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

Dear Minister McLellan,

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

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

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

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

Under the amended provisions of the *Immigration and Refugee Protection Act*, the Solicitor General and the Minister of Citizenship and Immigration may sign a Security Certificate

alleging a non-citizen to be inadmissible to Canada on grounds of security or serious criminality. Upon being named in such a Certificate, unless the individual is a permanent resident, the subject is automatically detained, without a warrant. If the subject is a permanent resident a warrant is required, but there must only be reasonable grounds to believe the subject is a danger to national security or the safety of any person, or is unlikely to appear for removal.

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

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

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

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

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

Unlike the criminal law regime, when it comes to detaining non-citizens alleged to represent threats to Canadian security, the reviewing Court is restricted to assessing the "reasonableness" of the government's allegations. That means that even where a Court comes to the conclusion,

based on one-sided, secret evidence, that the government's allegations are incorrect, as long as the government's allegations aren't *so obviously incorrect* that they are unreasonable, the Court is required to uphold them. Once a Security Certificate has been found to be reasonable the matter is closed: there is no appeal from such a finding. This differential treatment is inherently discriminatory and fails to safeguard the rights of the accused.

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

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

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

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

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

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

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

Sincerely yours,

Sharryn J. Aiken, Assistant Professor of Law, Queen's University and

Andrew J. Brouwer, Co-Chair, Legal Affairs Committee, Canadian Council for Refugees

c.c. Hon. Judy Sgro, P.C., M.P., Minister of Citizenship and Immigration
Rt. Hon. Paul Martin, P.C., M.P., Prime Minister of Canada
Hon. Irwin Cotler, P.C., M.P., Minister of Justice
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