Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

Security Integration and Rights Disintegration
In The Post 9-11 World

by
Maureen Webb[1]

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 US. 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 US. And Canada, our dear country, 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) and the *Convention against Torture*[2], *Geneva Convention on Refugees*[3], *International Covenant on Civil and Political Rights*[4], as well as Canada's extradition regimes[5], privacy and data protection regimes[6], Canadian constitutional protections like the right to due process and security of the person freedom of expression, freedom of association, freedom from unreasonable search and seizure[7], our Criminal Code[8] regime, our Evidence Act[9] regime, the due process and fairness protections set out in our administrative law and more.

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.

---

[1] Maureen Webb prepared these speaking notes for her March 15th 2008 lecture in Vancouver British Columbia, the first in a 4-part series offered by LRWC and the University of BC Continuing Studies. The notes are edited by Margaret Stanier and are available at { HYPERLINK "http://www.lrwc.org" }. Podcasts and webcasts of Ms Webb's lecture are also available: to listen: { HYPERLINK "http://www.ubc.ca/podcasts/" } and to view { HYPERLINK "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 changes to Canadian law. She is the author of *Illusions of Security: Global Surveillance and Democracy in the Post 9/11 World.* Ms Webb is the Co-chair of the International Civil Liberties Monitoring Group, founder of the International Campaign Against Mass Surveillance and a Director of LRWC.

[2] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, Treaty Series, vol. 1465, p. 85.

[3] *Convention relating to the Status of Refugees*, United Nations, Treaty Series, vol. 189, p. 137.

[4] United Nations, Treaty Series, vol. 999, p. 171

[5] included, *inter alia* are the *Extradition Act*, Stats. Can. 1999, c. 18; the *Geneva Conventions Act*, RSC 1985, c. G-3; the *Corrections and Conditional Release Act*, Stats. Can. 1992, c. 20; *Immigration and Refugee Protection Act*, 2001, c. 27

[6]

[7] *Charter of Rights and Freedoms*, *The Constitution Act, 1982, Part I*

[8] *Criminal Code*, R.S.C. 1985, c. C-46

[9] *Canada Evidence Act*, R.S.C. 1985, c. C-5

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. And the idea that reason was a capacity possessed equally by men was a deeply radical one at the time. It logically led 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 them 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 their society and the society must mobilize itself to ensure these rights, and 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 WWII 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. So that with victory, the Allies drafted the *Nuremburg Charter*[10] 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*[11] 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 UN Commission on Human Rights was set up and its first task was to prepare the *Universal Declaration on Human Rights*[12] – 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.

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. And the Age of Terror of course is what the Bush Administration – and, make no mistake, both Republican and Democratic candidates for the upcoming Presidency -- would have us believe we are living in since 9-11**.** An Age when sophisticated transnational networks of Islamist terrorists pose an

[10] Principles of International Law Recognized in the *Charter of the Nuremberg Tribunal* and in the Judgment of the Tribunal. Adopted by the International Law Commission of the United Nations, 1950.
[11] { HYPERLINK "http://www.un.org/aboutun/charter/" }
[12] { HYPERLINK "http://www.un.org/Overview/rights.html" }

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 US 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, even when inflated, 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 survival of species -- we face from global warming. A threat about which are governments are doing comparatively little about.

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 being governed in security matters by executive fiat, rather than democratic houses of government. An Age of the widespread use and official acceptance of torture, of "Legal Black Holes", an age 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 – CANADA-U.S. SMART BORDER AGREEMENT

This is a huge topic because there is so much to be said about what is happening in the U.S., UK, EU, Asia, Latin America, and developing countries we call "the South" to illustrate my thesis. And even limiting our discussion to Canada, there is so much to cover.

A good place to start is with the Canada-U.S. Smart Border Agreement and Action Plan[13]. This was an administrative agreement negotiated in December 2001 by John Manley Deputy Prime Minister of Canada and Tom Ridge, Head of the US Department of Homeland Security and in many ways it is the blueprint for security integration with the U.S.

Three things to note about it:

It is 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 into our rights. Very dangerous idea because as we have seen with the doctrine of preemptive war it can be used to justify just about anything.

It is not legislation, not a treaty, never 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

[13] { HYPERLINK "http://www.mindfully.org/WTO/Smart-Border-Canada12dec01.htm" }

agreements, regulations, international working groups, and international forums like ICAO and the G8.

It reveals the special role of Canadian business elites in driving security integration with the U.S.

Many reasons countries acquiescing to integration of security policy and functions with the US. – can talk about in question period if you want. But in Canada, it is the corporate lobby that has been most vigorously driving security integration with US. I've heard various figures, but they say 80% of Canada's trade is with the U.S. and they don't want the border shut down or slowed down because of U.S. security concerns. Also see current security preoccupations of US as golden opportunity to push for Customs Union, social and regulatory union with U.S. they've always wanted and John Manley has been a key proponent of these goals both in and out of office.

So what does the Smart Border Agreement 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.

2.1 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. 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 their entire unedited investigation file to these agencies. They 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 the US agencies.

These INSET teams which are still operating in Canada and have also been set up with the EU allow US agencies to share information directly with host agencies, without the formal state to state requests usually required under mutual assistance treaties. And the US 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 right against unreasonable search and seizure, right not to be deprived of security of the person except in accordance with

fundamental justice, right to counsel, right to *habeas corpus*, and 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 the U.S. agencies. In the Arar Inquiry[14] it was revealed that the Canadian Ambassador to Syria acted as the liaison between the Syrian Military Intelligence who were torturing Arar and other Canadians and the RCMP and that both the RCMP and the Ambassador must have known that torture was taking place. And in the Almalki, El Maati and other cases, the RCMP and CSIS have been accused of practicing a kind of rendition lite**,** waiting for the 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 signatory like Canada must not "expel return or extradite a person to another state where there are substantial grounds for believing that the would be in danger of being subjected to torture". Canada may have just 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 to not 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: 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, the UK tips off the CIA in Gambia about UK citizens, Macedonia tips off the CIA about a German citizen and when he is rendered by the US to Afghanistan, German agents interview him there. Canadian, Australian, and EU agencies participate with the US in an operation called CAMOLIN where their function is reportedly to supply dossiers on suspects for the CIA to act on. And until Canadian courts put a stop to it, Canadian Security Intelligence agents were traveling to Guantanamo Bay to interview suspects

At the Iacobucci Inquiry[15] into the El Maati, Almalki and Nurredin cases the parties were asked to make submissions on what standards of conduct Canadian officials should have complied with in these cases. And the Canadian government's position was that it depended on the circumstances – that their conduct should be judged in the special context of the climate after 9-11.[16]

3. USA PATRIOT ACT STYLE LEGISLATION – THE CANADIAN *ANTI-TERRORISM ACT*

Now, the Smart Border Agreement and Action Plan calls for "new anti-terrorism legislation" in the two countries. In the US the USA Patriot Act[17] was pushed through Congress

[14] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, { HYPERLINK "http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/index.htm" }

[15] Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nurredin., { HYPERLINK "http://www.iacobucciinquiry.ca/" }

[16] { HYPERLINK "http://www.iacobucciinquiry.ca/pdfs/documents/2007-12-14-AG-Submission-re-Standard-of-Conduct.pdf" }

[17] HR 3162 RDS, { HYPERLINK "http://epic.org/privacy/terrorism/hr3162.html" }

without much debate, before the end of 2001 and in Canada we got a very similar piece of legislation, the Canadian *Anti-terrorism Act*[18], ("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 US *Criminal Code*[19] to create new "terrorist" offences and terrorist participation or material support offences. So does the Canadian *Anti-terrorism Act*. The imposition of a terrorist framework on the *Criminal Code*[20] 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 freedom of expression and association:

1) First, it imports a motive element into the criminal law – making the reason why something commits an act an element which the Crown must prove. Except in sentencing, motive is foreign to domestic and international criminal law. Its importation unduly politicizes the application of the law and makes ethnic and religious profiling more likely eg: NZ – Moaris, Mexico-- pro-democracy movement –El Salvador – water activists, US – animal rights; Canada CSIS report – aboriginals, anti globalization protesters, anti abortion movement] as terrorist.

2) Second, it casts an overbroad net, criminalizing legitimate expression and association in a democratic society eg: farmers tractor cavalcade, a wildcat nurses strike.

3) Thirdly, by piling inchoate offenses like aiding and abetting on new inchoate offences like "financing terrorism" and "participating in terrorism", it extends the chain of criminal liability to an unprecedented degree, in unforeseen, complex and undesirable ways eg: a person who sells milk to Maher Arar or caters a Greenpeace rally are being prosecuted as terrorists.

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 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*. And these powers apply not only in criminal law proceedings but administrative law proceedings, Inquiry proceedings, and even Parliamentary proceedings with consequent effects on accused's right to fair trial, administrative due process and ability of Parliament and journalists to get to the bottom of government scandals and wrongdoing.

---

[18] S.C. 2001, c. 41
[19] US Code, Title 18
[20] R.S.C. 1985, c. C-46

3.1 Indefinite Detention/ Deportation to Torture of Immigrants, Refugees

The Smart Border Agreement and Action Plan calls for coordinated visa and refugee policy and the integration of our policy with that of the US 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*[21] with the US, which deemed the US a "safe" country to make a refugee claim in and required most refugees claimants arriving in Canada by land from the US to return to the US and make their claim there. The STC was recently ruled unconstitutional under s. 7 and 15 of the *Charter* by the Federal Court[22] on the basis the US was not a safe country in that it did 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) and Canada should not be sending them there. Canadian government has appealed and the Federal Court of Appeal granted a stay until such time as the Court has heard and determined the appeal.[23]

3.2 Mass, Pervasive, Globalized Surveillance

One of the more insidious and less examined developments in the US 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 Agreement 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 be the US is much more ambitious. In the new model, the US 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 domestic, but domestic feed into global and global into the domestic and the US has the greatest control over all of them.

3.3 Biometric registration

---

[21] { HYPERLINK "http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=4dab936142dee010VgnVCM1000000ecd190aRCRD&vgnextchannel=4dab936142dee010VgnVCM1000000ecd190aRCRD" }

[22] *Canadian Council for Refugees v. Canada*, 2007 FC 1262 (CanLII), [2007] F.C.J. No. 1583, 2007 FC 1262), { HYPERLINK "http://www.canlii.org/eliisa/highlight.do?text=safe+third+country+&language=en&searchTitle=Federal&path=/en/ca/fct/doc/2007/2007fc1262/2007fc1262.html" }

[23] *Canada v. Canadian Council for Refugees*, 2008 FCA 40 (CanLII), { HYPERLINK "http://www.canlii.org/eliisa/highlight.do?text=safe+third+country+&language=en&searchTitle=Federal&path=/en/ca/fca/doc/2008/2008fca40/2008fca40.html" }

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 or registers. Once this is done, the idea is that the US 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 of standard but the most inaccurate: it has an error rate 15% after only three years. DNA seen as the ultimate gold standard -- even though margin for error and manipulation there too – and the registration of entire populations by DNA may well be the endgame of biometric registration. The US now takes and stores DNA of anyone stopped by the police and so does the UK – regardless of whether the person is ever convicted or charged. Tony Blair – the maximum # of people should be registered this way and new talk of registering 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.

3.4 Travel

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

These collection systems are being expanded to other modes of transportation. The US 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 US has a no fly list and Canadian government recently implemented Canadian no fly list despite objections from the public and parliamentary committees. government has protested that list would be "made in Canada" and shorter than US list, but the issue is probably moot, because Canadian airlines are enforcing the US list for all flights to and over the US as well as for purely domestic flights in Canada.

3.5 Finances

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

And US has gained wide access to Canadian financial and other records under USA PATRIOT Act which allows FBI to obtain records from US companies and their subsidiaries operating in Canada.

3.6 Telecommunications

The US is monitoring communications like never before and pushing other countries to do the same. Under the USA *Patriot Ac*t law enforcement and security agencies powers of search and seizure and interception were substantially increased as were roving wiretap taps, nation wide warrants, lower standards under FISA, expanded power for NSLs, expanded use of pen register, sneak and peak searches, etc. Some of this has happened under ATA as well.

The U.S. has also been pushing countries to ratify the *Convention on Cybercrime*[24] which asks countries to pass laws requiring telecommunications companies to build in back door into systems for state agencies to listen in. Canada and 30 other countries have signed the *Convention*.

And in the US and Canada, the agencies which constitute the "5 Eyes" of ECHELON, have been allowed to turned 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 US, UK, Canada, NZ and Australia which allowed them to listen in on foreign intelligence through the world's telecommunications. 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 US, there was a storm of controversy – meanwhile the Canadian Security Establishment was openly authorized to spy domestically under the ATA without anyone batting an eye. This is and incursion on Canadians privacy rights and could also violate *Charter* rights against unreasonable search and seizure**.**

3.7 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 it 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 and 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 US "use the same risk analysis system". And in *Smart border Action Plan* reports talk about the systems being "interoperable".

Similarly, the NSA and CSE domestic spy programs are data mining programs.

And it is perhaps reasonable to ask whether the RCMP – like the FBI and CIA -- is running data mining programs 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.

---

[24] Council of Europe - ETS No. 185 - *Convention on Cybercrime*
Budapest, 23.XI.2001, { HYPERLINK "http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm" }

3.8 Consequences

The integration of Canada into the new model of mass, globalized surveillance which the US is pushing is turning our society, if not into a police state, then something similar – a surveillance society. And it is having a disintegrating effect on our democratic institutions, our rights to due process in administrative law and under the *Charter*, and international law, specifically the ICCPR, our rights to mobility, freedom from discrimination, freedom of expression and association, presumption of innocence, rights against unreasonable search and seizure, and in some cases, right against arbitrary detention under the both the *Charter* and the ICCPR.

4. INTEGRATION OF MILITARY FUNCTIONS, TRANSFER OF DETAINEES TO AFGHAN AND U.S.

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 US interests. With this has come increased demands by the US 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**.** And 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 US commitments.

Canada has been transferring Afghan combatants that it captures in the war to Afghan detention where Canada knows they are being tortured. Canada also has a Canadian citizen, Omar Khadr, who was taken by the US from the same theatre of war, all the way to US 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 prosecuted for any crimes or war crimes they may have committed in their home countries or released, but Canada has not.

Humanitarian law has a history of development at least as long as that of human rights law. Where human rights standards 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 its 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 it is important if you want your own soldiers to be protected in existing and future conflicts.

Time however 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 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 an moral obligation and possibly Constitutional one to do what it can diplomatically to ensure that Khadr,

is treated by the US in compliance with the *Geneva Conventions* including his right to receive a fair trial for any crimes or war crimes he committed in the theatre of war.[25]

5. 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 being 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 benign designs of government. In this Age of Terror, we need perhaps to be a little more skeptical, a little more vigilant. To keep track of the initiatives that are being put in place in our name and to fight for the kind of country we really want to live in.

APPENDIX

Canadian charter of rights and freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

---

[25] see: *Amnesty International Canada et al v. Attorney General of Canada et al*, 2008 FC 336 (CanLII) - { HYPERLINK "http://www.canlii.org/en/ca/fct/doc/2008/2008fc336/2008fc336.html" } where the court held, at para. 346:

… the questions posed by this motion should be answered as follows:

1. Does the Canadian Charter of Rights and Freedoms apply during the armed conflict in Afghanistan to the detention of non-Canadians by the Canadian Forces or their transfer to Afghan authorities to be dealt with by those authorities? NO

2. If the answer to the above question is "NO" then would the Charter nonetheless apply if the Applicants were ultimately able to establish that the transfer of the detainees in question would expose them to a substantial risk of torture? NO

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

{ HYPERLINK "http://laws.justice.gc.ca/en/charter/const_fr.html" \l "libertes" }

2. Everyone has the following fundamental freedoms:

a) freedom of conscience and religion;

b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

c) freedom of peaceful assembly; and

d) freedom of association.

{ HYPERLINK "http://laws.justice.gc.ca/en/charter/const_fr.html" \l "droits" }

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months

{ HYPERLINK "http://laws.justice.gc.ca/en/charter/const_fr.html" \l "circulation" }

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

a) to move to and take up residence in any province; and

b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

{ HYPERLINK "http://laws.justice.gc.ca/en/charter/const_fr.html" \l "juridiques" }

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention
a) to be informed promptly of the reasons therefor;
b) to retain and instruct counsel without delay and to be informed of that right; and
c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

11. Any person charged with an offence has the right
a) to be informed without unreasonable delay of the specific offence;
b) to be tried within a reasonable time;
c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
e) not to be denied reasonable bail without just cause;
f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Reasons; shaken populations want to be seen t be doing something, bur other agendas as well. So called security concerns: threat of terrorism vs threat of climate change, car accidents. Other agendas: immigration, law and order, crushing dissent or political opposition, insurgency (U.S., El Salvador, Russia, Columbia), reelection staying in power, furthering hegemonic interests in strategic regions, new raison d'etre for security establishment, corporate profits – cannibalization of core state functions.

Integration Other Countries

EU-US integrated security intelligence teams
EU-US Europol agreement
EU-US PNR sharing agreement
Camolin
Mexico – aid package for email and internet surveillance – suggestion that info will be available to US agencies
Colombia – aid package. Assassination of FARC leader in Ecuador defended by U.S. officials under U.S. doctrine of self defence against countries harbouring terrorists
Philippines – US military hunting down terrorist suspects – no status of forces agreement
Uzbekistan –
FBI access to U.S. subsidiary info under PATRIOT Act
US agencies buying personal information of foreign citizens from data aggregators
ECHELON

Canada

Tom Ridge – your information should be our information
Recent stopping of activists –police records
US request to put US Customs on Canadian side be able to fingerprint anyone who approached but wanted to turn back
FBI access to Canadian personal information under PATRIOT Act
Canada – storing data. Said that the Smart Border Action Plan talks about increased sharing of intelligence, and of course the longer information is stored the more that is available to chare and analyze. U.S. – US VISIT 100 years, ATS 40 years, NSA – permanent?, TSC watch list – 99 years. Canada –PNR for incoming flights can be stored by CBSA for 6 years. Amount of time PNR can be stored by Transport Canada for other flights is governed by the ***Public Safety Act***. – concern in both cases is that CBSA and Transport Canada can pass PNR information to Mounties, CSIS and other agencies and question of what limits there are on how long they store information.

Shortly after 9-11, US demand to EU for **mandatory data retention**. Define. Not in Canadian bills for lawful access –but that could come.