

AMNESTY INTERNATIONAL CANADA
Presentation to the ICJ Eminent Jurists Panel on
Terrorism, Counter-terrorism and Human Rights

Ottawa, Canada

April 25, 2007

Alex Neve, Secretary General

SPEAKING NOTES

- Since 2001, Amnesty International has consistently and forcefully, both globally and nationally within Canada, reaffirmed the fundamental relationship between security and human rights, emphasizing that neither is attainable or sustainable in the absence of the other. Human rights protection, in the absence of security, will always be tenuous; and security will at best be precarious without regard for human rights protection.
- In Canada, Amnesty International has raised that perspective within the parliamentary process (including at the time of the adoption and the review of Canada's Anti-Terrorism Act); in the courts (including intervening in Supreme Court of Canada cases dealing with deportation to torture in 2002 and immigration security certificates in 2007, and launching a lawsuit challenging Canada's approach to prisoner transfers in Afghanistan); in judicial inquiries (intervenor status in both the Maher Arar Inquiry and the current Iacobucci Inquiry); and in public campaigning on a wide variety of issues.
- Amnesty International has been concerned that a number of laws, policies and practices adopted as part of Canada's approach to counter-terrorism, violate or undermine Canada's international human rights obligations. We have pressed Canada to improve its record for two reasons. First, the human rights of those individuals affected by this approach must of course be safeguarded. Second, we want to ensure that Canada's international-level voice in the area of human rights in general, and the particular area of security and human rights, remains as credible and persuasive as possible.
- The potential areas of concern are wide-ranging and I know that others are addressing many of those issues. I would like to highlight 4 issues, all of which relate to the overall concern that Canada has failed adequately to ensure that laws, policies and practices firmly reject any complicity in torture. The issues I will touch on are: the detention and torture of Canadians abroad; Canada's approach to the handling of battlefield detainees in Afghanistan; the failure to comply fully with the prohibition against *refoulement* to situations of torture; and unanswered questions about Canada's position regarding the use of Canadian airspace by CIA flights that may have been involved in extraordinary rendition.

DETENTION AND TORTURE ABROAD

- I realize that the panel will be very familiar with the case of Maher Arar, whose dramatic story of arrest in and then rendition from the United States to Syria, where he endured a year of detention without charge or trial was badly tortured, is on international renown. The public inquiry into the role of Canadian officials in his case revealed very disturbing wrongdoing and shortcomings and has, of course led to a formal apology and compensation for Mr. Arar. While the government has acted on some of the key recommendations coming out of this report, such as a formal apology and redress, much remains unimplemented. There has never been an official written government response to the report, nor any timetable or plan of action released which would describe government plans for moving forward with the very important recommendations included in the report.
- Sadly, of course, stories of Canadian citizens being detained and tortured abroad in a security and counter-terrorism context did not end with Mr. Arar. Three other citizens, Abdullah Almalki, Ahmed El Maati and Muayyed Nureddin, were all detained and tortured in the same detention centre in Damascus where Mr. Arar was held in and around the same time period. Ahmed El Maati was also sent on to Egypt, where he continued to face torture and other human rights violations. There is very troubling reason to believe that there was significant Canadian involvement in each of these cases. Most chilling are the indications of possible willful blindness on the part of officials to the likelihood that Canadian actions might increase the chances of these men being tortured.
- A new judicial inquiry, overseen by former SCC Justice Frank Iacobucci has been set up to examine those concerns, something Amnesty long pushed for and has welcomed. I would like to flag the concern for the panel, however, that the government has chosen to give this inquiry a largely private, internal mandate and is pressing for the bulk of the proceedings to be held *in camera*. The men themselves have opposed that direction. They are asking for maximum public access to the inquiry. Amnesty endorses that position. We are awaiting a ruling from the Commissioner as to how he intends to handle the balance between public and private phases of the process. It will be regrettable if he does indeed choose largely to conduct his work behind closed doors. It would be particularly regrettable given that Canadian confidence in law enforcement and national security has been shaken in the wake of the Arar case, and the unsuccessful effort to obtain criminal convictions related to the Air India bombing. Private proceedings will not help rebuild that confidence.
- Canadians continue to face detention in abroad in security and counter-terrorism contexts. Omar Khadr has been held at Guantánamo Bay for over four years, having been first detained by US soldiers in Afghanistan when he was still a minor. He is soon to come before a US Military Commission. Huseyin Celil, an ethnic Uyghur, has been held in incommunicado detention in China since July 2006 and was recently sentenced to a term of life imprisonment. He had been

summarily deported to China from Uzbekistan during a family vacation. Bashir Makhtal, has been imprisoned in Ethiopia since January of this year, having been subjected to rendition from Kenya. Mohamed el-Attar has been imprisoned in Egypt since January 1 of this year and has now been sentenced to a 15 year prison term on charges of spying for Israel. There are serious concerns about torture in all of these cases. Khadr, Celil and el-Attar have all publicly claimed that they have been tortured. It is very likely that Makhtal has also been tortured.

- These four cases have not, to this point in time, given rise to allegations of Canadian complicity. But they have again raised questions about the approach Canada takes in cases of this nature, particularly when thorny issues of dual-nationality arise. There appears to be inconsistent approaches taken by government officials, and the cases are treated with often dramatically varying degrees of seriousness. In the Khadr case, the unwillingness of the Canadian government to take a forceful stand against the travesty of Guantánamo justice has been shocking. Notably, a range of recommendations coming out of the Arar Inquiry for more formal practices and policies to be adopted to guide the government's approach to cases of this sort has not yet been implemented.

DETENTIONS ON THE BATTLEFIELD IN AFGHANISTAN

- Let me move to the battlefield: Afghanistan. The panel members will have no doubt seen the considerable media attention this week, continuing today, to the issue of Canada's approach to handling detainees captured by Canadian soldiers in the course of fighting in Afghanistan. This has received intense recent attention, but is an issue that Amnesty first raised with the government in January 2002, when Canadian troops were first deployed to Afghanistan. The approach at that time was to transfer prisoners into US custody. We pressed for a different approach, given US refusal to apply the Geneva Conventions and the rapidly emerging concerns about the then new Guantánamo Bay detention facility. We suggested one option would be for the Canadian military to develop its own detention capacity in Afghanistan.
- Nonetheless those transfers continued until December 2005 when Canada reached an agreement with Afghan officials providing for prisoner to be transferred instead into their custody. We immediately highlighted the very real risk of torture in Afghan prisons. The Canadian government stressed that they had assurances from Afghan officials that transferred prisoners would not be torture, and that the ICRC and the AIHRC would play a central role in monitoring the treatment of transferred prisoners. This is of course an echo of the deepening international practice of relying on what are often called "diplomatic assurances" as a means of going ahead with deportations and extraditions, even when there is a severe risk of torture. If torturers will provide a promise, and if there is some semblance of a monitoring process in place, everything is deemed to be fine.

- But it is of course not fine. Promises from governments that either direct, tolerate or have proven unable to tackle torture in their prisons are far from reliable. And monitoring, to look out for a practice that is hidden, secretive and insidious; and which can occur and inflict extreme harm in a few short minutes, will obviously never be up to the task of effectively preventing its occurrence.
- Sadly, as the assurances of the Afghan government have proven unreliable, and as the so-called monitoring processes have been revealed to be exaggerated and ineffective, the Canadian government has refused to budge. We have seen no willingness to end prisoner transfers. No willingness to consider other options. As a result Amnesty, along with the BCCLA, took the extraordinary step of taking the government to court on this issue. The matter is currently before the Federal Court and will take months yet to come to full hearing. It is, of course, not too late however. The government could still cease this practice and we continue to insist that they do just that.

REFOULEMENT TO TORTURE

- Let me move to another longstanding concern about Canada's understanding of its obligations with respect to torture in a national security context: *refoulement*. International law is of course very clear. No one should be tortured. And no one should face *refoulement* to a country where they would face torture. Canadian law and practice continues to refuse to recognize the absolute nature of the ban on *refoulement* to torture. The Immigration and Refugee Protection Act fails to implement the absolute ban. The SCC, in its 2002 *Suresh* decision failed to require an absolute ban. And Canadian practice continues to be to press for deportation in a range of security cases, even when the risk of torture is very real. The UN has frequently called on Canada to amend its laws and practice and bring them into conformity with international standards. The UN CAT and the UN HRC have each, on two occasions now, called on Canada to change its position. Canada has defied those UN requests. We continue to call for Canadian law to be reformed.
- This has been of particular concern with respect to the current immigration security certificate cases, which you will have heard a great deal about already. Here the concern about being returned to torture is compounded by the fact that the individuals held under certificates have been dealt with under a process that is fundamentally unfair. The SCC has recently come to that same conclusion and has given the government a year to come up with a process that does meet fair trial requirements. We are concerned that the government's anticipated offering may still be inadequate, with the possibility of a minimally improved process that relies on a special advocate of some description but who might not have a solicitor/client relationship with the individual concerned. We consider it to be essential that a new approach to immigration security certificates is built upon a model that ensures legal counsel to the individual concerned does have full access

to the evidence in the case, with any undertakings that may be necessary to protect confidentiality and security concerns.

EXTRAORDINARY RENDITION AND CANADIAN AIRSPACE

- Lastly, I'd like to pick up an issue that you might not yet have heard from others about. The question here is whether Canadian airspace been used by flights engaged in extraordinary rendition. As the details emerged in Europe about the rampant and widespread use of airstrips, airports and airspace by CIA operated flights likely engaged in extraordinary rendition, information came to light that some of those same planes, sometimes on the very same flights, had flown through Canada airspace. Through the efforts of journalists we know of a minimum of 70 such flights, many of which also made use of Canadian landing strips in Newfoundland, northern Ontario and Nunavut.
- We have repeatedly asked the government to look into these flights, clarify their purpose and put in place safeguards to help prevent the use of Canadian airspace by planes that may be transporting individuals to countries where they are likely to be tortured.
- It has been disappointing in the extreme to see the lack of interest on the part of government officials about this concern. With respect to the call for investigations we are simply told that the flights in question have been reviewed and all legal requirements were satisfied. We have asked for confirmation that the review included an examination of international human rights provisions. The government has refused even to disclose what provisions were used in the review. We are left therefore with the dismal assumption that the review likely went no further than safety checks and flight logs. Canadian take-up of this concern has paled in comparison to the range of inquiries, investigations and court cases that have gone forward in Europe. We continue to press Canada to ensure a full and independent review of these concerns.