

A Human Rights Approach to National Security Confidentiality

Submission to the Commission of Inquiry
Into the Actions of Canadian Officials in
Relation to Maher Arar, made Pursuant to Section 37
of the Draft Rules of Procedure and Practice

Amnesty International Canada

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Pursuant to Section 37 of the Draft Rules of Procedure and Practice, these are the submissions of Amnesty International Canada regarding the principles that should be applied with respect to whether information and evidence should be heard *in camera* or in public.

PROCEDURAL CONTEXT

Pursuant to the Order-in-Council creating the Arar Inquiry, the Commissioner is directed:

in conducting the inquiry, to take all steps necessary to prevent disclosure of information that, if it were disclosed to the public, would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security and, where applicable, to conduct the proceedings in accordance with the following procedures, namely,

(i) on the request of the Attorney General of Canada, the Commissioner shall receive information *in camera* and in the absence of any party and their counsel if, in the opinion of the Commissioner, the disclosure of that information would be injurious to international relations, national defence or national security,

(ii) in order to maximize disclosure to the public of relevant information, the Commissioner may release a part or a summary of the information received *in camera* and shall provide the Attorney General of Canada with an opportunity to comment prior to its release, and

(iii) if the Commissioner is of the opinion that the release of a part or a summary of the information received *in camera* would provide insufficient disclosure to the public,

he may advise the Attorney General of Canada, which advice shall constitute notice under section 38.01 of the Canada Evidence Act.

The expression “injurious to international relations, national defence or national security” (hereafter “national security justification”) is not defined in the Order-in-Council. Thus, this provision extends to the Commissioner the discretion to decide what information meets the national security justification

Amnesty International submits that several principles should guide the Commissioner’s exercise of discretion.

GUIDING PRINCIPLES

The central principle guiding National Security Confidentiality (hereafter “NSC”) determinations made in the course of the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (hereafter “the Inquiry”) must be disclosure and public accessibility. Thus, to the maximum extent possible all aspects of the Inquiry must be accessible both to Mr. Arar and to the general public. In a case such as Mr. Arar’s, where the confidence of Canadians in ensuring equality in law enforcement and the administration of justice is at stake, openness and transparency is of critical importance.

Amnesty International submits that this openness is supported by both domestic and international principles governing access to government information, and by international human rights law.

LEGAL PRINCIPLES FAVOURING MAXIMUM DISCLOSURE

- A. **In Assessing Whether A National Security Confidentiality Claim Is Proper, The Commissioner Should Be Mindful Of Domestic Legal Standards On Information Disclosure**

1. The Expression “Injurious To International Relations, National Defence Or National Security” Is Not *Sui Generis*

The expression “injurious to international relations, national defence or national security” is not alien to Canadian law. While the terminology is not identical, the phrase maps relatively closely the national security-related disclosure exemption found in the *Access to Information Act*, R.S.C. 1985, c. A-1 (“Access Act”) and the *Privacy Act*, R.S.C. 1985, c. P-21.

Characterized by the Supreme Court of Canada in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3 at para. 5, as a “national security” exemption, s.15 of the Access Act (and s.21 of the *Privacy Act*) allow the government to resist disclosure of any record requested under the Acts “that contains information the disclosure of which could *reasonably be expected* to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities” (emphasis added).

The terms of “defence of Canada or any state allied or associated with Canada” is defined as including the efforts of Canada and of foreign states “toward the detection, prevention or suppression of activities of any foreign state directed toward actual or potential attack or other acts of aggression against Canada or any state allied or associated with Canada.” Meanwhile, “subversive or hostile activities” means

espionage against Canada or any state allied or associated with Canada, ... sabotage, ... activities directed toward the commission of terrorist acts, including hijacking, in or against Canada or foreign states, ... activities directed toward accomplishing government change within Canada or foreign states by the use of or the encouragement of the use of force, violence or any criminal means, ... activities

directed toward gathering information used for intelligence purposes that relates to Canada or any state allied or associated with Canada, and ... activities directed toward threatening the safety of Canadians, employees of the Government of Canada or property of the Government of Canada outside Canada.

Section 15 enumerates a non-exhaustive list of circumstances that properly fall within this exemption. Each of the listed examples has a clear focus on preserving Canada from a threat of violence or physical harm. *See* Appendix 1 for the full text of Section 15 of the Access Act.

The exception to this observation involves examples of what the Act appears to mean by “international relations,” such as diplomatic correspondence. However, for reasons set out below, Amnesty International submits that, in the context of the Inquiry, the reference to “international relations” must be read narrowly to include only information respecting threats of violence or physical harm.

2. At A Minimum, Information Is Not Entitled To NSC If It Would Be Disclosed Under the Access Or Privacy Acts

Amnesty International submits that in reviewing NSC claims, at a bare minimum, the Commissioner should not allow non-disclosure where it could not be justified under the national security-related exemption to the Access and Privacy Acts.

Amnesty International submits that it would strain credulity to bar from public disclosure under the Inquiry information that would be accessible to Mr. Arar under the *Privacy Act* or any person making a request under the Access Act. Put another way, NSC claims should not be more constraining of access and disclosure than would be the Access or Privacy Acts.

Several principles applicable to NSC reviews flow from this submission. First, as noted, s.15 may only be employed by the government to deny access where disclosure is “reasonably” expected to cause the national security injury. In other words, at the very least, the Commissioner should allow disclosure where they the government has not demonstrated at least a reasonable expectation of injury.

Second, because NSC claims should be no more limiting than the national security-related Access or Privacy Act exemptions, Amnesty International submits that the objectives and principles guiding the Access Act apply equally to the Commission in reviewing NSC claims. Specifically, pursuant to s.2, the express purpose of the Access Act is “to extend the present laws of Canada to provide a *right of access to information* in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.”

The key provision of the Access Act, s. 4, provides that every Canadian citizen and permanent resident “has a *right to and shall, on request, be given access* to any record under the control of a government institution,” subject to other sections in the Act.

In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, paragraph 61, Mr. Justice LaForest (writing in dissent, though not on this point), held that the “overarching purpose of access to information legislation [...] is to facilitate democracy.” In, *Canada (Attorney General) v. Canada (Information Commissioner)*, [2004] F.C. 431, at para. 22, the Federal Court explained this purpose as follows: “The legislation [facilitates democracy] by insuring that citizens are properly informed so as to be able to participate

meaningfully in the democratic process and by insuring that politicians and bureaucrats remain accountable to citizens.”

Thus, exemptions to access are to be construed narrowly. As the Federal Court of Appeal put it in *Rubin v. Canada (Minister of Transport)*, [1998] 2 F.C. 430 at para. 23,

...all exemptions must be interpreted in light of [the purpose clause]. That is, all exemptions to access must be limited and specific. This means that where there are two interpretations open to the Court, it must, given Parliament's stated intention, choose the one that infringes on the public's right to access the least. It is only in this way that the purpose of the Act can be achieved. It follows that an interpretation of an exemption that allows the government to withhold information from public scrutiny weakens the stated purpose of the Act.

Similarly, in *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, [1989] 1 F.C. 265, 274, 276 (F.C.A.), Mr. Justice Heald J. (with whom Urie J.A and Stone J.A. concurred) held:

... When it is remembered that subsection 4(1) of the Act confers upon every Canadian citizen and permanent resident of Canada a general right to access and that the exemptions to that general rule must be limited and specific, I think it clear that Parliament intended the exemptions to be interpreted strictly.

...

The general rule is disclosure, the exception is exemption and the onus of proving the entitlement to the benefit of the exception rests upon those who claim it.

In *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110, 128-9, the Federal Court of Appeal held that courts were to give the same kind of “liberal and purposive construction” to the interpretation of the public right to access that they give to statutory rights to be free from discrimination. In the Court’s words, “...Parliament intended the Act to apply liberally and broadly with the citizen's right of

access to such information being denied only in limited and specific exceptions.” The Federal Court has since referred to the Access Act as “quasi-constitutional” in nature. *See Canada (Attorney General) v. Canada (Information Commissioner)*, [2002] 3 F.C. 630, at para. 41 (F.C.).

In light of these principles, Amnesty International submits that the Commission must engage in an aggressive, probing test of any claim of NSC, with the onus of showing the reasonableness of the national security justification falling exclusively on the party seeking NSC status. Any doubts as to the legitimacy of such a claim should be resolved in favour of disclosure.

Moreover, for reasons set out below, Amnesty International further submits that international principles provide guidance to the Commissioner on how to conduct this probing of NSC claims.

B. International Standards Circumscribe The Circumstances In Which National Security Can Legitimately Be Employed To Deny Access

1. International Standards On Access To Information Supply Criteria For Measuring The Legitimacy Of National Security Confidentiality Claims

Article 19 of the Universal Declaration of Human Rights (UDHR) provides that “[e]veryone has the right to freedom of opinion and expression; this right includes the right to ... *seek and impart information* and ideas through any media and regardless of frontiers.” Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. As the UN Special Rapporteur on freedom of expression has noted, this provision creates a right to disclosure of information. Report of the Special Rapporteur,

Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63 (18 January 2000).¹

The Universal Declaration of Human Rights has legal force as customary international law. *See Statement 95/1 Notes For An Address By The Honourable Christine Stewart, Secretary Of State (Latin America And Africa), At The 10th Annual Consultation Between Non-Governmental Organizations And The Department Of Foreign Affairs And International Trade*, Ottawa, Ontario, January 17, 1995 (“...Canada regards the principles of the Universal Declaration of Human Rights as entrenched in customary international law binding on all governments”); *Alvarez-Machain v. United States*, 331 F.3d 604, 618 (9th Cir. 2003) (“We have recognized that the Universal Declaration, although not binding on states, constitutes ‘a powerful and authoritative statement of the customary international law of human rights’”), citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

As customary international law, the UDHR is part of the common law of Canada, and thus should be taken into account by the Commissioner. *See Jose Pereira E Hijos S. A. v. Canada (Attorney General)*, [1997] 2 F.C. 84 at para. 20 (F.C.T.D.) (“The principles concerning the application of international law in our courts are well settled ... One may sum those up in the following terms: accepted principles of customary international law are recognized and are applied in Canadian courts, as part of the domestic law unless, of course, they are in conflict with domestic law. In construing domestic law, whether

¹ *See* para. 42-44: “the Special Rapporteur wishes to state again that the right to seek, receive and impart information is not merely a corollary of freedom of opinion and expression; it is a right in and of itself. As such, it is one of the rights upon which free and democratic societies depend. It is also a right that gives meaning to the right to participate which has been acknowledged as fundamental to, for example, the realization of the right to development” and noting “[p]ublic bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; ‘information’ includes all records held by a public body, regardless of the form in which it is stored.”

statutory or common law, the courts will seek to avoid construction or application that would conflict with the accepted principles of international law”).

Meanwhile, Article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by (and thus directly binding on) Canada,² also provides that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to *seek, receive and impart information and ideas of all kinds*, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (emphasis added). This right is subject *only* to such restrictions “as are provided by law and are necessary,”

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The expression “national security” is not defined in this instrument, creating ambiguity as to when it may be employed to justify constraints on disclosure. In response to this problem, experts on the topic proposed, in 1995, the *Johannesburg Principles: National Security, Freedom of Expression and Access to Information*.

These Principles have since been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression. *See* Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1996/39 (22 March 1996) at para. 145 (“the Special Rapporteur recommends that the Commission on Human Rights endorse the Johannesburg Principles on National

² See UN Treaty Database, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty7.asp>.

Security, Freedom of Expression and Access to Information, which are contained in the annex to the present report and which the Special Rapporteur considers give useful guidance for protecting adequately the right to freedom of opinion, expression and information”).

They have also been invoked by the UN Human Rights Commission in the preamble of many of its resolutions (each time, during years in which Canada was a member).³ Finally, the Principles have been cited with a measure of approval by the House of Lords in *Secretary of State for the Home Department v Rehman*, [2003] 1 AC 153 *per* Lord Slynn (referring to the Johannesburg Principles and then indicating that “[i]t seems to me that the appellant is entitled to say that ‘the interests of national security’ cannot be used to justify any reason the Secretary of State has for wishing to deport an individual from the United Kingdom. There must be some possibility of risk or danger to the security or well-being of the nation which the Secretary of State considers makes it desirable for the public good that the individual should be deported”).

In their material parts, the Johannesburg Principles read:

Principle 1: Freedom of Opinion, Expression and Information

...

(b) Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.

³ See United Nations Human Rights Commission, The right to freedom of opinion and expression, Resolution 2003/42 (“*Recalling* the Johannesburg Principles on National Security, Freedom of Expression and Access to Information adopted by a group of experts meeting in South Africa on 1 October 1995 (E/CN.4/1996/39, annex”); UN Human Rights Commission, Resolution 2002/48 (same); UN Human Rights Commission, Resolution 2001/47 (same); UN Human Rights Commission, Resolution 2000/38 (same); UN Human Rights Commission, Resolution 1999/36 (same); UN Human Rights Commission, Resolution 1998/42 (same); UN Human Rights Commission, Resolution 1997/27 (same).

(c) The exercise of the rights provided for in paragraph (b) may be subject to restrictions on specific grounds, as established in international law, including for the protection of national security.

(d) No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.

...

Principle 1.2: Protection of a Legitimate National Security Interest

Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

Principle 1.3: Necessary in a Democratic Society

To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

(a) the expression or information at issue poses a serious threat to a legitimate national security interest;

(b) the restriction imposed is the least restrictive means possible for protecting that interest; and

(c) the restriction is compatible with democratic principles.

Principle 2: Legitimate National Security Interest

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

...

See Appendix II for the full text of the Johannesburg Principles.

Amnesty International submits that these international principles set out in the UDHR and the ICCPR, as further refined in the Johannesburg Principles, should guide the Commissioner's assessment of NSC claims.

Amnesty International emphasizes that the test for a "legitimate" national security interest, as defined in the Principles, is very narrow: its genuine purpose and demonstrable effect must be to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

There is, therefore, no international legal standard permitting the government to refuse disclosure of information that relates solely to a country's international relations that is not also connected to protecting the country from force or violence.

2. The Substantive Human Rights Context Of The Inquiry Enhances The Need For National Security Exemptions To Be Carefully Scrutinized

Amnesty International further submits that, given the particular context of the Inquiry, the Commissioner's NSC determinations must be firmly grounded in

international human rights law, and that the Johannesburg Principles, as a result, must be applied with particular rigour.

A human rights-based approach to NSC is necessary to ensure that Canada's binding human rights obligations are upheld. Putting human rights first reinforces both justice and security. National security policies that undermine or violate human rights standards are ultimately both unjust and insecure. This fundamental principle is important not only in Canada but also universally. A strong endorsement by this Commission of the vitally important role of human rights in security laws, policies and practices will have positive global impact.

Thus, Amnesty International submits that NSC determinations must consider closely whether the information might shed light on alleged human rights violations suffered by Mr. Arar or any other individual.

International human rights law has clear limitations as to when concerns about national security can serve as justification for the violation or infringement of binding human rights standards. In this Inquiry the two human rights concerns most central to what Mr. Arar experienced are the protection against torture and the protection against arbitrary arrest and detention.

Amnesty International submits that the Inquiry should prioritize these human rights principles in deciding whether information regarding the commission of human rights abuses should be shielded from disclosure.

a. The Protection Against Torture

The right not to be subjected to torture, including the right not to be sent to a country where there are substantial grounds for believing that torture would occur, is

absolute. Under international law, no justification, including national security concerns, is recognized. The UN Convention against Torture states, in article 2(2):

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

In 2000, the UN Committee against Torture explicitly reminded Canada about the absolute ban on sending an individual to face a substantial risk of torture in another country:

59. The Committee recommends that the State party:

(a) Comply fully with article 3, paragraph 1, of the Convention prohibiting return of a person to another State where there are substantial grounds for believing that the individual would be subjected to torture, whether or not the individual is a serious criminal or security risk; ...

Concluding observations of the Committee against Torture: Canada, 22/11/2000, A/56/44, paras. 54-59.

The International Covenant on Civil and Political Rights, in article 4, also establishes that the protection against torture is one of a number of obligations from which a state is never permitted to derogate.

International law thus establishes that national security cannot serve as a justification for committing torture or for returning an individual to another country where there are substantial grounds for believing he or she would be tortured. Amnesty International submits that, likewise, national security cannot serve as a justification for maintaining the confidentiality of information that may explain how and why an individual was sent to a country where he or she was tortured, and that may identify who bears responsibility for that wrongdoing.

Such information must, at a minimum, be disclosed to the individual concerned, in this case Mr. Arar.

b. The Protection Against Arbitrary Arrest And Detention

At international law, the right to be protected from arbitrary arrest and detention is most clearly articulated in article 9 of the International Covenant on Civil and Political Rights, dealing with the right to liberty and security of the person. Article 9 is one of the provisions from which the Covenant does permit derogation, pursuant to Article 4. However, such derogation is allowed only if lawfully proclaimed and if necessary due to a “public emergency which threatens the life of the nation.” This is clearly and intentionally a very high standard and would permit derogation in only very exceptional circumstances.

For the same reasons as set out above in relation to torture, Amnesty International submits that Article 9 justifies full disclosure of information to at least Mr. Arar explaining how or why an individual was subjected to arbitrary arrest and detention, and who bears responsibility for that detention. In light of Article 4, non-disclosure may only be justified by a “public emergency which threatens the life of the nation.”

c. Information Obtained Through Or Which May Result In Human Rights Abuses Or Other Harm

Amnesty International submits that in addition to the principles outlined above, the Commissioner must adopt an approach that carefully considers whether information for which NSC status is sought was either obtained through, or may result in, human rights abuses or other harm.

Throughout four decades of human rights monitoring and reporting Amnesty International has documented a consistent and commonplace worldwide pattern of torture

being used to extract information and confessions from individuals. That practice is in clear contravention of international human rights standards. Law enforcement and security experts have also highlighted that information obtained under torture is inherently unreliable.

Amnesty International urges that all information, much of which may well originate from sources outside Canada, be considered closely to assess the likelihood that it may have been obtained through torture. If the information was obtained from an individual who was in detention, that assessment should take into account human rights reports regarding the prevalence of torture in that detention center.

If it appears that information was likely obtained under torture it should be fully disclosed and should not be eligible for NSC status.

Amnesty International is also aware that the disclosure of some information may expose third parties, such as security agents and sources, to possible human rights abuses and other harm. Non-disclosure of information in this context would be consistent with Article 19 of the ICCPR, and its reference to non-disclosure to protect the rights of individuals. Thus, if such a risk is clearly established, measures should be taken, including through limitations on the disclosure of the information, to guard against such abuses or harm occurring.

CONCLUSION

Amnesty International summarizes its submissions as follows:

First, the expression “injurious to international relations, national defence or national security” is not alien to Canadian law. Amnesty International submits that in reviewing National Security Confidentiality Claims, at a bare minimum, the

Commissioner should not allow such claims where they could not be justified under the national security-related exemptions to the Access and Privacy Acts. These national security exemptions require non-disclosure only where reasonably necessary to confront (almost exclusively) the existence or threatened existence of harm or violence.

In assessing the reasonable necessity of non-disclosure, Amnesty International submits that the objectives and principles guiding the Access Act apply equally to the Commission in reviewing NSC claims. These principles require the Commissioner to engage in a probing test of any claim of NSC, and any doubts as to the legitimacy of such a claim should be resolved in favour of disclosure.

However, Amnesty International further submits that international principles require this testing of claims to be more rigorous than simply Canadian information law requires.

First, customary and conventional international law create international legal obligations on Canada obliging disclosure. Restrictions are permitted only “as are provided by law and are necessary,” *inter alia*, “[f]or the protection of national security.” The authoritative Johannesburg Principles provide guidance on how this national security exception should be interpreted.

Pursuant to these Principles, no National Security Confidentiality claim should be permitted unless the government can demonstrate that, first, it is *necessary* in a democratic society and, second, that non-disclosure is motivated by a *legitimate* national security interest.

More specifically, to establish that a National Security Confidentiality claim is necessary in a democratic society, a government must show, at minimum, that disclosure

poses a serious threat to the legitimate national security interest and also that the non-disclosure sought is the least restrictive means possible for protecting that interest.

To meet the test of a legitimate national security interest, a NSC claim must have, as its genuine purpose and demonstrable effect, protection of Canada's, or an allied country's, existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. A National Security Confidentiality claim may not be justified on the ground of national security if its genuine purpose or demonstrable effect is to protect interests unrelated to national security; including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions. Moreover, a claim of NSC status on the grounds of "international relations" not tied to the sorts of harms anticipated in the definition of a legitimate national security interest does not, in Amnesty International's submission, comply with international standards.

Further, Amnesty International submits that the Johannesburg Principles must be applied with particular rigour, given the human rights-related focus of the Commission and in light of Canada's international human rights obligations.

Thus, if the information claimed as confidential appears to have been obtained as a result of human rights violations, such as torture, a legitimate national security interest is not engaged and non-disclosure is not consistent with a democratic society. Disclosure should be automatic. Only if disclosure would expose a third party to the risk of human rights abuses or other harm, should disclosure be limited.

Further, if the information is of probative value in understanding how and why Mr. Arar may have experienced human rights violations, and who may have been responsible, the question of disclosure should be determined in a manner consistent with the human rights principles enunciated in international human rights law, binding on Canada. These principles favour disclosure. Any other approach risks undermining critical international human rights obligations.

International human rights treaties, drafted and ratified by governments including Canada, have carefully considered the balance between rights and other imperatives, including national security. That balance recognizes some rights, such as the protection against torture as absolute, and allows infringements of other rights, such as the protection against arbitrary arrest and detention, but only in exceptional circumstances. The process of examining and accounting for alleged violations of those rights must strike the same balance.

Any other approach would result in a deeply troubling paradox: that individuals who may have committed or contributed to the violation of such rights can use the national security justification to shield themselves from responsibility in circumstances where a national security excuse cannot justify the violation in the first place.

Appendix I: Key Provisions of the Access and Privacy Acts

Access Act

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

...

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or

(b) a permanent resident within the meaning of the *Immigration Act*,

has a right to and shall, on request, be given access to any record under the control of a government institution.

...

15. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information

(a) relating to military tactics or strategy, or relating to military exercises or operations undertaken in preparation for hostilities or in connection with the detection, prevention or suppression of subversive or hostile activities;

(b) relating to the quantity, characteristics, capabilities or deployment of weapons or other defence equipment or of anything being designed, developed, produced or considered for use as weapons or other defence equipment;

(c) relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment, of any military force, unit or personnel or of any organization or person responsible for the detection, prevention or suppression of subversive or hostile activities;

(d) obtained or prepared for the purpose of intelligence relating to

(i) the defence of Canada or any state allied or associated with Canada, or

(ii) the detection, prevention or suppression of subversive or hostile activities;

(e) obtained or prepared for the purpose of intelligence respecting foreign states, international organizations of states or citizens of foreign states used by the Government of Canada in the process of deliberation and consultation or in the conduct of international affairs;

(f) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (d) or (e) or on sources of such information;

(g) on the positions adopted or to be adopted by the Government of Canada, governments of foreign states or international organizations of states for the purpose of present or future international negotiations;

(h) that constitutes diplomatic correspondence exchanged with foreign states or international organizations of states or official correspondence exchanged with Canadian diplomatic missions or consular posts abroad; or

(i) relating to the communications or cryptographic systems of Canada or foreign states used

(i) for the conduct of international affairs,

(ii) for the defence of Canada or any state allied or associated with Canada, or

(iii) in relation to the detection, prevention or suppression of subversive or hostile activities.

Definitions

(2) In this section,

"defence of Canada or any state allied or associated with Canada" includes the efforts of Canada and of foreign states toward the detection, prevention or suppression of activities of any foreign state directed toward actual or potential attack or other acts of aggression against Canada or any state allied or associated with Canada;

"subversive or hostile activities" means

(a) espionage against Canada or any state allied or associated with Canada,

(b) sabotage,

(c) activities directed toward the commission of terrorist acts, including hijacking, in or against Canada or foreign states,

(d) activities directed toward accomplishing government change within Canada or foreign states by the use of or the encouragement of the use of force, violence or any criminal means,

(e) activities directed toward gathering information used for intelligence purposes that relates to Canada or any state allied or associated with Canada, and

(f) activities directed toward threatening the safety of Canadians, employees of the Government of

Canada or property of the Government of Canada outside Canada. R.S. 1985, c. A-1, s.15.

Privacy Act

2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.

...

12. (1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of the Immigration Act has a right to and shall, on request, be given access to

(a) any personal information about the individual contained in a personal information bank; and

(b) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.

...

21. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada, as defined in subsection 15(2) of the Access to Information Act, or the efforts of Canada toward detecting, preventing or suppressing subversive or hostile activities, as defined in subsection 15(2) of the Access to Information Act, including, without restricting the generality of the foregoing, any such information listed in paragraphs 15(1)(a) to (i) of the Access to Information Act.

Appendix II: The Johannesburg Principles

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996).

INTRODUCTION

These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg.

The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognized by the community of nations.

These Principles acknowledge the enduring applicability of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights and the Paris Minimum Standards of Human Rights Norms In a State of Emergency.

PREAMBLE

The participants involved in drafting the present Principles:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;

Convinced that it is essential, if people are not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law;

Reaffirming their belief that freedom of expression and freedom of information are vital to a democratic society and are essential for its progress and welfare and for the enjoyment of other human rights and fundamental freedoms;

Taking into account relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UN Convention on the Rights of the Child, the UN Basic Principles on the Independence of the Judiciary, the

African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights;

Keenly aware that some of the most serious violations of human rights and fundamental freedoms are justified by governments as necessary to protect national security;

Bearing in mind that it is imperative, if people are to be able to monitor the conduct of their government and to participate fully in a democratic society, that they have access to government-held information;

Desiring to promote a clear recognition of the limited scope of restrictions on freedom of expression and freedom of information that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms;

Recognizing the necessity for legal protection of these freedoms by the enactment of laws drawn narrowly and with precision, and which ensure the essential requirements of the rule of law; and

Reiterating the need for judicial protection of these freedoms by independent courts;

Agree upon the following Principles, and recommend that appropriate bodies at the national, regional and international levels undertake steps to promote their widespread dissemination, acceptance and implementation:

Principle 1: Freedom of Opinion, Expression and Information

(a) Everyone has the right to hold opinions without interference.

(b) Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.

(c) The exercise of the rights provided for in paragraph (b) may be subject to restrictions on specific grounds, as established in international law, including for the protection of national security.

(d) No restriction on freedom of expression or information on the ground of national security may be imposed unless

the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.

Principle 1.1: Prescribed by Law

(a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.

(b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.

Principle 1.2: Protection of a Legitimate National Security Interest

Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

Principle 1.3: Necessary in a Democratic Society

To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

(a) the expression or information at issue poses a serious threat to a legitimate national security interest;

(b) the restriction imposed is the least restrictive means possible for protecting that interest; and

(c) the restriction is compatible with democratic principles.

Principle 2: Legitimate National Security Interest

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's

existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

Principle 3: States of Emergency

In time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law.

Principle 4: Prohibition of Discrimination

In no case may a restriction on freedom of expression or information, including on the ground of national security, involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status.

II. RESTRICTIONS ON FREEDOM OF EXPRESSION

Principle 5: Protection of Opinion

No one may be subjected to any sort of restraint, disadvantage or sanction because of his or her opinions or beliefs.

Principle 6: Expression That May Threaten National Security

Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Principle 7: Protected Expression

(a) Subject to Principles 15 and 16, the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties. Expression which shall not constitute a threat to national security includes, but is not limited to, expression that:

- (i) advocates non-violent change of government policy or the government itself;
- (ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials ³, or a foreign nation, state or its symbols, government, agencies or public officials;
- (iii) constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;
- (iv) is directed at communicating information about alleged violations of international human rights standards or international humanitarian law.

(b) No one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency

Expression, whether written or oral, can never be prohibited on the ground that it is in a particular language, especially the language of a national minority.

Principle 10: Unlawful Interference With Expression by Third Parties

Governments are obliged to take reasonable measures to prevent private groups or individuals from interfering unlawfully with the peaceful exercise of freedom of expression, even where the expression is critical of the government or its policies. In particular, governments are obliged to condemn unlawful actions aimed at silencing freedom of expression, and to investigate and bring to justice those responsible.

III. RESTRICTIONS ON FREEDOM OF INFORMATION

Principle 11: General Rule on Access to Information

Everyone has the right to obtain information from public authorities, including information relating to national security. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

Principle 12: Narrow Designation of Security Exemption

A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.

Principle 13: Public Interest in Disclosure

In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

Principle 14: Right to Independent Review of Denial of Information

The state is obliged to adopt appropriate measures to give effect to the right to obtain information. These measures shall require the authorities, if they deny a request for

information, to specify their reasons for doing so in writing and as soon as reasonably possible; and shall provide for a right of review of the merits and the validity of the denial by an independent authority, including some form of judicial review of the legality of the denial. The reviewing authority must have the right to examine the information withheld.

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 16: Information Obtained Through Public Service

No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

Principle 18: Protection of Journalists' Sources

Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source.

Principle 19: Access to Restricted Areas

Any restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent journalists or representatives of intergovernmental

or non-governmental organizations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed. Governments may not exclude journalists or representatives of such organizations from areas that are experiencing violence or armed conflict except where their presence pose a clear risk to the safety of others.

IV. RULE OF LAW AND OTHER MATTERS

Principle 20: General Rule of Law Protections

Any person accused of a security-related crime involving expression or information is entitled to all of the rule of law protections that are part of international law. These include, but are not limited to, the following rights:

- (a) the right to be presumed innocent;
- (b) the right not to be arbitrarily detained;
- (c) the right to be informed promptly in a language the person can understand of the charges and the supporting evidence against him or her;
- (d) the right to prompt access to counsel of choice;
- (e) the right to a trial within a reasonable time;
- (f) the right to have adequate time to prepare his or her defence;
- (g) the right to a fair and public trial by an independent and impartial court or tribunal;
- (h) the right to examine prosecution witnesses;
- (i) the right not to have evidence introduced at trial unless it has been disclosed to the accused and he or she has had an opportunity to rebut it; and
- (j) the right to appeal to an independent court or tribunal with power to review the decision on law and facts and set it aside.

Principle 21: Remedies

All remedies, including special ones, such as habeas corpus or amparo, shall be available to persons charged with security-related crimes, including during public emergencies which threaten the life of the country, as defined in Principle 3.

Principle 22: Right to Trial by an Independent Tribunal

(a) At the option of the accused, a criminal prosecution of a security-related crime should be tried by a jury where that institution exists or else by judges who are genuinely independent. The trial of persons accused of security-related crimes by judges without security of tenure constitutes a *prima facie* violation of the right to be tried by an independent tribunal.

(b) In no case may a civilian be tried for a security-related crime by a military court or tribunal.

(c) In no case may a civilian or member of the military be tried by an *ad hoc* or specially constituted national court or tribunal.

Principle 23: Prior Censorship

Expression shall not be subject to prior censorship in the interest of protecting national security, except in time of public emergency which threatens the life of the country under the conditions stated in Principle 3.

Principle 24: Disproportionate Punishments

A person, media outlet, political or other organization may not be subject to such sanctions, restraints or penalties for a security-related crime involving freedom of expression or information that are disproportionate to the seriousness of the actual crime.

Principle 25: Relation of These Principles to Other Standards

Nothing in these Principles may be interpreted as restricting or limiting any human rights or freedoms recognized in international, regional or national law or standards.