Safety. The letter warned that if certain opposition amendments were made to the Immigration and Refugee Protection Act, it could become impossible to use Security Certificates to arrest suspected terrorists since it would prohibit the use of information from regimes known to use torture, thus indicating that such cases might not stand up without information obtained under duress. This information vindicated the suspicions of the five men who had been detained in Canada for long periods under Security Certificates, i.e., Messers. Charkaoui, Harkat, Almrei, Jaballah and Mahjoub.

### **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 5<sup>th</sup>, 2003. On February 8<sup>th</sup>, 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 8<sup>th</sup>, 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 Qaida", and then 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.

20. On December 12<sup>th</sup>, 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. Judge 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, Canada has not implemented these recommendations and we are still without the comprehensive review and oversight mechanism proposed by Judge O'Connor.

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### **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 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 11<sup>th</sup>, 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 found that the actions of Canadian government officials respecting these three men were deficient and indirectly led to their detention and mistreatment. As of this date, the Canadian government has not apologized nor compensated these men despite a majority vote in the House of Commons in favour of a motion to that effect.

### **Benamar Benatta**

22. Benamar Benatta was detained by Canadian border guards on September 5<sup>th</sup>, 2001 at the Peace Bridge crossing between Buffalo (NY) and Fort Erie (ON) as he applied for asylum in Canada. Canadian officials handed him over without due process to U.S. authorities on September 12<sup>th</sup>, 2001, one of roughly 1,200 mostly Muslim men arrested by the U.S. after the terror attacks that day. Benatta, a Muslim, spent nearly the next five years in detention centers in Buffalo and Brooklyn, where he was subjected to ill treatment and torture, even though the F.B.I. cleared him of any links to terrorism in November 2001. Benatta has asked the Canadian government to explain the legal basis on which he was handed over to American authorities but no explanation has been given. This is another case where Canada has violated its obligations under international human rights standards.

### **The Internet Predators Act (C.30)**

23. Bill C-30 was introduced by the Public Safety Minister in the House of Commons on February 14<sup>th</sup>, 2012. The legislation expanded the powers available to the police and forces Telecommunications Service Providers (T.S.P.s) to provide subscriber data without warrant upon a request by the police. Authorities will also be able to request traffic information with a warrant based merely on “reasonable grounds to suspect”, a much lower threshold than “reasonable grounds to believe” required for telephone tapping. This information will show the contacts with whom you communicate, when and where, as well as which websites you use. Then, with a warrant based on “reasonable grounds to believe”, authorities will be able to access the content of all communications and tracking data (cellphone, RFID) and track individuals geographically. We submit that several of these provisions violate Art. 17, 19 and 21 of the *International Covenant on Civil and Political Rights*.

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### Torture

24. The Minister of Public Safety issued directives to the R.C.M.P. and the Canadian Border Services Agency (C.B.S.A.), giving them the authority to use and share information that was likely extracted through torture. Newly disclosed memos obtained by Canadian Press showed that Minister Toews issued the directives to the R.C.M.P. and C.B.S.A. in September 2011, shortly after giving similar orders to C.S.I.S., Canada's intelligence service. The directives apply to the use of this information for investigative purposes and to information-sharing with foreign government agencies, militaries and international organizations. The instructions were criticized by human rights advocates and opposition M.P.s as a violation of Canada's obligation under the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

25. These "torture memos" are even more troublesome in light of the Canada/U.S. *Joint Statement of Privacy Principles* under the North American perimeter security plan. The "principles" released at the end of June will permit the sharing of personal information gathered at the border with third countries – in some cases, without informing the other government until after the fact.

26. The ICLMG submits that not only are such policies in violation of the CAT Art. 2.2 but they also promote a market for information obtained from torture. The emphasis should be on obtaining information through legitimate means and not on providing exceptions where torture may be used. In 2006, Justice Dennis O'Connor, reporting for the federal Arar Commission, recommended policies "aimed at eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuing accountability."

### Extradition – The Hassan Diab Case

27. Hassan Diab is a Canadian university professor alleged by the French government to be a party to a 1980 bombing in France that killed 4 people. France has recently sought the extradition of Diab from Canada to stand trial in France where he could face life in prison. Under Canada's extradition law, there is first a hearing before a judge and then a reference to the Minister of Justice who makes the final decision. Contrary to international human rights standards, the hearing before the judge does not provide the recognized protections for a fair trial – there is a lack of due process, no procedure to test unreliable evidence, including secret evidence and evidence obtained through torture; nor is there protection against unjust extradition requests that are politically motivated.

28. In the judicial hearing, the judge found on June 6<sup>th</sup> 2011 that the case against Diab was weak, suspect and confusing and did not describe the source of certain evidence or the circumstances upon which it was received. Nevertheless, under the Canadian extradition law, he felt obliged to rule for the extradition. The case then went to the Minister of Justice who also decided in favour of extradition. This is an example of a Canadian law which does not protect individuals against evidence resulting from torture and doesn't conform to Canada's obligations under the Convention against Torture, especially Art. 2 and 15.

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### **Conclusion**

29. In this submission, the ICLMG requests the UNHRC to raise the above-cited issues with the Canadian government during Canada's review (UPR) in May 2013 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 U.N. Charter, the ICCPR and the CAT.

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