



**Amnesty  
International**

**PROTECTION GAP:**  
**STRENGTHENING CANADA'S COMPLIANCE WITH ITS**  
**INTERNATIONAL HUMAN RIGHTS OBLIGATIONS**

Amnesty International Canada's Submission to the  
United Nations Human Rights Committee  
on the occasion of the consideration of the Fifth Periodic Report of Canada

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Canada prides itself, with considerable justification, on its record of protecting human rights domestically, as well as its commitment to promoting stronger human rights protection worldwide. Amnesty International recognizes that Canada has done much in both regards.

The occasion of the review of Canada's record of compliance with its obligations under the International Covenant on Civil and Political Rights (ICCPR), however, provides an important reminder that there are still a number of areas where significant improvements in Canada's human rights performance are needed. Some, such as the protection of the basic rights of Indigenous peoples, are longstanding and very serious areas of concern. The need to address these shortcomings is critical; both to ensure the protection of the fundamental rights of those individuals and sectors of Canadian society who are affected, and also to ensure that Canada's human rights record stands strong as an example to other countries and helps bolster human rights protection the worldover.

This briefing elaborates in more detail on some of the issues outlined in Amnesty International's summary of concerns submitted to the Committee prior to the pre-session meeting on Canada, held during its 84<sup>th</sup> session last July. It highlights Amnesty International's concerns and recommendations for improvement in seven principal areas:

- The compliance and implementation gap
- Civil remedies for human rights violations
- Protecting the rights of Indigenous peoples
- Protecting the rights of refugees
- Human rights and counter-terrorism
- Human rights and law enforcement
- Ratification of the Second Optional Protocol to the ICCPR

## **I. THE COMPLIANCE AND IMPLEMENTATION GAP – ICCPR article 2**

Amnesty International continues to have serious concerns about the lack of coordination among the federal, provincial and territorial governments in Canada when it comes both to the ratification of human rights treaties and the subsequent implementation of and compliance with international human rights obligations, including the provisions of the ICCPR. Amnesty International is also concerned that the processes in place with respect to ratification and implementation lack public transparency.

Decisions with respect to ratification of human rights instruments are made either entirely by the federal government or when it is felt that the treaty touches on areas that fall within provincial level constitutional jurisdiction, consultations are launched within the Continuing Committee of Federal, Provincial and Territorial Officials on Human Rights, an inter-governmental group established in 1975. The committee, which is comprised of bureaucrats, meets behind closed doors and has not permitted civil society representatives to participate, observe or even make occasional limited submissions.

More recently, for treaties that do not come within provincial jurisdiction, but which may implicate a number of different federal government ministries, a cross-departmental process of occasional meetings at the level of Deputy Ministers has been initiated. Again the proceedings are not publicly accessible and it is not possible for civil society groups to attend or make submissions. Amnesty International is aware, for instance, that the Deputy Ministers have

recently discussed Canada's possible ratification of the Second Optional Protocol to the ICCPR, but was not able to attend or contribute to that meeting.

Amnesty International recognizes that government officials may need opportunities to meet and discuss issues with respect to the ratification of human rights treaties in confidence. However, it is also important that discussions and decisions regarding treaty ratification be as broadly open and accessible to the public as possible. There is no other committee or governmental process charged with responsibility for treaty ratification that is open to the public. Furthermore, it is notable that there has been no ministerial level meeting within Canada of federal, provincial and territorial ministers responsible for human rights since 1988.)

These concerns about the lack of public transparency with regard to ratification of human rights treaties apply equally to the crucial step of ensuring full implementation of and compliance with Canada's obligations, such as the ICCPR. Contentious questions about divided federal/provincial jurisdiction or overlapping responsibility among various federal departments frequently arise when UN human rights treaty bodies issue Concluding Observations following the review of periodic reports from Canada, or publish their views regarding an individual petition brought against Canada. In such instances it is unclear which officials, if any, are taking the lead in ensuring Canadian compliance. Discussions may occur within the Continuing Committee or among the Deputy Ministers, but are not in any way open to the public.

Civil society groups have suggested that once Concluding Observations or Views on an individual petition have been issued by a body such as the Human Rights Committee, the government should prepare a public Plan of Action that outlines the steps to be taken to ensure compliance and specify which government departments bear responsibility. The need for such a process is particularly acute in cases where there is a failure, sometimes longstanding, to comply with UN-level recommendations, but where there is no public reporting at the national level about the non-compliance. That has been the case, for example with the Human Rights Committee's views issued with regard to the petition brought on behalf of the Lubicon Cree (discussed later in this brief, in section II(d)); and also in cases where Canadian authorities have chosen not to comply with requests for interim measures made by UN treaty bodies and special procedures, such as the request made by this Committee for a suspension of the deportation of Mansour Ahani to Iran in 2002.<sup>1</sup>

The lack of transparency in these processes is particularly problematic because the federal government has frequently asserted that even though it is responsible for ratification of and compliance with human rights treaties, it cannot ensure implementation when provincial level powers are implicated. This was the case for instance with respect to the Human Rights Committee's recommendation to Canada in 1999 to establish a public inquiry into the 1995 police killing of Dudley George.<sup>2</sup> This Committee has highlighted that a national level government cannot "point to the fact that an action incompatible with the provisions with the ICCPR was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility."<sup>3</sup> Given that such disputes between levels and departments of government within Canada often become obstacles to implementation and compliance, it is crucial that there be processes in place that are publicly accessible so as to ensure broad public understanding of and debate about these disputes.

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<sup>1</sup> Communication No. 1051/2002, U.N. Doc. CPR/C/80/D/1051/2002(2004).

<sup>2</sup> *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105, 7 April 1999, para. 11.

<sup>3</sup> UN Human Rights Committee, General Comment No. 31, para. 4.

Amnesty International has asked Canada to take steps to improve the coordination and public transparency regarding ratification of and compliance with international human rights treaties.<sup>4</sup> A meeting of federal, provincial and territorial ministers with responsibility for human rights issues, long overdue, would provide a valuable forum for agreeing to a new approach. A report published in December 2001 from the Standing Committee on Human Rights of the Senate of Canada highlighted these same concerns and made similar recommendations. The Committee noted that “there appears to be a significant democratic deficit with respect to human rights in Canada, particularly in the area of the acceptance and implementation of Canada’s international human rights commitments.”<sup>5</sup> The report calls for a parliamentary human rights committee to be established, with broad powers to oversee Canada’s compliance with international human rights obligations.

Decisions about ratifying human rights treaties and measures to ensure compliance with international human rights obligations are matters deserving of serious public consideration. Canada’s approach at present is opaque and difficult for members of the public to understand. An improved approach would certainly stand to strengthen Canada’s overall commitment to human rights protection.

**Amnesty International believes that the Canadian government should establish a publicly accountable and authoritative intergovernmental body to monitor and coordinate compliance with Canada’s international human rights obligations.**

## **II. THE RIGHT TO A REMEDY – ICCPR article 2**

Amnesty International is concerned that the Canadian government has taken the position that the concept of state immunity prevents victims of serious human rights violations from obtaining redress in Canadian courts against governments responsible for the violations they have experienced. They have also asserted that universal jurisdiction, which applies to the criminal prosecution of certain human rights violations such as torture, does not extend to civil suits for redress.<sup>6</sup> However, accountability and justice in the face of torture and other crimes subject to universal jurisdiction is not only a criminal law issue.

The Special Rapporteur on Torture has highlighted the critical importance of the right of survivors of torture to obtain reparations for what they have suffered. He notes that:

“beyond the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts, has an inherent preventive and deterrent aspect.”<sup>7</sup>

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<sup>4</sup> *Above all Else: A Human Rights Agenda for Canada*, Amnesty International Canada, December 2004, pp. 17-18.

<sup>5</sup> *Promises to Keep: Implementing Canada’s International Human Rights Obligations*, Report of the Standing Senate Committee on Human Rights, December 2001, pg. 17.

<sup>6</sup> *Bouzari v. Iran*, Quicklaw cite: [2004] O.J. No. 2800 (Quick Law), Docket C38295, June 30, 2004.

<sup>7</sup> Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/55/290, 11 August, 2000, para. 28.

Houshang Bouzari is a Canadian citizen who attempted in a Canadian court to sue the government of Iran for torturing him in 1993, prior to his arrival in Canada. His attempt to obtain redress encountered an obstacle in Canada's *State Immunity Act*, which limits lawsuits against foreign governments except in very narrow circumstances, such as lawsuits based on commercial activities, criminal activities, or injuries and losses occurring in Canada. Mr. Bouzari challenged this restriction on his ability to seek compensation by arguing that Canada's *State Immunity Act* does not accord with the Canadian *Charter of Rights and Freedoms* or with Canada's international obligations.

Mr. Bouzari relied on a number of international human rights provisions in advancing his case, most particularly Article 14(1) of the Convention against Torture, which states:

“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible...”

The Canadian government has argued that article 14 is restricted to acts of torture that occur within a state's jurisdiction, despite the absence of any language in the article requiring this territorial limitation. Amnesty International has taken the position that the absence of a territorial limitation in Article 14 of the Convention should be interpreted to provide torture victims with the widest possible opportunity to obtain redress for torture. In our view that position is bolstered by the provisions of Article 2(3)(a) of the ICCPR:

“... any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”.

Amnesty International considers it to be unreasonable to interpret international human rights obligations so as to allow states to prosecute torturers for torture committed abroad, but not allow reparation for torture committed abroad (footnote: ref to AI docs)<sup>8</sup>. The Ontario Court of Appeal accepted the Canadian government's position,<sup>9</sup> and the Supreme Court of Canada declined to hear an appeal of the matter. Earlier this year, however, the Committee against Torture called on Canada to:

“review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture.”<sup>10</sup>

**Amnesty International believes that the Canadian government should enact the necessary legal provisions to recognize jurisdiction with respect to civil suits brought in Canadian courts seeking reparation for crimes against humanity, war crimes, torture and other human rights violations subject to universal jurisdiction suffered abroad at the hands of foreign governments and to ensure that any such suits cannot be defended on the basis of state immunity.**

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<sup>8</sup> *Redoubling the Fight Against Torture – Amnesty International's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report from Canada*, 8 October 2004, pp. 3-4.

<sup>9</sup> *Bouzari v. Iran*, footnote 6, para.76.

<sup>10</sup> *Conclusions and recommendations of the Committee against Torture – Canada*, U.N. Doc. CAT/C/CO/34/CAN, 34<sup>th</sup> session, May 2005, para. 5(f).

### **III. PROTECTING THE RIGHTS OF INDIGENOUS PEOPLES**

When Canada appeared before the UN Human Rights Committee in 1999, government officials acknowledged that the plight of Indigenous peoples was “the most pressing human rights issue facing Canadians.”<sup>11</sup> Sadly, six years later that assessment almost certainly still holds true. Amnesty International has serious concerns about the protection of the basic rights of Indigenous peoples in a wide number of areas.

#### **a) Violence against Indigenous women – ICCPR articles 2, 3**

According to a 1996 Canadian government statistic, Indigenous women between the ages of 25 and 44 with status under the federal Indian Act, are five times more likely than other women of the same age to die as the result of violence.<sup>12</sup> Unfortunately, there are significant gaps in available information, including the fact that police often fail to record when the victims of violent crimes are Indigenous. Incomplete information about the true scale or the circumstances of violence against Indigenous women in Canada results in public policy based on questionable assumptions rather than fact.

Amnesty International’s own research points to the role of discrimination in fuelling violence against Indigenous women, in denying Indigenous women the legal protection they deserve or in allowing the perpetrators to escape justice. More specifically, Amnesty International’s research has indicated three critical factors: 1) a history of government policies that have broken up and dispossessed Indigenous families and communities has contributed to large numbers of Indigenous women living in situations of extreme economic and social marginalization where they face an increased risk of violence; 2) various levels of government have failed to provide stable, adequate funding to culturally appropriate services to assist the growing numbers of Indigenous women living in urban centers escape the threat of violence; and 3) police forces across Canada have largely failed to recognize and respond adequately to the specific threats faced by Indigenous women.<sup>13</sup>

**Amnesty International believes that the Canadian government should:**

- **Ensure collection of accurate information on the extent of violence against Indigenous women.**
- **Provide adequate sustained funding to services assisting Indigenous women escape situations of violence or access the justice system.**
- **Ensure that all police forces work with Indigenous women’s organizations to develop policies and protocols that will ensure an appropriate and effective response to reports of missing persons or other threats to the safety of Indigenous women and girls.**

#### **b) Indigenous children in state care – ICCPR articles 18(1), 27**

The 1996 Canadian Royal Commission on Aboriginal Peoples recognized the disastrous consequences of past policies aimed at the destruction of Indigenous cultures, including the forced removal of Indigenous children from their families and communities to attend residential

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<sup>11</sup> Concluding observations of the Human Rights Committee: Canada, footnote 2, para. 7.

<sup>12</sup> Aboriginal Women: A Demographic, Social and Economic Profile, Indian and Northern Affairs Canada, Summer 1996.

<sup>13</sup> *Canada, STOLEN SISTERS – Discrimination and Violence Against Indigenous Women in Canada, A Summary of Amnesty International’s Concerns*, October 2004, AI Index AMR 20/001/2004.

schools.<sup>14</sup> It has been estimated that there are now three times the number of Indigenous children in state care than at the peak of the residential school era.<sup>15</sup> The federal government, Indigenous children are four to six times more likely than non-Indigenous children to be removed from their families and placed in the care of the state<sup>16</sup> while a recent study of three sample provinces found that First Nations children with status under the Indian Act were fifteen times more likely than other children to be removed from their families.<sup>17</sup>

While removal of children from their families is sometimes necessary to guarantee their health and safety, it is acknowledged in international human rights law that it is preferable, whenever possible, to ensure children's welfare within their culture and community to help foster the sense of identity, belonging and self-worth that is a vital part of growing up.<sup>18</sup> This is particularly important for Indigenous children who may lose the opportunity to learn the traditions and values of their own culture if they are removed from their families for too long.

In 2000, the federal government acknowledged that chronic underfunding of child and family services in Indigenous communities mean that Indigenous communities were often denied access to services that could provide for Indigenous children's welfare while keeping them within their families and communities.<sup>19</sup> Of particular concern was the lack of adequate funding for preventative and early intervention programs that could address emerging problems before the situation necessitated the removal of children from their families. In 2000, the average federal funding for Indigenous child and family services was 22% lower per child than what provincial governments provided for non-Indigenous children. This is despite the higher costs of providing services in small and remote communities and the ongoing impacts of the residential school experience and other federal policies on the stability of Indigenous communities. Amnesty International is concerned that the federal government has not taken sufficient measures to address this gap and many Indigenous child and family service organizations believe that the gap has continued to widen over as there has been no adjustment to keep pace with increases in the cost of living over the last ten years.<sup>20</sup>

**Amnesty International believes that the Canadian government must act immediately to end the disparity in funding for Indigenous child welfare services and ensure that the best interests of Indigenous children are protected by effective preventative and early intervention programs.**

**c) Arbitrary detention and inhumane treatment of persons in mental distress – ICCPR articles 7, 9, 10**

On the night of 28 January 2000, Darrell Night, a 34-year-old member of the Saulteaux First Nation, was picked up by Saskatoon police, driven to an industrial park on the outskirts of town

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<sup>14</sup> Report of the Royal Commission on Aboriginal Peoples (RCAP), 1996.

<sup>15</sup> First Nations Child and Family Caring Society of Canada. UNCRC Day of General Discussion: Children without Parental Care - The Chance to Make a Difference for this Generation of Indigenous Children: Learning from the Lived Experience of First Nations Children in the Child Welfare System in Canada. 16 August 2005. [www.fncfcs.com](http://www.fncfcs.com)

<sup>16</sup> "Building a Brighter Future for Urban Aboriginal Children: Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities," June 2003, p.17.

<sup>17</sup> The First Nations Child and Family Caring Society of Canada. *Wen: de- We are coming to the light of day*. October 2005. p. 44. [www.fncfcs.com](http://www.fncfcs.com)

<sup>18</sup> Convention on the Rights of the Child, articles 20 and 30.

<sup>19</sup> First Nations Child and Family Services Joint National Policy Review, June 2000.

<sup>20</sup> *Wen: de- We are coming to the light of day*. Supra footnote 17.

and abandoned. Night was intoxicated and the temperature was far below zero: it is unlikely that he would have survived if he had not been lucky enough to get the help of a security guard at a nearby power plant. Night's testimony led to inconclusive investigations into the deaths of three other Indigenous men found on the outskirts of Saskatoon, as well as to a provincial plan to reform the treatment of Indigenous persons by the justice system.<sup>21</sup>

There are disturbing similarities between the arbitrary detention and reckless abandonment of Darryl Night and the death of Frank Joseph Paul who died of hypothermia in an alley in Vancouver's Downtown Eastside on the morning on December 6, 1998 after twice being in the custody of Vancouver City police the previous night. Picked up for public intoxication on the night of December 5, Mr. Paul was held for just over 6 hours in the "drunk tank" of a police jail and then released. Two hours later he was placed in custody a second time after police again found him intoxicated and unable to walk or take care of himself. This time he was at the jail only five minutes before his unconscious and rain soaked body was dragged out again, reportedly on the instruction of an officer to "breach Mr. Paul out of the area".<sup>22</sup> Despite the requests of two successive Police Complaints Commissioners the provincial government has refused to hold a public inquiry into his death.

In Saskatchewan, some police have used the term "starlight tours" to describe the practice of picking up apparently intoxicated individuals and then dropping them off at a remote location.<sup>23</sup> In other jurisdictions, similar practices of forcibly removing intoxicated individuals to out of the way places is reportedly referred to as "breaching," the term used by the officer who ordered the removal of Frank Joseph Paul. The fact that such terms have entered police terminology is one indication that the practice is likely not restricted to a few isolated incidents and deserves careful consideration.

Police officers have a general duty to uphold the rights and safety of the public at large and a specific duty to ensure the welfare of individuals in their custody. Officers who encounter a person who is severely intoxicated or in mental distress must act not only to prevent this person causing harm to others but also to ensure that this person receives the assistance he or she may require for his or her own welfare and safety. It is unacceptable – and contrary to Canadian laws – for officers to bring severely intoxicated or mentally distressed individuals into their custody without an intention to ensure they receive the medical assistance they require, much less to deliberately transport that person to a place where they face continued or even greater risk.

Because the practice of breaching is informal, there may be no record of the individual being in custody. As a consequence, officers may enjoy virtual impunity for abuse they may commit in the course of the breach. The lack of accountability is compounded by systemic barriers of discrimination that may prevent Indigenous witnesses coming forward and by the fact that in almost all jurisdictions in Canada, allegations of abuses by police are investigated by the implicated police force.

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<sup>21</sup> *Creating a Healthy, Just, Prosperous and Safe Saskatchewan: A response to the Commission on First Nations and Métis Peoples and Justice Reform*, Government of Saskatchewan, May 2005.

<sup>22</sup> Frank Joseph Paul: Reasons for the Decision. Dirk Ryneveld, Police Complaint Commissioner, 16 January, 2004.

<sup>23</sup> Federation of Saskatchewan Indian Nations Justice Secretariat. Final Submission. Commission on First Nations and Métis Peoples and Justice Reform. February 3, 2004.

**Amnesty International believes that the Canadian government should:**

- **Ensure the provision of effective and culturally appropriate alternatives to the arrest of individuals in agitated states due to alcohol or substance abuse.**
- **Strengthen police capacity to fulfill their duty to ensure that persons presenting a danger to themselves or others due to intoxication or other forms of mental distress receive appropriate care, including by providing core operational training which addresses the contexts in which police officers encounter such individuals, and establishing appropriate procedures enabling police officers to readily draw upon expertise and assistance from medical professionals.**
- **Require that police document all instances of individuals being brought into police custody, whether or not police choose to proceed to process their arrest or instead choose to release them.**
- **Ensure the creation of independent civilian oversight bodies to investigate allegations of human rights abuse at the hands of police.**

**d) Lubicon Cree – ICCPR article 27**

In March 1990, the Human Rights Committee concluded that logging and oil and gas development taking place in the hunting and trapping territory of the Lubicon Cree without the community's consent constituted an ongoing violation of the Lubicon's right to maintain and practice their Indigenous culture.<sup>24</sup> At the time, the Canadian government assured the Committee that it was seeking a settlement that would protect the rights of the Lubicon.<sup>25</sup>

To date, however, no such settlement has been reached. In fact, it has been almost two years since there were any substantial negotiations between the Lubicon and the Canadian government. In the meantime, licenses continue to be granted to allow resource extraction on or near the disputed territories. Fifteen years since the Human Rights Committee issued its views, the Lubicon Cree still await protection of their fundamental rights.

The situation of the Lubicon Cree is not unique. The 1996 report of the Canadian Royal Commission on Aboriginal Peoples (RCAP) stated that Indigenous peoples have lost access to almost two-thirds of their lands since the formation of the Canadian state in 1867 and that those lands which have been set aside for Indigenous peoples have been largely stripped of their natural resources. RCAP stated:

Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.<sup>26</sup>

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<sup>24</sup> UN Human Rights Committee, U.N. Doc. CCPR/C/38/D/167/1984.

<sup>25</sup> For background information and a more detailed overview of the concerns Amnesty International has raised in this regard see: *Canada, "Time is wasting": Respect for the land rights of the Lubicon Cree long overdue*, 1 April 2003, AI Index: AMR 20/001/2003.

<sup>26</sup> Royal Commission on Aboriginal Peoples. *Supra* footnote 14.

In 1998, the UN Committee on Economic, Social and Cultural Rights called on the Canadian government to “to take concrete and urgent steps to restore and respect an Aboriginal land and resource base adequate to achieve a sustainable Aboriginal economy and culture.”<sup>27</sup> In 1999, the UN Human Rights Committee called for “decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation.”<sup>28</sup>

Despite these urgings, little progress has been made to resolve the vast majority of outstanding Indigenous land and resource disputes in Canada. In the report of his 2004 mission to Canada, the U.N. Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, noted that the mechanisms and processes to resolve disputes over Indigenous lands and territories are slow, adversarial and generally inadequate to resolve the problems highlighted by RCAP:

Métis land claims have not been dealt with in any significant way, except partially in Alberta, leaving the Métis without a land and resource base and with no way of settling their grievances at the national level. Some Aboriginal nations have not received any land allocations and there have been few mechanisms to allow for the extension of the land and resource base of First Nations as their populations and needs grow. In other cases, the lands concerned are being denuded of natural resources before Aboriginal claims are recognized and can be addressed.... Their inherent right over natural resources is in many instances not recognized by the various orders of government and frequently the authorities apply other laws and statutes that limit the exercise of such Aboriginal rights.<sup>29</sup>

**Amnesty International believes that the Canadian government should:**

- **Collaborate with Indigenous peoples to establish effective, non-adversarial approaches to the timely resolution of disputes over lands and territories guided by the goal of upholding the human rights of Indigenous peoples and restoring and protecting restoring a land base sufficient to ensure their well being and cultural survival**
- **Immediately resume negotiations with the Lubicon Cree with the aim of achieving a timely settlement of the land dispute that fully respects their rights under national and international law.**
- **Ensure that unless the Lubicon give their free, prior informed consent, no activities are undertaken on the disputed land that could jeopardize the fulfillment of Lubicon rights**

**e) The death of Dudley George – ICCPR article 6**

Dudley George was fatally wounded by a police sniper on September 6, 1995 when the Ontario Provincial Police attacked a small group of unarmed Indigenous protestors occupying land that

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<sup>27</sup> Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada. 10/12/98. E/C.12/1/Add.31

<sup>28</sup> Concluding observations of the Human Rights Committee: Canada, footnote 11.

<sup>29</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum: Mission to Canada. 2 December 2004 E/CN.4/2005/88/Add.3.

the federal government expropriated from their community decades earlier and never returned.<sup>30</sup> In April 1999, the Human Rights Committee called for “a public inquiry into all aspects of this matter, including the role and responsibility of public officials.”<sup>31</sup> However, it was not until a new provincial government was elected in Ontario in 2003 that such an inquiry was called.

In contrast to Canada’s slow progress in recognizing and restoring the lands and resource rights of Indigenous peoples (as noted in the section above), Indigenous communities that exercise what they believe to be their legitimate land and resource rights in opposition to views and policies of federal and provincial governments have often been subjected to swift and sometimes aggressive enforcement actions. Amnesty International believes that when legal uncertainty exists over the exercise of Indigenous rights, Canadian officials have an obligation to seek a peaceful and just resolution of the dispute through an appropriate legal process in which the rights of Indigenous peoples can be given full consideration. Any deployment of police officers in the context of an unresolved dispute needs to be undertaken with great care to ensure that the police fulfill their duty to uphold the rights of all and are not encouraged to abuse their powers to aid the political agenda of the government.

The just resolution of Indigenous land and resource disputes and the appropriate role of police in such disputes are central issues in the now ongoing inquiry into the death of Dudley George. Amnesty International is concerned that the federal government, which had ignored repeated calls by U.N. treaty bodies to establish the inquiry, has declined to participate directly in the inquiry convened by the government of Ontario. This detracts from the capacity of the inquiry to examine the underlying issue of whether the dispute could have been resolved peacefully, and in accordance with the rights of Indigenous peoples, before the provincial police resorted to violent force. The fact-finding phase of the inquiry is currently underway. A second phase examining the underlying policy issues is expected to begin later this year or early next year.

**Amnesty International believes that the Canadian government should uphold its responsibilities under the Covenant and its constitutional and treaty-based obligations to ensure the protection of the basic rights of Indigenous peoples, by participating in the second phase of the inquiry into the death of Dudley George.**

#### **IV. PROTECTING THE RIGHTS OF REFUGEES**

Over the years and decades Canada has made important contributions to global refugee protection, both through initiatives that have responded to crises in other countries and also through the development of a strong quasi-independent national refugee determination system. Developments in recent years, however, have raised serious concerns about Canada’s commitment to refugee protection and have led to laws and policies which put refugees at risk of experiencing serious human rights violations.

##### **a) Deportation to Torture - ICCPR article 7**

Amnesty International has repeatedly pressed Canada to comply with its binding international human rights obligation to refrain from deporting, extraditing or otherwise returning individuals

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<sup>30</sup> For background information and Amnesty International’s previously voiced concerns see: Canada, *Why there must be a public inquiry into the police killing of Dudley George*, 4 September 2003, AI Index: AMR 20/002/2003.

<sup>31</sup> Concluding observations of the Human Rights Committee: Canada, footnote 2, para. 11.

to countries where there is a substantial risk of being tortured.<sup>32</sup> The Canadian government maintains that it should be allowed to do so in cases involving serious criminality or security concerns. The Supreme Court of Canada, in the case of *Suresh v. Canada*, has affirmed that normally no one should be deported to face a substantial risk of torture, but has left open the possibility that such deportations might be justified in exceptional circumstances. The Court did not go on to enumerate or describe what would constitute such exceptional circumstances.<sup>33</sup>

International law is very clear. The UN Committee against Torture, in its concluding observations with regard to review of Canada's third, fourth and fifth periodic reports in 2000 and 2005 has repeatedly reminded Canada that the international legal protection against torture, including removal to face torture, is absolute and applies in all circumstances, and that Canadian law and practice must be reformed accordingly.<sup>34</sup> Amnesty International has highlighted that if there are security concerns in a particular case, the appropriate response is to pursue justice through lawful investigations, charges and trial, not to breach international law and create further injustice by exposing an individual to a serious risk of torture.

**Amnesty International believes that the Canadian government should amend Canada's Immigration and Refugee Protection Act to recognize the absolute and unconditional nature of the international legal obligation not to remove any individual to a country where he or she faces a substantial risk of torture.**

**b) No meaningful appeal – ICCPR article 14**

Amnesty International welcomed the decision to establish Canada's Immigration and Refugee Board in 1988. However, the organization at that time noted a significant flaw in the new system: there was no independent appeal on the merits of a decision refusing a claimant refugee status. That remains the case, seventeen years later. There is an option of limited judicial review for legal errors by the Federal Court of Canada, and limited review processes carried out by immigration officers. But there is no full, independent review of a negative decision, a decision that can after all have serious life and death consequences.

Amnesty International and numerous other Canadian refugee and human rights organizations have, for many years, pressed Canada to remedy this distressing shortcoming in Canada's refugee determination system. The Inter-American Commission on Human Rights has strongly recommended that a merit-based review be part of the Canadian refugee determination system.<sup>35</sup> The UN Committee against Torture has recently called for a "judicial review of the merits" of any decision to expel where there is a substantial risk of torture.<sup>36</sup> In June 2002, a new *Immigration and Refugee Protection Act* was passed, which did at long last do so, as it included provisions that establish a new Refugee Appeal Division of the Immigration and Refugee Board. However, although the Act was passed in its entirety by Parliament, for the past three years the government

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<sup>32</sup> See, for example: *Redoubling the Fight Against Torture*, footnote 8, pp. 5-8; *It's Time: Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada*, November 2000, pp. 1-4.

<sup>33</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at paragraphs 76-78.

<sup>34</sup> *Conclusions and recommendations of the Committee against Torture – Canada*, footnote 10, para. 5(a); *Conclusions and recommendations of the Committee against Torture – Canada*, U.N. Doc. CAT/C/XXV/Concl.4, 25<sup>th</sup> session, November 2000, para. 6(a).

<sup>35</sup> *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000, section V(C)(2).

<sup>36</sup> *Conclusions and recommendations of the Committee against Torture – Canada*, footnote 10, para. 5(c).

has failed to enact the provisions that would lead to the establishment of the new Refugee Appeal Division.

**Amnesty International believes that the Canadian government should immediately enact the provisions of the *Immigration and Refugee Protection Act* relevant to the establishment of the Refugee Appeal Division of the Immigration and Refugee Board, and take steps to ensure that the Refugee Appeal Division begins hearing appeals as soon as possible.**

**c) Canada/US Safe Third Country Agreement – ICCPR articles 2(3), 7**

In December 2004, after several years of negotiations, the Canadian and US governments entered into an agreement whereby most refugee claimants passing through one country before seeking entry to make a refugee claim in the other, will be barred from making a refugee claim in the country of their choice. Instead, they will be forced to remain in the country of first arrival and make a refugee claim there.

In practice this will overwhelmingly affect refugee claimants who pass through the United States on their way to making refugee claims in Canada. Thousands of refugee claimants pass through the United States on their way to making claims in Canada every year. For those who travel overland from Latin America, there is no way to avoid the United States. For those who come by air from all parts of the world, it is often necessary to fly to the United States, which is more directly accessible by air than Canada is, and then continue on to Canada. The majority of these claimants will now be forced to make their claims in the United States instead of in Canada.

The Canadian and US governments assert that this new agreement is a means for them to “share the responsibility of providing protection to genuine refugees.”<sup>37</sup> Amnesty International agrees that governments should strive to improve their cooperation with regard to refugee protection, as a means of ensuring the strongest possible levels of protection are provided worldwide. However, any approach to responsibility sharing must be fully consistent with international legal standards. Amnesty International is concerned that refugee claimants who are forced to make their claims in the United States will be treated in a manner that does not conform to international law and may experience serious human rights violations, including arbitrary and lengthy detention, imprisonment in prison conditions which may constitute cruel treatment, and the possibility that refugee women making gender-specific refugee claims on the basis of such forms of persecution as domestic violence, female genital mutilation or honour crimes, will be denied protection and subjected to *refoulement*.<sup>38</sup> The organization has repeatedly urged Canada not to operationally the agreement until measures have been adopted to guard against any such abuses.<sup>39</sup>

**Amnesty International believes that the Canadian government should suspend the Safe Third Country Agreement with the United States and should launch a public review to**

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<sup>37</sup> *Fact Sheet – The Safe Third Country Agreement*, Citizenship and Immigration Canada, December, 2004, <http://www.cic.gc.ca/english/policy/safe-third-fact.html>.

<sup>38</sup> For recent overviews of Amnesty International’s concern regarding refugee protection in the United States see: *The REAL ID Act of 2005 and Its Negative Impact on Asylum Seekers*, Amnesty International USA, March 2005 ; *Attorney General Ashcroft Declines to Act on Domestic Abuse Asylum Claim*, Amnesty International USA, January 27, 2005; *REFUGEE UPDATE: US Treatment of Refugees and Asylum-seekers Has Recently Become Much Harsher*, Amnesty International USA, January 2005.

<sup>39</sup> *Above all Else*, footnote 4, pp. 8-9; *At Home and Abroad: Amnesty International’s Human Rights Agenda for Canada*, Amnesty International Canada, October 2003, pp. 13-14; *Real Security: A Human Rights Agenda for Canada*, Amnesty International Canada, May 2002, pp. 21-22.

**determine whether safeguards could be introduced to ensure that it can be implemented in a manner that does not lead to human rights violations.**

## **V. HUMAN RIGHTS AND COUNTER-TERRORISM**

Human rights and security: there is and can be no trade-off. Human rights will always be precarious if security is not assured, and security will inevitably be tenuous at best if not firmly grounded in human rights. Amnesty International has frequently reminded Canada of the importance of ensuring that the country's counter-terrorism practices are wholly consistent with Canada's international human rights obligations. Laws and policies adopted in the name of security cannot be allowed to cause or facilitate human rights violations. This is of vital importance in ensuring the protection of the basic rights of individuals, be they Canadian citizens or not, who may be impacted by these laws. It is doubly important however in that Canada must set a model for other nations to follow. Amnesty International considers Canada's counter-terrorism practices to be in need of reform in at least three significant respects, in order to ensure compliance with the country's human rights obligations.

### **a) Security Certificates - ICCPR articles 9, 14**

Non-citizens can be arrested, detained and ordered deported from Canada pursuant to security certificates issued under the Immigration and Refugee Protection Act. The certificates are used when two government ministers (Minister of Citizenship and Immigration; and the Minister of Public Safety and Emergency-Preparedness) agree that the person concerned poses a threat to Canada's national security.

At the present time four individuals are in detention pending deportation in Toronto and Ottawa pursuant to security certificates.<sup>40</sup> One other individual has recently been released from detention in Montreal but is subject to stringent conditions on his release.<sup>41</sup> Amnesty International is of the view that the security certificate process may very well result in arbitrary detention and thus violate the fundamental right to liberty of these individuals, and has been calling on the Canadian government to reform this process for many years.<sup>42</sup>

The process does not conform to a number of essential international legal standards, which are meant to safeguard against the very possibility of arbitrary detention. Detainees are not informed of the precise allegations against them. They see only a summary of the evidence that is being used against them. Evidence may be presented in court in the absence of the detainee or his or her counsel. The detainee is not afforded a right to examine any and all witnesses who have been the source of that evidence. Furthermore, the Federal Court considers only the "reasonableness" of the decision to issue a security certificate and does not substantively review it.

Amnesty International recognizes that special measures may need to be taken in cases involving security matters, but any such measures must be consistent with international law. We realize, for example, that the government may have concerns about protecting the identity of certain sources

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<sup>40</sup> Hassan Almrei, Syrian, held since October 20, 2001; Mohamed Harkat, Algerian, held since December 10, 2002; Mahmoud Jaballah, Egyptian, held for 9 months in 1999, cleared of allegations, held again since August 2001; and Mohammad Mahjoub, Egyptian, held since June, 2000.

<sup>41</sup> Adil Charkaoui, Moroccan, arrested May, 2003, released on bail February, 2005.

<sup>42</sup> Most recently in *Security through Human Rights*, Amnesty International Canada's Submission to the Special Senate Committee on the Anti-Terrorism Act and House of Commons Sub-Committee on Public Safety and National Security as part of the Review of Canada's Anti-Terrorism Act, May 16, 2005.

or witnesses. If so, specific and targeted measures should be taken to address those particular concerns, rather than through the wide sweeping approach of the current legislation. In any case, in view of the potential for a wide interpretation by the detaining authorities of security information which may be the basis for a decision to detain, and because decisions to detain in such cases are often based on a prediction about an individual's future actions, it is imperative that there be full and effective judicial scrutiny of such decisions, beyond the test of "reasonableness" that is the present standard.

Amnesty International has repeatedly drawn attention, worldwide, to instances where the failure to comply with international human rights standards regarding fair trials has led to wrongful detention and other human rights violations. In the present circumstances Amnesty International considers that individuals detained pursuant to a security certificate are effectively denied their right to prepare a defence and mount a meaningful challenge to the lawfulness of their detention. This is in contravention of Canada's obligations under articles 9 and 14 of the ICCPR.

While some of the provisions in articles 9 and 14 apply specifically to individuals who have been formally charged with a criminal offence, which is not the case in the issuance of a security certificate, they are nevertheless widely recognized as reflecting general principles of law and are relevant in so far as they set out the basic essential elements of a fair hearing. Furthermore some of the provisions apply to all detainees, such as those guaranteeing the right to challenge the lawfulness of their detention. That right to challenge must be in accord with recognized international fair trial standards.

Other international standards highlight the importance of ensuring that all detainees enjoy the same level of fairness. The *UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment*<sup>43</sup> establish that anyone who is detained shall be given an "effective opportunity" to be heard by a judicial or other authority, has the right to defend him or herself, and shall receive "prompt and full communication" of any order of detention "together with the reasons therefore."<sup>44</sup> The *Basic Principles on the Role of Lawyers*<sup>45</sup> underscore that lawyers must be given access to "appropriate information, files and documents" so that they can provide their clients with "effective legal assistance."<sup>46</sup> Amnesty International considers that these standards require that the detainee be given detailed reasons as to why he or she is detained, access to the full evidence that is being used against them, and a substantive hearing to examine the lawfulness of the detention.

**Amnesty International believes that the Canadian government should reform the security certificate process so as to bring it into line with Canada's international human rights obligations, including by ensuring a substantive review of the reasons for detention and by making all evidence available to the individual detained so that any potentially unfounded allegations can be effectively and meaningfully challenged.**

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<sup>43</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the U.N. General Assembly, 1988, U.N. Doc. A/43/49.

<sup>44</sup> *Ibid.*, Principle 11.

<sup>45</sup> Basic Principles on the Role of Lawyers, adopted at the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118.

<sup>46</sup> *Ibid.*, Principle 21.

## **b) National Security Detentions Abroad – ICCPR article 7**

Arrested in an airport, abducted in a foreign country, detained at a border crossing – and then bundled off to jail cells in foreign countries where torture is the norm and where the rule of law quite simply does not apply. One very significant human rights concern that has emerged post-September 11 is a practice that has existed for some time in the shadows of law enforcement and security operations, but is now becoming more commonplace and well-documented: *extraordinary rendition*.

Most international attention to date has focused on the U.S. practice of extraordinary rendition.<sup>47</sup> There are growing numbers of reports of individuals against whom allegations of involvement in or support for terrorist activities have been made, being arrested or detained directly by U.S. officials or with their tacit involvement, sometimes in the United States and sometimes abroad. These individuals then find themselves dealt with outside existing legal frameworks, certainly denied due process and other essential human rights protections. They ultimately end up being furtively sent to countries with abysmal human rights records, where they are subjected to extensive interrogation frequently marked by torture and cruel treatment. The inevitable conclusion in such cases is that U.S. officials may have turned to other regimes to commit torture on their behalf.

One such case which has received considerable attention in Canada is that of Canadian citizen Maher Arar, who was stopped by U.S. officials while transiting through New York's John F. Kennedy Airport on his way home to Canada on September 26, 2002. However, rather than allow him to return to Canada or even deport him back to Canada, after nearly two weeks of detention in the United States, Mr. Arar was reportedly taken out of his prison cell in the middle of the night and flown halfway around the world on a private jet, leading to one year of detention without charge or trial in Syria, where he was reportedly subjected to extensive interrogations, severe torture and inhumane prison conditions.

Amnesty International is concerned that Mr. Arar's case, along with at least three other cases involving the arrest, detention and alleged torture of Canadian citizens in Syria, raise troubling, yet-unanswered questions as to whether Canadian law enforcement and security agencies may have conducted their own version of extraordinary renditions.<sup>48</sup> In all four of these cases there are allegations of contact between Canadian officials and Syrian authorities before and/or during the detention. The allegations raise the prospect that Canadian officials may have provided information that directly led to their arrests and may have even done so with the expectation or with wilful blindness to the likelihood that it would result in their arrests - despite the well-documented practice of torture and arbitrary detention in similar cases in Syria. It also appears that information provided by Canadian sources likely served as the basis for the interrogation sessions in Syria during which these individuals were subjected to torture. There are further concerns that information coming out of these interrogations was then transferred back to Canada and may have been used by Canadian officials in the course of ongoing investigations of these

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<sup>47</sup> Amnesty International, *United States of America: The threat of a bad example – Undermining international standards as “war on terror” detentions continue*, AI Index AMR 51/114/2003, 19 August 2003.

<sup>48</sup> Ahmad Abou El Maati, arrested in Syria November 12, 2001, transferred to Egypt early 2002, released January 2003. Abdullah Almalki, arrested in Syria May 3, 2002, released March 2004. Muayyed Nureddin, arrested in Syria December 11, 2003, released January 11, 2004. Amnesty International has made representations to the Canadian government about all of these cases, and has been actively participating as an intervening party in the public inquiry underway regarding Maher Arar's case.

four men and other individuals. International law makes it very clear that information obtained under torture should not be relied upon and that it is illegal to make use of such information in the course of legal proceedings.<sup>49</sup>

There is a public inquiry underway looking at the question of what role Canadian officials may have played in what happened to Maher Arar. It is not yet clear how widely that inquiry will look at the broader pattern suggested by these other cases. Amnesty International and other organizations have encouraged the Commissioner of the inquiry to do so.<sup>50</sup> However, even if the inquiry examines the question of pattern expansively, more will be needed to ensure a full accounting of the other cases. Amnesty International has repeatedly made that suggestion to the Canadian government over the past year.

**Amnesty International believes that the Canadian government should:**

- **Extend the mandate of the existing Commission of Inquiry or appoint an Independent Expert to conduct a full review of all instances of Canadian citizens who have been “of interest” in the course of Canadian national security investigations, who have been detained abroad in countries where the protection of their basic human rights was at risk, and where circumstances suggest that Canadian officials may have directly or indirectly facilitated or tolerated their arrest and imprisonment. The results of the review should be reported publicly and should include recommendations regarding the discipline or criminal prosecution of anyone whose conduct has breached policies or protocols or broken any laws. The review should also include an appropriate mechanism for awarding compensation.**
- **Develop human rights protocols that will govern information and intelligence sharing arrangements with foreign governments.**
- **Explicitly prohibit any law enforcement or security practices that intentionally or recklessly expose individuals to the risk of serious human rights violations such as torture, in Canada or abroad.**

**c) Secrecy, Counter-Terrorism and International Relations – ICCPR article 14**

The Anti-Terrorism Act adopted in Canada in late 2001 included significant revisions to the Canada Evidence Act. In particular the Act established a draconian and highly secretive procedure whereby the government can, in any proceeding, block the public disclosure of “potentially injurious information” or “sensitive information.” Potentially injurious information is “information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.” Sensitive information is defined as “information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.” The hearing as to whether the information should be disclosed is held *in camera* and in fact, the mere fact that the hearing is

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<sup>49</sup> Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment,, article 15: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

<sup>50</sup> *Restoring his rights, Addressing the Wrongs*, Amnesty International’s Closing submissions to the Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, September 10, 2005; *Joint submissions of the Intervening Organizations in respect of the Notice of Hearing – May 3, 2005*, Submitted to the Commission of Inquiry into the Action of Canadian Officials in relation to Maher Arar, April 28, 2005.

even being held cannot be publicly disclosed. Ultimately, if the government disagrees with the court's ruling it can issue a certificate that simply forbids the disclosure of the information.<sup>51</sup> Amnesty International is concerned that these provisions fail to conform to the ICCPR in three important respects.

First, including "international relations" in the definition of potentially injurious or sensitive information exceeds the limits on fair trial rights established in international human rights law. It raises the prospect of information being withheld from the public, from the accused in a criminal trial, and the parties to other types of legal proceedings, simply because it might embarrass Canada in its dealings with another government or become an inconvenience in international negotiations dealing with a trade or other issue.

Article 14(1) of the *International Covenant on Civil and Political Rights* establishes the important right to a public trial and envisions the possibility of excluding the public from a criminal proceeding only for reasons of "morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Protecting international relations is not included and does not therefore in itself justify excluding the public.

Second, the undue secrecy involved in this process and the fact that ultimately a government decision to prohibit disclosure, through the issuance of a certificate under s. 38.13 of the Canada Evidence Act, is subject to very little judicial oversight.

The provisions bar the public from the court's review of the potentially injurious or sensitive information and also prohibit disclosure of the mere fact that a court proceeding has been launched. This has recently been sharply criticized by the Chief Justice of the Federal Court, who has asked that the current review of the anti-terrorism legislation reconsider the necessity of these provisions out of concern that they may "unnecessarily fetter the open court principle."<sup>52</sup> Amnesty International is of the view that the process does not conform with the requirements of article 14(1) of the ICCPR that court proceedings normally be open to the public.

Finally, if the government issues a certificate under s. 38.13, it must be upheld as long as the Federal Court of Appeal is of the view that the information at issue *relates to* information obtained in confidence from, or in relation to, a foreign entity, or *relates to* national defence or national security.<sup>53</sup> The standard of "relates to" is a very low threshold and risks decisions that in Amnesty International's view do not properly accord with the requirements of article 14(1).

**Amnesty International has called on the Canadian government to ensure that the Canada Evidence Act is fully in line with international human rights standards. In particular by:**

- **Deleting "international relations" from section 38 of the Act.**
- **Amending section 38 of the Act to ensure that the public is only excluded in instances strictly in keeping with the limitations recognized in article 14(1) of the ICCPR. Similarly there should be no ban on public disclosure of the mere fact that the court proceeding is underway unless it can be convincingly demonstrated that a ban on public notification of that fact conforms to article 14(1).**

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<sup>51</sup> Canada Evidence Act, ss. 38-38.15.

<sup>52</sup> *Ottawa Citizen Group v. Canada (A-G)*, [2004] F.C. 1052, para. 45. Lutfy C.J. raises serious concerns about the s. 38 scheme in a portion of his judgement entitled "*Post scriptum: too much secrecy??*"

<sup>53</sup> Canada Evidence Act, s. 38.131

- **Amending section 38.13 of the Canada Evidence Act so as to require the government to demonstrate *on a balance of probabilities* that disclosure of disputed information *would* be injurious to national defence or national security.**

## **VI. HUMAN RIGHTS AND LAW ENFORCEMENT – ICCPR article 7**

Since April 2003, in Canada, thirteen people have died following the use of a taser gun by police. Inquests into those deaths have not yet been completed. There are therefore no definitive findings as to whether tasers were a primary or contributing cause of any of the thirteen deaths. There have also been numerous reports of use of tasers in circumstances where allegations have been made that their use was excessive or inappropriate, including against people not actively resisting arrest and non-violent protesters.<sup>54</sup> Tasers are a trademarked brand of conducted energy device (CED) which fires two barbed darts up to a distance of 15-35 feet and delivers a 50,000-volt electric shock (or series of shocks) intended to cause instant incapacitation. The device can also be used as a direct contact stun gun.

In one high profile case, a complaint was made to the Office for Public Complaints against the Royal Canadian Mounted Police (RCMP), involving an incident that took place during demonstrations at the Summit of the Americas in Quebec City in April 2001. The Commission found that the individual against whom the taser was used was “not struggling and represented no threat to the members, to himself, to the public or to property” and that in these circumstances the use of the taser was a “clear abuse of authority.”<sup>55</sup> Official reports such as this raise the concern that, if not properly regulated, tasers can be used in circumstances tantamount to ill-treatment.

Amnesty International has followed with concern the growing use of taser guns by police forces in Canada.<sup>56</sup> Amnesty International does encourage police forces to make use of non-lethal means when deploying appropriate levels of force. This is in keeping with international standards with respect to the use of force by law enforcement officials. The organization is concerned, however, that electro-shock weapons, including tasers, are particularly open to misuse as they can cause severe pain at the push of a button without leaving substantial marks. There is also serious concern about health risks associated with tasers whose effects are not yet fully understood. In particular, Amnesty International has pointed to concerns that individuals with weakened hearts and those under the influence of drugs may be particularly susceptible to harm and even death when subdued with a taser.

Amnesty International has therefore called on police forces across Canada to suspend the use of tasers until comprehensive and independent research is conducted. On the basis of that research, governments in Canada should decide whether there are limited circumstances in which tasers might be deployed in order to save life and, if so, what rules, safeguards and oversight procedures should be put in place to prevent misuse. To date, however, police officers have not suspended taser use. Instead, the use of tasers has grown considerably over the past several years.

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<sup>54</sup> Amnesty International Annual Report, *Canada*, 2004, p.104.

<sup>55</sup> Commission for Public Complaints against the RCMP, Chair’s Interim Report, File No. PC-2001-0409, 29 October 2003, p.13.

<sup>56</sup> See Amnesty International Reports: *Canada: Excessive and lethal force? Amnesty International’s concerns about deaths and ill-treatment involving police use of tasers*, AMR 20/002/2004, November 2004; and *United States of America: Excessive and lethal force? Amnesty International’s concerns about deaths and ill-treatment involving police use of tasers*, AMR 51/139/2004, November 2004.

Amnesty International has welcomed recent reviews of taser use carried out by the Office of the Police Complaint Commissioner in British Columbia<sup>57</sup> and the review carried out by the Canadian Police Research Centre on behalf of the Canadian Association of Chiefs of Police.<sup>58</sup> However those studies have been limited to reviews of existing research, which Amnesty International considers to be inadequate. New research is required, as noted above.

**Amnesty International believes that the Canadian government should ensure that the use of tasers in Canada is suspended pending comprehensive and independent research to determine whether they should be used and if so, what rules, safeguards and oversight procedures are required.**

## **VII. RATIFICATION OF THE SECOND OPTIONAL PROTOCOL TO THE ICCPR REGARDING ABOLITION OF THE DEATH PENALTY**

As global consensus that the death penalty should be abolished began to mount, in 1989 the UN General Assembly adopted the Second Optional Protocol to the ICCPR. Over fifty governments have ratified that document and guaranteed that there will be no executions in those countries. Canada, which began firmly abolitionist in 1998 when provisions of the National Defence Act allowing for the death penalty were abolished, is notable for its failure to ratify the protocol.

Some officials within government are of the view that if Canada were to ratify the Second Optional Protocol it would make it difficult for Canada to extradite or deport criminals to a country where they would face the death penalty. But the Supreme Court of Canada has already ruled that Canada would only be able to do so in exceptional circumstances<sup>59</sup> and the UN Human Rights Committee has stressed that extradition or deportation should never go ahead unless reliable assurances are received from the other state that the death penalty will not be used.<sup>60</sup> Canada should stand firm as an abolitionist state and ensure that criminals face justice through fair proceedings that do not include the possibility of execution. Over the past year Canada's Minister of Foreign Affairs has twice publicly indicated that Canada is seriously considering ratification, in an address to the Second World Congress against the Death Penalty in October 2004, and then again speaking to the UN Commission on Human Rights earlier this year, where the Minister stated:

“Canada has already ratified a large number of international instruments. We plan to examine very seriously the possibility of ratifying others, including the Second Optional Protocol to the International Covenant on Civil and Political Rights (aiming at the abolition of the death penalty).”<sup>61</sup>

**Amnesty International believes that the Canadian government should take immediate steps to ensure the speedy ratification of the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.**

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<sup>57</sup> *Taser Technology Review, Final Report*, Office of the Police Complaint Commissioner, OPCC File No. 2474, June 14, 2005.

<sup>58</sup> *Review of Conducted Energy Devices*, Technical Report TR-01-2006, Canadian Police Research Centre, August 22, 2005.

<sup>59</sup> *United States v Burns*, [2001] 1 SCR. 283.

<sup>60</sup> UN Human Rights Committee, Communication No. 829/1998: Canada, *Roger Judge v Canada*, 20 October 2003.

<sup>61</sup> *Notes for an Address by the Honourable Pierre Pettigrew, Minister of Foreign Affairs*, 61<sup>st</sup> Session of the Commission on Human Rights, March 14, 2005.

## **SUMMARY OF RECOMMENDATIONS**

Amnesty International believes that the Canadian government should take the following steps, to improve its record of compliance with its international human rights obligations.

### **I. THE COMPLIANCE AND IMPLEMENTATION GAP**

1. Establish a publicly accountable and authoritative intergovernmental body to monitor and coordinate compliance with Canada's international human rights obligations.

### **II. A CIVIL REMEDY FOR HUMAN RIGHTS VIOLATIONS**

2. Enact the necessary legal provisions to recognize jurisdiction with respect to civil suits brought in Canadian courts seeking reparation for crimes against humanity, war crimes, torture and other human rights violations subject to universal jurisdiction suffered abroad at the hands of foreign governments and to ensure that any such suits cannot be defended on the basis of state immunity.

### **III. PROTECTING THE RIGHTS OF INDIGENOUS PEOPLES**

3. a) Ensure collection of accurate information on the extent of violence against Indigenous women.  
  
b) Provide adequate sustained funding to services assisting Indigenous women escape situations of violence or access the justice system.  
  
c) Ensure that all police forces work with Indigenous women's organizations to develop policies and protocols that will ensure an appropriate and effective response to reports of missing persons or other threats to the safety of Indigenous women and girls.
4. Act immediately to end the disparity in funding for Indigenous child welfare services and ensure that the best interests of Indigenous children are protected by effective preventative and early intervention programs.
5. a) Ensure the provision of effective and culturally appropriate alternatives to the arrest of individuals in agitated states due to alcohol or substance abuse.  
  
b) Strengthen police capacity to fulfill their duty to ensure that persons presenting a danger to themselves or others due to intoxication or other forms of mental distress receive appropriate care, including by providing core operational training which addresses the contexts in which police officers encounter such individuals, and establishing appropriate procedures enabling police officers to readily draw upon expertise and assistance from medical professionals  
  
c) Require that police document all instances of individuals being brought into police custody, whether or not police choose to proceed to process their arrest or instead choose to release them.  
  
d) Ensure the creation of independent civilian oversight bodies to investigate allegations of human rights abuse at the hands of police.

6. a) Collaborate with Indigenous peoples to establish effective, non-adversarial approaches to the timely resolution of disputes over lands and territories guided by the goal of upholding the human rights of Indigenous peoples and restoring and protecting restoring a land base sufficient to ensure their well being and cultural survival  
  
b) Immediately resume negotiations with the Lubicon Cree with the aim of achieving a timely settlement of the land dispute that fully respects their rights under national and international law.  
  
c) Ensure that unless the Lubicon give their free, prior informed consent, no activities are undertaken on the disputed land that could jeopardize the fulfillment of Lubicon rights
7. Uphold its responsibilities under the Covenant and its constitutional and treaty-based obligations to ensure the protection of the basic rights of Indigenous peoples, by participating in the second phase of the inquiry into the death of Dudley George.

#### **IV. PROTECTING THE RIGHTS OF REFUGEES**

8. Amend Canada's Immigration and Refugee Protection Act to recognize the absolute and unconditional nature of the international legal obligation not to remove any individual to a country where he or she faces a substantial risk of torture.
9. Immediately enact the provisions of the *Immigration and Refugee Protection Act* relevant to the establishment of the Refugee Appeal Division of the Immigration and Refugee Board, and take steps to ensure that the Refugee Appeal Division begins hearing appeals as soon as possible
10. Suspend the Safe Third Country Agreement with the United States and launch a public review to determine whether safeguards could be introduced to ensure that it can be implemented in a manner that does not lead to human rights violations.

#### **V. HUMAN RIGHTS AND COUNTER-TERRORISM**

11. Reform the security certificate process so as to bring it into line with Canada's international human rights obligations, including by ensuring a substantive review of the reasons for detention and by making all evidence available to the individual detained so that any potentially unfounded allegations can be effectively and meaningfully challenged.
12. a) Extend the mandate of the existing Commission of Inquiry in the Maher Arar case or appoint an Independent Expert to conduct a full review of all instances of Canadian citizens who have been "of interest" in the course of Canadian national security investigations, who have been detained abroad in countries where the protection of their basic human rights was at risk, and where circumstances suggest that Canadian officials may have directly or indirectly facilitated or tolerated their arrest and imprisonment. The results of the review should be reported publicly and should include recommendations regarding the discipline or criminal prosecution of anyone whose conduct has breached policies or protocols or broken any laws. The review should also include an appropriate mechanism for awarding compensation.

- b) Develop human rights protocols that will govern information and intelligence sharing arrangements with foreign governments.
  - c) Explicitly prohibit any law enforcement or security practices that intentionally or recklessly expose individuals to the risk of serious human rights violations such as torture, in Canada or abroad.
13. Ensure that the Canada Evidence Act is fully in line with international human rights standards by:
- a) Deleting “international relations” from section 38 of the Act.
  - b) Amending section 38 of the Act to ensure that the public is only excluded in instances strictly in keeping with the limitations recognized in article 14(1) of the ICCPR. Similarly there should be no ban on public disclosure of the mere fact that the court proceeding is underway unless it can be convincingly demonstrated that a ban on public notification of that fact conforms to article 14(1).
  - c) Amending section 38.13 of the Canada Evidence Act so as to require the government to demonstrate *on a balance of probabilities* that disclosure of disputed information *would* be injurious to national defence or national security.

## **VI. HUMAN RIGHTS AND LAW ENFORCEMENT**

14. Ensure that the use of tasers in Canada is suspended pending comprehensive and independent research to determine whether they should be used and if so, what rules, safeguards and oversight procedures are required.

## **VII. RATIFICATION OF THE SECOND OPTIONAL PROTOCOL TO THE ICCPR**

15. Take immediate steps to ensure the speedy ratification of the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.