The International Civil Liberties Monitoring Group

Brief to the
House of Commons
Subcommittee on Public Safety and National Security
Of the Standing Committee on Justice, Human Rights, Public Safety and
Emergency Preparedness

Submission Concerning
The Review of the *Anti-Terrorism Act*

April, 2005

1. ICLMG

The organization

The **International Civil Liberties Monitoring Group (ICLMG)** is a pan-Canadian coalition of civil society organizations that was established in the aftermath of the September 11, 2001 terrorist attack in the United States. The coalition brings together 34 international development and humanitarian NGOs, unions, professional associations, faith groups, environmental organizations, human rights and civil liberties advocates, as well as groups representing immigrant and refugee communities in Canada.

These organizations, active in the promotion and defense of rights within their own respective sector of Canadian society, came together to share their concerns about the impact of new anti-terrorism legislation and other counter terror measures with regards to civil liberties, human rights, refugee protection, racism, political dissent, and governance. The ICLMG was formalized in May, 2002, to serve as a roundtable for discussion and exchange, and to provide a point of reflection and cooperative action.

Our perspectives

> "*We cannot defend our democracies if we abandon respect for due process and fundamental rights. When public order is put above the civil liberties of citizens, then that democracy has adopted the tactics and principles (or lack of principles) of its enemies, and has been partially defeated.*"
>
> Sophia Macher, Commissioner,
> Truth and Reconciliation Commission, Peru

The International Civil Liberties Monitoring Group is composed of organizations vitally engaged in both domestic and international affairs.

We are organizations committed to human rights and democracy and to the protection of the rights and liberties guaranteed by the Canadian constitution.

We are organizations deeply concerned with the impact of contemporary violence, including all forms of political violence, and the use of terror, whether by states or non-state elements. It is a threat to the deepening of democratic and open societies and government around the world and to the enjoyment of human rights. While we recognize the obligation of states to protect citizens and others on their territories from violence, we regret the way in which most states are interpreting this obligation by restricting democratic freedoms. Fear has provoked actions in North America, and in many other nations, which restrict democratic freedom and increase repressive actions by the state and its security forces, and has led to an increased application of racial, religious and political "profiling", arbitrary arrests and imprisonment, torture and regressive responses to the urgent needs of refugees.

We support all legitimate and appropriate efforts to eliminate terrorism in all its forms. Indeed, to this end, our organizations are deeply committed to eradicating the roots of terrorist responses, whether in economic hardship, political repression, fundamentalism and intolerance or social marginalization.

2. CONSIDERATIONS INFORMING THE POSITION OF ICLMG

The rule of law must be restored and reaffirmed, domestically and internationally

Terrorism, like any crime or violence directed at civilians, is abhorrent. However, it is not a new phenomenon and pre-existing criminal laws (prior to the *Anti-terrorism Act*) and international agreements, if used properly, provide an adequate legal framework to address it. In the name of "fighting" terrorism, we must not forfeit the very democratic values and freedoms we are supposed to be protecting. We know from the hard experience of human history that respect for human rights and democratic values must be at the centre of any approach to human security. Where these rights and values are eroded or abused, the threat to human security and freedom is greater than the potential threat of one-off terrorist acts.

Indeed, draconian measures can only destroy the fundamentals of a free and democratic society and contribute little to address the root causes of terrorism. This view is echoed by Louise Arbour, UN High Commissioner for Human Rights, who cautioned that national governments should be wary of undermining personal liberties in their fight against terrorism, lest it help terror groups recruit more members. She says that "more than ever, the international human-rights agenda creates a forum, maybe the only universal forum, in which conflicting views, aspirations and beliefs of a most fundamental nature can confront each other in a respectful environment."[1]

Unfortunately, as pointed out by Judge Richard Goldstone, first chief prosecutor at the war crimes tribunal for former Yugoslavia and Rwanda, the terrorist attack on the United States in September 2001 have led to an over-reaction by politicians in many countries.[2] As a result, the international justice system and the rule of law have been weakened by the actions governments joining a "war on terror" led by the United States, and in which a culture of secrecy and lawlessness prevails. The use of indefinite detentions, secret prisons, rendition to third countries for torture, and the introduction of concepts such as "unlawful combatants" to evade obligations of the Geneva Convention, are concrete examples of this disturbing trend.

The incremental implementation of Canada's anti-terrorist agenda is intrinsically linked to this global trend. Instead of continuing relentlessly in this direction, terrorist acts must be addressed for what they are — criminality. Terrorism must be opposed by reaffirming democratic values and the rule of law, not through the erosion of liberties and increased lawlessness.

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[1] *Curbing rights helps terror groups, Arbour says,* Associated Press, Dec.9, 2004
[2] *U.S. terror war 'over-reaction,' top judge says*, Olivia Ward, Toronto Star, Jan. 17, 2005

3. ICLMG POSITION

The *Anti-terrorism Act* must be repealed

While it is essential to protect Canadians against terrorism, the *Anti-terrorism Act* should be repealed because it undermines democracy and human rights. It is legislation that was badly conceived at the time, in response to mis-perceived risk and fomented public fear. It has also proven to be unnecessary since already existing laws have been more than adequate in dealing with subsequent cases related to alleged terrorism threats.

Under pressure from the U.S., the legislation was passed expediently and without adequate and serious consideration to the more effective use of existing laws nor reference to fundamental and universal human rights frameworks as found in the *Universal Declaration* and the *Covenants* of the United Nations to which Canada is a party.

Further, the *Anti-terrorism Act* and other laws and measures adopted by Canada appear to come into conflict, in a variety of ways, with sections of the *Canadian Charter of Rights and Freedoms,* as well as with specific guarantees to the rights of Canadians in such laws as the *Privacy Act*.

It is ICLMG's view that Canada has in place prior domestic laws and international agreements and instruments that, used appropriately, allow it to deal with potential terrorist threats. In a commentary published in November, 2003, former CSIS director Reid Morden reminded us that "one must never forget that the existing criminal law in Canada already prohibits a broad range of terrorist activities, including agreements, attempts, assistance and counseling of crimes."[3] This view is authoritatively developed and substantiated by compelling legal arguments in the brief submitted to this Committee by the Canadian Association of University Teachers

The current Anti-Terrorism Act should be repealed. If, after careful study, it is deemed absolutely necessary to fill real, demonstrated gaps in the legislative tools available, new legislation could be re-introduced for consideration by Parliament. However, such proposed legislation should be rationally and proportionally tailored to a thorough and "demonstrated" threat assessment and take into account the utility of pre-existing laws and international agreements to deal with potential terrorist threats. Such proposed legislation should fully adhere to and respect basic constitutional and international human rights norms.

Review must encompass all anti-terrorism measures

The measures enabled in the *Anti-terrorism Act*, in other legislation such as the *Public Safety Act,* and in non-legislated measures such as the *Smart Border Action Plan,* form a complex web of far-reaching incursions on civil and human rights that, taken as a whole,

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[3] *Spies, not Soothsayers: Canadian Intelligence After 9/11,* Reid Morden, Commentary No. 85, a CSIS publication, November 26, 2003

threaten to undermine fundamental principles of law to radically and permanently alter the relationship between the State and its citizens. La Ligue des droits et libertés du Québec maintains that such measures imply a renunciation of the guarantees provided under the Canadian Charter of Rights and Freedoms, the Common Law, and the rules of procedural fairness, including the rights to freedom, to security, to a fair and public trial and to privacy. We concur.

Any serious review of Canada's anti-terrorism legislation has to address *Charter* rights including the right to life, liberty and security of the person and the right to equal treatment. It must take into account the rights of non-citizens, the rights of ethnic and religious minorities, the right to a fair hearing, the right to be protected from arbitrary detention, and the right under international law not to be sent or returned to countries where there is a risk of grave violation of fundamental human rights.

We welcome the committee's decision to extend the parliamentary review to include a review of the security certificate provisions of the *Immigration and Refugee Protection Act*. However, we believe the review should be extended to encompass other elements of Canada's anti-terrorism agenda such as:

- aspects of the *Public Safety Act* (as well as C-44 and S-23) related to the exchange of airline passenger information for the purpose of passenger screening;
- components of the *Smart Border Action Plan* that deal with the creation and integration of databases, data mining and airline passenger risk assessment screening (including the creation of "no fly" lists), as well as all information-sharing agreements with the United States;
- the Safe Third Country agreement;

In making this appeal for an overall review of Canada's anti-terrorism agenda, the ICLMG shares the view put forward by Justice Minister Irwin Cotler, last August, at a meeting of the Canadian Bar Association when he declared that he was "… open to the idea of an integrated and inclusive approach to appreciating the fallout with respect to civil liberties from our whole approach to anti-terrorism law and policy in this country which is not limited to the *Anti-terrorism Act."*

At the very least, the review of the *Anti-terrorism Act* must be holistic and take into account that any impact of C-36 must be assessed in relationship to all the other measures that form Canada's anti-terrorism response.

4. AREAS OF CONCERN

Purpose

Provisions contained in the various pieces of so-called "anti-terror" legislation and other non-legislated measures augment and expand the scope and scale of police and

government monitoring and control over Canadian citizens, far beyond measures necessary to respond to the potential risks of terrorism.

Indeed, the array of anti-terrorism measures appears to be driven not merely by pressures to appease U.S. demands and to meet Canada's international commitments, but also by the eagerness of the intelligence community, law enforcement agencies and government officials to exploit the "war on terror" as a convenient paradigm to promote an agenda that goes far beyond the fight against potential terrorist threats. Two ancillary objectives are evident:

> i) Increasing the investigative and surveillance powers of intelligence, security and police forces while diminishing the obligation for civilian scrutiny and public accountability;
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> ii) Tapping into the possibilities of new information technology for purposes of surveillance, data-gathering and data-mining, information-sharing, and profiling.

It is clear that the agenda is not limited to reducing exposure to potential terrorist threats, but aims to facilitate regular police work in anti-criminal operations, the tracking of immigrants and refugees, and the surveillance of and intelligence gathering on political dissenters.

The result is faulty and non-transparent dual purpose legislation, diminished oversight over police powers, and operational harmonization of Canada-U.S. security policies and systems, including the incremental access of information about Canadians by U.S. authorities.

The implementation of this agenda can only be achieved at the expense of Canadian constitutional protections, and must be curtailed.

Sweeping definition of terrorism

Terrorism is not a new phenomenon and states have historically dealt with it as a national or international law enforcement problem. "Terrorism" is not the name of an enemy. It is any criminal act of violence carried out against civilian populations to generate terror and to dominate by fear, whether committed by civilian, insurgent or terrorist groups, or by governments, their police and security apparatus, and regular armies.[4] Such acts of violence are already captured under domestic and international laws and conventions.

At the same time, "terrorism" is not actually defined in any Canadian statute but the one presently under review, although the Supreme Court proposed a definition in the Suresh case for the purposes of the *Immigration and Refugee Protection Act.* Nor are there any definitions of the concept in any important international instruments such as the *Rome Statute of the International Criminal Court*. Even the international conference on security

[4] Spanish Judge Baltasar Garzon, internationally renowned for his attempt to bring former Chilian dictator Agusto Pinochet to justice, in an interview to Inter Press Service, published March 9, 2005.

held in Saudi Arabia, in which Canada participated in February 2005, could not reach a consensus on the definition of terrorism.

Nonetheless, Canada's *Anti-Terrorism Act* provides a vague, imprecise and overly expansive definition of "terrorism" and "terrorist activity" that could be interpreted arbitrarily to encompass forms of dissent and/or violent behavior that have little to do with terrorism, thus threatening civil liberties and the right to legitimate political dissent. Furthermore, the definition introduces the notion of "ideology, politics and religion" as motivational requisite elements for the offense, which indirectly sanctions intrusive investigative capacity, including political and religious profiling. Using motive in this manner, as an essential element in defining and identifying a crime, is foreign to criminal law, humanitarian law, and the law regarding crimes against humanity.

Reid Morden says that the Canadian government, "in its race to catch up, went beyond the British and American legislation defining terrorist activities to include political, religious and ideological protests that intentionally disrupt essential services ….. The overall effect is to lengthen the long reach of the criminal law in a manner that is complex, unclear and unrestrained."[5]

The concern is that without a carefully limited scope, these heavily-charged terms will be applied to justify intrusive state action beyond that previously tolerated. This is not merely an issue for groups and individuals critical of current government policies. It is an issue for all citizens committed to the historic values of this nation, values that we have promoted internationally for over half a century as the core of our foreign policy.

On the basis of its own interpretation of this definition, a CSIS annual report tabled after the adoption of C-36 warns that "…Canada is confronted by domestic terrorism issues related to aboriginal rights, white supremacists, sovereignty, animal-rights and anti-globalization issues."[6]

On September 21, 2002, the *Anti-terrorism Act* was formally invoked by the RCMP, with support from CSIS, to obtain a search warrant and carry out a raid at the residence of two Native activists in Port Alberni, British Columbia. The high profile operation was carried out by the Integrated National Security Enforcement Team (INSET). The purpose of the raid was ostensibly to search for weapons. The entire neighborhood was evacuated "as a safety precaution". No unauthorized weapons were found and no charges were laid as a result of the police action. Spokespersons for the Warrior Society were told that the information used to obtain the search warrant was sealed.

Another problem with such a sweeping definition of "terrorism" is that it fails to distinguish between criminal terrorist entities and freedom fighters or liberation movements, whose legitimacy can shift depending on the time period and the dominating

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[5] *Spies, not Soothsayers: Canadian Intelligence After 9/11,* Reid Morden, Commentary No. 85, a CSIS publication, November 26,2003

[6] *Canadian Security Intelligence Service, 2001 Public Report*, June 12, 2002

political interests at stake. Under the current definition, Nobel prize recipients Nelson Mandela and Rigoberta Menchu would be considered terrorists. Members of the French resistance fighting against the Nazi occupation would have fallen into the same category. Inversely, the definition fails to address the issue of state terrorism which, in fact, is practiced against their own people by some of the very countries that have joined the U.S.-led campaign against terrorism.

ICLMG is also concerned that Bill C-36's definition of terrorist entities can be construed as an attack on Islam, since one of the pillars of the religion calls on Muslims to donate aid wherever it is needed and that means providing aid to people in Somalia, Kashmir, Chechnya or Palestine. The government's definition of terrorist groups is so wide that any citizen wishing to send money to relatives in countries such as Lebanon, where Hezbollah is active, could be accused of sponsoring terrorism.

Erosion of the right to due process

Several provisions of the *Anti-terrorism Act* allow for the ministerial issuance of security certificates, or ministerial orders, and for secret judicial reviews amounting to secret trials for the purpose of listing entities, de-registering charities and detaining individuals suspected of terrorist links. Under these provisions, the federal Attorney General has virtually absolute power to prohibit disclosure of information in connection with a proceeding. These features parallel the security certificate provisions of the *Immigration and Refugee Protection Act* that deny the right to due process and a fair and open trial to non-citizens suspected of representing a risk to national security. Under these provisions, individuals can be indefinitely detained until a single judge determines, *in camera* and *ex-parte,* whether a ministerial certification that the person is a security threat is reasonable and the person can be deported.

In essence, aspects of the security provisions of the *Immigration and Refugee Protection Act* served as a template for much of the *Anti-terrorism Act*. For that reason, a fundamental and honest review of the *Anti-terrorism Act* cannot take place in the absence of a thorough review of the security provisions of the *Immigration and Refugee Protection Act* related to the issuance of security certificates, preventative detentions and deportation.

The U.K. also used these same provisions of Canada's *Immigration and Refugee Protection Act* as a template for its own *Anti-terrorism Crime and Security Act, 2001*, permitting the Home Secretary to detain non-citizens without criminal charges on mere suspicion of representing a national security risk.

However, in December 2004, the appeal court of the House of Lords ruled, in an 8-1 majority, that this same anti-terrorism law was incompatible with the European Convention on Human Rights. The highest court in the country also concluded that the indefinite detention of non-citizens terrorist suspects was a disproportionate and discriminatory way to deal with terrorism.

Following the House of Lords' ruling, the Secretary General of the Council of Europe called for the immediate repeal of the U.K. anti-terror law. He also declared that "we will not win the fight against terrorism if we undermine the foundations of our democratic societies."[7]

In a clearly inadequate response, Home Secretary Charles Clark announced at the end of January 2005 that the U.K. would look into a twin track approach: deportation with assurances for foreign nationals; and a new mechanism — control orders — to contain and disrupt those people who could not be prosecuted or deported.[8] However, several human rights reports, including one by Human Rights Watch published in April, 2004, have denounced that such diplomatic assurances were no guarantee against torture.[9] Canada's Supreme Court has also expressed concerns about diplomatic assurances. In its ruling in the Suresh case, it said:

> "It may be useful to comment further on assurances. A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter." (Para. 124)

Nonetheless, the controversial *Prevention of Terrorism Act 2005* was adopted (and enacted) on March 11, 2005, despite harsh opposition and severe criticism in both Houses of Parliament.

Now, Justice Minister Cotler has declared, in front of this committee on March 23, 2005, that Canada will consider the recent U.K. legislation as an alternative to the detention of non-citizens under the security certificate provisions of the *IRPA*. Instead of responding to concerns that the use of security certificates and their secret review mechanism is a violation of the right to due process, he went in the opposite direction to say he was open to considering the use of supervisory control, including house arrest, for Canadian citizens as well who might be suspected of terrorism but against whom there is not sufficient evidence to lay criminal charges. The imposition of supervisory control, including house arrest, without a fair and open trial, whether for non-citizens or citizens, is still an infringement of any person's fundamental right to due process.

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[7] *Secretary General of COE calls for repeal of UK anti-terror law*, Statewatch News Online, Dec. 22, 2004
[8] *Clark ends terror suspects' detention without trial,* by Chris Moncrieff, Stan Clare and Jane Kirby, PA, The Independent online edition, Jan. 26, 2005
[9] *"Empty Promises:" Diplomatic Assurances No Safeguard Against Torture*, Human Rights Watch, April 2004

The U.S. faces similar difficulties. In June 2004, the Supreme Court ruled that individuals detained as enemy combatants were legally entitled to challenge their incarceration through a fair and open trial in American courts. Special military tribunals were set up shortly after this decision, to determine whether the detainees could still be held. However, on January 31, 2005, a District Court ruled that these military tribunals themselves were unconstitutional and reconfirmed the detainees' right to a fair and open trial.

In response to the ruling and increasing international pressure, U.S. officials are reported to be preparing long range plans for the indefinite detention abroad of suspected terrorists whom they do not want to set free or turn over to the courts. This would include hundreds of people presently in military and CIA custody about whom the government does not have sufficient evidence to charge in courts.[10]

Thus, in response to court rulings on the unconstitutionality of its treatment of suspected terrorists, the U.S. appears to be choosing a path that will lead even further along the path of tyranny and lawlessness.

Canadian parliamentarians surely will acknowledge that, with a more rational perspective and a certain emotional distance with regards to the tragic events of September 2001, lawlessness is not the path Canadians want to choose. A failure to address the lack of due process, both in the *Anti-terrorism Ac*t and in the *Immigration and Refugee Protection Act,* will raise serious questions as to Canada's role as an accomplice in flagrant violations of basic human rights and the negation of international covenants.

Canada's response to terrorism must be rooted in the rule of law, with an emphasis on international law and the use of multilateral institutions (including the International Criminal Court); in democratic development and good governance; in respect for human rights and civil liberties; and ultimately in social justice and the eradication of poverty, as the only way to truly confront terrorism.

Erosion of parliamentary responsibility and political accountability

The *Anti-terrorism Act*, the *Public Safety Act,* the *Immigration and Refugee Protection Act* and other measures adopted by Canada not only pose a major threat to human rights, civil liberties and due process. They also contribute to erode the power and authority of our democratic institutions. Taken as a whole, they provide for an unprecedented delegation of judicial and legislative powers to a handful of ministers. Such delegations of authority facilitate an arbitrary and potentially abusive application of secret powers through "orders in council", "regulations" and "security certificates" that are not subject to adequate oversight and parliamentary approval.

The *Public Safety Act* in particular has several provisions that cause concern because they are unnecessary and represent a dangerous intrusion on our democratic freedoms. They are provisions that provide investigative powers and enforcement tools that go far beyond

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[10] *Long-term plan sought for terror suspects,* by Dana Priest, The Washington Post, Jan. 2, 2005

the *Emergencies Act* of 1988**.** While the *Emergencies Act* explicitly states that all its provisions are subject to the Charter of Rights and Freedoms, the *Public Safety Act* has no such provision. Furthermore the act grants ministers and bureaucrats a wide range of powers: to issue "interim orders", "security measures" and "emergency directives"; to delegate authority to lower-level officials; and to collect and use personal information – all without adequate parliamentary approval, scrutiny and oversight, in other words without the usual checks and balances. The act also contains articles that state that certain "orders" are not "statuary instruments" and consequently not subject to review by the parliamentary committee mandated by law to review all other statutory instruments. In addition, there is a provision that states that no legal action lies under the *Crown Liability Act*, with respect to intercepted communications.

The *Anti-Terrorism Act* has similar provisions that derogate from customary judicial review and parliamentary authority. These are addressed in other sections of this brief.

Parliament as the traditional guardian of our rights and freedoms against an over-reactive and over-zealous executive should be extremely concerned with this erosion of its powers as set out in these laws. Such erosion is inconsistent with our parliamentary democracy and unnecessary to deal with the potential risks of terrorism.

Open-ended legislation

A great danger of the *Anti-terrorism Act* and other measures is that they will become permanent. The *ATA* and other anti-terrorism measures confer to the police and security agencies investigative powers, law enforcement tools and a level of discretion never imagined before outside the War Measures Act — yet it does not contain a sunset clause.

The War Measures Act as it was applied in 1970 severely compromised civil liberties, and precisely because of that, its enactment contained an explicit sunset clause and the Act was implemented for a restricted and pre-determined period of time. Canada then returned to normality — a judicial *status quo ante*.

This is not the case with the *Anti-terrorism Act*. It is part of an irreversible and incremental process that will alter forever the fundamental values, civil liberties and Constitutional guarantees that Canadians have until now viewed as the pillars of Canadian democracy, particularly with regard to due process, the right to privacy and legitimate political dissent.

Listing of terrorist "entities" and de-registration of charities

The listing of terrorist entities by a ministerial decision is unjust because it entails insufficient notice and a lack of procedural fairness, and the absence of an open and transparent appeal mechanism for redress. Furthermore, the listing is done on the basis of a definition of terrorist activity on which there is no international consensus, and with disregard for the social and political context in which such activity might take place. This brings us back to the problem of definition addressed earlier in this brief.

This concern also applies to the provision for de-registration of charities, which creates a chilling effect on international development NGOs and humanitarian organizations. The new *Charities Registration (Security Information) Act* enacted as part of the *Anti-terrorism Act* enables the government to revoke the charitable status of an existing charity or deny a new charitable status application if it is determined that the charity has supported, or will support, “terrorist activity”. It can also lead to the freezing or seizure of the charity’s assets and expose its Directors to civil liability for breach of their duties by not adequately practicing due diligence.

The process is initiated by the issuance of a security certificate by the Solicitor General and the Minister of National Revenue where they have “reasonable grounds” to believe that the organization has made, makes or will make resources available, directly or indirectly, to an entity that has engaged or will engage in a “terrorist activity”. After a charity has been served notice of the issuance of a certificate, it is then reviewed by a judge of the Federal Court for a determination of its reasonableness. During this judicial consideration, the judge must give the charity a summary of the grounds giving rise to the issuance of the certificate, but may limit the disclosure of information on the grounds of “national security”, especially if the evidence is based on information obtained from a foreign government or other foreign sources. Furthermore, evidence submitted by the ministers to the judge can include information that would be inadmissible in a court of law. This procedure severely limits the capacity of the charity to defend itself and raises serious concerns from the point of view of basic principles of natural justice and due process.

As a result of this legislative change, there is a growing concern among Canadian religious and humanitarian non-governmental organizations (NGOs) that humanitarian assistance could be compromised or even discouraged in areas of conflict where it is often impossible to avoid contact with the various belligerents in the process of delivering assistance to those in need. Organizations might be reluctant to get involved in those conflicts because of the risk of “proximity” with organizations on the UN list of suspected “terrorist organizations” and the dramatic consequences for any humanitarian NGO accused of “links” to those organizations. Even by following best practices and international standards, taking considerable precautions and using due diligence to avoid situations that might bring about liability, many organizations feel that the vague definition of “terrorism” in the legislation and the lack of due process leave them vulnerable.

The recent relief efforts in Northern Sri Lanka is an example that highlights the absurdity of this situation and the conundrum created by the *Anti-terrorism Act* with regards to the delivery of humanitarian assistance in zones of conflict where, quite often, the needs of the poor, the marginalized and the displaced population are the greatest. In this specific case, while the generosity of Canadians towards the victims of Northern Sri Lanka was unprecedented, Canadian aid workers having contacts with individuals and local organizations related to the Tamil Tigers ran the risk of openly contravening the *Anti-terrorism Act.* They were vulnerable of being accused of association with a terrorist organization because the Tamil Tigers, who control much of the affected area, are listed

on the U.N. list of terrorist entities. Canadian donors contributing to organizations such as the Tamil Rehabilitation Organization, for instance, ran a similar risk since that organization has played a key role along with other international relief groups in helping victims in areas where the population is mainly Tamil and the Tigers control much of the territory.

The chill experienced by Canadian charities has been exacerbated by the recent publication by the Canada Revenue Agency of its business plan for 2005-2006, which gives some clues of what is coming. The business plan contains the following statement:

> "Finally, we will fully implement Part 6 of C-36 [*Charities Registration (Security Information) Act*] in co-operation with Public Safety and Emergency Preparedness Canada (which includes the core activities of the Solicitor General of Canada). This statute enforces Canada's commitment to international co-operation to deny support to those who engage in terrorist activities."

The ICLMG recommends that, before proceeding immediately with the denial of or revocation of charitable status, the Canadian government should inform charities of any concrete concern it might have and give them reasonable opportunity to justify or modify their practices. Moreover, sections 6 and 7 of the *Charities Registration Act* that define the conduct for which a charity can be de-registered, and the procedure to do so, must be repealed. Any new mechanism put in place must be transparent, respect due process and include genuine possibilities for appeal and redress.

More intrusive investigative and surveillance powers with reduced oversight

The *Anti-terrorism Act* grants police expanded investigative and surveillance powers, including a much lower threshold to obtain warrants for wiretap, surveillance and search and seize operations.

By introducing a motive-based definition of "terrorist activity" and adding new terrorism offenses in the *Criminal Code*, the *ATA* de facto re-instates the RCMP in "intelligence" and "national security" operations, along with CSIS and CSE, without any civilian or political oversight. The *ATA* thus overrules the conclusions of the MacKenzie and McDonald Commission that both concluded, respectively in the mid-1960s and in the mid-1980s, that this police force lacked the training, sophistication, and analytical capacity to carry out such activity.

The *Act* also served as a Trojan horse to introduce enabling legislation that made official for the first time the existence of the Communications Security Establishment (CSE), which has operated since 1947 under mere authorization by executive decrees.[11] Furthermore, the mandate of the agency was expanded to include the right to intercept wireless communications involving Canadians and that originate or terminate in Canada, as long as "the interception is *directed* at foreign entities located outside Canada." This

[11] *La face cachée de la loi,* commentary by Jean-Paul Brodeur, Le Devoir, p. A-11, October 24, 2001.

can be done by authorization of the Minister of Defense, without judicial warrant and practically no oversight. While CSE is formally accountable to the minister of Defense, there is no provision for accountable management of the database of intercepted communications, which amounts to a "blank cheque" for wiretap authority. Under its expanded mandate CSE also provides technical and operational assistance to federal agencies responsible for the application of the law.

All these increased investigative and surveillance powers are implemented, virtually without judicial nor civilian oversight, with the support of powerful new information technologies that enable and promote information mining, monitoring, and pattern analysis equivalent to or worse than practices of the most reprehensible of security forces in dictatorships. It is antithetical to a free and democratic society.

Any increases in police powers has to be accompanied by increased oversight and by measures to reinforce due process. People and organizations caught up in these security measures must have the means to defend themselves, and the public's right to know and judge state action must be preserved.

Erosion of transparency and increasing secrecy

ATA amendments to the *Privacy Act*, the *Security of Information Act* and the *Canada Evidence Act* have eroded government transparency and public accountability and the right of the public to be informed. Combined with the propensity of intelligence and security forces to evade public scrutiny and oversight, these measures provide fertile ground for a culture of secrecy and impunity.

A concrete example of the impact of the amendments to the *Canada Security of Information Ac*t on freedom of the press is the case of the high profile RCMP's search and seizure operation, in December 2003, against reporter Juliette O'Neil and the Ottawa Citizen, in relationship to the case of Maher Arar.

Similarly, according to Justice Denis O'Connor, the breadth of new secrecy provisions of the *Canada Evidence Act* empower the government to prevent the Arar Commission from making public any ruling to keep documents secret on national security grounds. This, he says, "…clearly detracts from the transparency of the inquiry…" and does " … not appear to sit well with the whole idea of a public inquiry."

Justice O'Connor added that the law might be open to a constitutional challenge at some point.[12]

Erosion of privacy rights and reversal of the principle of presumption of innocence

Several related measures have the potential to render privacy laws, and the concept of personal privacy itself, obsolete: the creation of an Airline Passenger Information (API) / Passenger Name Reservation (PNR) data bank (authorized by Bill S-23); the sharing of

[12] *New secrecy laws delay Arar hearings*, by Colin Freeze, The Globe and Mail, p. A-5, February 7, 2005.

information on airline passengers with foreign governments (Bill C-44); plans for the introduction of identification documents with biometrics features; and projects to create No Fly Lists and to implement passenger screening systems (such as the National Risk Assessment Centre) that rely on data mining of government and private sector databases.

The incremental adoption of these measures by Canada is deeply troubling when viewed in the context of U.S. plans to impose upon the rest of the world a draconian infrastructure of global registration and mass surveillance. Under this grandiose scheme of Orwellian proportions, the personal information of Canadians will soon be collected, stored, linked, data mined, monitored and shared with other countries in an unprecedented way. More than privacy is at stake here. The fundamental principle of presumption of innocence is reversed, every individual becomes a suspect, and data profiles are created on everyone.

Threats to the privacy rights of Canadians are also aggravated by provisions of the Patriot Act that forces American owned companies, and their Canadian subsidiaries, to hand over to U.S. authorities on request any information on Canadians in their possession. Once in U.S. hands, information is available to at least 15 different agencies, including the FBI and the CIA, operating under the responsibility of National Intelligence Director, John Negroponte.

Governments rationalize these initiatives as technical solutions to the problem of terrorism. But the questions that we should all urgently be asking are: "*Is* general and pervasive surveillance an effective response to terrorism? Is it proportionate to the real risk? Or will it destroy the very democratic societies it is supposed to be protecting?"

While the gradual adoption of such measures received little public notice in Canada, similar agreements between the European Union and the U.S. have been at the heart of major controversy in the European Parliament. Parliamentarians are concerned that European passenger data shared with the U.S. will receive little or no protection and is likely in violation of the privacy rights of European citizens. Would it not be reasonable to expect the same level of concern from Canadian parliamentarians in light of the fact that Maher Arar and at least seven other Canadians have been jailed abroad — and in some cases tortured — as a result of reckless information sharing with foreign authorities? [13]

In this light, a moratorium should be placed on the adoption of personal identification documents relying on biometric features, on the operation of the National Risk Assessment Centre, and on information sharing agreements with foreign governments, until the legal and ethical implications of new surveillance technologies are fully understood and debated by Canadians and their elected representatives.

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[13] *Collateral damage: At least 8 Canadians caught in terror war were jailed overseas*, by Shelly Page, The Ottawa Citizen, December 15, 2004.

Racism and Racial profiling

Since 9/11, there have been numerous high profile cases of Canadian Arabs and Muslims who have been stigmatized as terrorists without public evidence or due process. The cases of Maher Arar, the twenty-three, mostly-Pakistani, individuals arrested in Toronto as part of "Operation Thread", in addition to a half dozen other Canadian citizens of Arab or Islamic origin, have demonstrated the divisive and discriminatory pursuits of the security agenda. The Council on American-Islamic Relations (CAIR- Canada) and the Canadian Arab Federation, both members of the ICLMG, have accused the government of Canada of turning a blind eye to the violations of the rights of these individuals.

Racial profiling has also extended well beyond these high profile cases. Community leaders of Arab and/or Muslim origin have reported numerous cases of people being visited for interviews by security forces without warrants, often in the middle of the night, and taken away for interrogation. Although the full extent of the *ATA* was not implemented in these cases, it has been used as a threat to "encourage" voluntary interviews by citing the risk of preventative detention allowed under the Act. Victims of such police conduct have been afraid to come forward publicly for fear of further retaliation, but community leaders report that hundreds of such interviews have taken place.

In a modest in-house survey of 40 Canadian lawyers, carried out jointly by the ICLMG and the Canadian Muslim Lawyers Association in early 2004, 10 lawyers reported 35 cases of abuse by CSIS, the RCMP or government officials linked to the anti-terrorism legislation. These were broken down into categories and cross-referenced to ensure the same incident was not repeated in the survey. There were 6 cases related to wrongful dismissal, 16 cases of security forces coming into the workplace to question a client and harassment by officials, 7 cases of hostility or inaction by the police and 6 immigration-related incidents. The survey did not include American officials or border issues, as there are literally hundreds if not thousands of stories about border problems according to leaders of visible minorities.

Questioning whether multiculturalism can survive the security agenda, Raja Khouri, past-president of the Canadian Arab Federation, said Canada "has effectively engaged in an exercise of self-mutilation: stripping away civil liberties it holds dear, trampling on citizens' rights it had foresworn to protect, and tearing away at its multicultural fabric with recklessness". [14]

Refugee policies

Much as Canadians of Muslim and/or Arab origin, and other visible minorities, have experienced the brunt of our new anti-terrorism agenda, people seeking refuge in Canada have also felt the impact of that agenda, with virtually no recourse for reporting discriminatory treatment.

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[14] Commentary by Raja Khouri, published in the *Toronto Star,* March 9, 2003.

In the fall of 2002, Citizenship and Immigration Canada undertook a project at Pearson International Airport to detain arrivals, most of them refugee claimants, of uncertain identity. According to the *Standard Operating Procedures* [A55(2)(b*)*] *Detention at Greater Toronto Enforcement Centre*, persons are to be detained on the following grounds: "claimed identity questionable, concerned person's overall credibility and/or evasiveness, lack of co-operation." Those most affected by the project are refugee claimants, many who must travel without valid documentation. Paragraph 1, Article 31 of the United Nations *Convention Relating to the Status of Refugees* recognizes that refugees may have to use illicit means to enter a safe country, and requires that host countries "shall not impose penalties on that account". Yet, one border guard told the *Globe and Mail*: "Before we were expected to release, now we're encouraged to detain."[15]

On December 5, 2002, Canada and the U.S. signed a "S*afe Third Country*" agreement as part of the *Smart Border Action Plan* adopted between the two countries after the September 11 terrorist attacks. Under this agreement, which came into effect on December 29, 2004, Canada can turn back refugee claimants who arrive at land borders, who are instead compelled to make their claims for asylum in the United States, based on the principle that refugees must claim protection in the first country they reach.

Unfortunately, the United States is a country that is not necessarily safe for refugees. Asylum seekers run the risk of detention in violation of international standards and are often denied protection and returned to persecution because of more restrictive rules and interpretation of the refugee definition. Furthermore, US policies and practices discriminate against some refugees and immigrants on the basis of their nationality, ethnicity or religion.[16]

As just one telling example, should this agreement have been in place in the 1970's and 1980's, most Latin Americans who sought refuge in Canada during decades of civil strife in their countries of origin, including victims of the Pinochet dictatorship, would have been returned to the U.S. and likely deported back to Latin America. Canada and Québec would have been deprived of the rich cultural contribution of the Latino community that is now part of the social fabric in several major Canadian cities.

If it was in place in the 40s, 50s and 60s, it is quite likely that the families of many sitting members of parliament would never have been allowed to settle here.

Furthermore, in the *Regulatory Impact Analysis Statement* (RIAS) accompanying the draft *safe third country* regulations, published in the *Canada Gazette*, 26 October 2002, the government acknowledged that the agreement "will likely have differential impacts by gender." The *RIAS* goes on to say that "Canada and the United States have different approaches to the treatment of claims based on gender-based persecution." In the United States, regulations severely restrict protection for women fleeing gender-based persecution in the United States.

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[15] *Globe and Mail,* November 28, 2002, Page A8.
[16] *10 Reasons why Safe Third Country is a bad deal*, Canadian Council for Refugees, February, 2005.

Consequently, in order to fulfill its moral and legal obligation with respect to the protection and the rights of refugees guaranteed by virtue of international covenants to which it is a signatory, Canada must immediately repeal the *Safe Third Country* agreement.

Conclusion

The events following September 2001 have made some people think that weakening legal safeguards and trampling on human rights will make us safer. In fact, we are made safer by laws and processes that guarantee respect for human rights.

Over the last three years there has been an alarming tendency to bring our laws, administrative practices and regulations into greater "harmony" with those of the U.S. without adequate public scrutiny or parliamentary debate. We deplore that the Canadian government feels constrained to bow to persistent U.S. pressure — direct and indirect — at a time when so many Americans themselves consider that their own essential liberties and constitutional guarantees are being threatened.

We reiterate our belief that Parliament and the government of Canada must reassert a commitment to the essential rights and protections of Canadians as embodied in Canada's *Constitution* and *Charter of Rights and Freedoms*. Legislation dealing with security and concerns like international terrorism must be tested in the light of these prior and fundamental claims.

Finally, we urge members of this parliamentary committee, and Parliament as a whole, not to succumb to fear. We call upon you to display the courage to examine rationally and critically the combined effect of all the legislation and other measures that form Canada's anti-terrorism agenda with a view to reinstituting due process and respect for the rule of law, both domestically and internationally. This is the minimal essential requirement to preserve our fundamental democratic values and to begin to address the root causes of terrorism.

Annex 1

ICLMG MEMBERSHIP LIST

The International Civil Liberties Monitoring Group is a multi-sector coalition that promotes respect for human rights and civil liberties. Positions expressed by ICLMG speak to common concerns of members but do not necessarily articulate the position of individual member organizations.

- Amnesty International
- Association québécoise des organismes de coopération internationale
- B.C. Freedom of Information and Privacy Association
- Canadian Arab Federation
- Canadian Association of University Teachers
- Canadian Auto Workers Union
- Canadian Council for International Co-operation
- Canadian Council for Refugees
- Canadian Council on American-Islamic Relations (CAIR-CAN)
- Canadian Federation of Students
- Canadian Friends Service Committee
- Canadian Labour Congress
- Canadian Union of Postal Workers
- CARE Canada
- Centre for Social Justice
- Communications Energy and Paperworkers Union
- Council of Canadians
- CUSO
- David Suzuki Foundation
- Development and Peace
- Greenpeace
- Imagine Canada
- International Development and Relief Foundation
- Inter Pares
- KAIROS
- Ligue des droits et libertés
- Muslim Lawyers Association
- National Organization of Immigrant and Visible Minority Women of Canada
- Ontario Council of Agencies Serving Immigrants
- Primate's World Relief and Development Fund
- Public Service Alliance of Canada
- Rights & Democracy
- United Steelworkers of America
- World Vision Canada

Friends of the ICLMG

Hon. Warren Allmand; Mr. Allmand is a former solicitor general of Canada and the immediate past president of the International Centre for HumaRights and Democratic Development (Rights & Democracy).

Hon. Edward Broadbent; Mr.Broadbent is a former leader of Canada's New Democratic Party. He was the first president of the International Centre for Human Rights and Democratic Development.

Hon. Gordon Fairweather; Mr. Fairweather was the first chief commissioner of the Canadian Human Rights Commission. He is a former attorney general of New Brunswick and a member of the Canadian House of Commons.

Hon. David MacDonald; Mr. MacDonald is a former Canadian secretary of State andminister of communications. Mr. MacDonald is also an ex-Canadian ambassador to Ethiopia.

Hon. Flora MacDonald; Ms. MacDonald is a former Canadian minister of foreign affairs and a former minister of communications.

The Very Rev. Lois Wilson; Rev. Wilson is a former moderator of the United Church of Canada and retired recently from the Canadian Senate.