

INSECURITY AND HUMAN RIGHTS:

CONCERNS AND
RECOMMENDATIONS WITH
RESPECT TO BILL C-51,
THE *ANTI-TERRORISM ACT*,
2015

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OVERVIEW

With the combination of Bills C-44 and, particularly, C-51, the Canadian government is proposing the most comprehensive reforms to the country's national security laws since 2001. Amnesty International agrees that governments have an important obligation, part of their responsibility to uphold human rights, to prevent terrorist acts and to hold individuals who have committed such acts accountable. It is also essential that laws, policies and actions taken to counter terrorism comply with international human rights standards.

Amnesty International has, throughout its history, documented the extensive and deeply troubling ways that governments of all political stripes, economic wealth and military power have ignored, undermined and directly violated human rights while responding to perceived or actual security threats, including terrorism. In the end, both security and human rights suffer as a result of such measures.

The global context is of vital importance. In some instances, states over-react or respond rashly to actual threats and in doing so take steps that contravene international human rights norms. But in other situations governments propose and adopt draconian measures in an opportunistic attempt to rein in all manner of foes, opposition figures or groups outside the mainstream who may sometimes pose a threat to the government's hold on power but not to national security. These policies and practices are often used as a pretext to target ethnic and religious minorities, migrants, political foes, human rights defenders, independent journalists and others. Amnesty International's recent research highlights these concerns in countries around the world, including Russia,¹ Uzbekistan,² Pakistan³ and the United States,⁴ among many others.⁵

¹ Amnesty International, *Violation of the Right to Freedom of Expression, Association and Assembly in Russia* (Index: EUR 46/048/2014) October 2014 online: <<https://www.amnesty.org/en/documents/EUR46/048/2014/en/>>; Amnesty International, *A Right, Not a Crime: Violations of the Right to Freedom of Assembly in Russia* (Index: EUR 46/028/2014) June 2014 online: <<https://www.amnesty.org/en/documents/EUR46/028/2014/en/>>.

² Amnesty International, "Erosion of the right to freedom of expression and association, torture of detainees, and no access for international monitors to Uzbekistan" (Index: EUR 62/005/2013) September 2013 online: <<https://www.amnesty.org/en/documents/eur62/005/2013/en/>>.

³ "Open letter to Prime Minister Nawaz Sharif" (Joint statement of shared concerns about attacks on journalists in Pakistan, 29 May 2014) online: <<https://www.amnesty.org/en/documents/asa33/010/2014/en/>>; Amnesty International, *"A Bullet has been Chosen for You": Attacks on Journalists in Pakistan* (Index: ASA 33/005/2014) April 2014 online: <<https://www.amnesty.org/en/documents/asa33/005/2014/en/>>; Amnesty International, *Pakistan: Human Rights and justice – the key to lasting security: Amnesty International submission to the Universal Periodic Review* (Index: ASA 33/003/2012) April 2012 online: <<https://www.amnesty.org/en/documents/asa33/003/2012/en/>>.

⁴ Amnesty International, *United States of America: Another Year, same missing ingredient: Human rights still absent from counter-terrorism policy a year after President Obama proclaimed "America at crossroads"* (Index: AMR 51/032/2014) May 2014 online: <<https://www.amnesty.org/en/documents/amr51/032/2014/en/>>; Amnesty International, *USA: Human rights betrayed: 20 years after US ratification of ICCPR, human rights principles sidelined by "Global War" theory* (Index: AMR 51/041/2012) June 2012 online: <<https://www.amnesty.org/en/documents/amr51/041/2012/en/>>.

⁵ See, e.g. Amnesty International, *Saudi Arabia: Counter-terror law continues to provide legal cover to silence dissent a year on* (Index: MDE 23/0012/2015) February 2015 online: <<https://www.amnesty.org/en/documents/mde23/0012/2015/en/>>; Amnesty International, *Hungary: Their backs to the wall: Civil society under pressure in Hungary* (Index: EUR 27/0001/2015) February 2015 online: <<https://www.amnesty.org/en/documents/eur27/0001/2015/en/>>; Amnesty International, *Egypt "covering up" protester deaths in fourth anniversary of "25 January Revolution"* (Index: MDE 12/0005/2015) February 2015 online: <<https://www.amnesty.org/en/documents/mde12/0005/2015/en/>>; Amnesty International, *France: Newly announced "anti-terror measures" put human rights at risk* (Index: EUR 21/0001/2015) January 2015 online: <<https://www.amnesty.org/en/documents/eur21/0001/2015/en/>>; Amnesty International, *South Korea: National Security Law continues to restrict freedom of expression* (Index: ASA 25/001/2015) January 2015 online: <<https://www.amnesty.org/en/documents/asa25/001/2015/en/>>; Amnesty International, *Turkey: Arrests of journalists point to continuing pattern of criminalising dissent* (Index: EUR 44/025/2014) December 2014 online:

Amnesty International expects Canadian national security laws to serve as a model of upholding human rights, not to replicate or encourage bad practice elsewhere. That means being cognizant of the need to identify and respond to actual terrorist threats in keeping with human rights obligations; and also to recognize the risk that counter-terrorism measures may be used to target or have a disproportionate impact on individuals and groups exercising their fundamental rights to freedom of expression and association.

In this brief, Amnesty International highlights major preoccupations about the human rights implications of the new powers, offences and processes introduced by Bill C-51, as well as pressing and longstanding concerns that are not addressed by the proposed legislation.

1. The following proposals in Bill C-51 should be withdrawn in their entirety and only reintroduced in a form that conforms to international human rights requirements:

- a) Unprecedented new powers granted to the Canadian Security Intelligence Service (CSIS) officers to act to reduce security threats considering that :
 - i) These new powers are based on an existing and overly-broad definition of “threats to the security of Canada” extending far beyond the definition of terrorist activities under Canadian law. Among other concerns, this definition only excludes such advocacy, protest, or dissent that is lawful, raising the likelihood that a wide range of protest activity that may not be lawful in the sense of being officially authorized, but is not criminal, would be susceptible to interference and disruption through these new powers.
 - ii) The proposed legislation provides no description of the particular measures that officers would be allowed to take to reduce threats, nor does it limit the scope of their power to undertake these actions. Bill C-51 only explicitly excludes CSIS agents from acting in ways that would lead to death, bodily harm, perversion of justice or violation of sexual integrity and does not protect other internationally guaranteed human rights such as deprivation of liberty, right to privacy and freedom of expression.
 - iii) The Bill authorizes Federal Court judges to issue warrants approving CSIS activity that violates the *Canadian Charter of Rights and Freedoms (Charter)* and permitting CSIS agents to act in disregard of local law in countries where they are operating; and
 - iv) These powers are entrusted to security and intelligence officials who do not have the specific training, command structures, accountability or public transparency required of law enforcement agencies.
- b) New criminal offence of advocating or promoting the commission of terrorism offences “*in general*”, which has the potential to both violate and cast a chill on freedom of expression, and has not been demonstrated to be necessary over and above existing offences of directly inciting, threatening, counselling or conspiring to commit terrorist activities.
- c) Expanded powers to detain a person on the basis of a recognizance with conditions which significantly lower the threshold of suspicion and increase the maximum time for holding an individual in police custody without charge.
- d) Expansive information-sharing across government departments and agencies in the *Security of Canada Information Sharing Act* which:
 - i) is based on the most far-reaching and vague definition and enumeration of acts that “undermine the security of Canada” ever adopted in Canadian law; and

ii) lacks clear safeguards to address well-documented examples of serious human rights violations, including torture and other ill-treatment, that have been caused or facilitated by Canadian law enforcement and security officials sharing unreliable, inaccurate or inflammatory information domestically and internationally.

e) Appeal procedures in the *Secure Air Travel Act* which apply the minimal standard of review of 'reasonableness' before a Federal Court judge and do not ensure that a listed individual has meaningful access to the full information and accusations against him or her which would make it possible to mount an effective challenge.

2. Establish robust oversight and effective review of agencies and departments engaged in national security activities. In particular,

- a) Develop a model of integrated, expert and independent review as proposed by Justice Dennis O'Connor in his 2006 Arar Inquiry report;
- b) Ensure that all agencies and departments engaged in national security activities are subject to review and oversight;
- c) Ensure that all review and oversight bodies and processes have sufficient powers and resources to carry out their work effectively; and
- d) As part of an overall system of review and oversight, institute a robust system of parliamentary oversight of national security in Canada.

3. Address outstanding cases and concerns with respect to national security and human rights. Specifically,

- a) Adopt a legislated human rights framework for Canada's national security program;
- b) Promptly redress unresolved cases involving security-related human rights violations implicating Canadian officials;
- c) Carry out and make public a full assessment of past cases and existing laws, tools and resources in the area of national security before considering expanded powers and other reforms; and
- d) Commit to implementing outstanding national security-related recommendations that have been made to Canada by a range of United Nations (UN) human rights experts and bodies dealing with intelligence-sharing and torture, deportations to torture, immigration security certificates and a number of individual cases.

1. CONCERNS AND RECOMMENDATIONS WITH RESPECT TO BILL C-51

The proposals in Bill C-51 are detailed and complex. The implications and consequences of the changes and additions are extensive. A wide range of serious concerns have already been highlighted by other organizations and legal experts. Amnesty International shares many of those concerns.

In this brief Amnesty International focuses on five major areas of concern with respect to provisions in Bill C-51: (1) CSIS powers to act to ‘reduce’ threats to the security of Canada; (2) the new offence of advocating or promoting the commission of terrorism offences “in general”; (3) extended periods of detention without charge; (4) expanded powers of information-sharing; and (5) inadequate appeal procedures for individuals listed under the *Secure Air Travel Act*.

A) CSIS’ NEW POWERS OF THREAT REDUCTION

One of the most dramatic changes proposed in the Bill is to expand CSIS powers well beyond the Service’s current mandate of collecting, analyzing and reporting to government about information and intelligence concerning activities that may constitute threats to the security of Canada.⁶ Bill C-51 proposes an expanded mandate that would also allow CSIS, when there are “reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada” to “take measures, within or outside Canada, to reduce the threat”.⁷

Amnesty International is deeply concerned about these proposed new powers for two fundamental reasons. First, the definition of what constitutes a “threat to security” authorizing the exercise of these new powers draws on an existing definition used for threat investigation, which extends far beyond acts that would constitute terrorist activity under the *Criminal Code* to include vague and/or overly-broad categories of offences that could infringe the legitimate exercise of human rights. Second, the measures that can be taken by CSIS to reduce threats include actions that would violate human rights. Those violations could be authorized by Federal Court judges, and could explicitly include acts in other countries that violate or disregard local laws.

I) THREAT TO THE SECURITY OF CANADA

The new threat reduction powers are linked to the existing definition of “threats to the security of Canada” found in the *Canadian Security Intelligence Service Act (CSIS Act)*:⁸

2. In this Act ...

“threats to the security of Canada” means

(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,

(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or

⁶ *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, s 12 [*CSIS Act*].

⁷ Bill C-51, *Anti-terrorism Act, 2015*, 2nd Sess, 41st Parl, 2015, clause 42, proposing new s.12.1 to the *CSIS Act* [Bill C-51].

⁸ *CSIS Act*, *supra* note 6, s. 2.

ideological objective within Canada or a foreign state, and

(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,

but does not include **lawful** advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).⁹

Notably, this existing definition does not expressly refer to acts of “terrorism.” Moreover, the threats listed are broad and, in some instances, involve vague and undefined concepts: espionage, sabotage, foreign-influenced activities “detrimental” to Canada’s interest, “serious violence” linked to political, religious or ideological objectives, and the “destruction” of Canada’s system of constitutionally established government. Whether or not this definition of “threats to the security of Canada” is appropriate for the purposes of intelligence-gathering and reporting, it requires very careful consideration when it is linked to new powers of disruption that would have direct consequences for an individual’s rights to privacy, liberty, and security of person.

CSIS has interpreted the concept of “threats to the security of Canada” very expansively when undertaking intelligence-gathering. Sabotage, for instance, includes “activities conducted for the purpose of endangering the safety, security or defence of vital public or private property, such as installations, structures, equipment or systems.”¹⁰ In relation to covert unlawful acts, CSIS has stated that such acts include “subversive activities seek to interfere with or ultimately destroy the electoral, legislative, executive, administrative or judicial processes or institutions of Canada.”¹¹

The *CSIS Act*’s proviso excluding lawful advocacy, protest or dissent that is not linked to any of the described threats from “threats to the security of Canada” offers only minimal safeguards. There are many acts of advocacy, protest or dissent which are not criminal but at the same time are not lawful in the sense that organizers have not met the procedural or other requirements stipulated in laws or by-laws. That is a common feature, for instance, in protests mounted by Indigenous communities, environmental groups or the labour movement. They may not have obtained an official permit; or they may even be protesting despite a court order to desist demonstrations. That does not mean they are criminal; and it does not mean they are undeserving of *Charter* protection.

Particularly troubling is that the decision to apply the existing *CSIS Act* limitation applicable to intelligence-gathering activities to the new threat reduction powers, and thus requiring that the protest be lawful, is a departure from existing Canadian criminal law. Threat reduction powers are closer in nature to criminal sanctions than simply intelligence-gathering. The *Criminal Code* defines “terrorist activity” to include acts that cause “serious interference with or serious disruption of an essential service, facility or system, whether public or private”¹² but excludes advocacy, protest, dissent or stoppage of work that is not intended to result in death or serious bodily harm, endanger a person’s life or cause a serious risk to public health or safety.¹³ Under the *Criminal Code*, there is no requirement that the advocacy, protest, dissent or work stoppage be *lawful* in order to exempt it from the definition of “terrorist activity”.¹⁴

⁹ *Ibid* [emphasis added].

¹⁰ Canadian Security Intelligence Service, “Backgrounder #1: CSIS Mandate” (2005) as cited in Craig Forcese and Kent Roach, “Bill C-51 Backgrounder #2: The Canadian Security Intelligence Service’s Proposed Power to ‘Reduce’ Security Threats through Conduct that May Violate the Law and Charter” (12 February 2015) at 9 online: <<http://craigforcese.squarespace.com/storage/documents/Final%20Backgrounder%20on%20CSIS%20Powers%20v1.pdf>> [Backgrounder #2].

¹¹ *Ibid* at 11.

¹² *Criminal Code of Canada*, RSC 1985, c C-46, s 83.01 [*Criminal Code*].

¹³ *Ibid*.

¹⁴ *Ibid*.

By relying on the *CSIS Act* to require advocacy and protest to be lawful in order to exempt it from CSIS's disruptive powers, rather than on the *Criminal Code*, which does not contain this qualification, the disruptive powers of CSIS are expanded, giving rise to the troubling possibility that they may be used against individuals and groups expressing dissent or protesting unlawfully in the sense of not having met procedural requirements for holding a protest but who in no way threaten death or serious bodily harm, endanger any person's life or cause serious risk to public health or safety.

II) MEASURES TO REDUCE A THREAT TO THE SECURITY OF CANADA

The proposed new powers of threat reduction are not prescribed or defined. As such, they appear to be limitless in scope and nature. If the exercise of these powers in a particular case would involve violations of the *Charter* or other Canadian laws, a warrant must be obtained from a Federal Court judge.¹⁵ Some actions are prohibited. CSIS officials and/or agents are not permitted to:

- (a) cause, intentionally or by criminal negligence, death or bodily harm [as defined in section 2 of the *Criminal Code*¹⁶] to an individual;
- (b) wilfully attempt in any manner to obstruct, pervert or defeat the course of justice; or
- (c) violate the sexual integrity of an individual.¹⁷

Amnesty International is deeply concerned about the proposed threat reduction scheme for three main reasons.

First, it is some comfort, but a cold comfort, that the Act clearly prohibits CSIS officials from carrying out acts of death, bodily harm, obstruction of justice and violation of sexual integrity. The fact that it was considered necessary to explicitly prohibit acts that are already clearly and unequivocally unlawful under Canadian and international law is telling of the potential scope and nature of the potential disruptive powers that may be utilized. Amnesty International is deeply troubled that the prohibitions are limited to these three instances, and do not clearly prohibit violations of other rights that are safeguarded by the *Charter* and under international human rights standards binding on Canada.

Second, Amnesty International is very concerned that the scheme authorizes Federal Court judges to approve violations of the *Charter*. It is extremely worrying that this Bill designates the judiciary, which is entrusted with the vital responsibility of upholding the Canadian Constitution, including the *Charter*, as the state authority that would *authorize* constitutional breaches, including violations of the *Charter*. Even with the requirement that the 'reasonableness and proportionality'¹⁸ of the proposed measures be taken into account by the Federal Court judge, tasking judges with approving acts that violate the *Charter* is a perversion of the rule of law and separation of powers.¹⁹

¹⁵ Bill C-51, *supra* note 7, Clause 42, proposed new s.12.1(3) of the *CSIS Act*: "The Service shall not take measures to reduce a threat to the security of Canada if those measures will contravene a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms* or will be contrary to other Canadian law, unless the Service is authorized to take them by a warrant issued under section 21.1."

¹⁶ *Criminal Code*, *supra* note 12, s 2. Bodily harm is "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature."

¹⁷ *Ibid*, Clause 42, proposed new s.12.2 of the *CSIS Act*.

¹⁸ *Ibid*, Clause 44, proposed new s.21.1(2)(c) of the *CSIS Act*.

¹⁹ Under international human rights law there are very narrowly circumscribed situations which allow violations of some, but not all, rights. Article 4 of the *International Covenant on Civil and Political Rights* 16 December 1966, 999 UNTS 171 [*ICCPR*], provides that "1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present

Third, CSIS agents will be authorized to carry out these acts of disruption both within and outside Canada. Notably, if a Federal Court judge authorizes actions that violate the *Charter*, the resulting warrant may be issued “without regard to any other law, including that of any foreign state.”²⁰ This provision raises a wide range of concerns related to the extra-territorial application of Canada’s human rights obligations, whether there would be differential treatment or consequences for Canadian citizens and foreign nationals subject to CSIS actions, and the sovereignty of foreign states.

III) THE POTENTIAL REACH OF THREAT REDUCTION

There are a virtually endless number of scenarios in which these disruptive powers would be exercised. Many are deeply troubling and would almost certainly involve serious violations of Canada’s international human rights obligations.

An overall reading of this scheme would suggest, for instance, that a Federal Court judge could allow CSIS agents who are, with an eye to disrupting ‘sabotage’, monitoring the activities of Indigenous and environmental protesters who are blockading, without the prior notification or authorization required by a local by-law, a roadway into a contested hydroelectric project in Canada, to physically detain a suspected leader of the protest movement, even while he or she is in another country, without regard for the police powers, judicial oversight and laws that apply in that country, as long as the detention does not involve sexual assault, perversion of justice, bodily harm or death. That would effectively circumvent extradition or other transparent processes that would allow criminal or security concerns to be addressed, within a legal framework that properly ensures rights are respected.

While the example may seem extreme, the deliberate combination of a number of factors inevitably points to this description. This includes the decision to only protect “lawful” protest, to anticipate the possibility of *Charter* violations and to instruct Federal Court judges to disregard foreign law.

The implications are of even greater concern given that these powers are granted to intelligence officers, not law enforcement agents who should be subject to particular rules of accountability and command and control, and trained and equipped accordingly. Powers of this nature should be restricted to law enforcement agencies, recognizing the very serious repercussions of actions that may restrict liberty, interfere with privacy or infringe other human rights.

B) ADVOCATING OR PROMOTING THE COMMISSION OF TERRORISM OFFENCES IN GENERAL, AND RELATED PROVISIONS WITH RESPECT TO TERRORIST PROPAGANDA

Bill C-51 proposes the creation of a new criminal offence of advocating or promoting the commission of terrorism offences in general:

Every person who, by communicating statements, knowingly advocates or promotes the commission of terrorism offences in general – other than an offence under this section – while knowing that any of those offences will be committed or being reckless as to whether any of these offences may be committed, as a result of such communication, is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.²¹

Some of the key elements of this offence are not defined, such as what is meant by “terrorism offences” and, very

Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” Therefore, the test for limiting human rights is one of necessity, not reasonableness. Moreover, a number of rights can never be violated. Article 4 further provides that “2. No derogation from articles 6 [right to life], 7 [torture and other ill-treatment], 8 [slavery], 11 [imprisonment merely for inability to fulfil a contractual obligation], 15 [being held guilty of a criminal offence for conduct that is not criminal], 16 [recognition before the law], and 18 [freedom of thought, conscience and religion] may be made under this provision.”

²⁰ Bill C-51, *supra* note 7, Clause 44, proposed new s.21.1(4) of the *CSIS Act*.

²¹ *Ibid*, Clause 16, proposed new s.83.221 of the *Criminal Code of Canada*.

critically, the significance of the term “in general”.

The proposed new crime does not focus on the commission of an offence constituting “terrorist activity”, which is explicitly defined in the *Criminal Code*,²² but refers more broadly to “terrorism offences.” There are numerous terrorism-related offences in Canadian law, ranging from direct involvement in a terrorist act to various forms of financing terrorism, as well as incitement, conspiracy and complicity.²³ The scope and content of this range of offences is complex and would not be readily comprehensible to most individuals. The uncertainty is compounded by the inclusion of the qualifying term “in general” which presumably means that this is not limited to advocating or promoting the commission of a particular offence, such as a specific intended act constituting “terrorist activity”, but expands the offense to some undefined, broader and unspecified range of expression.

This is fraught terrain, as criminalization of expression by its very definition intrudes on the right to freedom of expression. While international human rights standards do recognize limits on free expression under certain circumstances, those limits must be clearly and narrowly defined, respond to a pressing social need and be the least intrusive measure available to address that need. A government may therefore only impose restrictions on the exercise of freedom of expression if they (a) are provided by law; (b) conform to strict tests of necessity and proportionality; (c) are applied only for the purpose for which they were prescribed, which must be one of the purposes permitted under international human rights law; and (d) are directly related to the specific need on which they are based.

Amnesty International has highlighted problems with similar existing or proposed new laws in other countries.²⁴ We have expressed concern that arrests and prosecutions on the basis of the vaguely defined offence of “defending terrorism” (*l’apologie du terrorisme*) in French criminal law risk violating freedom of expression. International treaties on the prevention of terrorism require states to criminalize incitement to commit a terrorist offence. Incitement requires an element of intent and a direct and immediate likelihood that the expression will prompt violence or other criminal acts. But vaguely-defined offences such as defence of terrorism; or promotion or advocacy of commission of terrorism offences in general risk criminalizing statements or other forms of expression which, even if offensive to many, fall well short of incitement. The UN Human Rights Committee, in its most recent General Comment regarding Article 19 of the *International Covenant on Civil and Political Rights* notes the following:

Such offences as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression.²⁵

International human rights law provides for restrictions on the exercise of freedom of expression which are demonstrably necessary and proportionate for specified legitimate purposes including national security and protection of the rights of others.²⁶ Within this framework criminalizing incitement to commit acts of terrorism is

²² *Criminal Code*, *supra* note 12, s 83.01(1).

²³ *Ibid*, ss 83.02-83.04.

²⁴ See Amnesty International, *Spain: New counter-terrorism proposals would infringe basic human rights*, (10 February 2015) online: < <https://www.amnesty.org/en/articles/news/2015/02/spain-new-counter-terrorism-proposals-would-infringe-basic-human-rights/>>; Amnesty International, *France faces ‘litmus test’ for freedom of expression as dozens arrested in wake of attacks*, (16 January 2015) online: <<https://www.amnesty.org/en/articles/news/2015/01/france-faces-litmus-test-freedom-expression-dozens-arrested-wake-attacks/>>.

²⁵ UN Human Right Committee, *General Comment No. 34: Article 19, Freedoms of Opinion and Expression*, CCPR/C/GC/34, 12 September 2011, para. 46 [*General Comment No. 34*].

²⁶ Article 19 of the *ICCPR*, *supra* note 19 provides that the exercise of the right to freedom of expression “carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such 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.” Article 20 further provides that “Any propaganda for war shall be prohibited by law” and “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

not inconsistent with the right to freedom of expression. Canadian law too, as Professors Craig Forcese and Kent Roach have noted, has recognized that some restrictions on freedom of expression are legitimate and necessary and, with respect to terrorist activities, these restrictions would include such offences as instructing, threatening and counselling the commission of acts that constitute terrorist activity.²⁷ But the fact that the new offense created by Bill C-51 uses concepts of “advocating” and “promoting” indicates that it is intended to include conduct broader than the crime of inciting or threatening terrorism. Yet there has been no assessment or explanation as to why those existing offences have proven inadequate or ineffective and why further and broader criminalization of expression is justified, necessary and consistent with international requirements such as Article 19 of the *International Covenant on Civil and Political Rights*.

Any legislation establishing criminal offences must be in line with the principle of legality, as set out in Article 15 of the *ICCPR*. The principle of legality requires that the law must classify and describe crimes in precise and unambiguous language that narrowly defines the punishable offence. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has noted that,

This requires that the imposition of criminal liability be limited to clear and precise provisions so as to respect the principle of certainty of the law and ensure that it is not subject to interpretation, which would unduly broaden the scope of the proscribed conduct. Overly vague or broad definitions of terrorism would not meet this requirement and may be used by States as a means to cover peaceful acts, to discriminate against particular individuals or groups or to limit any sort of political opposition.²⁸

The Special Rapporteur notes that there are several reasons why precision is important, including facilitating more effective cooperation among states.

While States have a duty to take measures to protect populations from violence and insecurity and to deliver justice, such measures must be anchored in respect for international human rights law. Experience at the national level has demonstrated that protecting human rights and ensuring respect for the rule of law contribute to countering terrorism in particular by creating a climate of trust between the State and those under its jurisdiction, and supporting resilience of communities to threats of violent radicalism. From a criminal justice perspective, ensuring that counter-terrorism legislation and policy are grounded in human rights also helps to promote the prosecution and conviction in accordance with legally established procedures of individuals engaged in acts of terrorism. This also encourages legal consistency between national jurisdictions, thereby facilitating international cooperation. Conversely, compromising on human rights has proven corrosive to the rule of law and undermines the effectiveness of any counter-terrorism measure.²⁹

Notably, the new offence does not contain any of the defences that are found in other areas where expression is criminalized, such as the private conversation, public interest or educational defences that are provided for offences dealing with child pornography or hate propaganda. It is also concerning that Bill C-51 lowers the threshold for the criminalization of reckless expression. Rather than criminalizing expression that is reckless as to whether an offence *will or is likely* to be committed as a result of the statement, Bill C-51 criminalizes expression that is reckless as to whether it *may* result in the commission of a terrorist offence.³⁰ It is sufficient that the statement is made recklessly, knowing that terrorism offences may be committed, as a result. There is no requirement that the person has an underlying motive or purpose that the statement will lead to the commission of a terrorism offence. The ways in which this aspect of the offence might serve to chill legitimate academic debate, policy discussions, and public discourse with respect to terrorism, national security and foreign relations are obvious.

²⁷ Kent Roach and Craig Forcese, “Bill C-51 Backgrounder #1: The New Advocating or Promoting Terrorism Offence” (3 February 2015) at 21 online: < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560006> [Backgrounder #1].

²⁸ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/28/28, 19 December 2014, para. 48.

²⁹ *Ibid*, para. 20.

³⁰ Backgrounder #1, *supra* note 27 at 6-7.

The implications of this vaguely defined criminal offence go further. The new offence of promoting or advocating the commission of terrorism offences in general also serves as the basis for the definition of what the Bill categorizes to be “terrorist propaganda”. In particular, terrorist propaganda is “any writing, sign, visible representation or audio recording that advocates or promotes the commission of terrorism offences in general [...] or counsels the commission of a terrorism offence.”³¹ The Bill lays out new powers in the *Criminal Code* allowing for the seizure of any publication that constitutes terrorist propaganda or of material stored on a computer system that constitutes terrorist propaganda.³²

C) RECOGNIZANCE WITH CONDITIONS: DETENTION WITHOUT CHARGE

One of the controversial amendments to Canadian national security law in 2001 was the institution of recognizance with conditions measures under which law enforcement officers may detain, but not charge, individuals suspected of planning to commit terrorist acts. Given the obvious concerns associated with a provision allowing detention without charge, the provision was subject to a sunset clause and expired after three years. It was later reintroduced without a sunset clause, as section 83.3 of the *Criminal Code*.

Given the exceptional nature of this power, it is currently subject to high evidentiary requirements, namely that a peace officer “believes on reasonable grounds that a terrorist activity will be carried out [and] suspects on reasonable grounds that the imposition of a recognizance with conditions [...] is necessary to prevent the carrying out of the terrorist activity.”³³ Detention under recognizance currently cannot extend for more than three days.

Bill C-51 introduces two significant and worrying changes. The threshold for obtaining a recognizance with conditions is lowered significantly from believing that a terrorist activity *will* be carried out, to *may* be carried out; and that the recognizance is *necessary* to prevent it to *is likely* to prevent it. The maximum possible length of time that an individual may be held under a recognizance would increase from three days to seven.³⁴

Amnesty International is particularly concerned about the significant change in lowering the threshold of suspicion from “will” to “may”; and the assessment of necessity from “necessary” to “likely”. The UN Human Rights Committee has stated that detention without charge in a security-related context such as the recognizance with conditions scheme constitutes, must be limited to situations in which a person presents a “present, direct and imperative threat”:

To the extent that States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention.³⁵

Amnesty International’s own position, which it has set out in repeated calls on governments, is that they should not arrest and detain individuals on security grounds unless there is an intention to lay criminal charges and bring the individual to trial in a reasonable period:

Anyone deprived of their liberty by the state should promptly be charged with a cognizable criminal offence

³¹ Bill C-51, *supra* note 7, clause 15, proposed new section 83.222(8) of the *Criminal Code of Canada*.

³² *Ibid*, clause 15, proposed new sections 83.222 and 83.223 of the *Criminal Code of Canada*.

³³ *Criminal Code*, *supra* note 12, s 83.3 [emphasis added].

³⁴ Bill C-51, *supra* note 7, clause 17, amendments and additions to s.83.3 of the *Criminal Code of Canada*.

³⁵ UN Human Rights Committee, *General comment No. 35: Article 9 (Liberty and Security of the Person)*, UN Doc CCPR/C/GC/35 (16 December 2014) at para 15.

and tried within a reasonable period, unless action is being taken to extradite them within a reasonable period. The procedures, rules of evidence and burden and standard of proof in the criminal justice system minimize the risk of innocent individuals being deprived of their liberty for prolonged periods. It is unacceptable for governments to circumvent these safeguards, and it is a serious violation of human rights for states to detain people whom they do not intend to prosecute (or extradite). The requirement that the government use the institutions and procedures of ordinary criminal justice, including the presumption of innocence, whenever it seeks to deprive a person of liberty based on allegations of essentially criminal conduct is a fundamental bulwark of the right to liberty and security of person, and an underlying principle of international human rights law.³⁶

D) INFORMATION-SHARING

Significantly, Bill C-51 proposes new legislation, the *Security of Canada Information Sharing Act*. The Act's purpose is to "encourage and facilitate information sharing between Government of Canada institutions in order to protect Canada against activities that undermine the security of Canada."³⁷ Amnesty International recognizes that effective information-sharing is essential in both preventing and responding to terrorist activities. Information-sharing can also play an important role in preventing and responding to human rights violations.

However, information-sharing without stringent safeguards can have a considerably detrimental impact on human rights, particularly if the information is unreliable or inaccurate or if it is shared with agencies or governments with poor human rights records. In Canada, those lessons have been well documented through the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Arar Inquiry) and the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (Iacobucci Inquiry). Both of these inquiries revealed the extent to which inaccurate and inflammatory information, shared widely in Canada and abroad, contributed to the grave human rights violations, including torture, that four Canadian citizens experienced in Syria and additionally, for one of the men, Egypt.

The new information-sharing powers proposed in Bill C-51 are associated with "activity that undermines the security of Canada".³⁸ This section of the Bill defines what constitutes a security threat much more broadly than the already far-reaching and vague definition of security in the *CSIS Act*.³⁹ It extends to activities that "undermine the sovereignty, security or territorial integrity of Canada or the lives or the security of the people of Canada".⁴⁰ The situations specifically enumerated are:

- (a) interference with the capability of the Government of Canada in relation to intelligence, defence, border operations, public safety, the administration of justice, diplomatic or consular relations, or the economic or financial stability of Canada;
- (b) changing or unduly influencing a government in Canada by force or unlawful means;
- (c) espionage, sabotage or covert foreign influenced activities;
- (d) terrorism;
- (e) proliferation of nuclear, chemical, radiological or biological weapons;
- (f) interference with critical infrastructure;
- (g) interference with the global information infrastructure, as defined in section 273.61 of the *National Defence Act*;
- (h) an activity that causes serious harm to a person or their property because of that person's association with Canada; and
- (i) an activity that takes place in Canada and undermines the security of another state.

³⁶ Amnesty International, *UN Human Rights Committee: Observations on the revised draft General Comment 35 on Article 9 of the International Covenant on Civil and Political Rights*, IOR 41/013/2014, May 2014, pp. 10-11.

³⁷ Bill C-51, *supra* note 7, clause 2.

³⁸ *Ibid*, s 2 of the proposed *Security of Canada Information Sharing Act*.

³⁹ *Supra*, note 6, s 2.

⁴⁰ Bill C-51, *supra* note 7, s 2 of the proposed *Security of Canada Information Sharing Act*.

The proposed definition of security threats in this new Act is stunningly vast. Notably, for an Act which arises as part of an 'anti-terrorism' Bill, terrorism is only the fourth of nine security threats listed. Other threats on the list go far beyond any other Canadian legal definition of security threats, including concerns about Canada's territorial integrity, as well as interference with diplomatic or consular relations, Canada's economic or financial stability or critical infrastructure.⁴¹

As with the *CSIS Act*, it is made clear that the definition "does not include lawful advocacy, protest, dissent and artistic expression." As noted earlier, this exception is of limited protection given that it only applies to lawful protest, and thus excludes the many situations where protests, while not criminal, are not lawful in the sense of complying with local by-law requirements. As noted earlier, this restriction is contrary to the definition of terrorist activity in the *Criminal Code*, which exempts all advocacy, protest, dissent or work stoppage, whether or not it is lawful; and is an unjustified limitation of an important *Charter* right.

Bill C-51 does not incorporate recommendations or lessons learned from the Arar Inquiry and the Iacobucci Inquiry. The reports from those inquiries, issued in 2006 and 2008, documented multiple ways that unchecked, reckless and negligent information-sharing was at the root of the chain of events that led to the range of serious human rights violations, including arbitrary arrest, unlawful imprisonment and torture, suffered by the four men who were the subjects of the Inquiries.

The expansiveness of the Act is well demonstrated by authorizing the head of a designated government institution who has received information to then "further disclose it to any person, for any purpose."⁴² Given the almost limitless definition of security threats applicable to information sharing, this provision is unprecedented in its far-reaching scope.

These provisions must be considered in conjunction with the existing Ministerial Directions on Information Sharing with Foreign Entities⁴³ that have been issued for a number of government agencies and departments, including the Royal Canadian Mounted Police (RCMP), CSIS, the Canadian Border Services Agency, the Communication Security Establishment and the Canadian Armed Forces. In exceptional circumstances, these Ministerial Directions permit information to be shared, domestically or internationally, even if doing so would result in the mistreatment of an individual. This substantially increases the level of severity and nature of the human rights risks associated with expanded information-sharing across government.

The UN Committee against Torture has called on Canada to amend the Ministerial Directions so that they are brought into compliance with the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.⁴⁴ The UN Special Rapporteur on Torture has called on states to "restrain from [...] sharing [...] information, even if there is no pattern of systematic torture, if it is known, or should be known, that there is a real risk of acts of torture or other cruel, inhuman or degrading treatment or punishment."⁴⁵

Also of concern is a provision that seeks to limit government liability for human rights violations or other harmful consequences that may stem from reckless or negligent information sharing. The Bill establishes that "no civil proceedings lie against any person for their disclosure in good faith of information under this Act."⁴⁶

⁴¹ *Ibid.*

⁴² *Ibid.*, clause 6.

⁴³ Minister of Public Safety Vic Toews, "Ministerial Direction to the Canadian Security Intelligence Service: Information Sharing With Foreign Entities" (28 July 2011) online: < <http://cips.uottawa.ca/wpcontent/uploads/2012/04/PS-ATIP-A-2011-00297-March-2012-InformationSharing.pdf>>.

⁴⁴ UN Committee against Torture, *Concluding Observations of the Committee against Torture: Canada*, 48th Sess, UN Doc CAT/C/CAN/CO/6 (25 June 2012) at para 17 [Committee against Torture Concluding Observations].

⁴⁵ UN Human Rights Council, *Report of the Special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, 25th Sess, UN Doc A/HRC/25/60 (10 April 2014) at para 83(h).

⁴⁶ Bill C-51, *supra* note 7, clause 8.

All of this transpires in a context where both internal and independent monitoring, oversight and review to both prevent and address instances of information sharing leading to breaches of privacy rights and other internationally-protected human rights is non-existent, inadequate or stretched.

Amnesty International urges that any legislated framework for sharing security-related information across government agencies and departments should:

- a) incorporate safeguards to ensure the reliability and relevance of the information;
- b) unequivocally prohibit any sharing of information that is likely to result in acts of torture or other forms of cruel, inhuman or degrading treatment or punishment;
- c) circumscribe the definition of security threats;
- d) remove the requirement that advocacy, dissent and protest be “lawful”; and
- e) refrain from immunizing from liability information-sharing that was carried out in “good faith”.

E) THE *SECURE AIR TRAVEL ACT*

Bill C-51 includes a new statute, the *Secure Air Travel Act*, which would establish in law the system for overseeing the administration of Canada’s so-called ‘no-fly’ list. The Act empowers the Minister of Public Safety and Emergency Preparedness to establish a list of persons who the Minister has reasonable grounds to suspect will engage in an act that would threaten transportation security or who will travel by air for the purpose of committing a number of specified terrorism offences. The list is to be reviewed and amended as necessary every 90 days. As a result of being listed that person may be denied transportation.⁴⁷

Amnesty International welcomes the fact that the system of listing individuals who may be barred from flights would be established in law, an improvement over doing so through the Passenger Protect Program, as is presently the case.⁴⁸ Amnesty International has, in the past, raised concerns about the current system. In particular, we have highlighted that there is no accessible and fair appeal mechanism through which individuals can seek to have their names removed from the list.⁴⁹

Under the *Secure Air Travel Act* listed individuals would have two avenues of recourse. Within 60 days of being denied boarding, they may apply to the Minister, in writing, requesting that their name be removed from the list. They are to be afforded a reasonable opportunity to make representations. However there is no requirement that they be provided access to information that is the basis of the decision to place their name on the list.⁵⁰

If the decision to list the individual is not reversed by the Minister, the individual may appeal to the Federal Court. Amnesty International is concerned that this appeal is inadequate in two important respects. First, the judge is only to determine whether the decision to list the individual was “reasonable”, a low threshold.⁵¹ Second, the judge may withhold information from the individual during the appeal if it would be injurious to national security or endanger the safety of any person; in which case the individual will instead only be provided with a summary of the information. The judge can base his or her decision on any information, even when a summary of it has not been provided to the individual.⁵²

The UN Human Rights Committee has underscored that an individual must be able to have access to information

⁴⁷ *Ibid*, clause 11, proposed ss 8 and 9 of the *Secure Air Travel Act*.

⁴⁸ See Public Safety Canada, “Safeguarding Canadians with Passenger Protect” online: <<http://www.publicsafety.gc.ca/cnt/ntnl-scr/cntr-trrrsm/pssngr-prtct/index-eng.aspx>>.

⁴⁹ Amnesty International, *Human Rights for All: No Exceptions, An Update to Amnesty International's 2002 Submission to the U.N. Committee on the Elimination of Racial Discrimination on the occasion of the examination of the seventeenth and eighteenth periodic reports submitted by Canada*, (Index: AMR 20/001/2007) January 2007 at 10-11.

⁵⁰ Bill C-51, *supra* note 7, clause 11, proposed s 15 of the *Secure Air Travel Act*.

⁵¹ *Ibid*, clause 11, proposed s 16(3) of the *Secure Air Travel Act*.

⁵² *Ibid*, clause 11, proposed s 16(6) of the *Secure Air Travel Act*.

about him or her held in official files and to have that information rectified if it is erroneous.

... every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to have his or her records rectified.⁵³

The right to have erroneous information rectified must be meaningful. The *Tshwane* Principles, adopted at an international conference of experts, notes that information may not be withheld on national security grounds “in a manner that would prevent accountability for [human rights] violations or deprive a victim of access to an effective remedy.”⁵⁴

The human rights implications of being listed can be serious. A 2007 submission to Transport Canada on behalf of 25 Canadian civil society organizations highlighted concerns that the administration of Canada’s no-fly list had negative repercussions on the right to liberty, freedom of movement, privacy rights and discrimination. The report also underscores that there have been many instances of individuals being erroneously or mistakenly included on the Canadian and other no-fly lists.⁵⁵ A comprehensive report by the International Civil Liberties Monitoring Group in 2010 provides further detailed accounts and documents the difficulties individuals have faced in seeking to have their names removed from such lists.⁵⁶ The reports note frequently that restricted travel may significantly interfere with employment when individuals hold positions that require travel.

Given the numerous human rights protections at stake, it is vital that there be a fair appeal process for individuals who seek to have their names removed from the list. With substantial restrictions on access to information and a low standard of review which does not examine the merits, Bill C-51 does not offer that fair appeal process.

⁵³ *General Comment No. 34, supra*, note 25, para. 18.

⁵⁴ The Global Principles on National Security and the Right to Information (The Tshwane Principles), 12 June 2013, Principle Ten, <http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>.

⁵⁵ Faisal Kutty, “Canada’s Passenger Protect Program: Too Guilty to Fly, Too Innocent to Charge?” (2007) Social Science Research Network online: < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=962797 >.

⁵⁶ International Civil Liberties Monitoring Group, *Report of the Information Clearinghouse on Border Controls and Infringements to Travellers’ Rights*, (February 2010) online: <<http://iclmg.ca/wp-content/uploads/sites/37/2014/03/R-Clearinghouse-border-controls.pdf>>.

2. THE REVIEW AND OVERSIGHT GAP

The likelihood of human rights violations increases significantly when there is little or no oversight of the actions of police, intelligence, military, penal and other security officials who have the power and potential to commit abuses. That risk increases substantially in contexts where there is considerable secrecy, as is the case with national security. Amnesty International has consistently highlighted that effective review and oversight is key in ensuring that human rights protections are not undermined by a government's national security laws, policies and practices.

Writing recently in the *Globe and Mail*⁵⁷ and *La Presse*,⁵⁸ a group of 22 eminent Canadians, including four former Prime Ministers, who have served in political, judicial and watchdog roles with responsibility for assessing, responding to and making decisions about national security threats, laws, policies and operations, all strongly called for significant improvements to the oversight and review of Canada's national security agencies and departments. Amnesty International strongly concurs with their position that robust oversight and effective review serve three crucial, related objectives: safeguarding human rights, protecting public safety and strengthening accountability.

There have been numerous tragic reminders in Canada, including through the findings of the Arar Inquiry and the Iacobucci Inquiry, of how vulnerable human rights are in national security cases. The consequences have included torture, disappearance, arbitrary arrest, unfair trials and discrimination. In all instances, the lack of meaningful review and oversight was starkly evident, leaving troubling unanswered questions as to whether the abuses could have been prevented if there had been stronger, more regular scrutiny from independent bodies and from Parliament.

In the absence of accessible and genuine review and oversight, individuals who have suffered national security-related human rights harms have instead turned to "after the fact", cumbersome and protracted judicial inquiries and lawsuits.

Notably, when Justice O'Connor was given his mandate for the Arar Inquiry in 2004, he was specifically asked to make recommendations with respect to reviewing the national security activities of the RCMP. His comprehensive report was released in December 2006 with a clear conclusion: national security review in Canada was inadequate.

Justice O'Connor determined that with "enhanced information sharing, new legal powers and responsibilities, and increased integration in national security policing" it was time for an overhaul to the approach taken to review the activities of the RCMP and the numerous other agencies and government departments involved in national security. His proposed model includes ensuring that all agencies and departments are subject to review, that review bodies have strong and effective powers and that there is integration across all the review bodies to ensure that nothing falls through the cracks in a world where the agencies and departments involved in national security increasingly carry out their work in an interconnected fashion.

The urgency of strengthening national security review and oversight in Canada continues to grow. In the years since Justice O'Connor's 2006 recommendations, national security operations in Canada have become even more integrated. Review and oversight bodies themselves have, therefore, highlighted the importance of there being similar integration of review and oversight. The former Chair of the Security Intelligence Review Committee (SIRC), Chuck Strahl, noted in 2013 that SIRC did not "have the authority under the current system to chase those threads [involving agencies and departments such as Foreign Affairs, the RCMP, Transport Canada, and the Canadian Border Services Agency]. All we can do is investigate CSIS." He noted that there was a need for "rules and perhaps legislation that reflects that 21st century

⁵⁷ Jean Chretien, Joe Clark, Paul Martin, and John Turner, "A close eye on security makes Canadians safer" *The Globe and Mail* (19 February 2015) online: <<http://www.theglobeandmail.com/globe-debate/a-close-eye-on-security-makes-canadians-safer/article23069152/>>.

⁵⁸ Jean Chretien, Joe Clark, Paul Martin, and John Turner, "Une question de protection du public et de droits de la personne" *La Presse* (19 February 2015) online: <<http://www.lapresse.ca/debats/votre-opinion/201502/18/01-4845380-une-question-de-protection-du-public-et-de-droits-de-la-personne.php>>.

reality.”⁵⁹

The unevenness of review and oversight across the various agencies and departments involved has become an increasing challenge. Some departments, such as the Canadian Border Services Agency, are not subject to any regular independent scrutiny. The oversight of at least one agency was diminished with the decision in 2010 to dismantle the position of Inspector General for CSIS. The Commission for Public Complaints against the RCMP has recently been replaced by the Civilian Review and Complaints Commission for the RCMP. This change, however, did not include any steps to ensure that the new Commission carried out national security review in an integrated manner with other review and oversight bodies.

Not only does Canada lack a system of expert and independent review and oversight of national security agencies along the lines of the model proposed by Justice O'Connor, but Parliament is also not given a proper oversight role with respect to national security. Canada is alone among our closest national security allies – the United States, the United Kingdom, Australia and New Zealand – in not entrusting parliamentarians with that responsibility.

There has been cross-party support, as far back as 2004, for Parliament to be given a robust oversight role with respect to national security. The Report of the Interim Committee of Parliamentarians on National Security, made up of and endorsed by MPs from all parties, made that recommendation in October 2004:

We believe that closer parliamentary scrutiny will better assure Canadians that a proper balance is being maintained between respect for their rights and freedoms, and the protection of national security. The intelligence community will be more accountable to Parliament and, by extension, to the people of Canada. This closer scrutiny will also better assure the efficacy and efficiency of the intelligence community by thoroughly examining its roles and responsibilities.⁶⁰

The vital importance of strong oversight of the activities of national security agencies has been highlighted repeatedly by UN human rights experts, including the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism:

Intelligence services are overseen by a combination of internal, executive, parliamentary, judicial and specialized oversight institutions whose mandates and powers are based on publicly available law. An effective system of intelligence oversight includes at least one civilian institution that is independent of both the intelligence services and the executive. The combined remit of oversight institutions covers all aspects of the work of intelligence services, including their compliance with the law; the effectiveness and efficiency of their activities; their finances; and their administrative practices.⁶¹

⁵⁹ Jim Bronskill, “Watchdog cites need for stricter oversight to keep pace with spy services” *CBC News* (8 November 2013) online: <www.cbc.ca/news/politics/watchdog-cites-need-for-stricter-oversight-of-spy-services-1.2419551>.

⁶⁰ *Report of the Interim Committee of Parliamentarians on National Security*, (4 October, 2004) online: <<http://www.pco-bcp.gc.ca/docs/information/publications/aarchives/cpns-cpsn/cpns-cpsn-eng.pdf>>.

⁶¹ United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight*, 14th Sess, UN Doc A/HRC/14/46 (17 May 2010) at 8. See also United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Ten areas of best practices in countering terrorism*, 16th Sess, UN Doc A/HRC/16/51 (22 December 2010) at 9-12.

3. CONTEXT AND LEGACY: OUTSTANDING CONCERNS AND CASES MUST BE ADDRESSED

The changes proposed in Bill C-51 do not arrive in a vacuum. They build on years of legal, institutional, and policy reforms and initiatives in the area of national security and a number of cases that have gone through the Canadian intelligence, law enforcement and legal systems. That context, history and legacy must inform the current debate. And it is vital that outstanding concerns be remedied before new powers are considered.

A) HUMAN RIGHTS *AND* NATIONAL SECURITY

It is crucial to situate the current proposals in the vitally important wider debate about national security and human rights that has evolved considerably in the years since the September 11th 2001 terrorist attacks in the United States. There have been stark illustrations of the consequences of lawful and unlawful national security activities that violate human rights, be it through individual cases such as that of Maher Arar or sweeping revelations such as those in the US Senate Select Committee on Intelligence report on the Central Intelligence Agency's secret detention and interrogation practices. We have ample reminders that national security measures that violate human rights are not only unjust and abusive but, ultimately, undermine long-term security by directly and indirectly targeting particular communities, ethnicities and religions, fomenting divisions and creating grievance.

A fundamental lesson that has emerged is that it is essential for national security laws and policies fully to embrace human rights obligations. Human rights cannot be seen as obstacles or impediments to security, but rather as the very key and roadmap to security. The range of human rights principles that are directly relevant include equality and non-discrimination; the rights to freedom of expression, association, religion, and liberty; fair trial guarantees, including the presumption of innocence; and the absolute prohibition against all forms of torture and other ill-treatment.

It is therefore necessary to pursue national security law reform in a manner that in all ways seeks to maximize human rights protection and minimize restrictions. That may call into question the assumption that responding to national security concerns always necessitates new criminal offences, greater restrictions on civil liberties and human rights and more intrusive police and intelligence powers. Embracing human rights compels us to ensure that inclusiveness, tolerance and equality are guiding principles for national security legal and policy reform.

These principles apply to and should guide initiatives specifically linked to national security, such as Bills C-44 and C-51. They also extend to other legal issues that are indirectly related, such as the current debate about allowing women to wear the *niqab* during citizenship ceremonies.⁶²

These standards should also be enforced through the tone and tenor set through language used in the debate. Amnesty International shares the concern highlighted by many commentators, organizations and community leaders, for instance, that Prime Minister Harper's public comments referring to mosques as places where terrorist-related radicalization occurs were discriminatory and divisive.⁶³ Political leaders must avoid wide and potentially inflammatory generalizations of this nature which at a minimum lay the ground for ongoing discrimination. Such comments fail to foster the sense of inclusion and respect which is at the heart of truly effective approaches to national security.

⁶² Amnesty International urges the government to withdraw its appeal of the recent Federal Court decision upholding the right of women to wear the *niqab* in citizenship ceremonies.

⁶³ "Muslim groups 'troubled' by Stephen Harper's mosque remark", *CBC News*(2 February 2015) online: <<http://www.cbc.ca/news/politics/muslim-groups-troubled-by-stephen-harper-s-mosque-remark-1.2940488>>.

B) PAST INJUSTICES MUST BE ADDRESSED

Many cases involving direct and indirect responsibility for human rights violations on the part of Canadian law enforcement and security agencies remain unresolved. In some instances, Canada has failed to provide remedies following very significant findings or rulings from judicial inquiries or Supreme Court of Canada judgments. It is critically important that past injustices be corrected and lessons learned which must inform any proposals for new reforms:

- Former Supreme Court of Canada Justice Frank Iacobucci conducted a judicial inquiry which documented the ways that deficient conduct on the part of Canadian officials contributed to the overseas human rights violations, including torture and other ill-treatment, of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin. Commissioner Iacobucci's report was issued in October 2008.⁶⁴ The three men have not received an apology or compensation and are instead engaged in prolonged litigation with the government.
- The Supreme Court of Canada ruled in January 2010 that Canadian intelligence officials violated the Charter rights of Omar Khadr when they interrogated him at Guantánamo Bay knowing that he had been subjected to sleep deprivation, and that he was a youth.⁶⁵ There has been no remedy of those violations.
- Abousfian Abdelrazik continues to seek the truth and compensation for the role CSIS played in his detention and torture in the Sudan.⁶⁶
- Benamar Benatta is looking for truth and redress for the unlawful actions of Canadian immigration officials who sent him across the border into the hands of US officials on September 12, 2001, launching a five year nightmare of arbitrary detention and other abuse, including torture and ill-treatment.⁶⁷

Lawsuits launched by Adil Charkaoui and Hassan Almqrei, both of whom were subjected to the unfair immigration security certificate system for years, are also pending.⁶⁸

C) PREVIOUS SUCCESSES AND FAILINGS MUST BE ASSESSED

It is also critical to take account of the cases of national security-related arrests, prosecutions and convictions that have occurred to date. Several have taken place before actual terrorist activities occurred, suggesting that investigations were successful in thwarting attacks or other criminal acts. All have different histories, challenges, concerns and results. Canadians have not been presented with a comprehensive analysis of the cases that have arisen since the last major national security legal overhaul in 2001.

That analysis would demonstrate the degree to which current tools and powers have been adequate and where there have been gaps. It would also highlight human rights concerns associated with particular operations or the existing legal framework. The integrity and reliability of current proposals for law reform are fundamentally undermined by that lack of information. The significance of this failure to prepare and release a comprehensive analysis is of even greater concern given that there is no independent and comprehensive review or parliamentary

⁶⁴ *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Ottawa: Public Works and Government Services, 2008) online: < http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/pdfs/documents/final-report-copy-en.pdf>;

⁶⁵ *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44.

⁶⁶ *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 FCR 267.

⁶⁷ "Five Lost Years: Toronto's Benamar Benatta calls himself a forgotten victim of Sept. 11" *Ottawa Citizen* (29 January 2008) online: <http://www.canada.com/ottawacitizen/news/observer/story.html?id=6cfbd053-d721-4146-9cb9-3e02e1558093>.

⁶⁸ "Charkaoui to sue Ottawa for \$24 million" *CBC News* (12 March 2010) online: <<http://www.cbc.ca/news/canada/montreal/charkaoui-to-sue-ottawa-for-24-million-1.881023>>.

oversight of national security activities.

D) COMPLYING WITH INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

There is an important international dimension to the laws, policies and actions Canada pursues in the name of national security. It is evident in the numerous bilateral partnerships, multilateral arrangements and binding obligations through UN treaties and Security Council resolutions, all dealing with the responsibility to counter terrorist threats. Often overlooked, however, are the international human rights aspects of national security that must receive equal attention and response. For example, numerous UN human rights experts and bodies have over the years expressed concern and made recommendations with respect to various Canadian national security laws, policies and practices that contravene the country's international human rights obligations.

Unfortunately, those recommendations have generally been either ignored or even explicitly rejected by the Canadian government. That must change. It is essential that Canada implement these binding human rights recommendations in the national security arena for two reasons. First, doing so ensures that Canada abides by its legally binding international obligations to observe human rights in all matters related to its national security. Second, it would demonstrate sorely-needed leadership and make a crucial contribution to global "best practices" in the ongoing international debate about national security and human rights.

Issues that continue to be of concern for the UN human rights system include:

- The UN Committee against Torture has called on Canada to amend Ministerial Directions with respect to intelligence sharing which, in exceptional circumstances: (1) authorize the use of intelligence from abroad that may have been obtained through torture and, by using it, thus implicitly condoning torture, and (2) permit sharing intelligence with other countries even if that is likely to result in mistreatment.⁶⁹
- The UN Human Rights Committee and UN Committee against Torture have both called on Canada to incorporate the absolute ban on *refoulement* to torture into Canadian law.⁷⁰
- The UN Committee against Torture, the UN Human Rights Committee and the UN Working Group on Arbitrary Detention have called on Canada to bring the immigration security certificate process into conformity with international fair trial standards.⁷¹
- The UN Human Rights Committee, the UN Committee on the Right of the Child and the UN Committee against Torture have called on Canada to remedy national security related human rights violations experienced by Abdullah Almalki, Ahmad Abou-Elmaati, Muayyed Nureddin and Omar Khadr.⁷²

⁶⁹ Committee against Torture Concluding Observations, *supra* note 44.

⁷⁰ *Ibid* at para 9; UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada*, 85th Sess, UN Doc CCPR/C/CAN/CO/5 (20 April 2006) at para 15 [Human Rights Committee Concluding Observations].

⁷¹ Committee against Torture Concluding Observations, *supra* note 44 at para 12; UN Economic and Social Council, *Report of the Working Group on Arbitrary Detention: Addendum: Canada*, 62nd Sess, UN Doc E/CN.4/2006/7/Add.2 (5 December 2005) at para 92(d).

⁷² Committee against Torture Concluding Observations, *supra* note 44 at para 16; UN Committee on the Rights of the Child, *Concluding Observations on the combined third and fourth periodic report of Canada*, 61st Sess, UN Doc CRC/C/CAN/CO/3-4 at para 78; Human Rights Committee Concluding Observations, *supra* note 70 at para 16.