GETTING SECURITY RIGHT:

PROPOSALS FOR A HUMAN RIGHTS BASED APPROACH TO NATIONAL SECURITY IN CANADA

OCTOBER 2016

AMNESTY INTERNATIONAL

SUMMARY

In the years since the September 11th 2001 terrorist attacks in the United States, a misleading debate has taken hold about the relationship between national security and human rights. The debate assumes that there is an inescapable trade-off between the two goals; that more security requires weaker human rights protection and stronger regard for human rights will inevitably leave us more insecure.

Governments have a vital 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. These two responsibilities are not separate and apart, they are one and the same.

The current review of Canada's national security framework offers a valuable opportunity to reject this false dichotomy and affirm that the strongest approach to upholding national security is grounded in full regard for human rights. In this submission Amnesty International describes an approach to elaborating a human rights-based approach to national security for Canada with three main elements.

I. Recognize human rights as a foundational pillar in Canada's national security framework.
II. Adopt safeguards for human rights protection in Canada's national security framework.
    a) Include a binding reference to national and international human rights provisions in all national security laws.
    b) Expressly incorporate into all national security laws human rights obligations such as the ban on torture and prohibition on discrimination that are particularly susceptible to national security-related violations.
    c) Institute adequate parliamentary and expert, independent review and oversight of national security activities by bodies with a clear human rights mandate.
    d) Regularly review the human rights impact of national security laws.
    e) Commit to ensuring adequate redress for individuals who experience national security-related human rights violations.
III. Bring existing national security laws, policies and practices into line with human rights norms.
    a) Prohibit deportations to a risk of torture.
    b) Ensure immigration security proceedings meet fair trial norms.
    c) Repeal Ministerial Directions with respect to intelligence sharing and torture.
    d) Amend terrorism-related definitions to protect protest and free expression rights.
    e) Reform CSIS threat reduction warrants to conform to human rights obligations.
    f) Repeal the offence of promoting the commission of acts of terrorism "in general".
    g) Reform the information-sharing regime to meet human rights requirements.
    h) Update the no-fly list appeal provisions to meet requirements of fairness.
    i) Abolish recognizance with conditions provisions allowing detention without charge.

I Security and Human Rights

> States Members of the United Nations recognize that terrorist acts are aimed at the destruction of human rights, fundamental freedoms and democracy. Measures to combat terrorism may also prejudice the enjoyment of – or may violate – human rights and the rule of law... [C]ompliance with human rights is necessary to address the long-term conditions conducive to the spread of terrorism... [E]ffective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing goals.[1]

There are few legal and policy discussions where so much turns on a preposition. While many politicians and commentators frequently speak of security *or* human rights; the relationship should and must be understood as being about security *and* human rights. More of one need not lead to less of the other. In fact more of either should lead to more of both. True and sustainable security will come through human rights, not in spite of human rights.

When governments gathered at the newly-established United Nations and took the historic step of adopting the Universal Declaration of Human Rights in 1948, they recognized that human rights are valuable far beyond the evident and tangible benefits of the specific rights that are enumerated. Governments made it clear in the very first paragraph of the Declaration's preamble that, "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." In other words, human rights matter not only for their own sake but also because they are the key to other fundamental goals, such as freedom, justice and peace. By any measure or understanding that includes security.

As governments have taken further steps to elaborate the binding treaties that give detailed shape to the UDHR's vision, the relationship between security and human rights has been at the very core. Some rights, such as freedom of expression, are defined so as to recognize the inherent limitations of imperatives such as national security, narrowly defined and carefully circumscribed.[2] Other rights, such as liberty and security of the person, have no inherent limitations but can be suspended for a short period of time when a government faces a "public emergency threatening the life of the nation" and derogates from full regard for those rights publicly and with notice to the United Nations.[3] And there are a number of rights, including the prohibition against torture and ill treatment and the right to freedom of religion, which cannot be abrogated under any circumstance.[4] It is an approach that illustrates that governments have always been attuned to the inter-connected relationship between rights and security.

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[1] Ten areas of best practices in countering terrorism, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 22 December 2010, UN Doc. A/HRC/16/51, para. 8.
[2] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, article 19(3).
[3] *Ibid*, article 4(1).
[4] *Ibid*, article 4(2).

The reasons for the close connection are obvious. First, without security human rights remain precarious. That is particularly so with respect to the rights of those individuals and communities who traditionally face greater levels of marginalization and inequality. In a climate of increased violence and insecurity they are inevitably at heightened risk of being threatened and attacked. Situations of insecurity frequently serve directly or indirectly as an excuse to target political opponents, ethnic and religious minorities, human rights defenders, independent journalists, migrants and others.

Similarly, human rights violations stand to deepen insecurity, including when violations are justified in the name of security. Allowing torture, discrimination or unfair trials as part of a counter-terrorism strategy leaves greater numbers of survivors, victims and their families and deepens the sense of disenfranchisement that can be fertile ground for extremism and support for terrorist groups.

Amnesty International's research over the years has consistently demonstrated that human rights violations committed as part of an effort to bolster national security – whether that declared intention is genuine or a pretext – inevitably lead to both greater injustice and heightened insecurity.[5] Governments frequently theoretically endorse the notion that rights and security must go hand in hand; while adopting laws, enacting policies, approving practices or allowing extralegal operations that do precisely the opposite. The reforms that will follow this review of Canada's national security framework, offer an opportunity to demonstrate a commitment to human rights that goes beyond rhetoric and is in fact a matter of enforceable legal obligation.

RECOMMENDATION: Regard for human rights should be recognized as a foundational pillar to Canada's national security framework.

II Human Rights-Based Approach to National Security

> If they truly want us to feel more secure, they should start by stopping violating our rights.[6]
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> After three or four interrogation sessions, Mr. Elmaaati begged the interrogators to stop, and agreed to say whatever they wanted him to say…. [He] decided to select another target in Ottawa, a Canadian target, to satisfy his interrogators. He chose the Parliament Buildings because they were the biggest target he could think of.[7]

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[5] *Ethiopia: End use of counter-terrorism law to persecute dissenters and opposition members*, 2 June 2016; *Saudi Arabia: Counter-terror court sentences activist for exposing systematic human rights violations*, 29 May 2016; *China: Draconian anti-terror law an assault on human rights*, 4 March 2015; *France: Newly announced "anti-terror measures" put human rights at risk* (Index: EUR 21/0001/2015), January 2015; *South Korea: National Security Law continues to restrict freedom of expression* (Index: ASA 25/001/2015); January 2015; *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; *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.

[6] Sister of Mauritanian military officer, disappeared following abduction from prison in 2011. Interviewed by Amnesty International, Nouakchott, Mauritania, June 2013.

[7] The Honourable Frank Iacobucci, Q.C., *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin*, October 2008, pp. 273-274 [Iacobucci Inquiry].

Concerned about mounting human rights violations associated with national security practices, the United Nations Commission on Human Rights decided, in 2005, to establish a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The Special Rapporteur's mandate has since been renewed three times by the United Nations Human Rights Council. In 2010 the Special Rapporteur released a report laying out "ten areas of best practices in countering terrorism", which provides helpful guidance to developing a human rights-based approach to national security in Canada.[8] Drawing from the Special Rapporteur's report, the hallmarks of a Canadian national security framework grounded in full respect for human rights would include the following.

a) Explicit reference to national and international human rights obligations in all national security laws.

There is no specific reference, let alone requirement, to ensure compliance with human rights obligations under the Charter of Rights, *Canadian Human Rights Act* or binding international human rights standards in most Canadian national security legislation.[9] Notably, the *Immigration and Refugee Protection Act*, which does include provisions dealing with national security matters, is expressly required:

> to be construed and applied in a manner that … (d) ensures that decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination… ; and (f) complies with international human rights instruments to which Canada is signatory.[10]

RECOMMENDATION: All Canadian national security laws should be amended to include a provision requiring legislation to be interpreted and applied in a manner that complies with the Charter of Rights, the *Canadian Human Rights Act* and binding international human rights and international humanitarian legal norms.

b) Specific and binding incorporation into national security laws of human rights provisions and international humanitarian law obligations that are particularly susceptible to being violated as part of national security investigations and other activities.

National security laws must conform to the entirety of Canada's national and international human rights and humanitarian legal obligations. Against that general requirement, it is clear that there are specific

[8] Ten areas of best practices in countering terrorism, *Supra*, footnote 1.
[9] See, for example: *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23; *National Defence Act*, R.S.C. 1985, c. N-2 (part V.1, relating to the Communications Security Establishment); *Security of Canada Information Sharing Act*, S.C. 2015, c. 20, s. 2 (does reference the Canadian Charter of Rights and Freedoms and the right to privacy in the preamble but not in the Act itself); *Secure Air Travel Act*, S.C. 2015, c. 20, s. 11; *Proceeds of Crime and Terrorist Financing Act*, S.C. 2000, c. 17; and *Canada Evidence Act*, R.S.C. 1985, c. c-5 (s. 38 of which deals with "International Relations and National Defence and National Security).
[10] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 3(3).

human rights and humanitarian legal norms that are most vulnerable in a national security context and are regularly violated and undermined by governments around the world. As such, Canadian law should expressly recognize the binding obligations related to those rights.

RECOMMENDATION: All Canadian national security laws should be amended to include specific, binding incorporation of the right to life; ban on torture and ill-treatment; prohibition of discrimination; safeguards against unlawful arrest, arbitrary detention and unfair trials; freedoms of expression, association and assembly; freedom of religion; privacy rights; the protection against *refoulement*; and provisions dealing with the treatment of prisoners of war.

c) Adequate parliamentary as well as expert, independent review and oversight of national security activities by bodies whose mandate specifically includes upholding national and international human rights norms.

One of the clear lessons highlighted in the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Arar Inquiry) was the inadequacy of existing national security review and oversight bodies and processes in Canada. As part of his mandate, Justice Dennis O'Connor proposed a comprehensive new model of integrated review that would subject all agencies to robust review, by bodies that possess the necessary powers and operate in an integrated manner. Ten years later that recommendation has not been taken up.

In June 2016 the government introduced Bill C-22, which would establish a National Security and Intelligence Committee of Parliamentarians. There is no specific reference to the Charter, the Canadian Human Rights Act or international human rights obligations in the Bill. There has been no accompanying reform to the powers and mandates of existing independent bodies responsible for reviewing individual agencies; no proposal to create review bodies for agencies, such as the Canadian Border Services Agency, currently not subject to independent review; and no indication of an intention to develop a framework that ensures all review agencies can and will operate and cooperate in an integrated manner.

RECOMMENDATION: In addition to the current proposal to establish parliamentary review, Canada's model of review and oversight of agencies involved in national security operations must be reformed to ensure all agencies are subject to robust, real-time review by bodies which possess all necessary powers and are able to cooperate and work with each other in an integrated manner in the course of their review activities.

d) Regular reviews of the human rights impact of national security laws.

Amnesty International proposes that human rights be established as a pillar of Canada's national security framework. International human rights norms do recognize that pressing national security concerns may justify measures that narrowly restrict some rights or temporarily suspend other rights.

As noted above, there are many rights that cannot be limited under any circumstances. Any such measures should be exceptional and not permanent. However, national security measures adopted by governments, including the Canadian government, are rarely temporary.

While there has been limited use of 'sunset provisions' with respect to some national security provisions,[11] most simply become fixtures in Canadian law, including many which violate or undermine human rights provisions. Regular review helps safeguard against that possibility.[12]

RECOMMENDATION: Parliament should ensure regular reviews, at least every three years, of the human rights impact of national security laws.

e) A commitment to ensuring adequate redress for individuals who experience national security related human rights violations.

Central to anchoring a strong commitment to human rights in Canada's national security framework is accounting for and redressing national security-related human rights violations from the past.[13] Numerous judicial inquiries and court rulings have highlighted serious human rights violations that have occurred in relation to Canadian national security investigations or operations, within Canada and abroad. The compensation and official apology provided to Maher Arar in 2007[14] and Benamar Benatta in 2015[15] are rare instances of redress being provided to individuals who have experienced serious national security-related human rights violations – including torture, unlawful arrest, arbitrary detention and unfair trials – for which Canadian officials bear some responsibility.

Notably Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin have not been compensated for the many ways that actions of Canadian officials contributed to the human rights violations they experienced, as documented in a 2008 judicial inquiry report from former Supreme Court of Canada Justice Frank Iacobucci.[16] Omar Khadr has had no redress for Charter violations upheld in unanimous 2008[17] and 2010[18] Supreme Court of Canada judgements. Other unresolved cases include Abousfian Abdelrazik[19] and individuals subject to immigration security certificates.

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[11] Such as the provision in the Anti-Terrorism Act, S.C. 2001, c-41 , s. 83.32, under which new powers with respect to preventive detention and investigatory hearings ended after five years, unless renewed. Notably as well, the Anti-Terrorism Act, s.145, required a review of the new legislation by parliamentary committees, three years after the law's entry into force.

[12] Ten areas of best practices in countering-terrorism, *Supra*, footnote 1, pp. 9-12.

[13] Ten areas of best practices in countering-terrorism, *Supra*, footnote 1, p. 12.

[14] "Harper's apology 'means the world': Arar", CBC News, January 26, 2007, www.cbc.ca/news/canada/harper-s-apology-means-the-world-arar-1.646481.

[15] Benamar Benatta reaches settlement with Canadian government, March 9, 2015, http://champlaw.ca/Benatta.

[16] Iacobucci Inquiry, *supra*, footnote 7.

[17] *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 SCR 125.

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

[19] To date Abousfian Abdelraziq has not yet received compensation despite findings that Canada was complicit in human rights abuses he suffered. See *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 FCR 267 at paras 156(i) & 156(iv) (wherein the Federal Court found that "CSIS was complicit in the detention of Mr. Abdelrazik by the Sudanese authorities in 2003" and that his right under the Charter of Rights to

RECOMMENDATION: Appoint a judge or other independent expert expeditiously to review and resolve, consistent with international human rights principles, all pending legal cases involving claims for redress related to human rights violations arising in the context of national security operations.

III Recommendations for Reform

In addition to the overarching recommendations detailed above, Amnesty International draws attention to the following provisions in Canadian laws or policies that require repeal or amendment to meet human rights requirements.

a) Deportations to a risk of torture

International law establishes an unconditional prohibition on deporting individuals where there are substantial grounds for believing they would be tortured, known as the ban on *refoulement* to torture.[20] However, Canadian law allows for such deportations to go ahead in exceptional circumstances,[21] which may include national security considerations. International law clearly establishes there are no exceptional circumstances for torture. UN human rights bodies have repeatedly called on Canada to amend laws to uphold the absolute ban on deportation to torture.[22]

RECOMMENDATION: Amend Canadian immigration and extradition law to conform with the absolute prohibition of *refoulement* to torture.

b) Immigration security certificates and other national security related immigration proceedings

Under Canadian refugee and immigration law, security certificate and other national security-related proceedings give rise to serious due process and fair trial concerns, arising largely because of secrecy and withholding of evidence. UN human rights experts have frequently called on Canada to address the shortcomings.[23] The security certificate process was struck down for failing to meet Charter of Rights

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enter Canada had been unjustifiably breached; Security Intelligence Review Committee, *Annual Report 2012-2013: Bridging the Gap*, p. 28 (wherein the SIRC found that in the context of an interview with Abdelrazik in Sudanese custody, "CSIS inappropriately and, in contravention of CSIS policy, disclosed personal and classified information").

[20] *Convention against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1987] 1465 UNTS 113, p. 85, article 3.

[21] *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, para 78.

[22] UN Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention, Concluding Observations*, 25 June 2012, UN Doc CAT/C/CAN/CO/6, para 9; UN Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*, 13 August 2015, UN Doc CCPR/C/CAN/CO/6, para 13.

[23] *Ibid*, para 13, UN Commission on Human Rights, *Civil and Political Rights Including the Question of Torture and Detention, Report of the Working Group on Arbitrary Detention*, 5 December 2005, UN Doc E/CN.4/2006/7/Add.2, paras 34-45.

guarantees of fundamental justice by the Supreme Court of Canada in 2007[24] and subsequently amended to introduce the role of Special Advocates.[25]

Special Advocates are generally barred from communicating with the individual who is subject to a certificate after having reviewed secret evidence in the case, significantly limiting their ability to look out for the individual's interests. The Special Advocates model has been upheld by the Supreme Court of Canada[26] but continues to draw criticism from the UN.[27]

RECOMMENDATION: Repeal security certificate and all other national security related immigration processes that rely on secrecy and withholding of evidence; and ensure that all immigration proceedings dealing with national security cases conform to international fair trial requirements.

c) Ministerial directions with respect to intelligence sharing and torture

Judicial inquiries conducted by Justices Dennis O'Connor and Frank Iacobucci with respect to the cases of Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin clearly document that intelligence information shared with foreign governments contributed to the torture and other human rights violations those four men experienced and intelligence information received from foreign governments in those cases bore the taint of being obtained through torture. Justice O'Connor was given a mandate to make recommendations as part of the Arar Inquiry. Having found that information shared with foreign intelligence agencies by Canadian agencies was at the root of the human rights violations experienced by Mr. Arar, Justice O'Connor recommended that:

> The RCMP and CSIS should review their policies governing the circumstances in which they supply information to foreign governments with questionable human rights records. Information should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture.[28]

However, the government did precisely the opposite. Ministerial Directions[29] adopted since the Arar Inquiry allow, in exceptional circumstances, for intelligence to be shared with foreign agencies even if doing so is likely to contribute to torture and also for intelligence to be received from foreign sources

[24] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350.
[25] *Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, SC 2008, c. 3.
[26] *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 SCR 33,.
[27] UN Human Rights Committee, *Concluding observations, supra,* footnote 23, para 13.
[28] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, p. 345 (Recommendation 14).
[29] *Ministerial Direction to the Canadian Security Intelligence Service: Information Sharing With Foreign Entities* (28 July 2011), <http://www.cips-cepi.ca/wp-content/uploads/2012/04/PS-ATIP-A-2011-00297-March-2012-InformationSharing.pdf>.

even if it was likely obtained through torture. The UN Committee against Torture has expressed concern about the Ministerial Directions and called for them to be reformed.[30]

RECOMMENDATION: Withdraw the existing Ministerial Directions with respect to intelligence sharing and torture and establish a clear legal prohibition on sharing intelligence when there are substantial grounds to believe it will contribute to torture and a clear legal prohibition on receiving intelligence when there are substantial grounds to believe it has been obtained through torture.

d) National security laws and the protection of protest and free expression

An inevitable human rights concern arises when laws defining terrorist activities and threats to security are drafted in broad terms which may readily include a range of protest, civil disobedience, advocacy and dissent activities. Several Canadian laws seek to limit that possibility but do so inconsistently with respect to whether protest must be lawful or not and the range of types of protest activity that are expressly protected.[31]

RECOMMENDATION: All definitions of terrorist activity or threats to security in Canadian law should explicitly protect "advocacy, protest, dissent, artistic and other expression, and work stoppages."

e) CSIS threat reduction warrants

One of the most substantial and troubling reforms adopted through Bill C-51, the *Anti-terrorism Act, 2015*, was the introduction of new threat reduction powers for CSIS which expressly contemplate the possibility that the exercise of such powers might involve criminal acts and breaches of the Charter of Rights, which would be allowable if authorized by a Federal Court warrant. The only acts specifically prohibited are death or bodily harm, obstructing justice or violating sexual integrity, leaving aside other conduct that could be illegal and/or involve human rights violations. The expectation that judges might authorize violations of the Charter is particularly troubling. This provision is a stark and explicit example of a complete failure to ensure national security practices conform to human rights requirements.

RECOMMENDATION: Repeal threat reduction powers allowing CSIS agents to commit violations of the Charter of Rights. Incorporate provisions in all relevant national security legislation expressly requiring law enforcement and national security personnel to operate in conformity with the Charter of Rights, the Canadian Human Rights Act and Canada's international human rights obligations.

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[30] UN Committee Against Torture, Concluding Observations, *supra*, footnote 23, para 17.

[31] The *Security of Canada Information Sharing Act* protects "advocacy, protest, dissent and *artistic expression*." The *CSIS Act* protects "*lawful* advocacy, protest or dissent." The *Criminal Code* definition of terrorist activity protects "advocacy, protest, dissent or *stoppage of work*." [Italics added to highlight differences among the provisions.]

f) Criminal offence of promoting the commission of acts of terrorism "in general".

Bill C-51 introduced a new criminal offence of advocating or promoting the commission of terrorism offences "in general". There are numerous serious human rights concerns associated with this offence, in particular that the uncertainty of the broad and undefined qualifying term "in general" both violates and chills free expression. As well, it is not clear what is covered by the reference to "terrorism offences". The need for this new offence has never been clear, given that Canadian law does already criminalize instructing, threatening, counselling, inciting, conspiring, and aiding and abetting with respect to terrorist activities.

RECOMMENDATION: Repeal s. 83.221 of the Criminal Code, "Advocating or promoting the commission of terrorism offences".

g) Information sharing

Enacted through Bill C-51, the *Security of Canada Information Sharing Act* institutes unprecedented expansive information-sharing across government departments and agencies. The new law 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. The Act also lacks clear safeguards to address well-documented examples of serious human rights violations, including torture and ill-treatment, which have been caused or facilitated by Canadian officials sharing unreliable, inaccurate and inflammatory information domestically and internationally. Those concerns have heightened in the wake of revelations of a memo laying out an agreement that information obtained during consular visits with Canadians detained abroad may be shared with CSIS.[32]

The virtually unchecked approach to information-sharing occurs against a backdrop of mounting concern about extensive privacy rights violations arising from information being obtained by security and law enforcement agencies through unwarranted and frequently illegal electronic surveillance. Effective information-sharing is essential in both preventing and responding to terrorist activities; and can also play an important role in preventing and responding to human rights violations. But it must conform to privacy and other rights and must include safeguards to ensure that only relevant and reliable information is shared and is done so in circumstances unlikely to contribute to human rights violations.

RECOMMENDATION: The *Security of Canada Information Sharing Act* should be repealed. Laws with respect to information-sharing must strictly conform to human rights requirements and be backed-up by provisions to safeguard against information being shared in ways that contribute to human rights violations.

[32] Jim Bronskill, The Canadian Press, *CSIS using C-51 to spy on Canadians in foreign prisons, memo reveals*, Toronto Star, 3 October 2016, https://www.thestar.com/news/canada/2016/10/03/csis-using-c-51-to-spy-on-canadians-in-foreign-prisons-memo-reveals.html.

h) No-fly list appeal provisions

One notoriously opaque counter-terrorism measure many governments, including Canada, have adopted in recent years is the increasing use of so-called "no-fly" lists of individuals who are considered to pose a sufficiently serious security risk such that they are barred from travelling on commercial flights. The sanction extends far beyond individuals who have been or even could face criminal charges. There are countless examples of individuals who discover they have been listed and who have absolutely no idea what the basis for the decision. Many are clearly cases of mistaken identity or other errors. A growing number of families in Canada have spoken out about their young children having been listed.[33] It has invariably proven to be a Kafkaesque experience for individuals who seek to have their names removed from no-fly lists.

The *Secure Air Travel Act* for the first time establishes a legislated system for overseeing Canada's no-fly list. However the process for lodging a complaint and seeking rectification of an erroneous listing decision is unfair and secretive. Among many concerns, information can be withheld from the individual concerned during the appeal, admissibility standards for evidence are substantially relaxed and the government needs only meet the low threshold of "reasonableness" for a listing decision to be upheld.

The human rights implications of being listed can be serious, extending far beyond the inconvenience and embarrassment of being kept off of a flight. Important rights to liberty, freedom of movement, privacy and non-discrimination are at stake. Being denied the right to fly may impede an individual's ability to work or make it impossible to visit or reunite with family. Given what is at stake, the system must be fair.

RECOMMENDATION: The appeal provisions under the *Secure Air Travel Act* should be reformed to 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.

i) Preventative arrest and detention

One of the most controversial amendments to Canadian security law in 2001 was the institution of recognizance with conditions measures under which law enforcement officers may detain, without charge, individuals suspected of planning to commit terrorist attacks. 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*. Amendments under Bill C-51 have significantly lowered the threshold of suspicion

[33] Sulemaan Ahmed, *Why are Canadian children still on no-fly lists – and what can be done?*, Globe and Mail, 27 June 2016, www.theglobeandmail.com/opinion/why-are-canadian-children-still-on-no-fly-lists-and-what-can-be-done/article30629435/. There are reports that 46 Canadian children have been listed under Canada's "Passenger Protect Program", www.noflylistkids.com. A newly established Passenger Protect Inquiries Office has been given the mandate to provide advice to individuals who are concerned that they have been improperly listed.

that would justify detention without charge from believing that a terrorist act *will* be carried out to *may* be carried out; and from an assertion that the detention is *necessary* to prevent it to *is likely* to prevent it. The maximum possible length of time that an individual could be detained under a recognizance is increased from three days to seven.

Recognizing the fundamental importance of liberty rights, international human rights law imposes stringent requirements when it comes to arrest and detention without charge, on security grounds or any other basis. The UN Human Rights Committee has noted that security related detention without charge should be "under the most exceptional circumstances" when there is a "present, direct and imperative threat ... that cannot be addressed by alternative measures."[34] Amnesty International has repeatedly called on governments to refrain from arresting and detaining individuals on security grounds unless there is an intention to lay criminal charges and bring the individual to trial in a reasonable period.[35]

RECOMMENDATION: Recognizance with conditions provisions in the *Criminal Code* allowing for detention without charge on security grounds should be repealed.

[34] 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), para. 15.

[35] 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*, AI Index: IOR 41/013/2014, May 2014, pp. 10-11.