

CANADIAN COUNCIL FOR REFUGEES
Brief to the House of Commons Subcommittee
on Public Safety and National Security
of the Standing Committee on Justice, Human Rights,
Public Safety and Emergency Preparedness

ANTI-TERRORISM ACT REVIEW

8 September 2005

Introduction

The Canadian Council for Refugees (CCR) is an umbrella organization with over 180 member organizations, committed to the protection of refugees in Canada and around the world and to the settlement of refugees and immigrants in Canada. The CCR has long been concerned that security-related measures are implemented in a manner that infringes on the rights of refugees and immigrants. These concerns existed prior to the events of September 11, 2001, but have intensified in the wake of various responses, including the adoption by the Canadian Parliament of Bill C-36, the *Anti-Terrorism Act* (ATA) in December 2001. We therefore welcome the opportunity to address our concerns to the Subcommittee on Public Safety and National Security.

The CCR is a member of the International Civil Liberties Monitoring Group, from whom we are pleased to see the Committee is also hearing. We endorse and recommend to your close attention the ICLMG brief¹ which covers a wider range of concerns shared by the CCR than we will be able to touch on in the comments below.

Immigration security provisions

We welcome the Committee's decision to include in the ATA review consideration of the security certificate process. It has been widely noted that the government has been using immigration procedures, including security certificates, in preference to criminal proceedings. We would suggest to the Committee that it may in fact be necessary to consider not only security certificates, but also immigration security provisions more broadly, since security certificates are relatively rare, while other extremely problematic security provisions of the *Immigration and Refugee Protection Act* (IRPA) are routinely employed.

Discrimination

The Canadian Council for Refugees is profoundly concerned about discrimination in both law and practice, in the area of anti-terrorism measures. In Canada as in other countries, there has been a widening gap between the rights of citizens and non-citizens, as the security agenda is pursued. The preference for applying immigration rather than criminal law measures to suspected terrorists in itself points to a double standard, since immigration measures by definition cannot be used against citizens. Furthermore, Canada's immigration security provisions impose serious penalties, including deportation potentially to torture, on non-citizens for actions or associations that are completely legal for citizens. As has been pointed out by the many critics of the security certificates, immigration processes fail to respect non-citizens' basic rights, including the right to due process, the right to liberty and the right to be free from torture.

¹ Available at www.caw.ca/whatwedo/internationalssolidarity/pdf/ICLMGBriefonC-36.pdf

In the context of security threats that are global and transnational, it is not appropriate to build responses that focus on the distinction between citizens and non-citizens. As Canadian citizens who travel to countries, including the United States, where we are “non-citizens”, we should be worried about global trends to minimize the rights of non-citizens, particularly in the security context. Most fundamentally, our commitment to international human rights and the value we give to human dignity are undermined when we determine what people are owed by reference to their status as non-citizens rather than to the fact that they are fellow human beings.

Security measures are also being applied in a manner that discriminates against particular ethnic and religious groups, notably Arabs and Muslims. Our laws should work to minimize the dangers of discrimination. However, the ATA and the security provisions of IRPA increase risks of discrimination by giving extensive powers to government, with minimal oversight and a cover of secrecy, which provide the circumstances in which abuses easily flourish.

A particularly clear and distressing example of the discriminatory approach to security issues is the case of Citizenship and Immigration Canada’s “Operation Thread” which resulted in the summer of 2003 in the arrest of 23 Pakistani and Indian men. The individuals arrested were formally and publicly identified by Citizenship and Immigration Canada as suspected terrorists, violating their right to be presumed innocent. However, it soon became clear that the suspicions were based on the flimsiest of evidence, some of which consisted of little more than stereotypes. The allegations were soon dropped. However, because Citizenship and Immigration Canada failed to issue a public disclaimer or apology clearing those who had been arrested, media stories continued to carry headlines referring to “suspected terrorists”. This illustrates clearly how, particularly in these security-conscious times, the terrorist label, once applied, remains attached to the person. The reputations of those arrested on the basis of suspected terrorism have been ruined. There was also a broad and devastating impact among South Asian, Muslim and Arab communities in Canada, heightening their sense of vulnerability to discrimination. A copy of the Canadian Council for Refugees’ letter to the Minister of Citizenship and Immigration on this matter is included in Appendix B (page 14).

The concerns about discrimination in Canada in the security context have also been voiced by the United Nations Committee on the Elimination of Racial Discrimination. In August 2002, in its concluding observations after examining Canada, the Committee requested Canada “to ensure that the application of the Anti-terrorism Act does not lead to negative consequences for ethnic and religious groups, migrants, asylum-seekers and refugees, in particular as a result of racial profiling.” (para. 338)²

The Canadian Charter of Rights and Freedoms affirms and guarantees the principle of non-discrimination. Canadians, particularly Canadians who themselves are victims of discrimination, have struggled long and hard to rid Canada of discrimination. We have a long way to go to achieve that goal and we need to acknowledge that there have been new and intensified forms of discrimination associated with the security agenda. Strong leadership is needed to address these problems of discrimination.

² Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada. 01/11/2002. A/57/18, paras.315-343.

Definition of security inadmissibility

A basic problem in IRPA is the extremely broad definition of inadmissibility on the basis of security³ (IRPA s.34). This definition applies to people subject to a security certificate⁴ as well as to other non-citizens who may be found inadmissible on security grounds.

There are at least two points worth making here:

- First, people talk loosely about people being deported as “a security risk” but in fact there is **no** requirement that a person represent a security risk in order to be found inadmissible on security grounds. IRPA provides for a person to be found inadmissible and deported on security grounds, or a security certificate to be signed and upheld by the Federal Court as reasonable, even if the person is not alleged to represent **any** kind of actual security risk.
- Second, even apart from the fact that a person need not actually represent a security *threat*, the language of IRPA gives the government extremely broad parameters for finding a person inadmissible on security grounds. For example a person may be found inadmissible on the basis of “membership” in a “terrorist group”, where membership can be construed so widely it includes *unknowingly associating* with someone *suspected* to be involved in a so-called terrorist group (which is itself also undefined). What’s more, this “membership” need not even be established as a fact. All that is required for a finding of inadmissibility is that there be “*reasonable grounds to believe*” that the particular grounds for inadmissibility “have occurred, are occurring or may occur” some day in the future.⁵

Considering the very grave consequences of an inadmissibility finding, safeguards need to be introduced to ensure that innocent persons are not wrongly determined to be inadmissible.⁶

Recommendation 1 Narrow the definition of security inadmissibility in the *Immigration and Refugee Protection Act*.

³ IRPA s. 34: “(1) A permanent resident or a foreign national is inadmissible on security grounds for: (a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada; (b) engaging in or instigating the subversion by force of any government; (c) engaging in terrorism; (d) being a danger to the security of Canada; (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c). (2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.”

⁴ Security certificates can also be signed for persons alleged to be inadmissible on grounds of violating human or international rights, serious criminality or organized criminality. The term “security certificate”, though in common use, does not actually appear in the Act.

⁵ IRPA s. 33 tells us that facts constituting inadmissibility under s. 34 (security) “include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.”

⁶ In the April 3, 2000 report of the Security Intelligence Review Committee on the complaint by Suleyman Goven the Hon. Robert Rae said: “I recommend that a more sophisticated analysis framework be developed for officials making assessments and that better guidelines be made available to the different interveners with respect to the definition of ‘membership’ and the definition of a ‘terrorist’ organization.”

Due process: use of secret evidence

The very serious concern about the unfairness of the security certificate process is well-known and shared by the CCR. Canadian traditions of fundamental justice are offended by a process in which an accused person does not know all the evidence, including sources, that are being used against them. This concern is more, not less, acute in the security context. Canadians have had driven home to them over the last few years the unreliability of leading nations' security intelligence services, the prevalence of untrustworthy and morally unacceptable confessions obtained under torture and the way in which trivial associations can lead to innocent people becoming suspects. These are all additional reasons to doubt that justice can be done when a person accused of security inadmissibility is unable to test the evidence on which a decision will be made.⁷

Several years ago, in February 2000, the Inter-American Commission on Human Rights had already made significant criticisms of Canada's security certificate process (see Appendix D, page 1). They found the use of secret evidence incompatible with Canada's human rights obligations. In the judgment of the Commission, "[a] person named in a certificate who is the subject of secret evidence will not enjoy a full opportunity to be heard with minimum guarantees, the essence of the right to due process." (para. 157) They recommended that Canada take measures to ensure that the person named in the certificate "has the ability to know the case he or she must meet, and to enjoy the minimum procedural guarantees necessary to ensure the reliability of the evidence taken into account." (para. 179c). Unfortunately this recommendation has not been implemented and those subject to a security certificate continue to be denied their due process rights.

While the use of secret evidence in the security certificate process is relatively well-known and widely condemned, it is less well-known that IRPA also provides for the use of secret evidence in non-security certificate cases. In an admissibility hearing, a detention review or an immigration appeal before the Immigration and Refugee Board (IRB), the Minister can apply for "non-disclosure of information" under s. 86 of IRPA. In these cases, the same provisions for reviewing the secret evidence apply as in security certificates, with the IRB member substituted for the Federal Court judge.⁸

The government may be increasing its use of s. 86 provisions. According to the IRB, the section has been used 10 times already.

Whether under a security certificate or under s. 86, the same concerns regarding the lack of due process apply when secret evidence is used. Canada should not tolerate this unfair process.

Recommendation 2 Eliminate the security certificate provisions and s. 86 providing for secret evidence in IRB hearings.

⁷ These and the following key concerns with the security certificate process are addressed in a letter to the Minister of Public Safety and Emergency Preparedness dated 14 October 2004 and endorsed by lawyers and law professors across Canada, included at Appendix C (page 17)

⁸ IRPA s. 86, which states that s. 78 (from the security certificate provisions) applies, with the necessary modifications.

Recommendation 3 Introduce a system for determining admissibility on security grounds with a) a right to a hearing before an independent decision-maker for those alleged to be inadmissible; b) protection of due process rights; c) an obligation to render a decision within a fixed time frame, d) access to the Security Intelligence Review Committee (SIRC) and e) a right to appeal from a decision against them by the Federal Court.

Long-term and mandatory detention

A second major concern relating to security certificates is long-term detention and, in the case of those who are not permanent residents, mandatory detention. Permanent residents named in security certificates are arrested on the basis of a warrant and have their detention reviewed after 48 hours in detention, although in practice anyone held on a security certificate is detained for a long time before being released, even under tight conditions.⁹ Persons who are not permanent residents are detained without a warrant and are not entitled to a review of their detention until 120 days after a certificate has been determined to be reasonable. Since the process of reviewing the certificate is very long, this means that people are held in detention, without **any** review or possibility of release, for years, based solely on the fact that two Ministers have signed a certificate. One of the current security certificate detainees, Mahmoud Jaballah, has been detained since August 2001, and under the IRPA provisions he has no prospect of having the lawfulness of his detention reviewed any time soon.

As noted above, persons detained on the basis of security certificates may not even be alleged to represent a security risk. Given that the purpose of the security certificate is to keep certain information or sources secret, there is no logical requirement for the person to be detained simply because there is information the government wants to keep secret. Even where the government does allege that that person represents a threat, it is intolerable that Canada should permit people to be locked up for weeks, let alone years, based solely on ministerial fiat, without any possible recourse to a court.

Also of very serious concern to the CCR and to many other Canadians are the inhumane conditions of detention. For example, three of the security certificate detainees are being held at Toronto West Detention Centre, a provincial remand facility intended for short-term detention, for those awaiting trial, serving short sentences, or awaiting transfer to a penitentiary or reformatory after trial. Two of the three individuals are in solitary confinement there, and have been for several years. The detention centre lacks any of the facilities and programs normally available to long-term detainees. Thus persons who have actually been charged, tried and convicted of a crime and sentenced to a fixed term in detention are treated much more humanely than the security certificate detainees, who are not even accused of a crime. The detainees are being denied some of the most basic of human needs, including simple “touch” visits with their own children and spouses, or a chance to exercise for an hour a day!

The Inter-American Commission on Human Rights also found the detention provisions relating to security certificates incompatible with international standards. The Commission noted that Canada’s mandatory detention provisions violate the obligation to provide detainees a prompt review of their detention (para. 147-151) and that “the assessment of the need to detain must in principle be based on the circumstances pertaining to the individual.” (para. 153) They note that

⁹ This was the experience of Adil Charkaoui, a permanent residence who was released with draconian conditions after 21 months in detention.

“[w]hile international human rights law allows for some balancing between public security and individual liberty interests, this equilibrium does not permit that control over a detention rest exclusively with the agents charged with effectuating it.” (para. 152)

In June 2005, the Working Group on Arbitrary Detention of the United Nations Commission on Human Rights conducted a visit to Canada. Their report is expected in October and will no doubt be of great interest. The Working Group has already indicated some of its main areas of concern, in a press statement delivered on 15 June in Ottawa, at the conclusion of their visit. Regarding detention under security certificates, the representatives recognized the Canadian government’s responsibility to protect its citizens and combat terrorism. They continued:

“Nonetheless, the Working Group is gravely concerned about the following elements, which undermine the security certificate detainees’ rights to a fair hearing, to challenge the evidence used against them, not to incriminate themselves, and to judicial review of detention:

- the security certificate procedure applies only to suspects who are not Canadian citizen [sic]; in fact, all four men currently detained under security certificates are Arab Muslims;
- if the person certified is not a permanent resident, detention is mandatory;
- the duration of this detention without charges is indeterminate; one of the security certificate detainees has been detained for five years now;
- the only way out of detention appears to be deportation to the country of origin; all four men currently detained argue – not without plausibility – that they would be exposed to a substantial risk of torture in case of deportation;
- the evidence on which the security certificate is based is kept secret from the detainee and his lawyer, who are only provided with a summary of the information concerning them. They are thus not in a position to effectively question the allegations brought against him;
- the Federal Court judge tasked with confirming the certificate has no jurisdiction to review, on the merits, whether the certificate is justified. His jurisdiction is limited to assessing the “reasonableness” of the government’s allegations.”¹⁰

Recommendation 4 Eliminate mandatory detention provisions in IRPA, and improve conditions of detention.

Deportation to torture

As the Working Group on Arbitrary Detention noted, those detained on security grounds have in theory the option of releasing themselves from detention by leaving Canada. In practice, this option is generally not available, because it is unlikely that a third country could be persuaded to accept a person the Canadian government has labelled a security threat, and the detainee in most cases faces a threat of torture in the country of origin. The accounts by Maher Arar and three

¹⁰ Press Conference by the Working Group on Arbitrary Detention of the United Nations Commission on Human Rights. UNHCR Office, Ottawa, Canada, 15 June 2005. Statement by Ms. Leila Zerrougui, Chairperson of the Working Group on Arbitrary Detention, Ms. Soledad Villagra de Biedermann and Mr. Mohammad Hashemi, members of the Working Group.

other Muslim Canadians, Abdullah Almalki, Ahmad El Maati and Muayyed Nureddin, provide compelling evidence of the use of torture against persons considered “of interest” from a security perspective.¹¹

As part of the security certificate process, a person named in a security certificate may request protection on the basis that they face a serious risk of torture or a risk to their life or of cruel and unusual treatment or punishment. In such a case, the Canadian government is obliged to assess the danger of torture as well as the risk to life or of cruel and unusual treatment or punishment, if the person is deported, but they then balance this risk against the alleged threat to Canadian security posed by the individual. Consistently alleging that the individuals named in the certificates present serious threats to national security, the Canadian government regularly refuses to seriously consider releasing the individuals on strict terms and conditions and instead insists that they should be deported to their home countries where, according the government’s own analysis, they face a probable risk of torture.

As signatory to the Convention against Torture, Canada is obliged to respect the absolute prohibition, affirmed in article 3 of that Convention, against deportation to torture. International law allows no exceptions to that prohibition, in keeping with the utter moral unacceptability of torture, with which no State may be in any way complicit. Given the prevarications of some, notably in the United States, regarding the prohibition of torture, it is particularly important that Canada, along with other countries, unequivocally condemn any complicity with torture, including deportation to torture.

However, to Canada’s enormous shame, federal government lawyers have been taking the position, incompatible with our international legal obligations, that in exceptional circumstances people may be returned to torture. This position recently drew the criticism of the UN Committee Against Torture¹² which expressed its concern over “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.” (para. 4(a)) The Committee recommended that Canada “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.” (para. 5(a))

Recommendation 5 : Legislate an absolute prohibition on return to torture, consistent with international law.

Deportation is not a solution

In continuing to make recourse to deportation for security cases, the Canadian government is failing to take seriously its own observations about the globalized nature of security threats. If this is true, it is not useful to simply deport people who may be a security threat without reference to what will happen to them after deportation. The Canadian Council for Refugees has

¹¹ See Maher Arar’s website (<http://www.maherarar.ca/>) for his account. For Abdullah Almalki’s account, see Globe and Mail, “For the first time, Abdullah Almalki tells his story”, by Jeff Sallot, 27 August 2005, page A1. For Ahmed El Maati’s account, see Globe and Mail, “Road to Damascus began with CSIS”, by Jeff Sallot, 29 August 2005, page A1. For Muayyed Nureddin’s account, see Toronto Star, “New torture claim shows Arar’s case isn’t unique”, by Thomas Walkom, 26 Feb. 2004.

¹² Conclusions and recommendations of the Committee against Torture: Canada. 07/07/2005. CAT/C/CR/34/CAN

raised a similar concern regarding the government's policy towards modern day war criminals: deportation without any attention to whether they will be brought to justice, in a fair trial, does not promote international justice.

Furthermore, it is inadequate and discriminatory to use measures that are directed only at non-citizens. This is the point made by the UK House of Lords in its important December 2004 judgment¹³, which found that the UK practice of indefinite detention of non-citizens violated guarantees of non-discrimination. The same point applies in the Canadian context: security certificates and other immigration measures that deny rights to due process can only be used against non-citizens. But the Canadian Security Intelligence Service has acknowledged that there is no necessary correlation between immigration status and whether a person is a terrorist or represents a threat to Canadian security. The London bombings of July 7, 2005, provide further evidence of the fact that threats can come from citizens. Since Canadian citizens may represent just as much of a threat as non-citizens but nevertheless are not subject to these denials of their rights, we cannot justify the measures as required for security reasons: they are apparently not required in the case of citizens. Applying the measures only to non-citizens is therefore discriminatory.

The UN Committee against Torture has also recently advised Canada against the deportation approach, raising its concern regarding Canada'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, [...] rather than subject him or her to the criminal process." (para. 4(e)). The Committee points out that the focus on removal increases the chances that issues involving potential removal to torture, prohibited under article 3 of the Convention, will arise.

It is worth noting as well that both the UN Security Council and the General Assembly have repeatedly called on governments to either prosecute alleged terrorists or to extradite them to face charges elsewhere, and to respect fundamental human rights throughout their anti-terrorism programs.¹⁴ Deportation violates both of these principles.

Recommendation 6 : Replace the policy of deportation for suspected terrorists and war criminals with a policy of ensuring that those suspected of committing serious crimes, including crimes related to terrorism, are extradited to face justice or prosecuted in Canada.

Landing issues

Threats of deportation under security certificates or other provisions are the most dramatic of immigration security measures and deserve special attention. However, they represent just a small proportion of the larger group of people in Canada and overseas who suffer serious hardships as a result of the unfair security provisions of IRPA. Though not faced with imminent deportation, they are instead forced to wait years – in several cases more than 10 years – in a legal limbo because of vague and unsettled allegations of security concerns. Because there is no

¹³ A(FC) and Others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent); X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), December 16, 2004, [2004] UKHL 56

¹⁴ UN Security Council Resolution 1456 (2003), 20 January 2003, UN Doc. S/RES/1456 and UN General Assembly Resolution 58/81 (2003), 9 December 2003, UN Doc. A/RES/58/81

legislated obligation on the government to make a decision on admissibility within a reasonable period of time, many people have their lives put on hold for years, even though the government eventually finds that they are not inadmissible on security grounds. Furthermore, the provision in the Act, known as Ministerial Relief, which allows the Minister to exempt from inadmissibility people whose “presence in Canada would not be detrimental to the national interest” is a largely illusory safeguard against injustice, particularly since the responsibility was transferred in December 2003 to the Minister of Public Safety and Emergency Preparedness.¹⁵

The CCR has addressed concerns about delays in landing on the basis of security in its paper, *Refugees and Security*, February 2003.¹⁶

Recommendations 1 (regarding narrowing the definition of security inadmissibility) and 3 (regarding the process for determining security admissibility) above would address the problems in access to landing.

Lack of oversight

One of the crucial shortcomings of Canada’s immigration security measures is the lack of adequate oversight, judicial or otherwise. Other services responsible for security, such as the Canadian Security Intelligence Service or the RCMP, have oversight bodies, although they are not fully adequate. The Canada Border Services Agency, however, which enforces IRPA, has *no oversight mechanism*, even though those affected are, as non-citizens, particularly vulnerable.

Prior to the implementation of IRPA, permanent residents had access to review of inadmissibility determinations by the Security Intelligence Review Committee. That review was removed in IRPA. The CCR is of the opinion that oversight should, on the contrary, have been extended to non-permanent residents and that an independent accountable and effective oversight mechanism is urgently needed for the Canada Border Services Agency.

Recommendation 7 Introduce an oversight mechanism for the Canada Border Services Agency.

Need for full respect for Charter and international human rights

Section 3(3)(f) of the *Immigration and Refugee Protection Act* requires that the Act be applied in a manner that complies with Canada’s international human rights obligations. S. 3(3)(d) requires that decisions made under the Act be consistent with the Charter. Yet, as discussed above, the discriminatory nature and application of the security inadmissibility provisions, the security certificate process itself, and of course the ultimate result of a certificate – potential return to torture – fly in the face of established, non-derogable, fundamental international norms and the rights guaranteed in the Canadian Charter. There is an urgent need to bring immigration security measures into line with international and Canadian human rights standards.

¹⁵ IRPA s. 34(2) provides for ministerial relief for security cases. Similar relief is also offered in cases of human or international rights violations (s. 35(2)) and organized criminality (s. 37(2)). The Supreme Court of Canada found in *Suresh* that the security inadmissibility provision was saved from violating the Charter right to freedom of association by the availability of ministerial relief (para. 110). In practice, ministerial relief is not made available in the way the Court assumed.

¹⁶ Available at www.web.ca/~ccr/security.PDF

SUMMARY OF RECOMMENDATIONS:

1. Narrow the definition of security inadmissibility in the Immigration and Refugee Protection Act.
2. Eliminate the security certificate provisions and s. 86 providing for secret evidence in IRB hearings.
3. Introduce a system for determining admissibility on security grounds with a) a right to a hearing before an independent decision-maker for those alleged to be inadmissible; b) protection of due process rights; c) an obligation to render a decision within a fixed time frame, d) access to SIRC and e) a right to appeal from a decision against them by the Federal Court.
4. Eliminate mandatory detention provisions in the IRPA.
5. Legislate an absolute prohibition on return to torture, consistent with international law.
6. Replace the policy of deportation for suspected terrorists and war criminals with a policy of ensuring that those suspected of committing serious crimes, including crimes related to terrorism, are extradited to face justice or prosecuted in Canada.
7. Introduce an oversight mechanism for the Canada Border Services Agency.

APPENDIX A

The following are resolutions adopted by the members of the Canadian Council for Refugees on matters addressed in this submission.

Res. 22, Nov. 96: SECURITY CERTIFICATE PROCESS

- WHEREAS:
1. The process under article 40.1 of the Immigration Act provides for mandatory detention when the Minister of Citizenship and Immigration and the Solicitor-General have signed a security certificate for people who may be refugees or refugee claimants;
 2. The person cited in these security certificates does not have the right to know the evidence against them;

THEREFORE BE IT RESOLVED that the CCR:

1. Condemn the security certificate process and particularly the provisions for mandatory detention without review and asks for the immediate repeal of this section of the Act.
2. Urge the Government of Canada to suspend immediately the use of these provisions which clearly violate the Canadian Charter of Rights and Freedoms and Canada's international human rights obligations;
3. Call upon the Canadian Bar Association and human rights NGOs to condemn these procedures which violate fundamental human rights.

Res. 13, Nov. 98: NATIONAL SECURITY ASSESSMENTS

- WHEREAS:
1. The CCR supports the right of the Canadian government to deny refuge to people who have committed crimes against humanity and to others who pose serious national security threats, except where refoulement is in contravention of the Convention Against Torture or where there will be a risk of capital punishment;
 2. It is the right and duty of the state to ensure that a just system for identifying such persons is in place;
 3. The definitions in the Immigration Act relating to inadmissibility on the basis of security are over-broad;
 4. Decisions regarding security inadmissibility are made without respecting the due process rights of those affected;
 5. There is no time limit within which a decision may be made, leading to indefinite delays for some of those affected;

THEREFORE BE IT RESOLVED that the CCR call on the Canadian Government to:

1. Introduce a system for identifying potential security risks with:
 - a) a right to a hearing before an independent decision-maker for those alleged to be inadmissible on security grounds;
 - b) protection of due process rights;
 - c) an obligation to render a decision within a fixed time frame;
2. Amend the Immigration Act to give a more precise definition of security risk.

Res. 21, Dec. 01 - SECURITY INTELLIGENCE REVIEW COMMITTEE (SIRC)

- WHEREAS:
1. In June 2000, CCR called for the Minister of Citizenship and Immigration and CIC to immediately implement the recommendations in the SIRC report concerning three complaints made by people suffering delays in landing for security reasons, and the responses to CCR by both the Solicitor General and the Minister of Citizenship and Immigration noted that “decisions on admissibility rest with CIC”, not with CSIS;
 2. The recommendations of SIRC appear to have had no effective role in modifying CSIS recommendations to CIC in this case;
 3. Although one of these complainants has been responded to positively, the other two cases remain unresolved at the present time;
 4. Bill C-36 greatly expands the ability of Canadian authorities to deem someone a “terrorist” and an organization a “terrorist organization;”

THEREFORE BE IT RESOLVED THAT the CCR:

1. Call on the Minister of Citizenship and Immigration to introduce legislation to expand the authority of the Security Intelligence Review Committee (SIRC) to review security certificates issued not only against Canadian citizens, but also those issued against permanent residents, Convention refugees and refugee claimants;
2. Call on the Minister of Citizenship and Immigration to instruct her officials that, where SIRC has heard a complaint against CSIS and issued a report, the report be given primacy in the Department’s decisions with regard to admissibility;
3. Call on the Solicitor General to introduce legislation to expand the authority of SIRC such that SIRC be empowered to review and issue binding reports on the government’s listing of “terrorist organizations” under Bill C-36.

Res. 31, Dec. 01 AGAINST PROFILING BASED ON IDENTITY

- WHEREAS:
1. Security concerns now require more intensive examinations of travellers at borders;
 2. Profiling based on identity has been used in the past;
 3. Profiling based on identity is highly demeaning for those involved and discriminatory;
 4. A serious public concern warrants the necessary costs and a broader sharing of the inconveniences;

THEREFORE BE IT RESOLVED THAT the CCR urge the government of Canada not to use profiling based on identity for border examinations and to ensure non-discrimination, by, if necessary, examining whole travelling populations.

APPENDIX B

6 November 2003

Hon. Denis Coderre, PC, MP
Minister of Citizenship and Immigration
Ottawa, Ontario, K1A 1L1

RE: “OPERATION THREAD”

Dear Mr Coderre,

We are writing to express our grave concern over your department’s handling of the cases of 23 Pakistani and Indian men arrested under “Operation Thread.” This matter has resulted in serious violations of the rights of the individuals directly affected, has had a broad and devastating impact among South Asian, Muslim and Arab communities in Canada, heightening their sense of vulnerability to discrimination, and has unnecessarily increased Canadians’ anxiety by raising the spectre of security threats without any solid evidence.

The individuals arrested have been formally and publicly identified by Citizenship and Immigration Canada (CIC) as suspected terrorists. This violates a basic rule of justice, namely that it is unfair to arrest a person based only on a suspicion. The high profile nature of anything to do with terrorism means that the allegations against the individuals have been broadly publicized. Even after Citizenship and Immigration Canada dropped the terrorism-related allegations, since no public disclaimer was made, media stories continued to carry headlines referring to “suspected terrorists”. This illustrates clearly how the terrorist label, once applied, remains attached to the person. The reputations of those arrested on the basis of suspected terrorism have been ruined, with devastating consequences.

For members of the South Asian, Muslim and Arab communities, the handling of the cases sends a clear message that the Canadian government practices racial profiling. It highlights how easy it is to be publicly labelled a “terrorist suspect” if you happen to have certain origins. For these communities in particular, “Operation Thread” has strengthened feelings of insecurity and victimization. They have to live with the consequences of the media coverage that reinforces popular stereotypes of South Asians, Muslims and Arabs as potential terrorists.

Canadians generally have suffered as a result of your department’s handling of “Operation Thread” through the publicity given to suspicions of security threats based on the flimsiest of evidence. In the current context when people’s fears have already been heightened, we could reasonably expect that the government would be particularly cautious about unnecessary fuelling of fears. Yet Citizenship and Immigration Canada’s actions have done just this, as well as reinforcing myths in Canada and abroad that hold that Canada’s immigration process makes Canada – and the US – vulnerable to terrorism.

We note that Canada has a long and shameful history of racist immigration policies and practices, including long periods where immigrants were explicitly denied entry because they were of “Asiatic race”. This past has not been left behind us: racial discrimination continues to be widespread in Canada. Citizenship and Immigration Canada’s “Operation Thread” represents a particularly shocking example of this continuing racism.

We hold the Canadian government responsible for respecting individual rights, for combatting racial and religious discrimination, and for promoting the population’s security through intelligent action. In Operation Thread, the government did not live up to these responsibilities.

We urge you to take decisive measures to correct some of the damage done in these cases and to address the systemic problems that underlie the mistakes. We call on you to:

1. Offer a public apology to those arrested under “Operation Thread” and to state clearly and publicly that Citizenship and Immigration Canada withdraws any suggestion that they are linked to any terrorist organization.
2. Use your discretion to give favourable consideration to any immigration applications from the affected individuals, taking into consideration the prejudice they would face in their home countries if returned after having been identified by the Canadian government as suspected terrorists.
3. Conduct an inquiry to identify those within the department who bear the principal responsibility for “Operation Thread” and ensure that they are disciplined.
4. Have your department meet with representatives of the South Asian, Muslim and Arab communities with a view to developing a process, including training, to assist CIC in making its policies and practices more sensitive to issues of racial and religious discrimination.
5. Amend the *Immigration and Refugee Protection Act* to eliminate powers of detention based on “suspicion” of inadmissibility on grounds of security, and in the meantime, refrain from using such powers.
6. Have your department meet with representatives of interested NGOs to discuss CIC’s policies and procedures for dealing with cases raising potential security issues, with a view to ensuring that CIC responds appropriately to security threats while respecting individual rights.

We look forward to your response to these concerns and recommendations

Yours sincerely,

Kemi Jacobs
President, Canadian Council for Refugees

This letter is endorsed by the following organizations:

All Nations Immigration and Refugee Aid Organization

Canadian Centre for Victims of Torture

Canadian Arab Federation

Council of Agencies Serving South Asians

Ligue des droits et libertés

Muslim Lawyers Association

National Network for the Health of Survivors of Torture and Organized Violence

Ontario Council of Agencies Serving Immigrants

Salaam: Queer Muslim Community

Victoria Immigrant & Refugee Centre Society

APPENDIX C

October 14, 2004

Hon. Anne McLellan, M.P., P.C.,
Minister of Public Safety and Emergency Preparedness
House of Commons
Ottawa, ON
K1A 0A6
Canada

Dear Minister McLellan,

We are writing this letter to express our grave and urgent concern about both the arbitrary detention and the removal to torture of non-citizens in Canada pursuant to the Security Certificate procedure. We are aware that there are at least five persons in Canada currently subject to Security Certificate procedures who have been denied the right to a fair hearing and face the imminent risk that they will be returned to torture, in violation of universal norms of international law.

As you know, the rights to life, liberty and security of the person, the right to be free from discrimination, as well as the prohibition on torture are pillars of democracy and the rule of law. They are guaranteed not only by our own *Charter of Rights and Freedoms*, but also by the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and numerous other international and regional human rights treaties to which Canada is a party. As a world community we have guaranteed these rights not on the basis of the accident of our place of birth or social status, but on the basis of the simple fact of our humanity. In this regard, section 3 (3) of the *Immigration and Refugee Protection Act* explicitly confirms that the Act is “to be construed and applied in a manner that ... complies with international human rights instruments to which Canada is signatory.”

A number of further rights flow from core human rights principles. These include the right to be free from arbitrary detention, the right to a fair trial, and the principle of natural justice that an accused must be informed of the charges against her and must be given an opportunity to respond to the charges. It is only when these rights are respected and protected for all that we can expect to have a truly egalitarian and democratic society. The Security Certificate process violates these fundamental principles in several crucial ways:

The Security Certificate process allows the arrest and detention of non-citizens on the basis of secret evidence.

Under the amended provisions of the *Immigration and Refugee Protection Act*, the Solicitor General and the Minister of Citizenship and Immigration may sign a Security Certificate alleging a non-citizen to be inadmissible to Canada on grounds of security or serious criminality. Upon being named in such a Certificate, unless the individual is a permanent resident, the subject is automatically detained, without a warrant. If the subject is a permanent resident a warrant is

required, but there must only be reasonable grounds to believe the subject is a danger to national security or the safety of any person, or is unlikely to appear for removal.

While both the Security Certificate and the grounds for continued detention must be reviewed by the Federal Court, the Court may hear the government's evidence in secret, i.e. in the absence of both the subject of the Certificate and his or her counsel. Indeed, the government is not even required to inform the detainee of the precise nature of the allegations at issue. Normal rules of evidence are dispensed with, including the right to cross-examine witnesses and to challenge evidence obtained through normally unacceptable means such as hearsay, plea-bargains or even torture.

Minister McLellan, without knowing and being able to challenge the specific allegations and the evidence against a person, it is in practice nearly impossible to mount an accurate and credible defense. By waiving procedural safeguards that are essential to the fair administration of justice, the Security Certificate process puts all the power in the hands of the government of the day and effectively strips individuals of their right to defend themselves and to challenge the grounds of their detention. While we appreciate the state's legitimate interest in protecting the nature and sources of its intelligence information, under the former *Immigration Act*, the Security Intelligence Review Committee had developed procedures for addressing such evidence that struck a much better balance between the state's interests in protecting sensitive evidence on the one hand and the individual's right to a fair hearing on the other.

In its 2000 Report on the Canadian Refugee Determination System, the Inter American Commission on Human Rights noted specific concerns with the inequality of arms inherent in the Security Certificate process before the Federal Court and urged Canada to enact additional safeguards to ensure that "the person named in the certificate has the ability to know the case he or she must meet, and to enjoy the minimum procedural guarantees necessary to ensure the reliability of the evidence taken into account."

The Security Certificate process holds the State to a lower standard of proof for the detention of non-citizens than for citizens.

The standard of proof for detention of persons pursuant to a criminal conviction in Canada is always the highest criminal standard of proof beyond a reasonable doubt. This high standard has been deemed to be appropriate by our Courts because of the fundamental importance of the interest at stake in detention – i.e. liberty.

Unlike the criminal law regime, when it comes to detaining non-citizens alleged to represent threats to Canadian security, the reviewing Court is restricted to assessing the "reasonableness" of the government's allegations. That means that even where a Court comes to the conclusion, based on one-sided, secret evidence, that the government's allegations are incorrect, as long as the government's allegations aren't *so obviously incorrect* that they are unreasonable, the Court is required to uphold them. Once a Security Certificate has been found to be reasonable the matter is closed: there is no appeal from such a finding. This differential treatment is inherently discriminatory and fails to safeguard the rights of the accused.

The Security Certificate process allows for the removal to persecution and torture of non-citizens.

Canada has been invoking the Security Certificate process in cases where the subjects face a serious risk of torture if they are deported. Torture and sending a person to where s/he will be tortured (*refoulement*) are prohibited by international law. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *International Covenant on Civil and Political Rights*, to both of which Canada is a party, as well as customary international law, include an absolute prohibition on torture and *refoulement* to torture. International law recognizes no circumstances that would justify torture or *refoulement* to torture.

In a number of the cases currently going through the Security Certificate process, Canadian officials have acknowledged that it is more likely than not that the subjects will be tortured by their governments if they are sent back. Nevertheless, Canada continues to seek their removal to torture, in contravention of international law.

Minister McLellan, there are other options. For example, upon apprehending a non-citizen believed to have committed terrorist acts, Canada may be able to prosecute the person under the anti-terrorism provisions of the Criminal Code. Alternatively, where an extradition request has been made, Canada may extradite the person to face charges elsewhere, provided the person's fundamental human rights will not be violated by that country. Both of these options meet the goal of avoiding impunity and protecting the public, and have been repeatedly advocated by the UN General Assembly, the UN Security Council, and international legal scholars. At its recent conference in Berlin, the International Commission of Jurists adopted the *Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*. The Declaration specifically affirms the principle that states should apply and where necessary adapt existing criminal laws rather than resort to extreme administrative measures in efforts to combat terrorism.

Refoulement to torture simply is not a legitimate response to a perceived or alleged security threat at international law. With respect to Canadian law, while the Supreme Court of Canada, in *Suresh v. Canada (MCI)*, did not completely foreclose the theoretical possibility of exceptional conditions that might justify *refoulement*, the Court emphasized that the Minister should generally not deport in circumstances where there is substantial evidence of a risk of torture.

We are gravely concerned that the Security Certificate process denies to non-citizens the due process rights to which they are entitled as equal human beings. Likewise of great concern is the denial of non-citizens' right to be free from arbitrary detention – especially in the case of those who are not permanent residents, who can be detained without even a warrant. As undeniably serious as these violations are, however, they pale in comparison to what for some is the eventual outcome of the process: torture, which is perhaps the ultimate violation of human dignity and fundamental human rights.

Minister McLellan, we recognize that there may be occasions where special measures need to be taken to protect the public from grave threats to their security. However, such measures must be very carefully tailored to directly address serious threats, and must do so in a way that respects the essential human dignity of all persons, complies with universal norms of human rights, and upholds the rule of law. The Security Certificate process, at least in its current form, fails to meet these basic requirements. We therefore urge you to immediately stay the removal of any person

to a country where they face a serious possibility of persecution or torture, and to overhaul the Security Certificate process to bring it into conformity with international human rights standards.

Sincerely yours,

Sharryn J. Aiken, Assistant Professor of Law, Queen's University and
Andrew J. Brouwer, Co-Chair, Legal Affairs Committee, Canadian Council for Refugees

c.c. Hon. Judy Sgro, P.C., M.P., Minister of Citizenship and Immigration
Rt. Hon. Paul Martin, P.C., M.P., Prime Minister of Canada
Hon. Irwin Cotler, P.C., M.P., Minister of Justice
Gilles Duceppe, Bloc Québécois Leader
Jack Layton, New Democratic Party Leader
Hon. Stephen Harper, Conservative Party Leader and Leader of the Opposition

Endorsed by:

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David Wiseman, Assistant Professor of Law, University of Windsor

Appendix D: COMMENTS OF INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON SECURITY CERTIFICATES

From the *Report On The Situation Of Human Rights Of Asylum Seekers Within The Canadian Refugee Determination System*
February 2000

[Note: the report was written when the previous *Immigration Act* was in force and references to that Act are included. The *Immigration and Refugee Protection Act* continues most of the security certificate provisions found in the previous Act and virtually all of the IACHR's comments remain applicable].

146. According to the information before the Commission, the security certification process under section 40.1 raises three principle concerns implicating the provisions of the American Declaration and other applicable norms: (1) the compatibility of the provisions concerning access to review of the legality of detention, (2) the apparent difficulties presented for a person deemed to be a security risk to seek protection for his or her right to non-return due to a risk to life or physical integrity, and (3), the compatibility of the procedures which allow the judge reviewing the certificate to consider evidence which may be withheld from the person concerned on the basis of the need to protect national security.

147. With respect to the first issue, Article XXV of the American Declaration provides that any person detained has the right to have the legality of the detention ascertained without delay. The requirement that detention not be left to the sole discretion of the State agents responsible for carrying it out is so fundamental that it cannot be overlooked in any context. Supervisory control over detention is an essential safeguard, because it provides effective assurance that the detainee is not exclusively at the mercy of the detaining authority.¹⁰⁷ This is an essential rationale of the right to *habeas corpus*, a protection which is not susceptible to abrogation.¹⁰⁸ Under normal circumstances, review of the legality of detention must be carried out without delay, which generally means as soon as practicable.¹⁰⁹ This essential safeguard is recognized in a range of international instruments, including principal human rights treaties, as well as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.¹¹⁰

148. While the certification process provides for judicial review of the grounds for issuing the certificate, it provides no recourse to seek review of the legality of the related detention. Under the terms of the *Immigration Act*, detention is mandatory until the certificate is quashed. The only exception prior to that point is release for the purpose of removal. If the certificate is not quashed, the terms of the Act expressly exclude the possibility of access to the writ of *habeas corpus* for 120 days after a removal order is issued.

149. As a matter of domestic law, the certification process and related detention provisions have been upheld as constitutional on the basis that, while the process "has the immediate unfortunate effect of leading to the arrest and detention of the person concerned, a fate normally reserved for criminals," its primary purpose is "providing preventive protection to the Canadian public." Further, the Court found that preventive detention under those terms is neither arbitrary nor excessive, given that: the issuance of the certificate requires the opinion of two Ministers based on security information, a determination subject to obligatory judicial review "within an acceptably short period of time;" that it allows for the detainee to end the detention at any time

by agreeing to leave the country; and that the provisions at issue deal with "individuals somehow associated with terrorism."**111** In its observations, the State indicated that "[i]n enacting section 40.1 of the Immigration Act, Parliament developed a procedure in which it attempted to strike a balance between the competing interests of the individual and the state." The State reiterated that the process of issuing a certificate "has various safeguards in place to ensure that individuals concerned are treated fairly includ[ing] the test for [] issuance ...: the reasoned opinion of two Ministers ...; the obligatory judicial scrutiny of the reasonableness of those opinions within an acceptably short period of time; and the type of prohibited class of individuals."

150. While the certificate review process provides an important judicial check on State action, it does not provide the simple, prompt access to judicial oversight with respect to the decision to detain required by Article XXV of the Declaration.**112** Where the decision to detain is taken by an administrative authority, "there is no doubt" that the person concerned must have recourse to challenge that decision before a court.**113** Further, this must be available without delay. In the first place, the 120 day waiting period does not meet this standard. In the second place, it only begins to run after the certificate is upheld and a removal order is issued. In the relatively few cases with respect to which the Commission has received information, the certificate review proceedings have taken months, even years to complete. Nor would the possibility of filing of an action seeking declaratory relief under the Charter before the Federal Court offer the kind of simple, prompt control contemplated by the protection of *habeas corpus*.**114** In principle, the terms of Article XXV, concerning the right to detention review without delay, particularly when read in conjunction with those of Article XVIII, concerning the right to a simple, brief procedure for the protection of fundamental rights, require the existence of a procedure such as habeas corpus or its equivalent which does not then require the institution of separate legal proceedings such as an application for judicial review.**115**

151. With respect to the duration of such proceedings, the State indicated in its observations that "[g]enerally speaking this process has been completed in most cases within four months of the filing of the certificate." "Some lengthy delays have occurred when these provisions were still new and when the constitutionality was being tested." The Commission notes in this regard that it has received information through its petition process about several specific cases of delay. In one, the individual concerned was detained for approximately a year and a half, and in another for two and half years.**116** It may further be noted that the subject of the Ahani case, cited by the State in its observations (see para. 156 *infra*), has been detained approximately seven years. Because detention is mandatory until the certificate is quashed, the information proffered by the State means that individuals concerned may be detained for four months pending the judicial decision on the certificate with no possibility of seeking judicial review of the legality of detention. Moreover, in cases where the certificate is upheld, the law expressly precludes an application for *habeas corpus* to obtain such review for an additional 120 days after the issuance of a removal order. The Commission observes in this regard that a delay of either four or eight months in affording access to judicial review of the legality of detention greatly exceeds the requirement under Article XXV of the Declaration that such access be accorded promptly.

152. Moreover, while the need to protect the rights of others may provide a basis for the limitation of certain rights under the Declaration, any such restriction must always flow from and be governed by law. This Commission and other international human rights bodies have consistently recognized the right and duty of the State to fight terrorism and protect citizen security, and the special problems which arise in this context.**117** At the same time, even under extreme circumstances, effective judicial control of State action remains a fundamental prerequisite for ensuring the rule of law. Accordingly, this Commission has consistently found

that resort to restrictive measures under the American Declaration may not be such as to leave "the rights of the individual without legal protection."**118** "[C]ertain fundamental rights may never be suspended, as is the case, among others, of the right to life, the right to personal safety, and the right to due process.... under no circumstances may governments employ ... the denial of certain minimum conditions of justice as the means to restore public order."**119** While international human rights law allows for some balancing between public security and individual liberty interests, this equilibrium does not permit that control over a detention rest exclusively with the agents charged with effectuating it.

153. Further, the assessment of the need to detain must in principle be based on the circumstances pertaining to the individual concerned. The particular question under study, the danger of an individual to national security, is a characteristic susceptible to change over time, indicating that new issues as to the lawfulness of detention may arise, which must be subject to the possibility of review at reasonable intervals.**120**

154. The Commission notes that, pursuant to these provisions, a person recognized as a Convention refugee can be divested of that status and removed from Canada to a seemingly uncertain future. Persons with respect to whom security certificates are issued are excluded from the refugee determination process and the post-claim risk review process. For persons who have been subject to certain forms of persecution, such as torture, return to their home country would place them at a risk which is impermissible under international law. As noted above, the prohibition of torture as a norm of jus cogens -- as codified in the American Declaration generally, and Article 3 of the UN Convention against Torture in the context of expulsion -- applies beyond the terms of the 1951 Convention. The fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue.**121** Return is also highly problematic as a practical matter in the case of stateless persons, or persons with respect to whom it is not possible to obtain travel documents. The information before the Commission is unclear in indicating what other effective options are available to such persons, or that there are adequate safeguards in place to ensure that expulsion does not place their lives or physical integrity at risk.

155. Finally, the Commission has carefully reviewed the provisions stipulating the bases according to which information may be withheld from the person concerned during the certificate review process. Pursuant to section 40.1(4)(b), the designated judge may: provide the person named ... with a statement summarizing such information available to ... the designated judge ... as will enable the person to be reasonably informed of the circumstances giving rise to the issue of the certificate, having regard to whether, in the opinion of the ... designated judge ... the information should not be disclosed on the grounds that the disclosure would be injurious to national security or to the safety of persons. Pursuant to section 40.1(5.1), where the State applies, *ex parte* and *in camera*, for the admission of information obtained in confidence from a foreign government or institution, or from an international organization of states or an institution thereof, the judge shall review it, and, if deemed relevant, may consider it, even though he or she determines that it should not be disclosed to the person concerned in order to protect national security of the safety of persons.

156. With respect to the process generally, the State recalled in its observations that the certification process had been upheld by the Federal Court of Appeal in the Ahani case as

consistent with the constitution and the requirements of fundamental justice. With respect to the issue of evidence and due process, the State indicated that:

The Supreme Court in *Chiarelli* ruled that an appropriate balance had been struck between the protection of information and due process in the security certificate determination process. While it may be argued that due process would entitle a person to always receive all the information in the hands of the state, the Court held that this must be balanced by the State's right to protect itself from terrorists and other serious criminals.

The State also noted that reference to its procedures for judicial control of the use of confidential material had been cited with approval by the European Court of Human Rights in the case of *Chahal v. U.K.*: "The Court attaches significance to the fact that, as the intervenors pointed out ..., in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which ... both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice." Finally, the State observed that the Federal Court had quashed security certificates in given cases, citing the decision issued recently in *Jaballah*, thereby demonstrating that "the judiciary ensures that fundamental justice is upheld" in these types of cases.

157. The Commission observes that the provisions of section 40.1 raise certain due process concerns under, *inter alia*, Articles XVII and XVIII of the American Declaration. First and foremost, where information considered within the process is withheld, the person concerned cannot be fully apprised of the case he or she is to meet. The legislation provides that the information at issue must be deemed relevant by the judge; however, its terms do not require an evaluation of the credibility or veracity of the original source, and the person concerned is unable to challenge the source or to rebut the content of that information.¹²² Although the certificate review process is not criminal in nature, the non-disclosure of such information may well prejudice the rights of the person concerned, giving rise to serious consequences. Once a certificate is upheld by a judge, it constitutes conclusive evidence that the person named falls within an inadmissible class, and mandates that he or she be detained until removed from Canada. While the IACHR recognizes that the State is necessarily concerned with the need to protect its ability to collect sensitive information, it is a fundamental principal of due process that the parties engaged in the judicial determination of rights and duties must enjoy equality of arms. A person named in a certificate who is the subject of secret evidence will not enjoy a full opportunity to be heard with minimum guarantees, the essence of the right to due process. Both citizens and non-citizens must be accorded due process in the determination of basic rights, in this instance, the right to seek asylum and the right to personal liberty, in particular.

From Recommendations:

179 (c) With respect to the section 40.1 security certificate procedure specifically, that additional safeguards are enacted to: (a) provide the detainee with access to judicial review of the legality of the detention without delay; (b) offer access to periodic detention review at reasonable intervals; (c) to assure that adequate procedures are in place to protect such persons against return where this would expose them to a serious risk of inhuman treatment or torture; and, (d), with respect to the right to due process specifically, that the person named in the certificate has the ability to know the case he or she must meet, and to enjoy the minimum procedural guarantees necessary to ensure the reliability of the evidence taken into account.