

# Lawyers' Rights Watch Canada

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## Security Integration and Rights Disintegration In the Post 9-11 World

by  
Maureen Webb<sup>1</sup>

### 1. FROM AN AGE OF RIGHTS TO AN AGE OF TERROR

Since the terrorist attacks of 9-11 the Bush Administration has been pushing countries to integrate their policing, security intelligence and military functions with those of the U.S. National governments have complied, giving up sovereignty and throwing aside existing checks and balances in favour of a security space that is largely being designed and controlled by the U.S., and Canada has been in the forefront of this trend.

In the process of this integration, a whole web of laws, norms and protections have been affected: Canada's obligations under international humanitarian law (IHL), the *Convention against Torture*<sup>2</sup>, the *Geneva Convention on Refugees*<sup>3</sup>, and the *International Covenant on Civil and Political Rights*<sup>4</sup>, as well as Canada's extradition regimes<sup>5</sup>, privacy and data protection regimes<sup>6</sup>, constitutional protections such as the right to due process and security of the person, freedom of expression, freedom of association and freedom from unreasonable search and seizure<sup>7</sup>, our *Criminal Code*<sup>8</sup> regime, our *Evidence Act*<sup>9</sup> regime, the due process and fairness protections guaranteed in our administrative law, and more.

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<sup>1</sup> Maureen Webb prepared these speaking notes for her March 15, 2008 lecture in Vancouver, British Columbia, the third in a four part series offered by Lawyers Rights Watch Canada and the University of British Columbia Continuing Studies. The notes were edited by Margaret Stanier and are available at [www.lrwc.org](http://www.lrwc.org). Podcasts and webcasts of Ms Webb's lecture are also available to listen to at <http://www.ubc.ca/podcasts/> and to view at <http://www.pasifik.ca/node/266>. Maureen Webb is a Canadian lawyer who writes and speaks on the implications of post 9/11 surveillance and security policy. She is the author of *Illusions of Security: Global Surveillance and Democracy in the Post 9/11 World* (San Francisco: City Lights, 2007). Ms Webb is the Co-chair of the International Civil Liberties Monitoring Group and a Director of Lawyers Rights Watch Canada.

<sup>2</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85.

<sup>3</sup> *Convention relating to the Status of Refugees*, United Nations, 28 July 1951, 189 U.N.T.S. 150.

<sup>4</sup> 16 December 1966, 999 U.N.T.S. 171.

<sup>5</sup> including the *Extradition Act*, S.C. 1999, c. 18; the *Geneva Conventions Act*, R.S.C. 1985, c. G-3; the *Corrections and Conditional Release Act*, S.C. 1992, c. 20; and the *Immigration and Refugee Protection Act*, 2001, c. 27

<sup>6</sup> *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

<sup>7</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11.

<sup>8</sup> *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>9</sup> *Canada Evidence Act*, R.S.C. 1985, c. C-5.

Tonight, what I'm going to try to do for you is to map out the process by which we are moving in the West, with Canada as a case example, from an Age of Rights to an Age of Terror ... from an Age of Rights to an Age where so-called security concerns trump everything.

Though there are important antecedents going back to the *Magna Carta* and beyond, the Age of Rights in the West began in earnest during the Enlightenment, when ideas about the natural, inalienable and universal rights of man were first enshrined in national constitutions. So that the domestic content of our human rights protections found in our criminal law, our constitutions, our administrative law, our privacy and other regimes is something that we have struggled to win and develop over centuries in the West.

This Age of Rights was accompanied and informed by the establishment of democratic forms of government in the West, and there is a profound relationship between the idea of rights and liberal democratic forms of government. The Enlightenment was a time of burgeoning humanism and faith in scientific progress when people were throwing off the oppression of earlier human history and placing their faith in human reason to make sense of the world. The idea that reason was a capacity possessed equally by men was a deeply radical one at the time. It led logically to the idea that all men were equal. It conferred on man a special moral status and dignity. It suggested logically that there was no natural sovereign above man so that in a liberal democratic tradition, government exists for and at the pleasure of the people – government is answerable to the people. But moreover, government is answerable to the individual. Individuals are to be treated as ends, never as means. They have claims, as of right on society and society “must mobilize itself to ensure these rights”.<sup>10</sup> Finally, these rights, while not always absolute, are of sufficient force that they often “trump” utilitarian calculations about what might otherwise be in the interest of the majority.

The Age of Rights deepened and widened with the advent of the Second World War. “Until the late 1930s the international political system, and international law, continued to maintain that how a state treated its own inhabitants was not a matter of legitimate international concern. With advent of the Second World War and ... mounting evidence of atrocities [in] Germany and ... countries under its military occupation, how Nazi Germany treated those under its rule became a subject of acute international concern.”<sup>11</sup> So that with victory, the Allies drafted the *Nuremberg Charter*<sup>12</sup> under which Nazi leaders were charged with the new crimes of waging aggressive war and crimes against humanity. At the same time, the Allies drafted the *Charter of the United Nations*<sup>13</sup> which prohibited the use of force by nations except in self defense or with the approval of the Security Council, and declared the promotion of human rights to be a primary purpose of the new organization. A U.N. Commission on Human Rights was set up and its first task was to prepare the *Universal Declaration on Human Rights*<sup>14</sup> – the seminal document of a new international human rights movement and something of which Canadians can be especially proud because one of our own, John Humphrey, was a principal drafter.

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<sup>10</sup> Louis Henkin, *The Age of Rights*, (New York: Columbia University Press, 1990) at 181.

<sup>11</sup> Louis Henkin, Gerald L. Neuman, Diane F. Orentlicher, David W. Leebron, *Human Rights*, (New York: Foundation Press, 1999) at 73.

<sup>12</sup> *Charter of the International Military Tribunal (Nuremberg Charter)*. 8 August 1945, 82 U.N.T.S. 279.

<sup>13</sup> 26 June 1945, Can. T.S. 1945 No.7.

<sup>14</sup> 10 December 1948, G.A. Res. 217A, U.N. Doc. A/180.

All of this constituted a new world order meant to guarantee greater global and human security. And it is this world order, along with our older democratic rights regimes, which is disintegrating as our governments succumb to U.S. demands to integrate our security policies with its new vision of the world.

I said we are moving from an Age of Rights to an Age of Terror. The Age of Terror, of course, is what the Bush Administration (and, make no mistake, the Republican and the Democratic candidates in the upcoming Presidential elections) would have us believe we are living in since 9-11: an Age when sophisticated transnational networks of Islamist terrorists pose an unprecedented if not existential threat to our free societies and world peace. Now I don't think most Canadians believe this. You would not be surprised, I am sure, to learn that U.S. State Department Reports show that between 1995 and 2003 the average number of people killed *globally* by terrorist attacks, including the attacks of 9-11, was just under 800. While no death caused by terrorism is acceptable, the numbers are miniscule compared to the 1.2 million deaths caused by car accidents and compared to the *truly* existential threat – not just to our nations but to the survival of our species – we face from global warming.

But you know, in difficult times, ironies abound. In many ways, the era we entered with 9-11 *is* an Age of Terror – an Age where an individual at any time can be presumed guilty and blacklisted from a job, dragged out of line, denied the right to travel, listened in on, detained, and even kidnapped, tortured and killed – without ever knowing the allegations made against him or the criteria by which he is being judged. It is an Age where the individual is answerable to the state, not the other way round and where societies increasingly are being governed in security matters by executive fiat, rather than democratic houses of government. An Age of widespread use and official acceptance of torture; of "legal black holes"; of new, large-scale, unexplained internment centres being built in the U.S.; of DNA databases being set up to register ordinary citizens; of centuries-old protections being suspended in permanent states of emergency – an Age of preemptive warfare, where *UN Charter* restraints on the use of military force have been brushed aside and in which there are seemingly no limits on the use of force by the strong. In short, an Age where the most brutal utilitarian calculations trump rights and even law and democracy themselves.

## **2. THE BLUEPRINT – THE CANADA-U.S. SMART BORDER DECLARATION AND ACTION PLAN**

As you will appreciate, my topic tonight is a large one. There is much to be said about what is happening in the U.S., the U.K., the E.U., Asia, Latin America, and developing countries we call “the South” to illustrate my thesis. Even limiting our discussion to Canada, there is much to cover.

A good place to start is with the *Canada-U.S. Smart Border Declaration and Action Plan*<sup>15</sup>. This was an administrative agreement negotiated in December 2001 by the Deputy Prime Minister of

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<sup>15</sup> The Canada-U.S. Smart Border Declaration and Action Plan for Creating a Secure and Smart Border, Ottawa, December 12, 2001, online: < <http://www.international.gc.ca/anti-terrorism/declaration-en.asp>>. See also U.S.-Canada Smart Border/30 Point Action Plan Update Press Release, December 6, 2002, online: <http://www.whitehouse.gov/news/releases/2002/12/20021206-1.html>>.

Canada at the time, John Manley, and the Head of the U.S. Department of Homeland Security, Tom Ridge. In many ways, the *Declaration* and accompanying *Action Plan* are the blueprint for security integration with the U.S.

There are three things to note about them:

First, the *Declaration* and *Action Plan* are premised on the idea that governments have to preempt further terrorist attacks. While this sounds like a reasonable goal at first blush, it is in fact the mantra which governments are using to justify all of their incursions on our rights. It is a very dangerous idea because, as we have seen with the doctrine of preemptive war, it can be used to justify just about anything.

Second, the *Declaration* and *Action Plan* are not legislation and not a treaty: they have never been reviewed or debated in Parliament. Much of what has been put in place since 9-11 has been done in this way – under the radar screen of the public and outside normal democratic processes – through administrative agreements, regulations, international working groups, and international forums like the International Civil Aviation Organization (ICAO) and the G8.

Third, the *Declaration* and *Action Plan* reveal the special role of Canadian business elites in driving security integration with the U.S. There are many reasons countries are acquiescing to the integration of their security policies and functions with the U.S. But, in Canada, it is the corporate lobby that has been most vigorously driving security integration with the United States. One hears various figures, but they say 80% of Canada's trade is with the U.S. and, of course, the business community does not want the border shut down or slowed down because of U.S. security concerns. But, the Canadian business community also see the current security preoccupations of the U.S. as a golden opportunity to push for the Customs Union and social and regulatory union with the U.S. that it has always wanted. John Manley has been a key proponent of these goals both in and out of office.

So what does the *Smart Border Declaration* and *Action Plan* call for?

- common biometric standards for identity cards that can be used across different modes of travel;
- coordinated visa and refugee policy;
- coordinated risk assessment of travelers;
- integrated border and marine enforcement teams;
- integrated national security intelligence teams;
- coordinated terrorist lists;
- new counter-terrorism legislation, increased intelligence sharing; and, interestingly,
- joint efforts to promote the Canada-U.S. model internationally.

Let's unpack some of what this means for the disintegration of rights in Canada.

## **A. Integrated Security Intelligence Teams, Sharing of Intelligence, Rendition Lite**

Everybody in Canada has heard about the case of Maher Arar and for most of us it is a striking example of how the rights of Canadian citizens have been compromised in the U.S.-led War on Terror. Well, the RCMP's Project A-O Canada which focused on Ahmed El Maati in Toronto and Abdullah Almalki and Maher Arar in Ottawa was an Integrated Security Intelligence Team or "INSET" operation of the kind called for by the *Smart Border Action Plan*, and the ultimate inquiry into the Arar affair illustrated the kind of intelligence sharing that goes on with these teams and in the new security paradigm generally.

The RCMP met regularly with the FBI and CIA and turned over its entire unedited investigation file to these agencies. The Mounties had a preemption mandate: they were told not to hold anything back. And they didn't – they turned over a lot of false and sloppy information about the Arars and, contrary to existing protocols, made no caveats about how the information was to be used by U.S. agencies.

These INSET teams, which are still operating in Canada and have also been set up in the E.U., allow U.S. agencies to share information directly with host agencies, without the formal state-to-state requests usually required under mutual assistance treaties. The U.S. agencies are not accountable to the host countries' national governments or courts. As it turned out in the Arar case, this is a recipe for the violation of citizens' constitutional rights against unreasonable search and seizure, their rights not to be deprived of security of the person except in accordance with fundamental justice, their right to counsel, to *habeas corpus*, and their rights against arbitrary detention, torture and inhumane treatment. Canada proffered him up to the U.S. and the U.S. did what it wanted to Maher Arar.

As Canada has integrated its security functions with those of the U.S. there is evidence, too, that Canadian agencies have been drawn into the same kind of human rights abuses as U.S. agencies. In the Arar Inquiry<sup>16</sup> it was revealed that the Canadian Ambassador to Syria acted as the liaison between the Syrian Military Intelligence who were torturing Arar and other detained Canadians, and the RCMP; and that both the RCMP and the Ambassador must have known that torture was taking place. In the Almalki, El Maati and other cases, the RCMP and CSIS have been accused of practicing a kind of "rendition lite", waiting for Canadians to travel to jurisdictions where torture and arbitrary detention are practiced in order to tip off local authorities and have them detained there. The *Convention Against Torture* provides that signatories like Canada must not "expel, return or extradite a person to another state where there are substantial grounds for believing that they would be in danger of being subjected to torture". Canada may have skated around that obligation in these cases, but it was, at the very least, complicit in torture, and possibly violated the s. 7 *Charter* rights of these Canadians not to be deprived of liberty and security of the person except in accordance with principles of fundamental justice.

All this is part of the new integrated security space: governments are sharing suspects and there is currently a global pool of suspects detained in legal black holes around the world to which multiple security services have access. Canada tips off Syria and Egypt about Canadian citizens,

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<sup>16</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, online: <[http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher\\_arar/07-09-13/www.ararcommission.ca/eng/index.htm](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/index.htm)>.

the U.K. tips off the CIA in Gambia about U.K. citizens, Macedonia tips off the CIA about a German citizen and when he is rendered by the U.S. to Afghanistan, German agents interview him there. Canadian, Australian, and E.U. agencies participate with the U.S. in an operation called CAMOLIN where their function is reportedly to supply dossiers on suspects to the CIA to act on. And, until Canadian courts put a stop to it, Canadian Security Intelligence Service agents were traveling to Guantanamo Bay to interview suspects.

At the Iacobucci Inquiry<sup>17</sup> into the El Maati, Almalki and Nurreidin cases the parties were asked to make submissions on what standards of conduct Canadian officials should have complied with in these cases. The Canadian government's position was that it depended on the circumstances – that Canadian officials' conduct should be judged in the special context of the climate after 9-11.<sup>18</sup>

## **B. USA PATRIOT Act Style Legislation: The Canadian Anti-terrorism Act**

Now, the Canada-U.S. *Smart Border Declaration and Action Plan* call for “new anti-terrorism legislation” in the two countries. In the U.S., the *USA PATRIOT Act*<sup>19</sup> was pushed through Congress without much debate before the end of 2001 and in Canada we got a very similar piece of legislation, the Canadian *Anti-terrorism Act*<sup>20</sup> (ATA), also pushed through before the end of 2001.

The *USA PATRIOT Act* is a draconian law full of emergency-style powers which have been embodied in permanent legislation. It creates a permanent state of emergency in a democratic country which is never a good thing, and the same could be said of the Canadian *Anti-terrorism Act*.

Among many other things, the *USA PATRIOT Act* amends the U.S. *Criminal Code*<sup>21</sup> to create new “terrorist” offences and terrorist participation or material support offences. So does the Canadian *Anti-terrorism Act*. The imposition of a terrorism framework on the *Criminal Code*<sup>22</sup> in Canada is unnecessary because the *Code* has more than enough offenses to deal with acts associated with terrorism. And it has a number of undesirable effects on rights in Canada, particularly on freedom of expression and association.

First, it imports a motive element into the criminal law – making the reason *why* someone commits an act an element which the Crown must prove. Except in sentencing, motive is foreign to domestic and international criminal law. Its importation into the criminal law unduly politicizes the application of the law and makes ethnic and religious profiling more likely.

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<sup>17</sup> Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah

Almalki, Ahmad Abou-Elmaati and Muayyed Nurreidin, online: <<http://www.iacobucciinquiry.ca/>>.

<sup>18</sup> *Ibid.*, Submissions of the Attorney General of Canada on Standard of Conduct, December 14, 2007, online: <<http://www.iacobucciinquiry.ca/pdfs/documents/2007-12-14-AG-Submission-re-Standard-of-Conduct.pdf>>

<sup>19</sup> HR 3162 RDS, online: <<http://epic.org/privacy/terrorism/hr3162.html>>.

<sup>20</sup> S.C. 2001, c. 41.

<sup>21</sup> U.S.C., Title 18.

<sup>22</sup> R.S.C. 1985, c. C-46.

Second, the importation of a terrorism framework on the Canadian *Criminal Code* casts an overbroad net, criminalizing legitimate expression and association in a democratic society. It arguably criminalizes, for example, a farmers' tractor cavalcade or a nurses' wildcat strike.

Third, by piling inchoate offenses like aiding and abetting on new inchoate offences like "financing terrorism" and "participating in terrorism", the new terrorism framework extends the chain of criminal liability to an unprecedented degree, in unforeseen, complex and undesirable ways. For example, a person who sells milk to Maher Arar or someone who caters a Greenpeace rally could arguably be prosecuted for terrorism offences under *ATA* amendments to the *Criminal Code*.

The *USA PATRIOT Act* creates new regimes of secrecy and so does the Canadian *ATA*. Amendments to the *Canada Evidence Act* replace the common law doctrine of "public interest immunity" codified there – which required government officials objecting to the disclosure of information in a legal proceeding to show that a specified public interest in non disclosure outweighed the public interest in disclosure – with astounding new powers in the hands of government officials to control and prohibit the disclosure of information, including the unfettered right of the Attorney-General to issue secrecy certificates under s. 38 of the *Act*. These powers apply not only in criminal law proceedings but administrative law proceedings, Inquiry proceedings, and even Parliamentary proceedings, with consequent effects on the rights of the accused to fair trial, administrative due process and the ability of Parliament and journalists to get to the bottom of government scandals and wrongdoing.

### **C. Indefinite Detention and Deportation to Torture of Immigrants and Refugees**

The *Smart Border Declaration and Action Plan* call for coordinated visa and refugee policy. The integration of our policy with that of the U.S. in this area has had a disintegrating effect on the rights of immigrants and refugees in Canada.

In 2004 Canada signed a so-called *Safe Third Country Agreement*<sup>23</sup> with the U.S., which deemed the U.S. a "safe" country to make a refugee claim in and required most refugee claimants arriving in Canada by land from the U.S. to return to the U.S. and make their claim there. The *Safe Third Country Agreement* was recently ruled unconstitutional under ss. 7 and 15 of the *Charter* by the Federal Court of Canada<sup>24</sup> on the basis that the U.S. is not a safe country in that it does not comply with the *Refugee Convention* (which prohibits, except in narrow circumstances, sending refugees back to persecuting countries) and the *Convention against Torture* (which prohibits sending someone back to a country that engages in torture). The Canadian government appealed the Federal Court's decision and the Federal Court of Appeal granted a stay of the judgment until such time as it has heard and determined the appeal.<sup>25</sup>

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<sup>23</sup> See <<http://www.cbsa-asfc.gc.ca/agency-agence/stca-etps-eng.html>>.

<sup>24</sup> *Canadian Council for Refugees v. Canada*, 2007 FC 1262, online: <<http://www.canlii.org/eliisa/highlight.do?text=safe+third+country+&language=en&searchTitle=Federal&path=/en/ca/fct/doc/2007/2007fc1262/2007fc1262.html>>.

<sup>25</sup> *Canada v. Canadian Council for Refugees*, 2008 FCA 40, online: <<http://www.canlii.org/eliisa/highlight.do?text=safe+third+country+&language=en&searchTitle=Federal&path=/en/ca/fca/doc/2008/2008fca40/2008fca40.html>>.

## **D. Mass, Pervasive, Globalized Surveillance**

One of the more insidious and less examined developments in the U.S.-led War on Terror, has been the incremental construction of a new infrastructure for mass, globalized surveillance. Many of the initiatives in the *Smart Border Declaration* and *Action Plan* are directed to this. Where before law enforcement and security intelligence agencies would be looking at specific threats in specific circles and following the leads from those inquiries outwards in their surveillance efforts, the new model of mass, globalized surveillance being pushed by the U.S. is much more ambitious. In the new model, the U.S. and its allies are to be engaged in the continuous collection of information on entire populations. In this model, surveillance is used not merely to follow up on leads, but to generate leads. Not merely to catch known terrorists or people suspected of terrorism on reasonable grounds as they cross borders or send emails, but to assess the risk that each of us poses to the state, to predict who among us *might be a terrorist*. And in this new model, surveillance systems are increasingly becoming globalized – some initiatives are domestic, but the domestic feed into the global and the global into the domestic.

### **i. Biometric registration**

In the new model of mass surveillance, the aim is first to biometrically register populations, with biometric visas and passports or better still, biometric driver's licenses or national ID cards and registers. Once this is done, the idea is that the U.S. and its allies will have a sort of gold standard for identifying individuals, to which they can then link information for surveillance and sorting purposes.

In Canada, the biometric standard of identification that has been chosen so far is digital face recognition. This is the least intrusive biometric standard but the most inaccurate: it has an error rate of 15% after only three years. DNA is seen as the ultimate gold standard, even though it has a margin for error and manipulation, too – and the registration of entire populations by DNA may well be the endgame of biometric registration. The U.S. now takes and stores the DNA of anyone stopped by the police and so does the U.K., regardless of whether the person is ever convicted or charged. The British Prime Minister Tony Blair declared that the maximum number of people should be registered this way and there has been serious talk in the U.K. of registering the entire population.

In the new surveillance model, once populations are biometrically registered, they are to be continuously tracked and monitored as they travel, conduct financial transactions and use telecommunications systems.

### **ii. Travel**

After 9-11, the U.S. required that airlines traveling to, through, or over the U.S. provide the passenger information in their reservation systems – up to 65 fields of information – to U.S. agencies. Complying with this requirement has forced countries like Canada and the E.U. to override their data protection laws. Once they were forced to do that, the E.U., the U.K., Canada and Australia set up their own passenger record collection systems, and the E.U. has called on ICAO to develop global standards for PNR collection.

These collection systems are being expanded to other modes of transportation. The U.S. Automated Targeting System collects PNR-type data for all modes of cross border travel and Canada is going to do the same thing with its parallel system run out of the National Risk Assessment Centre (NRAC).

The U.S. has a no fly list and the Canadian government recently implemented a Canadian no fly list, despite objections from the public and Parliamentary committees. The government protested that the list will be “made in Canada” and shorter than the U.S. list, but the issue is probably moot, because Canadian airlines are enforcing the U.S. list for flights to and over the U.S., as well as for purely domestic flights within Canada.

### **iii. Finances**

The U.S. has imposed new duties on banks and a wide range of businesses to report financial transactions and has asked Canada and other countries to do the same. The Canadian *ATA* places similar obligations on financial institutions with a new regime administered by FINTRAC.

The U.S. has gained wide access to Canadian financial and other records under the *USA PATRIOT Act* which allows the FBI to obtain records from U.S. companies and their subsidiaries operating in Canada.

### **iv. Telecommunications**

The U.S. is monitoring communications like never before and pushing other countries to do the same. Under the *USA PATRIOT Act* law enforcement and security agencies’ powers of search, seizure and interception were substantially increased through the institution of roving wiretap taps, nation-wide warrants, lower standards under the *Foreign Intelligence Surveillance Act*, expanded powers to issue National Security Letters, sneak and peak searches, and more. Some of this has happened under the Canadian *ATA* as well.

The U.S. has also been pushing countries to ratify the *Convention on Cybercrime*<sup>26</sup> which asks countries to pass laws requiring telecommunications companies to build back doors into their systems for state agencies to listen in. Canada and 30 other countries have signed the *Convention*.

In the U.S. and Canada, the agencies which constitute the “Five Eyes” of ECHELON have been allowed to turn their gaze inward for the first time in order to spy on communications in their own countries. ECHELON is a program set up after the Second World War by the U.S., the U.K., Canada, New Zealand and Australia which allows them to listen in on foreign intelligence through the world’s telecommunications systems. Until 9-11, the participating agencies were never allowed to spy domestically. When it was discovered in 2005 that President Bush had secretly allowed the National Security Agency (NSA) to do so in the U.S., there was a storm of controversy – meanwhile the Canadian Security Establishment (CSE) was explicitly authorized by the *ATA* to spy domestically without anyone batting an eye. This is an incursion on

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<sup>26</sup> Council of Europe, E.T.S. No. 185 (Budapest, 2001).

Canadians' privacy rights and could also violate *Charter* rights against unreasonable search and seizure.

#### **v. Data mining**

I said that the new surveillance is being used not merely to follow up on leads, but to generate leads; not merely to catch known terrorists or people suspected of terrorism on reasonable grounds, but to assess the risk that each of us poses to the state, to predict who among us might be a terrorist. This is being done with a technology known as data mining. Data mining is the use of computer algorithms to sort through masses of data for specified criteria, patterns or relationships. Data mining, more than anything, is predictive technology; it's not hung up on accuracy. Its developers would have us believe that it works like the film *Minority Report* where Tom Cruise and his colleagues stop criminal acts before they happen by reading people's minds – except the real world technology falls far short of the Hollywood fantasy. In many data mining systems being used today, racial, ethnic and religious profiling are endemic.

The ATS and NRAC systems I mentioned earlier are both data mining programs which assign “risk scores” to travelers. In the Arar Inquiry report, Justice O'Connor wrote that Canada and the U.S. “use the same risk analysis system”. *Smart Border Action Plan* reports talk about the systems being “interoperable”. Similarly, the NSA and CSE domestic spy programs are data mining programs. It is, perhaps, reasonable to ask whether the RCMP – like the FBI and CIA – is running a data mining program in light of recent revelations that it is buying commercial data, storing large amounts of personal information it should not be storing and is also receiving a steady stream of PNR data on all flights in Canada.

#### **vi. Consequences**

The integration of Canada into the new model of mass, globalized surveillance which the U.S. is building is turning our society, if not into a police state, then into something similar – a surveillance society. And it is having a disintegrating effect on our democratic institutions and on our rights in domestic and international law to due process, mobility, freedom from discrimination, freedom of expression, freedom of association, presumption of innocence, our rights against unreasonable search and seizure, and our rights against arbitrary detention.

### **3. THE INTEGRATION OF MILITARY FUNCTIONS AND THE TRANSFER OF DETAINEES TO AFGHAN AND U.S. AUTHORITIES**

The War on Terror has given the neo conservatives in the Bush administration an opportunity to realize their plans for an increased military presence around the world and a robust use of military force to advance U.S. interests. With this has come increased demands by the U.S. for other countries, including Canada, to integrate their military policy and functions with those of the U.S. In Canada, we avoided getting dragged into Iraq, but we have gone to Afghanistan. With this integration of military function, has come a disintegration of Canada's commitments to humanitarian law and the *Convention against Torture* in line with the disintegration of U.S. commitments.

Canada has been transferring the Afghan combatants it captures in the war in Afghanistan to Afghan detention where Canada knows they are being tortured. Canada also has a Canadian citizen, Omar Khadr, who was taken by the U.S. from the same theatre of war, all the way to U.S. detention facilities in Guantanamo Bay, Cuba. Other countries have insisted on fetching their nationals back from detention in Guantanamo Bay so that they can be released or prosecuted in their home countries for any crimes or war crimes they may have committed, but Canada has not.

Humanitarian law has a history of development at least as long as that of human rights law. Where human rights norms are important in protecting the interest of human dignity, and setting up the framework for our democratic forms of government, humanitarian law has an equally important function in governing conduct in war and mitigating war's most inhumane effects. Humanitarian law is based upon the premise of mutuality – it applies where both parties to a conflict are signatories to the *Geneva Conventions* or evince an intention to be mutually bound by them and customary humanitarian law. So abiding by IHL is important if you want your own soldiers to be protected in existing and future conflicts.

Time does not permit me to dwell long on this subject. It is also going to be the topic of the next lecture in this series by Michael Byers. Suffice it to say that under humanitarian law Canada has an obligation to treat the combatants it captures as Prisoners of War (POWs), and to ensure that *both* POWs and captured civilians, whether or not they are guilty of crimes or war crimes, are treated humanely and are not tortured. Under Art. 3 of the *Convention against Torture*, Canada has an obligation not to transfer persons in its control to torture. In respect of Omar Khadr, Canada has a moral obligation and possibly constitutional one to do what it can diplomatically to ensure that Khadr is treated by the U.S. in compliance with the *Geneva Conventions*, receiving, among other things, a fair trial for any crimes or war crimes he may have committed in the theatre of war.<sup>27</sup>

#### **4. CONCLUSION**

We tend to think in Canada that our hands are relatively clean in the War on Terror, compared to those of the United States – that while we might have made some mistakes along the way we have largely redeemed ourselves with an appropriate amount of public concern and government redress. But it is a mistake to think this way. In the case where we perhaps behaved the best, the case of Maher Arar, the Inquiry's recommendations have still not been implemented more than a year after they came out, and when asked, the Harper government refuses to say what it is even doing towards implementation. Meanwhile, there have been, and continue to be, a myriad of new security measures implemented and corresponding rights eroded.

Someone once said that “[a] *country is not only what it does – it is also what it puts up with, what it tolerates...*”. Canadians have a deep belief in the benign designs of government. In this Age of Terror we need, perhaps, to be a little more skeptical, a little more vigilant. We need to keep track of the initiatives that are being put in place in our name and to fight for the kind of country we want to continue to live in.

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<sup>27</sup> See *Amnesty International Canada et al v. Attorney General of Canada et al*, 2008 FC 336, online: <<http://www.canlii.org/en/ca/fct/doc/2008/2008fc336/2008fc336.html>>.