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INTRODUCTORY NOTE TO SURESH V. CANADA (INTER-AM. COMM'N H.R.)

BY CHRISTINA M. CERNA*

[April 13, 2016]

Immigration, legal and illegal, is one of the dominant issues of our time. The poor vote with their feet and seek a better life in countries where opportunities exist and the oppressed understandably flee those who are persecuting them. The perceived crisis in the United States of 11 million undocumented aliens motivated some Americans to vote for Donald Trump, who promised to deport "illegals" and to build a wall to keep out any additional Mexicans who sought to enter the country. The tsunami of boat people from Syria, Afghanistan, Iraq, and Africa washing up on Europe's shores threatened to destroy the European Union given the unwillingness of certain European states to accept their EU-determined quota of immigrants from these areas. The fear of immigrants is linked to the fear that many terrorists, whose goal is to subvert our values and our way of life, will hide among the wave of immigrants. The fear of immigrants is also linked to the fear of the immigrant poor overwhelming the opportunities for low-skilled labor and our social safety nets. When these fears are ratcheted up, the state looks to the deportation and expulsion of aliens as a quick and ready solution.

The major human rights treaties protect nationals from being expelled from their own states and also contain protections from expulsion for aliens who are "lawfully" in the territory of a state party, but no major human rights treaty includes explicit protection for an alien who is undocumented or unlawfully in a state.[1] This is a fundamental point that is ignored by many supervisory international human rights bodies. In addition, an alien "lawfully" in the territory of a state party may be summarily expelled when "required by compelling reasons of national security."[2] Given that international human rights treaties protect against the mass expulsion of aliens, it can be deduced that the expulsion of individuals (as compared to the expulsion of groups) was not a rule that states sought to codify through treaty law. In fact, state practice demonstrates that time and again states expel individuals whom they consider to be a threat to their national security and that they routinely ignore decisions of human rights bodies that find them in violation for threatening to do so. These same states jealously guard their right to determine who is a threat to their national security and aim to shield this determination from international scrutiny and human rights condemnation.

One seminal case is that of *Abu Qatada v. The United Kingdom*,[3] involving a Jordanian who received asylum in the United Kingdom in 1994 on the basis of having been detained and tortured in Jordan. He was recognized as a refugee on June 30, 1994, and was granted permission to remain in the United Kingdom until June 30, 1998. His fiery oratory brought him to the attention of the U.K. authorities as he advocated the killing of Jews and praised attacks on Americans. He was described as Osama bin Laden's right-hand man in Europe. In 1999 and 2000 Abu Qatada was tried and convicted in absentia in Jordan for terrorist crimes. It was alleged that the evidence against him was obtained through torture, and the European Court of Human Rights held that if Abu Qatada were deported to Jordan this would be in violation of Article 6 of the European Convention on Human Rights on account of the real risk of the admission at the applicant's retrial of evidence obtained by torture of third persons. Britain and Jordan adopted an extradition treaty to ensure that evidence obtained through torture could not be used against Abu Qatada in a retrial, and in 2013 he was deported to Jordan. In 2014 he was tried by a three-man military tribunal and acquitted for lack of evidence. It appears that the inability to introduce the tainted evidence was decisive in his acquittal.

In the case under consideration in this note, Manickavasagam Suresh, a citizen of Sri Lanka, was recognized as a refugee by Canada on April 11, 1991, on the basis that he feared persecution from the Liberation Tamil Tigers Eelam (LTTE), a separatist militant organization in Sri Lanka. In 1995, he applied for permanent residence in Canada and was subsequently found by Canadian authorities to be an executive member of the LTTE, the group that he had falsely alleged was persecuting him. On the basis of these subsequent findings, on October 17, 1995, Suresh was declared "inadmissible" to Canada and deportation proceedings began against him on the basis that he was a danger to the public. A day later he was detained. On January 8, 1998, Suresh was informed that he

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would be removed to Sri Lanka and he was released on March 23, 1998, after twenty-nine months in detention. It is not clear why he was not deported following his release.

He brought his case to the Inter-American Commission on Human Rights (the Commission), which has the competence to process individual complaints under the American Declaration of the Rights of Man (American Declaration), since Canada has not become a party to the American Convention on Human Rights. The Commission, having declared the case admissible, placed itself at the disposal of the parties with a view to reaching a friendly settlement. The petitioners accepted the offer but the state rejected it. Throughout the proceedings Canada maintained that states have the right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence, and expulsion of aliens and that a state may use its sovereign power to detain for the purpose of deportation and to deport aliens who represent a danger to national security.[4]

Despite the state's determination that Suresh was deportable because he was a potential danger to the public, the Commission found that Suresh had rights under the American Declaration that were violated by arbitrarily depriving him of his right to liberty and access to a simple, brief judicial procedure to challenge the legality of his detention. It further concluded that the circumstances of his detention (as a nonresident and noncitizen of Canada) constituted a violation of the right to equality under the law.[5] Canada, a country that has instituted more procedures than most as regards protection for aliens from expulsion (compared to the United States, for example), in response to the Commission's decision, indicated that Suresh was not entitled to any remedies because (1) he was a foreign national who had been determined to be inadmissible to Canada on the grounds of being a risk to national security on account of his membership in the executive level of a terrorist organization and his fundraising for a terrorist organization, (2) financial compensation is not payable for arbitrary detention under Canadian domestic law, and (3) Suresh was detained for purposes of deportation under a law that was constitutional at the time of his detention.[6] Although Canadian law does not protect an undocumented alien who has been designated inadmissible to Canada for being a member of a terrorist organization, the Commission evaluated Canada's treatment of him and found that it "was not objective, reasonable or proportionate to the interests the State sought to advance."[7] Had Canada deported him upon declaring him "inadmissible" there would have been no case, but placing him in detention opened up the legal challenges regarding lack of due process.

Canada ignored the Commission's decision and again announced its intention to deport Suresh; Suresh again appealed the decision, this time again to a national court. In a Federal Court of Canada decision issued January 10, 2017, dismissing the appeal, twenty-two years after Suresh was first deemed "inadmissible," the Canadian judicial system again determined that Suresh was "inadmissible" for being a member of a terrorist organization and for being complicit in war crimes and crimes against humanity, and his deportation, once again, is pending.[8] The Federal Court decision did not even cite the merits decision of the Inter-American Commission, issued a year earlier.

The European Court's ruling in *Abu Qatada* led David Cameron to warn that the concept of human rights was in danger of becoming discredited. He said, "We have a real problem when it comes to foreign nationals who threaten our security. The problem is that you can end up with someone who has no right to live in your country, who you are convinced means to do your country harm."[9] In the opinion of this observer, the determination of who lives in your country is perhaps the last redoubt of state sovereignty and international human rights bodies would be well advised to consider such cases nonjusticiable.[10]

ENDNOTES

1 International Covenant on Civil and Political Rights art. 13, Dec. 16, 1966, S. Exec. Rep. 102–123, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 4, art. 3, Nov. 4, 1950, Europ. T.S. No. 5; 213 U.N.T.S. 221. The European Convention prohibits the expulsion of an individual or group of nationals and in Protocol No. 4, Article 4, prohibits the collective (not the individual) expulsion of aliens. American Convention on Human Rights art. 22 (6), Nov. 21, 1969, 1144 U.N.T.S. 143; African Charter on Human and Peoples' Rights art. 12(4), June 27, 1981, 21 ILM 58.

2 International Covenant on Civil and Political Rights art. 13, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 ILM 368 (1967), 99 U.N.T.S. 171.

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3 Othman (Abu Qatada) v. The United Kingdom, App. No. 8139/09, Eur. Ct. H.R. (May 9, 2012).

4 Suresh v. Canada, Inter-Am. Comm'n H.R., ¶¶ 26, 27, 93 (April 13, 2016).

5 *Id.* ¶ 119.

6 *Id.* ¶ 103.

7 *Id.* ¶ 98.

8 Suresh v. Canada (Public Safety and Emergency Preparedness) 2017 FC 28, IMM-4483-15 (Jan. 10, 2017).

9 *European Judges' Ruling on Abu Qatada 'a Threat to Our National Security.'* THE TELEGRAPH, Feb. 7, 2012.

10 A clear example of how fraught with conflict the subject of the expulsion of aliens is can be seen in the work of the International Law Commission (ILC), which spent seven years (2005–2012) preparing "Draft Articles" on the protection of human rights of persons who have been or are being expelled. Then realizing that states have divergent national laws and regulations involving national security matters in this area, the ILC did not adopt the special rapporteur's initial proposal that the ILC suggest to the General Assembly that it recommend to states that the rules set forth in the draft articles be taken into account. *See* Sean D. Murphy, *The Expulsion of Aliens (Revisited) and Other Topics, The Sixty-Sixth Session of the International Law Commission*, 109 AJIL 125 (2015).

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REPORT No. 8/16
CASE 11.661
MERITS (PUBLICATION)

MANICKAVASAGAM SURESH
CANADA

Approved by the Commission at its session No. 2061 held on April 13, 2016
157 Regular Period of Sessions

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MANICKAVASAGAM SURESH
CANADA
APRIL 13, 2016

I. SUMMARY

1. The Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," the "Commission," or the "IACHR") received a petition dated July 26, 1996, filed by Barbara Jackman of Jackman and Associates, a firm of Barristers & Solicitors in Toronto, Canada (hereinafter "the petitioners"). The petition alleges that the Government of Canada (hereinafter "Canada" or "the State") bears international responsibility for denying certain fundamental human rights to Mr. Manickavasagam Suresh ("Mr. Suresh"), a citizen of Sri Lanka who arrived in Canada on October 5, 1990 and claimed protection as a refugee. The petitioners allege that Mr. Suresh had been in detention since October 18, 1995, based on his association with an organization that was lawful, not on the basis of any alleged unlawful conduct on his part.

2. Mr. Suresh was recognized as a refugee by Canada on April 11, 1991 on the basis that he feared persecution from the Liberation Tamil Tigers Eelam (LTTE), a separatist militant organization in Sri Lanka. In the summer of 1991, he applied for landed status, which permits recognized refugees to apply for permanent residence. He was detained by the Canadian authorities in 1995 while his application was pending on the basis of a Security Intelligence Report prepared by the Canadian Security and Intelligence Service (CSIS). The report found that Mr. Suresh was an executive member of the LTTE and, as such, could not have been unaware of the terrorist acts conducted by the LTTE in Sri Lanka. On the basis of these findings, the State declared Mr. Suresh inadmissible to Canada and began deportation proceedings against him to Sri Lanka on the basis that he was a danger to the public.

3. According to the petitioners, Mr. Suresh remained in detention for 29 months until released on bond by the Canadian authorities. The petitioners allege that the circumstances of Mr. Suresh's detention constituted arbitrary detention, a denial of the right to a fair trial, and a violation of his right to equality of treatment under law. The State, for its part, maintains that the allegations do not demonstrate facts that constitute violations of the American Declaration and that Mr. Suresh's detention was carried out in observance of laws that were found to be constitutionally valid at the time of their application.

4. In Report No. 7/02, adopted by the Commission on February 27, 2002 during its 114th regular period of sessions, the Commission declared the petition admissible, without prejudging the merits of the matter, with respect to the alleged violation of Articles II (right to equality), XVIII (right to a fair trial), and XXV (right of protection from arbitrary arrest), of the American Declaration of the Rights and Duties of Man ("the American Declaration" or "the Declaration") and decided to continue with the merits of the case. Based on the submissions of the two parties, the Commission determined that the three questions at issue are: (1) whether the mandatory nature of Mr. Suresh's detention violated the American Declaration; (2) whether Mr. Suresh was afforded simple, prompt access to judicial oversight of the decision to detain; and (3) whether the treatment received by Mr. Suresh, as a non-citizen of Canada, violated the right to equality before law.

5. As set forth in the present report, having examined the evidence and arguments presented by the parties, the Commission concludes that the State violated Mr. Suresh's right to a fair trial and protection from arbitrary arrest by denying him access to prompt and adequate means of challenging the legality of his detention, including *habeas corpus*. The Commission further concludes that the circumstances of Mr. Suresh's detention constitute a violation of his right to equality under the law.

6. Based upon these conclusions, the Commission recommends to the State that it grant Mr. Suresh integral reparations, including compensation and measures of satisfaction. The Commission also recommends that the State take legislative or other measures to ensure that subjects of security certification have: access to prompt judicial oversight

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of their detention without delay, are not subjected to indefinite mandatory detention, and are accorded equal access to judicial review of their detention at reasonable intervals.

II. PROCEEDINGS BEFORE THE IACHR

A. PRECAUTIONARY MEASURES

7. On January 8, 1998, Mr. Suresh was informed that he would be removed to Sri Lanka by January 19, 1998. Given the imminence of his deportation from Canada, Mr. Suresh requested that the IACHR issue precautionary measures aimed at suspending said deportation until such time as it had an opportunity to consider the case. The Commission granted the request and the precautionary measures were issued on January 16, 1998.

B. PROCEEDINGS SUBSEQUENT TO THE ADMISSIBILITY REPORT

8. By communications dated March 27, 2002, the Inter-American Commission transmitted the admissibility report to the parties and, pursuant to former Article 41 of the Inter-American Commission's Rules of Procedure[1], placed itself at the disposal of the parties with a view to reaching a friendly settlement. The petitioners accepted the offer[2], but the State rejected it[3]. From that date until the adoption of the instant report, the Inter-American Commission solicited[4] and received[5] observations and additional information (on the merits) from the parties.

III. PRELIMINARY CONSIDERATIONS

9. The petitioners' complaints have been the subject of much domestic litigation at different junctures. Apart from the actions pursued by Mr. Suresh, this case has been affected by the Supreme Court of Canada's 2007 decision *Charkaoui v Canada*[6]. In that case, the Supreme Court of Canada ruled that the certification and detention regime as applied to Charkaoui, as well as Mr. Suresh and others, was incompatible with the Canadian Charter of Rights and Freedoms, particularly with respect to the right to liberty and due process (see section V (C) *infra*).

10. Another development in Canada's domestic law during the pendency of this case has been the replacement of the Immigration Act by the Immigration and Refugee Protection Act of 2001 (IRPA). The IRPA maintained the certification and detention provisions contained in the Immigration Act. An important distinction is that under the Immigration Act, only those persons who were not citizens of Canada nor permanent residents were subject to being certified and detained; however, under IRPA, permanent residents were added as a class of persons subject to certification and detention.

11. Mr. Suresh's petition relates in important part to provisions of Canada's domestic law in effect prior to the enactment of the IRPA and the ruling of the Canadian Supreme Court in *Charkaoui*. As such, the Inter-American Commission considers it appropriate, under the "Established Facts" section, to set out a chronology of legal proceedings, with cross-references to the above developments where warranted.

IV. POSITIONS OF THE PARTIES

A. THE PETITIONERS

12. According to the petitioners, Mr. Manickavasagam Suresh is a Sri Lankan citizen of Tamil ethnicity, who entered Canada in October 1990 and was subsequently recognized as a refugee by the State. The petitioners further state that, in 1991, Mr. Suresh applied for landed immigrant status.

13. The petitioners claim that Mr. Suresh's application for landed immigrant status was aborted in 1995 when the Solicitor General of Canada and the Minister of Citizenship and Immigration (M.C.I.) certified Mr. Suresh as a danger to national security and accordingly initiated proceedings to deport him to Sri Lanka. In this respect, the petitioners allege that Mr. Suresh was certified under section 40.1 of the Immigration Act[7], which made Mr. Suresh inadmissible to Canada on security grounds. In accordance with section 40.1 of the Immigration Act, the Solicitor General and the M.C.I. filed the certificate with the Federal Court of Canada on October 17, 1995. As a consequence,

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the Canadian authorities detained Mr. Suresh on the following day. Mr. Suresh was subsequently released on March 23, 1998 after 29 months in detention.

14. The petitioners claim that the certification was based on the opinion of the CSIS that Mr. Suresh was a member of the LTTE. The petitioners further allege that the CSIS considers the LTTE to be a terrorist organization that has a branch operating in Canada under the auspices of the World Tamil Movement (WTM), for the purposes of fundraising, propaganda, and procurement of material. According to the petitioners, Mr. Suresh was the coordinator for the WTM in Canada. The petitioners allege that at the hearing in Federal Court to consider the reasonableness of the issuance of the certificate, counsel for the Minister conceded that neither Canada nor Sri Lanka had any allegations of criminal misconduct or criminal activity against Mr. Suresh.

15. The petitioners claim that Mr. Suresh's detention was in violation of Articles II, XVIII and XXV of the American Declaration, and more particularly that he:

(a) Was detained by Canadian Immigration Authorities under a legislative provision which provides for indefinite, mandatory detention without review;

(a) Was detained on the basis of his association with an organization, not on the basis of any alleged unlawful conduct on his part;

(b) Had no access to habeas corpus as a non-citizen detained under the Immigration Act, even though it is constitutionally entrenched in section 10 of the Canadian Charter of Rights and Freedoms; and

(c) Had no effective remedy to challenge his detention.

16. The petitioners further contend, *inter alia*, that:

(a) Section 40 of the Immigration Act operated without distinction to mandate the detention of all non-citizens, who are not permanent residents and are subject to a security certificate, and allowed for review of the need to detain by a competent authority only after the conclusion of proceedings to determine the reasonableness of the grounds supporting the security certificate *and* the person is thereby afterward ordered deported *and* is still not deported after 120 days following the issuance of the detention order;

(b) Mr. Suresh's ultimate release after almost two and half years of detention demonstrates the absence of any compelling national security imperative to justify his detention (maintained without periodic review) in the first place. If Mr. Suresh needed to be detained to protect national security, there would have been no basis for permitting his release after the conclusion that the security certificate was reasonable;

(c) Mr. Suresh's detention was arbitrary to the extent that it occurred automatically on the issuance of a security certificate and the filing of it in the Federal Court; that no detention review (such as *habeas corpus*) was available to him between October 1995 and January 1998, and that if and when such detention review becomes available and is granted, such persons bear the onus of establishing that their release is justified;

(d) The judicial review of the "reasonableness" of the security certificate did not address the substantive issue of the need to detain the subject of the security certificate; the purpose of the security certificate review process was concerned solely with the reasonableness of the certificate and not with whether a person ought to be detained or released; and

(e) The law that governed the detention of Mr. Suresh is discriminatory given, *inter alia*, that persons facing serious criminal allegations, including murder, are entitled to a bail review within 24 hours of detention and to regular bail reviews thereafter; it is only persons who are not permanent residents or citizens who are subjected to the regime of security certification/mandatory detention; and that

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Mr. Suresh had the onus of establishing that his release was justified; and generally, once there is a detention review, there are no further regular detention reviews.

17. With regard to the impact of the *Charkaoui* decision[8], the petitioners contend that it vindicates Mr. Suresh's complaints regarding the alleged violations of Articles XXIII and XXV. Nonetheless, the petitioners reject the State's contention that Mr. Suresh's complaints in this regard are now "moot" in all respects. The petitioners note that, pursuant to *Charkaoui*, decided in February 2007, Mr. Suresh was entitled to have ongoing reviews of the terms of his release by the Federal Court (every six months) and to apply in February 2008 to have his certificate quashed. However, as of November 2007, the petitioners asserted that no dates had been scheduled to review Mr. Suresh's conditions of release, despite the passage of over six months.[9]

18. Following *Charkaoui*, the petitioners argue that, while the Supreme Court has upheld constitutional challenges to the certification and detention regime, such review is of limited assistance in respect to the right to equality before the law under Article II of the American Declaration. Petitioners submit that *Charkaoui* does nothing to address the violation that Suresh claimed, namely that he was treated differently from other non-citizens alleged to be members of terrorist organizations who were brought before regular immigration tribunals to answer allegations rather than being subject to security certificates.[10] The petitioners argue that Mr. Suresh was also treated differently than permanent residents subject to security certificates on the same allegations. In this regard, petitioners lastly affirm that *Charkaoui* does not place security certificate subjects on the same footing as other non-citizens facing terrorism allegations in the regular immigration stream. They maintain that those non-citizens have an immediate review of the need to detain followed by a seven day review, then review every 30 days, whereas security certificate subjects are entitled to an immediate review and then review every six months.[11]

19. While the petitioners acknowledge that the holding of *Charkaoui* will "ensure that Canada's laws are brought into compliance" with Articles I, XVII, XVIII, XXIV, and XXV of the Declaration, they observe that Suresh cannot recover damages under Canadian law "for the breach of his human rights while in detention" but maintain that damages should flow from this breach of Mr. Suresh's rights.[12] The petitioners reaffirm that Mr. Suresh's complaints are not moot because under the pre-*Charkaoui* legal regime, Mr. Suresh did not have the right to have the legality of his detention ascertained without delay by a simple, brief procedure and therefore had no remedy available to him while in detention.[13]

B. THE STATE

20. According to the State, prior to *Charkaoui*, Mr. Suresh's petition did not disclose any violations of the American Declaration: he was detained pursuant to legislation that was found, by Canadian Courts, not to violate Canadian constitutional rights to liberty and freedom from arbitrary detention. Post-*Charkaoui*, the State contends that this decision has rendered Mr. Suresh's complaints "moot" or otherwise without merit and should be dismissed.

21. The State maintains that Mr. Suresh was detained because of his classification as an inadmissible alien. In this regard, the State argues that section 19 of Canada's Immigration Act listed classes of aliens who were inadmissible because they were allegedly involved in espionage, subversion of democratic governments, or terrorism. According to the State, the Immigration Act permitted the detention of inadmissible aliens to achieve two purposes: first, to ensure the effective removal of inadmissible individuals who may resist removal; and second, to protect Canadian society from persons who are considered to be dangerous. In this respect, the State alleged that Mr. Suresh was detained because of his suspected involvement in terrorism.

22. In addressing the issues raised by the petitioners that: a) Mr. Suresh was never in charge of fundraising for the LTTE, and b) there was never any evidence that the funds collected by the WTM went directly to buy arms or to finance terrorist acts, the State affirms that Canada gives great importance to preventing the financing of terrorist acts, as part of its obligations under the various international conventions and resolutions to which the State is party. However, the State maintains that the issue here is not a criminal one, and as such, it is irrelevant that fundraising for a terrorist organization was not criminal in Canada at the time Mr. Suresh was detained. Along similar lines, the State argues that it is irrelevant that the evidence did not establish that Mr. Suresh had committed criminal activity or the direct procurement of ammunition, arms weapons or material of military application in Canada or that

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he was involved in shipping materials from Canada. Rather, the only issue properly before the Inter-American Commission, according to the State, is Mr. Suresh's detention, and specifically whether the State could detain a non-citizen during deportation proceedings on the basis that he poses a danger to the Canadian public. The State further argues that Mr. Suresh's release from detention has rendered this issue moot.

23. The State also maintains that Mr. Suresh's arrest and detention were in accordance with pre-existing law as required by Article XXV of the American Declaration, and that continued detention for purposes of exclusion from the country of persons involved in terrorism for the purpose of protecting public security was "entirely compatible with the American Declaration."[14] The State maintains its overall position that extended periods of detention during deportation do not violate Article XXV, but concedes that any such process must provide for meaningful and ongoing detention reviews in the wake of *Charkaoui*.[15]

24. The State further contends that the American Declaration does not specifically refer to *habeas corpus* as the necessary procedure for the review of a detention, and that the rule of the domestic system that *habeas corpus* need not be available when an alternative mechanism exists to review the detention does not violate the American Declaration. Section 40.1 of the Immigration Act, the State contends, represented such a mechanism. The State submits that section 40.1, in effect during the processing of Mr. Suresh, provides a simple, brief procedure for the review of detention by a court, and that the certification review process before a judge of the Federal Court includes a procedure established to review the detention of the person named in the security certificate. According to the State, if, as a result of this procedure, the court comes to the conclusion that the grounds for the issuance of the certificate are not reasonable, the person is released. If, however, the court comes to the conclusion that they are reasonable, then the person remains in detention, and if he or she is not removed within 120 days, he or she may then apply to the judge for release.

25. The State argues that the regime of mandatory detention is not arbitrary because it is expressly authorized by law and occurs only following a separate decision by two ministers, based on security information, that a person who is neither a Canadian citizen nor a permanent resident has a terrorist background or propensities; and, as in the case of Mr. Suresh, that the person has engaged or will engage in terrorism or was or is a member of a terrorist organization. The State adds that the continuation of the detention of the person is inextricably linked with the certificate review process, as the person's continued detention depends on whether a Federal Court judge believes that the certificate filed by the M.C.I. and the Solicitor General is reasonable on the basis of evidence and information available to the judge. On this basis, the State submitted that there was no need for a separate hearing into the person's detention, when the person could have been released as a direct result of the inquiry into the reasonableness of the grounds for issuance of the certificate. Thus, for the State, the procedure mandated by section 40.1 (4) (d) of the Immigration Act constituted a statutory detention review by a Court available to the person detained.

26. Regarding the right to equality, Canada contends that States have the right, as a matter of well-established international law, and subject to their treaty obligations, to control the entry, residence and expulsion of aliens. Further, Canada maintains that States have the right to deport a person who represents a danger to the security of the persons on their territory or to their national security, and, consequently, to detain for the purposes of the deportation proceedings. In this respect, the State contends that detention during deportation proceedings does not violate the right to equality under the American Declaration. Given that Canadians are not subject to deportation proceedings, the State argues that it is inappropriate to compare the regime applied to Canadian citizens and/or permanent residents on the one hand and non-Canadian citizens and/or non-permanent residents on the other. The State submits that the equality rights of Mr. Suresh have not been violated since, as a non-resident alien, he enjoys the same right, in common with Canadian citizens and permanent residents, to have the legality of his detention ascertained without delay by the court.

27. As noted previously, in its submission after the *Charkaoui* decision, the State has affirmed that the conclusions of the Supreme Court have rendered Mr. Suresh's complaints moot or that the complaints are otherwise without merit. With respect to Mr. Suresh's complaints under Article XVIII of the American Declaration the State argues that the Supreme Court expressly recognized the right of certified detainees to have the legality of their detentions ascertained without delay by a simple, brief procedure. In the State's view, this recognition renders these complaints moot. The State also notes that the Supreme Court had dismissed allegations that the security certificate process

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violated section 15 of the *Canadian Charter* (right to equal protection). The State observes that Section 6 of the *Canadian Charter* specifically allows for differential treatment of citizens and non-citizens in deportation matters, as only citizens are accorded the right to enter, remain in and leave Canada. The State contends that foreign nationals now have the same rights with respect to review of detention as permanent residents, which is that they are entitled to automatic review of detention within 48 hours. The State reiterates that the fact that fund-raising for a terrorist organization was not unlawful for a Canadian citizen at the time is irrelevant. The State maintains that it may use its sovereign power to detain for the purpose of deportation and to deport aliens who represent a danger to national security. Accordingly, the State concludes that Mr. Suresh's complaints under Articles II and XXV of the American Declaration are also moot.

28. Pursuant to *Charkaoui*, the State points out that Mr. Suresh was eligible to apply to quash the existing security certificate on or after February 23, 2008.[16] The State has acknowledged the petitioners' complaint about delays in scheduling judicial review of Mr. Suresh's conditions of release but asserts that "any delay, while regrettable, is not relevant to the issues before the Inter-American Commission."[17]

29. The State agrees with the petitioners that Canadian law does not permit Mr. Suresh to recover damages for being detained between 1995 and 1998 under a law that was only recognized as unconstitutional in 2007. The State rejects any claim made by the petitioners before the Inter-American Commission for compensation and/or any other remedies. The State argues that there is no legal or equitable basis upon which Mr. Suresh would be eligible for compensation, given the history of his detention on national security grounds under a law that was not challenged until 2007.

V. ESTABLISHED FACTS

A. DOMESTIC PROCEEDINGS

30. At the time of Mr. Suresh's petition, Canada's Immigration Act[18] authorized the removal from Canada of persons who were not citizens or permanent residents for reasons of national security. The domestic proceedings against Mr. Suresh entailed four distinct, possible steps, namely: 1) the issuance of a security certificate, 2) a determination of whether the certificate is reasonable on the basis of the evidence available to the judge; 3) the deportation hearing; and 4) the notification of deportation.

1. Issuance of a security certificate

31. In October 1995, the Canadian authorities issued a certificate under section 40.1 of the Immigration Act[19] declaring Mr. Suresh to be inadmissible to Canada on security grounds. In accordance with the Immigration Act, the Solicitor General and the M.C.I. jointly filed the certificate with the Federal Court of Canada on October 17, 1995. As a consequence, Mr. Suresh was placed in mandatory detention on the following day. Mr. Suresh, as a non-citizen and non-permanent resident of Canada, was not entitled to challenge the certificate or consequent detention until a judge of the Federal Court, in conformity with the law, determined whether the grounds for the issuance of the certificate were reasonable and, following an affirmative determination, the issuance of a removal order.[20] Thus, under the Immigration Act, the mandatory detention of Mr. Suresh would continue until he was either removed from Canada or (conditionally) released from detention upon the order of a judge pursuant to a request for review after a minimum period of 120 days following the issue of a removal order.[21] It should be noted Mr. Suresh had no statutory right to be released after this period had elapsed, but merely to apply to a designated judge to review his request for release. Under s. 40 (9) of the Immigration Act, a judge could only order his release if satisfied that Mr. Suresh "will not be removed from Canada within a reasonable time," and that his "release would not be injurious to the national security or to the safety of persons." Mr. Suresh remained in detention for two years and five months.

32. The Commission notes that there were other persons subject to the same mandatory detention scheme as Mr. Suresh. Through its petition process, the Commission received information on two such cases: that of Mr. Walil Khalil Baroud, who was detained for approximately one and a half years, and that of Mr. Mansour Ahani, who was detained for approximately seven years.[22]

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2. Federal Court review of the certificate

33. Section 40 (4) (d) of the Immigration Act provides:

> Where a certificate is referred to the Federal Court pursuant to subsection (3), the Chief Justice of that Court or a judge of that Court designated by the Chief Justice for the purposes of this section shall determine whether the certificate filed by the Minister and the Solicitor General is reasonable on the basis of the evidence and information available to the Chief Justice or the designated judge, as the case may be, and, if found not to be reasonable, quash the certificate.

34. In August 1997, the Federal Court Judge, Justice Teitelbaum, upheld the issuance of the section 40.1 certificate naming Mr. Suresh, finding the evidence presented by the Solicitor General and the M.C.I. to be reasonable. In specific, Judge Teitelbaum found that this information provided reasonable grounds to believe that: (1) Mr. Suresh had been and remained a member of the LTTE since his youth[23]; (2) the WTM was part of the LTTE or at least an organization that supported the activities of the LTTE; (3) Mr. Suresh obtained refugee status "by willful misrepresentation of facts" and lacked credibility; and (4) the LTTE had committed terrorist acts. By virtue of section 40(6) of the Immigration Act, the judge's determination was not subject to appeal or review by any court. Under the Immigration Act, the designated judge reviewing the certificate had no jurisdiction to determine whether the certificate itself was justified, but rather was required to assess the "reasonableness" of the grounds for issuance of the certificate.

3. The deportation hearing

35. Following the judge's determination, the State commenced proceedings to deport Mr. Suresh from Canada. In a deportation hearing, an adjudicator found no reasonable grounds to conclude Mr. Suresh was directly engaged in terrorism under s. 19(1)(f)(ii), but held that he should be deported on grounds of membership in a terrorist organization under ss. 19(1)(f)(iii)(B) and 19(1)(e)(iv)(C) of the Immigration Act.

4. Notification of deportation

36. On the same day, September 17, 1997, the Minister took the fourth step in the deportation process, notifying Mr. Suresh that she was considering issuing an opinion declaring him to be a danger to the security of Canada under s. 53(1)(b) of the Act, which permitted the Minister to deport a refugee on security grounds even where the refugee's "life or freedom" might be threatened by the return. In response to the Minister's notification, Mr. Suresh submitted written arguments and documentary evidence, including reports indicating the incidence of torture, disappearances, and killings of suspected members of LTTE in Sri Lanka. Donald Gautier, an immigration officer for Citizenship and Immigration Canada, considered the submissions and recommended that the Minister issue an opinion under s. 53(1)(b) of the Act that Mr. Suresh constituted a danger to the security of Canada. Accordingly, on January 6, 1998, the Minister issued an opinion that Suresh constituted a danger to the security of Canada and should be deported pursuant to s. 53(1)(b) of the Act. Mr. Suresh was not provided with a copy of Mr. Gautier's memorandum, nor was he provided an opportunity to respond to it orally or in writing. The certified person was not entitled to be given reasons under s. 53(1)(b) of the Immigration Act and none were given in this case.

B. LEGAL CHALLENGES BY MR. SURESH

37. Based on the above-outlined domestic procedure, the Commission notes that Mr. Suresh's legal challenges began with his seeking to overturn the Minister's decision to issue a security certificate against him, as a first step in contesting the legality of his detention and ultimately procuring his own release. To this end, on January 9, 1998, Mr. Suresh applied to the Federal Court of Canada – Trial Division, for leave to commence judicial review of the Minister's decision. In his application, Mr. Suresh alleged that: (1) the Minister's decision was unreasonable and (2) the procedures under the Act (which did not require an oral hearing and an independent decision-maker) were unfair. On January 19, 1998, Mr. Suresh applied with the Ontario Court General Division for a constitutional declaration that the Act infringed ss. 2(b), 2(d), and 7, of the Canadian Charter of Rights and Freedoms, the latter specifically because Mr. Suresh alleged that he feared torture if return to Sri Lanka. On January 28, 1998,

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Justice Lane of the Ontario Court stayed the application for a constitutional declaration, finding that it was tied to the resolution of the application for leave to review the Minister's Decision, which was pending in the Federal Court – Trial Division.[24] In June 1999, the Federal Court – Trial Division dismissed Mr. Suresh's application.[25]

38. Mr. Suresh subsequently appealed to the Federal Court of Canada – Appellate Division.[26] The Appellate Division dismissed Mr. Suresh's appeal on January 18, 2000, and, with regard to s. 7, reasoned that "the right under international law to be free from torture was limited by a country's right to expel those who pose a security risk."[27] While this aspect of the case was not brought before the Commission in the present, the IACHR wishes to indicate that it has already addressed this issue and the standards under international law governing the absolute prohibition on torture, requiring States to refrain from returning all persons – even those suspected of terrorism – where substantial grounds of real risk of persecution are at issue, in its *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System* of 2000 ("the Canada Report").[28]

39. Mr. Suresh then appealed to the Supreme Court of Canada. On January 11, 2002, just one month before the Commission published its admissibility report on the present case, the Supreme Court of Canada upheld the constitutionality of the security certification regime under the Immigration Act.[29] However, the Court found that the Minister breached a duty of fairness to Mr. Suresh by issuing her opinion without first affording Mr. Suresh a fair opportunity to respond to the case against him (as presented in Mr. Gautier's memorandum), and by failing to give reasons for her opinion.[30] Accordingly, the Court held that Mr. Suresh was entitled to a new hearing that conformed to the requirements of "fundamental justice," and the Court consequently remanded the case to the Minister for reconsideration. As such, as the parties understand and was previously mentioned, the issue of whether Mr. Suresh can be deported to Sri Lanka if he might be subject to the risk of torture upon return is not before the Commission.

40. In early 1998, Mr. Suresh applied for release from detention.[31] On March 23, 1998, Mr. Suresh was released from detention, based on the results of the hearings held on February 6, 1998 and March 19-20, 1998.[32] The release was ordered on terms.[33]

41. On the issue of detention, which the parties agree is the only issue before this Commission, Mr. Suresh filed an action in Federal Court in April 1996 claiming that the detention provisions of section 40.1 of the Immigration Act violated the *Charter of Rights and Freedoms*.[34] The Federal Court – Trial Division held on October 21, 1999 that there was no breach of the principles of fundamental justice under Section 7 of the *Charter* in relation to the process and the detention, nor any breach of the right to be free from arbitrary detention under Section 9 of the *Charter*. The Appellate Division upheld this judgment.[35] The Supreme Court of Canada declined to hear any further appeal in the matter.

C. CHARKAOUI V. CANADA

42. In February 2007, the Supreme Court of Canada ruled in the case of *Charkaoui v. Canada* that the regime of certification and mandatory detention under the Immigration and Refugee Protection Act (IRPA)[36] violated section 7 (the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of "fundamental justice") of the Canadian Charter of Rights and Freedoms.[37] The Supreme Court concluded that IRPA "unjustifiably violated s. 7 of the Charter" by "allowing the issuance of a certificate of admissibility based on secret material without providing for an independent agent at the stage of judicial review to better protect the named person's interests,"[38] and by failing to assure the hearing that s. 7 requires before the State deprives a person of this right."[39] The Court further concluded that the

> [L]ack of review of the detention of foreign nationals until 120 days after the reasonableness of the certificate has been judicially confirmed . . . infringed the guarantee against arbitrary detention in s. 9 of the Charter, which encompasses the right to prompt review of detention under s. 10(c) of the Charter.[40]

43. The Court further noted that, "While there may be a need for some flexibility regarding the period for which a suspected terrorist may be detained, this cannot justify the complete denial of a timely detention review."[41]

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44. The Court also considered whether the certificate and detention review procedures discriminate between citizens and non-citizens, contrary to section 15 of the Canadian Charter[42], and if so, whether the discrimination is justified under section 1 of the Charter[43]. The Court concluded, based on the particular facts of the *Charkaoui* case, that a violation had not been established. The Court noted that only Canadian citizens are accorded the right to enter, remain in, and leave Canada[44]; and that accordingly, this allowed for differential treatment of citizens and non-citizens in deportation matters. For that reason, the Court concluded that a deportation scheme that applies to non-citizens, but not to citizens, does not, for that reason alone, violate s. 15 of the Charter.

45. As part of its rationale on this point, the Court acknowledged that there are two ways in which the IRPA could, in certain circumstances, result in discrimination.[45] The first is when detention may become indefinite, as deportation is put off or becomes impossible. An example provided by the Court of the latter is when there is no country to which the person can be deported. A second instance is if the government was to use the IRPA not for the purpose of deportation but rather to detain the person on security grounds. In both situations, the Court noted that the source of the problem is that the detention is no longer related, in effect or purpose, to the goal of deportation. Concluding, the Court found that

> Even though the detention of some of the appellants has been long - the record on which we must rely does not establish that the detentions at issue have become unhinged from the state's purpose of deportation. More generally, the *answer to these concerns lies in an effective review process* that permits the judge to consider all matters relevant to the detention, as discussed earlier in these reasons (emphasis added).[46]

46. The Supreme Court also held that extended periods of detention pending deportation under the certificate provisions of the IRPA do not violate ss. 7 and 12 of the Charter if accompanied by a process that provides regular opportunities for review of detention, taking into account all of the relevant factors, including the reasons for detention, the length of the detention, the reasons for the delay in deportation, the anticipated future length of detention, if applicable, and the availability of alternatives to detention. The Court further acknowledged that, despite this review process, a judge is not precluded from concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice.[47]

47. With respect to its declaration that s. 7 of the Charter had been violated by the failure to afford a fair hearing, the Supreme Court concluded that IRPA's procedure for the "judicial confirmation and review of detention" was inconsistent with the Charter and "hence of no force or effect." However, the Court suspended the date by which the declaration became effective for a year to give the Canadian Parliament an opportunity to amend the offending provisions of the IRPA.[48] The Court ruled that if the government chose to go forward with the proceedings to determine the reasonableness of Mr. Charkaoui's certificate, then the existing processes under the IRPA would apply. After a year, the certificate of any individual that had been deemed reasonable would lose this "reasonable" status, such as in the case of Mr. Suresh,[49] and it would then be open to the affected individuals to apply to have these certificates quashed.[50]

VI. LEGAL ANALYSIS

48. The issues before the Commission in the present case are limited to the following: (1) whether the mandatory nature of Mr. Suresh's detention violated the American Declaration; (2) whether Mr. Suresh was afforded simple, prompt access to judicial oversight of the decision to detain; and (3) whether the treatment received by Mr. Suresh, as a non-citizen of Canada, violated the right to equality before law. The first two issues will be addressed in sub-section C; issue (3) will be addressed below in sub-section D.

A. APPLICATION AND INTERPRETATION OF THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

49. The petitioners claim that the State has violated the rights of Manickavasagam Suresh under Articles II, XVIII and XXV of the American Declaration. As concluded in the admissibility report in this matter, the IACHR is competent to examine and pronounce upon these allegations against the State of Canada. The Declaration became a source of legal obligation for application by the Inter-American Commission to Canada when it became a

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Member State of the Organization of American States (OAS). Canada deposited its instrument of ratification of the OAS Charter on January 8, 1990. Article 20 of the Inter-American Commission's Statute, and the Rules of Procedure of the Inter-American Commission, authorize the Inter-American Commission to entertain the alleged violations of the Declaration raised by the petitioners against the State, which relate to acts or omissions that transpired after the State joined the OAS.

50. In addressing the allegations raised by the petitioners in this case, the Inter-American Commission emphasizes that it is necessary to consider the provisions of the American Declaration in the broader context of both the Inter–American and international human rights systems. The Inter-American Commission considers this appropriate in light of developments in the field of international human rights law since the Declaration was adopted and having regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged.[51] Pursuant to the principles of treaty interpretation, the Inter-American Court of Human Rights has likewise endorsed an interpretation of international human rights instruments that takes into account developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions.[52]

51. Developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments. In particular, this includes the American Convention on Human Rights, which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration. While the Commission clearly does not apply the American Convention in relation to Member States that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the Declaration.[53]

52. The Commission notes that as a modern human rights instrument, the American Declaration must be applied in a way to protect the basic rights of individuals, irrespective of nationality, both with respect to one's State of nationality and all other States. This is based on the precept that human rights are fundamentally derived from one's attributes as a human being and not by virtue of being a citizen of a particular State.[54]

B. OTHER CONSIDERATIONS

53. The Inter-American Commission has already noted that in 2007, the Supreme Court of Canada ruled the regime of certification and mandatory detention under the Immigration and Refugee Protection Act[55] (IRPA) infringed section 7 of the Canadian Charter of Rights and Freedoms (the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice). The Court also found that the lack of review of the detention of foreign nationals until 120 days after the reasonableness of the certificate has been judicially confirmed infringed the guarantee against arbitrary detention in s. 9[56] of the Charter, which encompasses the right to prompt review of detention under s. 10(c)[57] of the Charter.

54. While the State acknowledges the impact of the Court's judgment, it continues to argue that Mr. Suresh's complaints are without merit and undeserving of any redress. On the other hand, the petitioners consider that the Supreme Court's judgment vindicates Mr. Suresh's complaints relative to his 29-month detention, and that he is entitled to reparation for the violation of his rights.

55. The Inter-American Commission does not consider that the *Charkaoui* ruling renders Mr. Suresh's complaints under Articles XXV and XVIII of the American Declaration 'moot' as a result. Based on the foregoing, the Inter-American Commission considers that the judgment of the Supreme Court is instructive but does not resolve the petitioners' complaints before the Inter-American Commission. Accordingly, the Inter-American Commission now sets out its analysis of Mr. Suresh's complaints under Articles XXV, XVIII, and II of the American Declaration.

C. THE RIGHT TO PROTECTION FROM ARBITRARY DETENTION (ARTICLE XXV) AND THE RIGHT TO A FAIR TRIAL (ARTICLE XVIII)

56. Article XXV of the American Declaration establishes that "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law"; that "every individual who has been

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deprived of liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise to be released"; as well as "the right to humane treatment during the time he is in custody."

57. While the right to liberty is not absolute, any such restriction must be consonant with the protections set out in Article XXV of the Declaration. The Commission has derived three requirements from Article XXV: a) detention must have a legal basis; b) detention cannot be arbitrary; and c) there must be an expeditious judicial review mechanism; in circumstances of ongoing detention, that means the review of the decision at regular intervals of time.[58] The review proceedings for detention orders must fulfill procedural requirements, to include: an impartial adjudicator, the opportunity to submit evidence, and respect for the rights to a defense and to counsel.[59]

58. The Inter-American Commission notes that the right to protection from arbitrary arrest and detention is concerned with the exercise of physical freedom[60] and is similar to the provisions of other international human rights instruments in this regard. For example, Canada is party to the International Covenant on Civil and Political Rights (ICCPR), having acceded to it on May 19, 1976. Article 9 of the ICCPR provides the right "to not be subjected to arbitrary arrest or detention except . . . on such grounds and in accordance with such procedures as are established by law" as well as that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court," that court to decide "without delay" on the lawfulness of the detention. This right to protection from arbitrary detention, as with all others under the Declaration, applies to every individual falling within the authority and control of the State and must, in principle, be afforded to all such persons without distinction, in accordance with the right to equal protection of the law under Article II of the Declaration.

59. In assessing the first issue for review – whether the mandatory nature of Mr. Suresh's detention violated the American Declaration, and in particular, Article XXV – the Commission reiterates the importance of respecting the exceptionality of detention.[61] In this regard, Principle III (2) of the Inter-American Principles on the Protection of Persons Deprived of Liberty in the Americas reflects the basic principle that deprivation of liberty of detention must be an exceptional measure, and that

> the law shall ensure that personal liberty is the general rule in judicial and administrative procedures, and that preventive deprivation of liberty is applied as an exception, in accordance with international human rights instruments.

60. In *Rafael Ferrer-Mazorra et al v. United States*, the Commission reiterated that, when considering the application of the deprivation of liberty, the presumption must be of liberty rather than of detention. More specifically, the IACHR found that

> the domestic law upon which the petitioners' detention was based, as described above, is fundamentally antithetical to the protections prescribed under Articles I [right to life, liberty, and personal security] and XXV [right to protection against arbitrary arrest] of the Declaration, because it fails to recognize any right to liberty on the part of the petitioners . . . [I]ndeed, it prescribes a presumption of detention rather than a presumption of liberty and is therefore incompatible with the object and purpose of Articles I and XXV of the Declaration, namely to secure the liberty of the individual save in exceptional circumstances justified by the State as lawful and non-arbitrary.[62]

61. Along with the presumption of liberty, there must be an individualized assessment of the need to detain. As the Commission has previously established, detention is only permissible when a case-specific evaluation concludes that the measure is necessary in order to serve certain legitimate interests of the State.[63] In all cases, the Commission reiterates that the arguments in support of the appropriateness of detention must be set out clearly in the corresponding decision.[64]

62. As indicated above, Mr. Suresh was detained in Canada pursuant to the security certification that indicated that he was a "high ranking member of the LTTE in Canada who maintains contact with the international leadership of the LTTE."[65] It must be noted that neither party has suggested that Mr. Suresh actively or directly participated in any criminal or terrorist act.

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63. The State has indicated two justifications for the detention of Mr. Suresh and others detained under the security certification regime: first, to ensure the effective removal of inadmissible individuals who may resist removal; and second, to protect Canadian society from persons who are considered to be dangerous. In other words, the detention was presumably based on the ongoing interest in eventually removing the person certified as posing a danger.

64. The certification process is an immigration proceeding, not a criminal trial. It includes neither the administrative and judicial reviews of a normal deportation process, nor the due process protections required in a criminal trial, and accordingly raises particular concerns. The Commission takes note that the Working Group on Arbitrary Detention of the United Nations Human Rights Council has found resort to administrative detention on the basis of suspicion of direct participation in terrorist activity to be inadmissible. The Working Group has emphasized that suspicion of terrorism must be dealt with through the filing of criminal charges with the attendant due process protection, including effective access to *habeas corpus* upon detention.[66]

65. While citizen security is an issue of great importance, its invocation is not sufficient to justify the mandatory or indefinite detention of a certain group of persons, namely non-citizens and non-permanent residents. The legislation in effect neither required nor permitted an individualized review of the need to detain Mr. Suresh during the time the certificate was under review.

66. Based on the facts presented, the Commission determines that the detention of Mr. Suresh was applied not based on a presumption in favor of liberty, but rather on a presumption of detention and of mandatory detention for an indefinite period, according to the law. In this regard, the State of Canada failed to respect the overarching principle of the exceptionality of detention as applied to Mr. Suresh. Further, the Commission observes that Canada did not conduct an individualized assessment nor did it provide clear justifications in a corresponding decision of the need to detain Mr. Suresh based on the risk he posed to Canadian society, due to his alleged participation in the financing of terrorist activities.

67. Even detention which was at first legal can nonetheless become arbitrary and violative of Article XXV when the law does not set a maximum duration. Under no circumstances should detention be indefinite or of excessive duration. In this regard, Inter-American jurisprudence has established that when detention – preventive or otherwise[67] – is unduly prolonged, it becomes punitive in nature.[68] In the present case, the Commission observes that there was no maximum duration set for the mandatory detention of persons subject to security certificates, and Mr. Suresh was ultimately detained for over two years.

68. In light of the foregoing, on the first issue the Commission finds that the State of Canada violated Article XXV to the detriment of Mr. Suresh.

69. In regards to the second issue – whether Mr. Suresh was afforded simple, prompt access to judicial oversight of the decision to detain, the Commission refers to Article XVIII, which prescribes a fundamental role for the courts of a State in ensuring and protecting the legal rights of the individual. Specifically, it provides that "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights."

70. As the Commission noted in the Canada Report, the security certification process of section 40.1 provides for judicial review of the grounds for issuing the certificate, but provides no recourse to seek review of the legality of the related detention. Under the terms of the Immigration Act, detention is mandatory until the certificate is quashed. The only exception, prior to that point, is release for the purpose of removal. If the certificate is not quashed, the terms of the Act expressly excluded the possibility of access to the writ of *habeas corpus* for 120 days after a removal order is issued.[69]

71. This security certification process raises three principle concerns implicating the provisions of the American Declaration. Two of these concerns have been previously raised in the Commission's Canada Report: the compatibility of the provisions concerning access to review of the legality of detention and the compatibility of the procedures allowing the judge to consider evidence, which may be withheld from the person concerned on the basis of the need to protect national security, with Canada's obligations under Inter-American legal instruments.[70]

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72. With respect to the first concern, the Commission has held *inter alia* that the grounds and procedures by which non-nationals may be deprived of their liberty should define with sufficient detail the basis for such action, that authorities should have a very narrow and limited margin of discretion, and that guarantees for the revision of the detention should be available at a minimum at reasonable intervals.[71]

73. Article XXV of the American Declaration also provides that any person detained has the right to have the legality of the detention ascertained without delay. The requirement that detention not be left to the sole discretion of the State agents responsible for carrying it out is so fundamental that it cannot be overlooked in any context. Supervisory control over detention is an essential safeguard, because it provides effective assurance that the detainee is not exclusively at the mercy of the detaining authority.[72] Under normal circumstances, review of the legality of detention must be carried out without delay, which generally means as soon as practicable. This approach has been applied by the United Nations Human Rights Committee (UNHRC) in considering the application of Article 9 (4)[73] of the ICCPR to 40.1 of the Immigration Act. The Committee (by majority) opined:

> given that an individual detained under a security certificate has neither been convicted nor sentenced to a term of imprisonment, an individual must have appropriate access, in terms of article 9, paragraph 4, to judicial review of the detention, that is to say, review of the substantive justification of detention, as well as sufficiently frequent review.[74]

74. While the certificate reviews process provides an important judicial check on State action, the Commission finds that it does not provide the simple, prompt access to judicial oversight with respect to the decision to detain required by Articles XXV and XVIII of the Declaration. What section 40.1 of the Immigration Act does provide for is, first, the requirement that the Minister cause a copy of the certificate to be referred to the Federal Court for a determination as to whether the certificate should be quashed. The Commission notes that no time frame is provided for this action. The section also requires that the judge examine the security or criminal intelligence reports considered by the M.C.I. or the Solicitor General *in camera* within seven days after the certificate is referred to the Federal Court.[75] The next steps include, most pertinently, that the designated judge: provide the person named with a reasonable opportunity to be heard (no time frame provided) (s. 40.1(4)(c)); determine whether the certificate filed by the M.C.I. and the Solicitor General is reasonable on the basis of the evidence and information available (no time frame provided) (s. 40.1(4)(d)); and notify the M.C.I., the Solicitor General, and the person named in the certificate of the determination made (no time frame provided) (s. 40.1(4)). Ultimately, if the judge determines that the grounds underlying the certificate are reasonable, a final order of deportation is issued and, if following its issuance, 120 days pass and the named person is still not deported, then and only then does the detainee become eligible to seek review of his detention. Thus, the Commission observes that, in reality, the time period before which a detainee could have been eligible to seek review of his detention constitutes an indefinite period of time.

75. As mentioned above and in conjunction with the risk of becoming punitive in nature, the Commission considers that a period of indefinite or even 120-days duration far exceeds that which would qualify as a review "without delay" of the legality of detention under Article XXV, as previously established in the Inter-American system.[76]

76. As the Commission previously established in its Canada Report, in principle, the terms of Article XXV, concerning the right to detention review without delay, particularly when read in conjunction with those of Article XVIII, concerning the right to a simple, brief procedure for the protection of fundamental rights, require the existence of a procedure such as *habeas corpus* or its equivalent[77] which does not then require the institution of separate legal proceedings such as an application for judicial review.[78] Indeed, this argument was advanced by the State, in proffering that the process prescribed by s. 40.1 of the Immigration Act "constitutes *per se* detention review" and therefore is an adequate substitute for *habeas corpus*.

77. For the reasons contained within this report, the Commission finds that the process prescribed in s. 40.1 is neither "simple" nor "brief" and was not available without delay. Therefore, it does not constitute a valid equivalent to *habeas corpus*.

78. Regarding the second concern, the Commission observes that the notion of fairness is particularly fundamental to ensuring that a process for the deprivation of liberty is not rendered arbitrary contrary to Article XXV of the

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Declaration. Thus, so as to make effective the fair trial guarantees provided by Article XVIII, in order to contest the legality of a deprivation of liberty, the Commission has established that the State has the obligation to inform the affected individual of the motives or reasons for the detention[79]; further, detention review proceedings must also ensure that: (1) the decision-maker meets standards of impartiality; (2) the detainee is given an opportunity to present evidence and to know and meet the claims against him or her; and (3) the detainee is given an opportunity to be represented by counsel or another representative.[80]

79. In the context of terrorism, this Inter-American Commission and other international human rights bodies have consistently recognized the right and duty of the State to investigate, prosecute, and punish acts of terrorism and protect citizen security, as well as attend to the special problems which arise in this context. In this regard, the Commission reaffirms the key principle expressed in its *Report on Terrorism and Human Rights*, the overriding requirement that any counter-terrorism initiatives by States comply with their existing obligations under international law, including those under international human rights and humanitarian law."[81] As the Commission has previously observed, "unqualified respect for human rights must be a fundamental part of any anti-subversive strategies when such strategies have to be implemented."[82]

80. Through the Inter-American Convention against Terrorism, the Inter-American system confirms that terrorism represents a serious threat to democratic values and to international peace and security, and recognizes that it is a cause of profound concern to all Member States.[83] The Convention, which entered into force in 2003, contains extensive provisions addressing the prevention, combating, and eradication of the financing of terrorism, such as requiring comprehensive regulatory and supervisory schemes for banks and addressing the seizure and confiscation of funds or assets used to finance terrorism.[84] Nonetheless, in accordance with its Article 15, it also cautions that the measures carried out by States parties "shall take place with full respect for the rule of law, human rights, and fundamental freedoms." In particular, it prescribes that, in the processes of interpretation and application of certain treaty provisions, fundamental human rights must be taken into account, including "the right to personal liberty and security, the right to due process, and the *non-refoulement* principle for the apprehension, detention, and prosecution or extradition of suspected terrorists."[85]

81. Even under extreme circumstances, effective judicial control of State action remains a fundamental prerequisite for ensuring the rule of law. Accordingly, this Commission has consistently found that resort to restrictive measures under the American Declaration may not be such as to leave "the rights of the individual without legal protection."[86] As the IACHR has established on multiple occasions, "under no circumstances may governments employ . . . the denial of certain minimum conditions of justice as the means to restore public order."[87] Applying this principle to the specific context of terrorism, the Commission has established that

> [S]hould a terrorist situation within a State's jurisdiction be of such nature or degree as to give rise to an emergency that threatens a state's independence or security, that State is nevertheless precluded from suspending certain fundamental aspects of the right to liberty and personal integrity which are considered necessary for the protection of non-derogable rights. These include the requirement that the grounds and procedures for the detention be prescribed by law, the right to be informed of the reasons for the detention, prompt access to legal counsel, family, and, where necessary or applicable, medical and consular assistance, prescribed limits upon the length of prolonged detention and maintenance of a central registry of detainees. These protections are also considered to include appropriate judicial review mechanisms to supervise detentions, promptly upon arrest or detention and at reasonable intervals when detention is extended.[88]

82. The Commission also reaffirms that, even in the context of terrorism or suspected terrorism, the right to the review of legality of detention exists independent of whether the detention itself is lawful.[89] The Commission further underscores the importance of periodic review, as the consideration that a person may be a danger to national security is "a characteristic susceptible to change" because, over time, "new issues [pertaining to] the lawfulness of detention may arise [and may later render the continuation of such detention unlawful]."[90]

83. While the Commission recognizes the State's right to exclude non-citizens and to protect Canadian society from persons considered to be dangerous, having regard to the foregoing considerations, the Commission finds

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that the State impermissibly denied Mr. Suresh the right to challenge the legality of his detention without delay in violation of Article XXV and that the State violated Article XVIII by failing to afford Mr. Suresh adequate or effective protection from deprivation of his basic right to liberty.

84. The Commission's conclusions in this regard are consistent with the considerations of the United Nations Human Rights Committee (UNHRC) in *Ahani v Canada*[91] in applying Article 9 (4)[92] of the ICCPR. Like Mr. Suresh, Mr. Ahani had been certified as presenting a danger to public security and detained pursuant to section 40.1 of the Immigration Act.[93] Mr. Ahani was detained for almost five years pending the outcome of constitutional challenges to section 40.1 of the Immigration Act and the "reasonableness" hearing itself. He was ordered deported in April 1998, and after waiting the requisite 120 days under the Act, he applied for judicial review of the ministerial determination and release from detention. As the UNHRC determined:

> Although a substantial part of that delay can be attributed to [Ahani] who chose to contest the constitutionality of the security certification procedure instead of proceeding directly to the "reasonableness" hearing before the Federal Court, the latter procedure [contesting his detention] included hearings and lasted nine and half months after the final resolution of the constitutional issue on 3 July 1997. This delay alone is in the Committee's view too long in respect of the Covenant requirement of judicial determination of the lawfulness of detention without delay. Consequently, there has been a violation of the [Ahani's] rights under article 9, paragraph 4 of the ICCPR.[94]

D. THE RIGHT TO EQUAL PROTECTION OF THE LAW (ARTICLE II)

85. Article II of the American Declaration establishes that "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."

86. As the Commission has previously observed, "[O]ne of the American Declaration's objectives was to assure in principle 'the equal protection of the law to nationals and aliens alike in respect to the rights set forth.'"[95]

87. In this regard, the Commission maintains that "The notion of equality before the law set out in the Declaration relates to the application of substantive rights and to the protection to be given to them in the case of acts by the State or others."[96] The Inter-American Court has also observed that Article II, while not prohibiting all distinctions in treatment in the enjoyment of protected rights and freedoms, fundamentally requires that any permissible distinctions be based upon objective and reasonable justification.[97] The Court, in an advisory opinion on domestic naturalization provisions, concluded in general terms that "no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice."[98] The Commission considers that these principles apply with equal force in the treatment afforded by States to resident and non-resident aliens.

88. In the context of immigration management, the Commission recognizes that under certain circumstances it may be appropriate for States to treat non-residents or foreigners differently from citizens or legal residents within the State's jurisdiction. Under international law, States have the right to establish their immigration policies, laws and practices, which may include provisions for the control of their borders and the requirements for entering and remaining in their territory, and the right to expel or deport foreign nationals.[99] Differential treatment may, for example, be justified in controlling the entry in and residence of foreigners in their territory.[100] Nonetheless, such immigration policies, laws, and practices must be respectful of and guarantee the human rights of all persons, including migrants and other non-nationals, including persons in an irregular migratory situation.[101] Specifically, and consistent with the principles underlying Article II of the Declaration, any such distinctions must be shown by the State to be objective, reasonable, and proportionate to the objective sought in the circumstances.

89. A context of counter-terrorism measures may give rise to particular considerations. For example, as the Commission previously noted in its report on *Terrorism and Human Rights*, migrants, asylum seekers, and other non-nationals may be "especially vulnerable" to discrimination in emergency situations resulting from terrorist violence.[102] States must therefore remain vigilant in ensuring that their laws and policies are not developed or applied in a manner that encourages or results in discrimination; that their officials and agents conduct themselves fully in

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conformity with these rules and principles; and that policies and practices are prohibited upon a showing that they discriminate against a certain category of persons, even when lacking proof of discriminatory intent.[103]

90. The Commission recognizes that, in the present case, the intent of section 40.1 of the Immigration Act was to create "a mechanism for the expeditious review by an independent judicial arbiter of the reasonableness of the decision of two separate ministers to issue a certificate that a person, other than a Canadian citizen or permanent resident, is a member of an inadmissible class of persons for various specified reasons, including terrorism."[104] The Commission acknowledges that differential treatment of persons suspected of terrorist acts may legitimately be utilized by States to protect their security where such treatment meets the abovementioned requirements.

91. In the present case, section 40.1 of the Act expressly required the mandatory and indefinite detention of non-citizens, who were not permanent residents, and restricted access to prompt judicial review of the legality of their detention. Until the enactment of the IRPA in 2002, permanent residents and citizens of Canada were expressly excluded from this regime. While there may be valid differences in the treatment of such groups for immigration purposes, those differences do not validate a blanket distinction in their treatment with respect to the right to liberty.

92. Further, the Commission observes that the treasurer of the WTM was a Canadian citizen and in charge of the organization's fundraising efforts and was not jailed or otherwise sanctioned for participating in the collection of funds.[105] The Commission in addition takes note that the LTTE and WTM were not classified by the Canadian government as terrorist organizations until April 8, 2006 and June 13, 2008, respectively.[106]

93. The principal justifications proffered by the State for this distinction are that

(a) States have the right, as a matter of well-established international law, and subject to their treaty obligations, to control the entry, residence and expulsion of aliens; and that

(b) States have the right to deport a person who represents a danger to security of the persons on their territory or to their national security, and consequently to detain for the purposes of the deportation proceedings.

94. The State further relies on the *Charkaoui* case as a basis for rejecting the petitioners' complaint of discrimination under the certification and detention regime. As already noted, the Supreme Court of Canada considered whether the certificate and detention review procedures discriminate between citizens and non-citizens, contrary to section 15[107] of the Canadian Charter, and if so, whether the discrimination is justified under section 1 of the Charter. The Court concluded, based on the particular facts of the *Charkaoui* case, that a violation had not been established. The Court noted that only Canadian citizens are accorded the right to enter, remain in, and leave Canada under s. 6 of the Charter; and that accordingly, this allowed for differential treatment of citizens and non-citizens in deportation matters. For that reason, the Court concluded that a deportation scheme that applies to non-citizens, but not to citizens, does not, for that reason alone, violate s. 15 of the Charter.[108]

95. While differences exist between citizens and foreigners for the purpose of immigration law, those differences do not imply, in and of themselves, some restriction to or lessening of such fundamental rights as due process or personal liberty. Under the American Declaration, all persons are entitled to the rights of liberty and due process; any distinction in treatment must be objective, reasonable, and proportionate. The IACHR reiterates, in this regard, the fundamental character of the obligation of non-discrimination:

> [S]tates [must] fulfill their obligations without discrimination of any kind, including discrimination based upon religion, political or other opinion or national or social origin. This applies not only to a state's commitment to respect and ensure respect for fundamental rights in the context of terrorist threats, but also limits the measures that states may take in derogating from rights that may properly be suspended in times of emergency by prohibiting any such measures that involve discrimination on such grounds as race, color, sex, language, religion, or social origin. The principle of non-discrimination also applies to all aspects of a state's treatment of individuals in connection with anti-terrorist initiatives, including their treatment when in detention.[109]

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96. The Commission considers that the distinction between citizens and non-citizens in their enjoyment of the right to liberty at the time Mr. Suresh was detained and the a priori imposition of mandatory detention for non-citizens and non-residents absent an individualized assessment of the need to detain was discriminatory.

97. As the Commission previously observed in relation to Article XXV, while there is no absolute right to liberty, there must be a presumption of liberty and any deprivation of it must not be arbitrary. Along these lines, the Commission stresses the utmost importance of *habeas corpus* and that the standards of the regional system admit no circumstances in which access to it by any person, regardless of citizenship or migratory situation would rightfully be limited.

98. Based on the above considerations, the Commission finds that the differential treatment accorded to Mr. Suresh as a non-resident and non-citizen of Canada was not objective, reasonable, or proportionate to the interests the State sought to advance. The State referred to its legitimate right and duty to control its borders and combat the threat of terrorism; however, the Commission observes that it did not provide specific justification as to why these objectives would require that one class of persons, namely non-resident foreigners, be treated differently than citizens or permanent residents in requiring mandatory detention nor why this class of persons would be excluded from the fundamental protection of *habeas corpus* or an adequate equivalent. Nor has the State indicated why the legitimate interests it sought to advance could not be accomplished through less restrictive measures than the deprivation of liberty. The terms of the mandatory detention regime did not require an individualized determination or justification for the need to detain, and no such determination was made.

99. In light of the above, the Commission finds that the State violated Mr. Suresh's rights under Article II of the American Declaration.

VII. REPORT No. 113/14

100. On November 7, 2014, during its 153 Regular Period of Sessions, the Commission approved Report No. 113/14 on the merits of this matter, which comprises paragraphs 1 to 98 *supra*, with the following recommendations to the State:

1. That it grant Mr. Suresh integral reparations, including compensation and measures of satisfaction; and
2. That it take legislative or other measures to ensure that subjects of security certification have: access to prompt judicial oversight of their detention without delay, are not subjected to indefinite mandatory detention, and are accorded equal access to judicial review of their detention at reasonable intervals.

VIII. ACTIONS SUBSEQUENT TO REPORT No. 113/14

101. On January 15, 2015, the report was transmitted to the State with a time period of two months to inform the Inter-American Commission on the measures taken to comply with its recommendations.

102. On March 13, 2015, the State presented its response to Report 113/14, stating that, "although the American Declaration describes binding obligations, the views and recommendations of the Commission are not themselves binding."

103. The State indicated that Mr. Suresh is not entitled to any remedies, financial or otherwise because: a) he is a foreign national who had been determined to be inadmissible to Canada on the grounds of being a risk to national security, on account of his membership in the executive of a terrorist organization and his fundraising for a terrorist organization; b) financial compensation is not payable under domestic law; c) Mr. Suresh was detained for the purposes of deportation under a law that was constitutional at the time of his detention and portions of it were determined to be unconstitutional only in 2007. The State argued that when placed in its proper context, there is simply no legal or equitable basis on which he could be considered to be entitled to financial compensation.

104. The State reiterated that the security certificate provisions in the *Immigration and Refugee Protection Act* (IRPA) were significantly amended in 2007 and 2008 (Bill C-3). The State indicated that the mandatory detention

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of foreign nationals named in security certificates was eliminated, and explains that detention can only proceed pursuant to an arrest warrant, and only if the Minister of Public Safety and Citizenship and Immigration are satisfied there are reasonable grounds to believe the person is a danger to national security. The State argued that, as a result of the amendments, foreign nationals now receive treatment equal to that accorded to non-citizen permanent residents.

105. Furthermore, the State informed that Bill C-3 also amended the IRPA to provide for the appointment of a special advocate to represent the interest of a person named in a security certificate during the closed portions of the hearing. The State indicated that special advocates are security cleared lawyers who are independent from both government and the courts and are granted access to the confidential security information on the condition they do not disclose it to anybody else, including the person named in the certificate and their lawyer. In addition, the State informs that the amendments introduced a right to appeal the Federal Court´s final decision on detention reviews or reasonableness to the Federal Court of Appeal. The State indicated that, like appeals from judicial reviews in other immigration matters; the right to appeal depends on the Federal Court stating a certified question of general importance for appeal and that further appeals to the Supreme Court of Canada are possible if leave is granted.

106. The State informed that, in May 2014, the Supreme Court of Canada held that the security certificate process in its current form is constitutional and in accordance with the Canadian Charter of Rights and Freedoms. The Court held that the provisions do not violate the affected individual's right to a fair process. Moreover, the State informed that the use of security certificates remains exceptional in Canada's immigration regime, that there are currently three active cases and that none of the three individuals is detained.

107. The State also reported that Mr. Suresh is no longer subject to the security certification process and that he is currently subject of ongoing proceedings before the Immigration and Refugee Board to determine whether he is inadmissible to Canada.

108. The State concluded that it has taken adequate steps to address the situation of Mr. Suresh and to prevent violations of the rights of other individuals who are or may become subject to the security certification process. The State requested that the Commission close the case.

109. On July 13, 2015, the Commission sent the report of the State to the petitioners and requested their observations within a month. On September 18, 2015, the petitioners submitted their observations.

110. With regard to the first recommendation and the information provided by the State, the petitioners confirmed that Canadian law did not provide a basis in domestic law for reparations to be paid to Mr. Suresh for his years in detention without review because the legal regime applied to him was the operative law until the Supreme Court struck it down in its resolution of 2007 in the abovementioned case *Charkaoui vs. MCI*. The petitioners alleged that this does not negate Canada's obligation to provide just reparations in light of its obligations under the American Declaration. They also affirmed that, under the American Declaration, Canada cannot deny him reparation for being a foreign national.

111. The petitioners informed that Mr. Suresh has been found inadmissible to Canada on the basis that there are reasonable grounds to believe that he was a member of the LTTE and that the next step is to determine whether he is a danger to Canada's security or whether he engaged in acts of such nature and such severity that he ought to be returned to Sri Lanka. They reminded the Commission that, in 2002, the Supreme Court determined that he could not be returned to face torture in Sri Lanka.

112. The petitioners recapped that a) Mr. Suresh was detained on October 18, 1995; b) his detention was mandatory under the law, without regard to the need to detain him; c) he was not eligible under the law at the time for a review of his detentions until 120 days after September 17, 1997, the date a deportation order was issued against him; d) he only first became eligible to be considered for release in late January, 1998; and e) a hearing was held and he was released on March 20, 1998. They affirm that there clearly is an equitable and legal basis for financial compensation to be paid under the American Declaration.

113. With regard to the second recommendation, the petitioners informed that, since the Supreme Court found the mandatory detention unconstitutional in 2008, there is now a hearing within 48 hours after a detention and thereafter

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every 6 months, if detention is continued. That is, mandatory detention, in absolute terms, no longer exists. A Federal Court determined that while the onus to justify detention rests with the government, a person who has already had his or her detention reviewed and who was not released, must establish that there are compelling reasons to overcome prior decisions to detain.

114. The petitioners added that there remain differences in treatment with respect to detentions. Those foreign nationals and permanent residents subject to security certificates have the 48 hour/6 month reviews. All other foreign nationals and permanent residents, subject to the same allegations but before the Immigration Division of the Immigration & Refugee Board, have 48 hour/7day/30 day reviews. They argued that there is no apparent justification for the difference in frequency of review.

115. They affirmed that contrary to what the State says, there is no right to appeal the Federal Court's final decision on detention reviews or reasonableness to the Court of Appeal, because the judge must state that there is a certified question of general importance in order for the person to appeal the decision. The petitioners maintained that, in that sense, access to a Court of Appeal is a matter of discretion.

116. They informed that the Immigration Division ordered Mr. Suresh to be deported on September 16, 2015 on the basis that there are reasonable grounds to believe that he was a member of the LTTE. They indicated that he was found to have been complicit in war crimes and crimes against humanity because his lawful activities in Canada were supportive of the LTTE and he had contact with its leadership by phone. The petitioners stated that Mr. Suresh's case is not completed in Canada and that he is likely to again face deportation to Sri Lanka, notwithstanding the dangers that he faces to his life, liberty and integrity.

IX. REPORT No. 76/15

117. On October 28, 2015, during its 156 Regular Period of Sessions, the Commission approved its final Report No. 76/15 containing the final conclusions and recommendations indicated infra. As set forth in Article 47.2 of its Rules of Procedures, on November 4, 2015, the Commission transmitted the report to the parties with a time period of a month to present information on the measures taken to comply with the final recommendations. No response was received.

X. FINAL CONCLUSIONS AND RECOMMENDATIONS

118. The Commission takes note of the considerations made by the State in the sense that it will not grant Mr. Suresh reparations. It also notes that the amendments to the IRPA described by the State are from 2007 and 2008, and were already analyzed by the Commission in its Report 113/14. The Commission also notes that the petitioners claim that differences in treatment remain with respect to the frequency of the review of detention.

119. On the basis of the foregoing analysis, the Inter-American Commission reiterates its findings that the State is responsible for violating Mr. Suresh's rights under Articles II, XVIII and XXV of the American Declaration by arbitrarily depriving Mr. Suresh of his right to liberty and access to a simple, brief judicial procedure to challenge the legality of his detention. The Commission further concludes that the circumstances of Mr. Suresh's detention (as a non-resident and non-citizen of Canada) also constituted a violation of his right to equality under the law.

120. Based upon these conclusions.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES TO THE STATE OF CANADA

1. That it grant Mr. Suresh integral reparations, including compensation and measures of satisfaction; and
2. That it take legislative or other measures to ensure that subjects of security certification have: access to prompt judicial oversight of their detention without delay, are not subjected to indefinite mandatory detention, and are accorded equal access to judicial review of their detention at reasonable intervals.

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XI. PUBLICATION

121. In light of the above and in accordance with Article 47.3 of its Rules of Procedure, the IACHR decides to make this report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Inter-American Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the State of Canada with respect to the above recommendations until it determines there has been full compliance.

Done and signed in the city of Washington, D.C., on the 13th day of the month of April, 2016. (Signed): James L. Cavallaro, President; Francisco José Eguiguren, First Vice President; Margarette May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, Esmeralda E. Arosema Bernal de Troitiño and Enrique Gil Botero, Commissioners.

ENDNOTES

1 Now Article 40 of the new Rules of Procedure of the IACHR, approved by the Commission at its 137th regular period of sessions, which entered into force as of August 1, 2013.

2 Letter to the Commission of April 30, 2002.

3 Letter to the Commission of May 01, 2002.

4 Letters of May 15, 2002 to both parties; letters to the petitioners of July 12, 2002; November 04 & 26, 2002; December 23, 2002; April 10, 2003; September 11, 2003; August 09, 2007; October 24, 2007; December 05, 2007; December 26, 2007; and October 24, 2014; and letters to the State of July 11, 2002; September 23, 2002; November 04, 2002; December 23, 2002; April 10, 2003; September 11, 2003; August 09, 2007, October 24, 2007, November 12, 2007, December 05, 2007, and December 26, 2007.

5 Letters from the petitioners of July 10, 2002; April 04, 2003; March 04, 2004; October 18, 2007; November 26, 2007; and November 6, 2014; and letters from the State of September 5 & 19, 2002; November 19 & 29, 2002; August 26, 2003; October 9, 2007; and December 11, 2007.

6 Full citation: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9. Discussed below in more detail under "Established Facts."

7 Replaced by the Immigration and Refugee Protection Act (S. C. 2001, c.27), which was passed in 2001 and fully entered into force in 2002.

8 A complete discussion of the case is located below under "Established Facts."

9 Petitioners' submission dated November 26, 2007, p. 2.

10 Petitioner's submission dated November 26, 2007 provides that Mr. Suresh was "jailed for his political activities," which were "perfectly lawful" for Canadian citizens at that time. Petitioners also provided that at his appeal before the Supreme Court in 2002, no evidence was provided that Mr. Suresh had ever "engaged in violence, contributed in any way to the violent activities of others, or supported violence against civilians," and pointed to the discrepancy between the detention of Mr. Suresh, a non-citizen, and the non-detention of the treasurer of the WTM, a Canadian citizen (p. 3).

11 Petitioner's submission dated November 26, 2007, p. 3.

12 Petitioner's submission dated October 18, 2007, p. 3-5.

13 Petitioner's submission dated October 18, 2007, p. 3-5.

14 State's submission dated November 19, 2002, p. 4, 52.

15 State's submission dated October 9, 2007, paras. 5-7.

16 This is stated in the State's submission of October 9, 2007 (para. 9); and confirmed by the Petitioners in their submission of October 18, 2007. The Petitioners explain that this date is based on an interpretation of the Supreme Court's ruling that "there should be an ongoing review of the terms of release by the Federal Court; and that while the process itself is not clear, "the Supreme Court's reasons imply that the Federal Court should conduct such reviews automatically, every six months."

17 State's submission of December 11, 2007, para. 3.

18 Succeeded in 2002 by the Immigration and Refugee Protection Act (IRPA).

19 This section provides that "...where the Minister and the Solicitor General of Canada are of the opinion, based on security or criminal intelligence reports received and considered by them, that a person, other than a Canadian citizen or permanent resident, is a person described in subparagraph 19(1)(c.1)(ii), paragraph 19(1)(c.2), (d), (e), (f), (g), (j), (k) or (l) or subparagraph 19(2)(a.1)(ii), they may sign and file a certificate to that effect with an immigration officer, a senior immigration officer or an adjudicator."

20 Section 40 (2) provides that: "Where a certificate is signed and filed in accordance with subsection (1),

> (a) an inquiry under this Act concerning the person in respect of whom the certificate is filed shall not be commenced, or if commenced shall be adjourned, until the determination referred to in paragraph (4)(d) has been made; and
>
> (b) a senior immigration officer or an adjudicator shall, notwithstanding section 23 or 103 but subject to subsection (7.1), detain or make an order to detain the person named in the certificate until the making of the determination."

[Section 40 (4) (d) is reproduced within the text of para. 33.]

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21 Pursuant to Section 40 (8) of the Immigration Act: "Where a person is detained under subsection (7) and is not removed from Canada within 120 days after the making of the removal order relating to that person, the person may apply to the Chief Justice of the Federal Court or to a judge of the Federal Court designated by the Chief Justice for the purposes of this section for an order under subsection (9)."

Section 40 (9) provides that: "On an application referred to in subsection (8) the Chief Justice or the designated judge may, subject to such terms and conditions as the Chief Justice or designated judge deems appropriate, order that the person be released from detention if the Chief Justice or designated judge is satisfied that

(a) the person will not be removed from Canada within a reasonable time; and

(b) the person's release would not be injurious to national security or to the safety of persons."

22 IACHR, *Report on the Human Rights Situation of Asylum-Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, Doc. 40 rev. (February 28, 2000), para. 151.

23 This is a disputed issue in the case. As indicated, the State considers that Mr. Suresh was a member of the LTTE and that there were reasonable grounds to believe the LTTE had committed terrorist acts. Mr. Suresh has denied said membership in the LTTE although he admits a close and supportive relationship with the it. He has presented the LTTE as a national liberation movement and as the *de facto* government for the Tamils in the north and parts of the east of Sri Lanka. He has denied that it is a terrorist movement.

24 *Suresh v. R.* (1998), 38 O.R. (3d) 267; 49 C.R.R. (2d) 131; [1998] O.J. No. 296 (O.C.G.D.).

25 *Suresh v. M.C.I.*, [1999] 3 F.C.D-39.

26 *Suresh v. M.C.I.*, [2001] F.C.J. No. 732; 2001 FCA 147 (C.A.).

27 *Suresh v. M.C.I.*, [2002] S.C.J. No. 3; 2002 SCC 1, para. 20 (citing [2000] 2 F.C. 592 at paras. 31-32).

28 In the Canada Report, the Commission established:

> Pursuant to [the provisions of the security certificate regime], a person recognized as a [ ] refugee [under the 1951 Convention relating to the Status of Refugees] can be divested of that status and removed from Canada to a seemingly uncertain future. Persons with respect to whom security certificates are issued are excluded from the refugee determination process and the post-claim risk review process. For persons who have been subject to certain forms of persecution, such as torture, return to their home country would place them at a risk which is impermissible under international law. As noted above, the prohibition of torture as a norm of *jus cogens* – as codified in the American Declaration generally, and Article 3 of the UN Convention against Torture in the context of expulsion – applies beyond the terms of the 1951 Convention. The fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue.

IACHR, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System,* OEA/Ser.L/V/II.106, Doc. 40 rev. (February 28, 2000) at para. 154. *See also*, Canada Report at paras. 117-122. Report based on the IACHR's on-site visit carried out in October 1997. *See also*, IACHR, *Annual Report of the Inter-American Commission on Human Rights of 2000: Second Progress Report of the Rapporteurship on the Rights of Migrant Workers and Members of their Families*, OEA/Ser./L/V/II.111 doc. 20 rev. (April 16, 2000), para. 97(2).

29 *Suresh v. M.C.I.*, [2002] S.C.J. No. 3; 2002 SCC 1.

30 At para. 122 of its judgment, the Supreme Court of Canada held:

> *We find that a person facing deportation to torture under s. 53(1)(b) must be informed of the case to be met. Subject to privilege of similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents, this means that the material on which the Minister is basing her decision must be provided to the individual, including memoranda such as Mr. Gautier's recommendation to the Minister. Furthermore, fundamental justice requires that an opportunity be provided to respond to the case presented to the Minister. While the Minister accepted written submissions from the appellant in this case, in the absence of access to the material she was receiving from her staff and on which she based much of her decision, Suresh and his counsel had no knowledge of which factors they specifically needed to address, nor any chance to correct any factual inaccuracies or mischaracterizations. Fundamental justice requires that written submissions be accepted from the subject of the order after the subject has been provided with an opportunity to examine the material being used against him or her. The Minister must then consider these submissions along with the submissions made by the Minister's staff.*

31 No date is provided for this request, but according to Petitioners' submission dated October 18, 2007, appendix B – p. 33, a deportation order against Mr. Suresh was entered on September 17, 1997, such that the 120-day waiting period would have expired in mid-January 1998.

32 Petitioners' submission dated October 18, 2007, appendix B – p. 34 (citing *Suresh v. M.C.I.*, [1998] F.C.J. No. 385 (T.D.)).

33 Petitioners' submission dated October 18, 2007, appendix B – p. 34 (citing *Suresh v. M.C.I.*, [1998] F.C.J. No. 385 (T.D.)). The terms of his release included the following: payment of a deposit of $40,000 and a $150,000 performance bond, weekly reporting by Mr. Suresh to the Immigration Reporting Centre, requirement to notify of any change in address, requirement to remain within fifty kilometers of Toronto city limits, no direct or indirect contact with officials from WTM or LTTE, and surrender of passport and other travel documents.

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34 *Suresh v. Canada*, unreported, FCTD, Court File: IMM-1390-96.

35 *Suresh v. M.C.I.*, [2001] F.C.J. No. 732; 2001 FCA 147 (C.A.).

36 This legislation replaced the Immigration Act in 2002, but retained the same security certification and mandatory detention provisions that were originally challenged by Mr. Suresh.

37 *Charkaoui v. Canada* (Citizenship and Immigration), 2007 SCC 9.

38 *Charkaoui* at para. 5.

39 *Charkaoui* at para. 28-29.

> *The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process . . . This principle emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on a motion of* habeas corpus*, [and] remains [] fundamental to our modern conception of liberty. This basic principle has a number of facets [including the right to a hearing]. It requires that the hearing be* before an independent and impartial magistrate*. It demands a* decision by the magistrate on the facts and the law*. And it entails the r*ight to know the case put against one*, and the* right to answer that case*. Precisely how these requirements are met will vary with the context. But for s. 7 to be satisfied, each of them must be met in substance (emphasis in original).*

40 *Charkaoui* at para. 91.

41 *Charkaoui* at para. 93.

42 Section 15 (1)of the Canadian Charter provides that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

43 Section (1) provides: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

44 As provided by s. 6 of the Charter.

45 *Charkaoui* at para. 130.

46 *Charkaoui* at paras. 130-31 (distinguishing the House of Lords case from the appeal before it).

47 *Charkaoui* at paras. 110-116, 123.

48 *Charkaoui* at paras. 139-40.

49 The parties agree that Mr. Suresh was eligible to apply to have his certificate quashed on or after February 23, 2008.

50 *Charkaoui* at para. 140.

51 *See* I/A Court H.R., I*nterpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 37 (pointing out that in determining the legal status of the American Declaration, it is appropriate to look to the Inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948). *See also* ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31 stating that "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation").

52 I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114 (*citing, inter alia*, the decisions of the European Court of Human Rights in *Tryer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), and *Louizidou v. Turkey* (1995)).

53 *See* IACHR, *Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, Doc. OEA/Ser.L/V/II.106, Doc. 40 rev. (February 28, 2000), para. 38; IACHR, *Garza v. United States*, Case No. 12.275, Annual Report of the IACHR 2000, paras. 88-89.

54 IACHR, Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al*, United States, April 4, 2001, paras 178-183.

55 This legislation replaced the Immigration Act in 2002, but retained the same security certification and mandatory detention provisions that were originally challenged by Mr. Suresh.

56 Section 9 of the Canadian Charter provides that: "Everyone has the right not to be arbitrarily detained or imprisoned."

57 Section 10 (c) of the Canadian Charter provides that: "Everyone has the right on arrest or detention (. . .) c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful."

58 IACHR, Annual Report of 2001, Chapter VI, Third Progress Report of the Rapporteurship on Migrant Workers and Their Families, OEA/Ser./L/V/II.114 doc. 5 rev., April 16, 2001, para. 61.

59 IACHR, *Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, Doc. OEA/Ser.L/V/II.106, Doc. 40 rev. February 28, 2000, para. 115; IACHR, Merits Report No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico), April 13, 1999, para. 212.

60 *See* Yoram Dinstein, *Right to Life, Physical Integrity, and Liberty*, *in The International Bill of Rights – The Covenant On Civil And Political Rights, paras.* 114, 128 (Louis Henkin ed., 1981.)

61 IACHR, *Report on Immigration in the United States: Detention and Due Process,* OEA/Ser.L/V/II. Doc. 78/10 (December 30, 2010), para. 34. For a more in-depth examination of the principle of the exceptionality of deprivation of liberty under international human rights law, see: IACHR, Merits Report No. 86/09, Case 12.553, Jorge, José and Dante Peirano Basso (Eastern Republic of Uruguay), August 6, 2009, paras. 93 et seq.; IACHR, Admissibility and Merits Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al. (The Mariel Cubans) (United States)*. April 4, 2001, paras. 216-219. *See generall*y I/A Court H.R., *Case of Nadege Dorzema et al. v. Dominican Republic*. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251, paras. 124-144; I/A Court H.R., *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations and

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Costs. Judgment of November 23, 2010. Series C No. 218, para. 166. Other cases in which the Inter-American Court has elaborated upon the principle that any deprivation or restriction of the right to personal liberty must be exceptional in nature, see: *Case of Yvon Neptune v. Haiti*. Merits, Reparations and Costs. Judgment of May 6, 2008. Series C No. 180, para. 98; *Case of Chaparro Álvarez y Lapo Iñiguez v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 93, and *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 129.

62 IACHR, Admissibility and Merits Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al*. (The Mariel Cubans) (United States). April 4, 2001, para. 219.

63 IACHR, *Report on Immigration in the United States: Detention and Due Process*. OEA/Ser.L/V/II. Doc. 78/10, December 30, 2010, paras. 219, 221, and 242.

64 IACHR, *Report on Immigration in the United States: Detention and Due Process*. OEA/Ser.L/V/II. Doc. 78/10, December 30, 2010, paras. 219, 221, and 242.

65 Canada's submission to the IACHR dated August 26, 2003, paras. 6, 9 (citing Justice Teitelbaum of the Federal Court – Trial Division in *Re Suresh*, March 20, 1998, Court File No. DES-3-95 in upholding the finding he made on August 29, 1997 that there were "reasonable grounds to believe that Mr. Suresh was and is a member of the LTTE" and that "Suresh had been a dedicated and trusted member in a leadership position with the LTTE").

66 *See* United Nations General Assembly, Human Rights Council, Report of the Working Group on Arbitrary Detention, A/HRC/10/21 (February 16, 2009), paras. 50-55.

67 Referring to instances in which the detention is for motives other than the purpose of serving a criminal sanction or penalty. *See generally* I/A Court H.R., *Case of Vélez Loor vs. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, para. 117.

68 *See generally* I/A Court H.R., *Case of Vélez Loor vs. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, para. 117; *see also* United Nations, Working Group on Arbitrary Detention, Report of the Group, Annex II, Deliberation no. 5, Situation regarding immigrants or asylum-seekers, 1999, E/CN.4/2000/4, Principle 7.

69 IACHR, *Report on the Human Rights Situation of Asylum-Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, Doc. 40 rev. (February 28, 2000), para. 148.

70 IACHR, *Report on the Human Rights Situation of Asylum-Seekers within the Canadian Refugee Determination System*, para. 146.

71 IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, at paras. 378-89; IACHR, Admissibility and Merits Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al*. (United States of America), April 4, 2001, paras. 212-213, 219-221, 226, 228, 230.

72 The application of habeas corpus and similar remedies plays a fundamental role in, *inter alia*, protecting against arbitrary arrest and unlawful detention, and clarifying the situation of missing persons. Such remedies, moreover, may "forestall opportunities for persons exercising power over detainees to engage in torture or other cruel, inhuman or degrading treatment or punishment." UN General Assembly Resolution 34/178 (1979)(commemorating 300th anniversary of act giving writ of habeas corpus statutory force).

73 Article 9 of the International Covenant on Civil and Political Rights (ICCPR):

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

74 UNHRC Communication No. 1051/2002, Canada.15/06/04, CCPR/C80/D/1051/2002 (Mansour Ahani) at para. 10.2.

75 Immigration Act of 1976, s. 40.1(3).

76 *See generally* IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 (October 2002); IACHR, Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al*, United States, April 4, 2001.

77 The Inter-American Court of Human Rights has established that habeas corpus is a non-derogable right within the IAHRS, as are the rule of law and the principle of legality. IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 (October 2002), para. 52.

78 IACHR, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, Doc. 40 rev. (2000), para. 150 (citing, generally, Eur. Ct. H.R., Hussain v. United Kingdom, Reports 1996-I No. 4, 22 E.H.R.R. 1 (1996) at para. 61).

79 IACHR, Merits Report No. 84/09, Case 12.525, *Nelson Ivan Serrano Saenz* (Ecuador), August 6, 2009, paras. 46-47; IACHR, Merits Report No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico), April 13, 1999, para. 39.

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80 IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 (October 2002), para. 143 (citing IACHR, Merits Report N° 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico), April 13, 1999; Eur. Court H.R., Brannigan v. United Kingdom, May 26, 1993, Ser. A 258-B, para. 58). *See also* IACHR, Merits Report No. 136/11, Case 12.474, *Pacheco Tineo Family* (Bolivia), October 31, 2011, paras. 114-116; IACHR, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II., Doc. 78/10 (December 30, 2010), para. 57; IACHR, Merits Report No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz* (Mexico), April 13, 1999, para. 70 (addressing the requirements of procedural fairness in the context of deportation proceedings).

81 IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 (October 2002), para. 22.

82 Annual Report of the IACHR 1990-91, Ch. V, Part II, at 512. Full respect for the rule of law and fundamental human rights has been explicitly recognized by OAS member states as a necessary requirement for efforts to combat terrorism. See, e.g., OAS General Assembly Resolution AG/RES. 1043 (XX-0/90), OAS GA twentieth regular session, 1990; Inter-American Convention Against Terrorism, Preamble, Article 15.

83 Inter-American Convention against Terrorism, adopted by the 32nd Regular Session of the OAS General Assembly (entered into force July 10, 2003). Canada ratified the Convention on December 2, 2002.

84 Inter-American Convention against Terrorism, Articles 4-5.

85 IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 (October 2002), para. 35-36.

86 IACHR, *Report on the Situation of Human Rights in Paraguay*, OEA/Ser.L/V/II.43 Doc. 13 corr. 1, p. 18, 31 Jan. 1978. *See generally*, I/A Court H.R., *Neira Alegria Case*, Judgment of Jan. 19, 1995, Ser. C No. 20, paras. 75-77 (finding violation under corresponding provision of the American Convention in the case of decrees in effect suspending the right to habeas corpus); Eur. Ct. H.R., A*muur v. France*, 22 E. H.R.R. 533 (1996) at para. 53, (finding violation of right to seek judicial review of the legality of detention where a lacuna in the applicable law left asylum seekers without access to such review for 17 days).

87 IACHR, *Report on the Situation of Human Rights in Argentina,* OEA/Ser. L/V/II.49 Doc. 19, p. 26-27, 11 April 1980. *See*, *e.g.,* IACHR, *Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.53, doc. 22, 1981, pp. 15-18; IACHR, Ten Years of Activities 1971-81 (1982) pp. 341-42; IACHR, Resolution on the Protection of Human Rights in Connection with the Suspension of Guarantees or 'State of Seige,' 12 Sept. 1968.

88 IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 (October 2002), para. 139.

89 *See* UN Human Rights Committee, General Comment 8/16, in "Compilation," paras. 1, 4 (concerning the significance of right to review in context of the deprivation of liberty outside of the criminal justice context).

90 *See generally*, Eur. Ct. H.R., *Hussain v. United Kingdom*, Reports 1996-I No. 4, 22 E.H.R.R. 1 (1996) at para. 54; *See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988). Principle 11 stipulating right to review of legality of detention and requirement that continuation of detention be subject to appropriate review.

91 *Mansour Ahani v. Canada*, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004).

92 Article 9 (4). Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

93 Following Mr. Ahani's certification and detention in July 1993, he opted to challenge the constitutionality of section 40. 1, rather than participate in the hearing to determine the reasonableness of the security certificate. Mr. Ahani's challenge was dismissed at first instance, and ultimately by the Federal Court of Appeal and the Supreme Court of Canada in July 1997. Following this constitutional litigation, the "reasonableness" hearing was concluded in April 1998, with a finding that the ministerial certificate was reasonable. Thereafter, in April 1998, an immigration adjudicator determined that Mr. Ahani was inadmissible to Canada, and ordered his deportation.

On August 12, 1998, the Minister of Citizenship and Immigration, following representations by Mr. Ahani that he faced a clear risk of torture in Iran, determined, without a reasoned justification and on the basis of a memorandum attaching Ahani's submissions, other relevant documents, and a legal analysis by officials, that Ahani (a) constituted a danger to the security of Canada and (b) could be removed directly to Iran. Mr. Ahani applied for judicial review of the Minister's opinion. Pending the hearing of the application, he applied for release from detention pursuant to section 40(1)(8) of the Act, as 120 days had passed from the issue of the deportation order against him. On March 15, 1999, the Federal Court finding reasonable grounds to believe that his release would be injurious to the safety of persons in Canada, particularly Iranian dissidents denied the application for release. The Federal Court of Appeal upheld this decision.

On June 23, 1999, the Federal Court rejected Mr. Ahani's application for judicial review of the Minister's decision, finding there was ample evidence to support the Minister's decision that the author constituted a danger to Canada and that the decision to deport him was reasonable. On January 11, 2001, the Supreme Court unanimously rejected the author's appeal, finding that there was "ample support" for the Minister to decide that Mr. Ahani was a danger to the security of Canada. Mr. Ahani was ultimately deported to Iran on June 10, 2002.

94 *Mansour Ahani v. Canada*, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004), para. 10.2.

95 IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106 Doc 40.rev (February 28, 2000), para. 96.

96 IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106 Doc 40.rev (February 28, 2000), para. 96 (citing IACHR, Report No. 51/96, Annual Report of the IACHR 1996, p. 550, paras. 177-178). *See also* IACHR, Merits Report No. 51/96, Case 10.675, *Haitian Boat People* (United States of America), March 13, 1997, para. 174 (establishing that the right to equal protection of the law is a right that "attaches in the application of a substantive right without discrimination, and not that the substantive aspects of the law will [necessarily] be the same for everyone").

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97 I/A Court H.R., Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 56. *See also* IACHR, Admissibility and Merits Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al. (The Mariel Cubans) (United States)*. April 4, 2001, para. 238. Also, *see generally* Eur. Ct. H.R., *Belgian Linguistics Case*, July 23, 1968, Series A N° 6, 1 E.H.R.R. 252, p. 35, para. 10.

98 I/A Court H.R. Advisory Opinion OC-4/89 (*supra*) at para. 57.

99 IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, OEA/Ser.L/V/II. Doc 48/13 (December 30, 2013) at para. 580 (citing the United Nations Human Rights Committee, "General Comment No. 15: The position of aliens under the Covenant" in: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty. HRI/GEN/1/Rev.9 (Vol.I), 2008, p. 189).

100 *See e.g., Amuur Case* at para. 41.

101 IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, OEA/Ser.L/V/II. Doc 48/13 (December 30, 2013) at paras. 580-81 ("the rights recognized in the Inter-American instruments apply to all persons, regardless of their nationality, their immigration status, statelessness or any other social condition").

102 IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 (October 2002), para. 411.

103 IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 (October 2002), para. 411; IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, OEA/Ser.L/V/II. Doc 48/13 (December 30, 2013) at para. 358.

104 *Ahani v Canada*, Federal Court of Canada (Trial Division), Mr. Justice McGillis, September 12, 1995.

105 Petitioner's submission dated November 26, 2007, p. 3.

106 Government of Canada, Public Safety Canada, "Listed Terrorist Entities: Currently Listed Entities," http://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-eng.aspx#2047.

107 Section 15 (1) of the Canadian Charter provides that: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

108 In *Charkaoui v. Canada*, the Supreme Court of Canada contrasted its decision with that of the House of Lords in *A (FC) and others (FC)* (Appellants) *v. Secretary of State for the Home Department* (Respondent) [2004] UKHL 56, in which the appellants (non-British nationals) were certified under Britain's Anti-terrorism, Crime and Security Act of 2001 and immediately subjected to mandatory indefinite detention. Under this legislation, only non-British nationals were liable to being certified and detained indefinitely. With reference to the European Convention on Human Rights, the House of Lords found that this regime of certification and detention wrongly discriminated between nationals and non-nationals. One of the law lords, Lord Hope of Craighead noted at paragraph 132 of *A and others*:

> *I would hold that the indefinite detention of foreign nationals without trial has not been shown to be strictly required, as the same threat from British nationals whom the government is unable or unwilling to prosecute is being met by other measures which do not require them to be detained indefinitely without trial. The distinction which the government seeks to draw between these two groups - British nationals and foreign nationals - raises an issue of discrimination. But, as the distinction is irrational, it goes to the heart of the issue about proportionality also. It proceeds on the misconception that it is a sufficient answer to the question whether the derogation is strictly required that the two groups have different rights in the immigration context. So they do. But the derogation is from the right to liberty. The right to liberty is the same for each group. If derogation is not strictly required in the case of one group, it cannot be strictly required in the case of the other group that presents the same threat.*

109 The obligation of non-discrimination is non-derogable under international human rights law and international humanitarian law. IACHR, *Report on Terrorism and Human Rights,* OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, para. 351.

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