THE GLOBALIZED RULE OF LAW AND NATIONAL SECURITY: AN ONGOING QUEST FOR COHERENCE*

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INTRODUCTION: THE CHALLENGE TO BALANCE SECURITY AND LIBERTY

Ever since the United States and its allies declared the "war on terror" jurists have acknowledged the difficulty that legislators, executives and courts face in trying to balance security and rights. In a decision of the Supreme Court of Canada delivered on January 11, 2002 the Court described the daunting challenge facing democratic governments in addressing national security:

> The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to meet this challenge.
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> On the other hand stands the need to ensure that those legal tools do not undermine the values that are fundamental to our democratic society — liberty, the rule of law, and the principles of fundamental justice — values that lie at the heart of the Canadian constitutional order and the international instruments Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.[1]

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* The paper was written when the author was National Security Coordinator for the Department of Justice Canada but the views expressed are those of the author and are not to be attributed to the government of Canada. The paper is based on a presentation made at the Annual Viscount Bennett Program, Faculty of Law, University of New Brunswick, October 22 2013. The title is a reference to a collaborative book project involving a number of international law professors from across Canada including professors Anne Warner La Forest, Don Fleming and John McEvoy from the University of New Brunswick Faculty of Law: *The Globalized Rule of Law: Relations between international and domestic law* (2006: Irwin Law); *Règles de droit et mondialisation : rapports entre le droit international et le droit interne* (2006: Éditions Yvon Blais).

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[1] *R v Suresh (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 3-4, [2002] 1 SCR 3, decision of the Court.

National security risks including terrorism are national, transnational, and international in scope, implicate a vast range of laws, and challenge rule of law at every level. This paper explores the relationship between international and domestic law dealing with matters of national security and argues that international and domestic law relating to national security is increasingly integrated and engages an ongoing need for coherence in developing the globalized rule of law as it pertains to national security.

First, this paper lays out the international law context for national security. Second, it briefly examines five aspects of the domestic law context for national security: terrorist financing law, criminal law, immigration law, intelligence law, and protection of sensitive information. Third, the paper examines the transnational law context for national security by considering the act of state doctrine, extradition, and joint international military operations. Fourth, the paper identifies some developing international, transnational, and domestic trends in relation to state immunity. The conclusion of the paper recaps the integration and harmonization of international and domestic standards in relation to national security law and acknowledges that the quest for coherence and balance of rights and security remains a work in progress.

> In an increasingly interconnected world, problems that originate abroad can easily impact Canadians. This is particularly true for international terrorism…
> Combating international terrorism requires cooperation between countries where problems start and those that are affected.[2]

INTERNATIONAL LAW CONTEXT

Canada is party to thirteen conventions adopted by the international community that address specific terrorist acts, five of which are deposited at the UN.[3] These conventions address acts such as hostage taking, hijacking, terrorist bombings, as well as activities that support terrorism, such as terrorist financing.

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[2] Department of Foreign Affairs and International Trade and Development website: online: <http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/positions-orientations/peace-paix/terrorism-terrorisme.aspx?lang=eng>. For additional publicly available information about the government of Canada's position with respect to national security and terrorism, see, Department of Justice Canada website, online: <http://www.justice.gc.ca/eng/cj-jp/ns-sn/role.html> the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) website, online: <http://www.fintrac-canafe.gc.ca/fintrac-canafe/antimltf-eng.asp> and the Public Safety Canada website, online: <http://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/index-eng.aspx>.

[3] These are listed and hyperlinked on the Department of Foreign Affairs and International Trade and Development website, online: <http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/positions-orientations/peace-paix/terrorism-terrorisme.aspx?lang=eng>.

The terrorist events of September 11, 2001 generated a swift response from the international community. On September 28, 2001 the United Nations Security Council adopted Resolution 1373 (2001)[4] requiring all UN member states to prevent and suppress the financing of terrorist acts; criminalize the willful provision or collection of funds to be used to finance terrorist acts; suppress the recruitment of terrorist groups; and deny safe haven to those who finance, plan, support or commit terrorist acts.

Concurrently the G-7 Finance Ministers and Central Bank Governors met and released an action plan to combat the financing of terrorism. In October 2001, the Financial Action Task Force (FATF), of which Canada is a member, also issued *Special Recommendations on Terrorist Financing* that its members should apply to combat terrorist financing. These recommendations contain provisions relating to the ratification of relevant UN instruments, criminalizing terrorist-related offences, the freezing and confiscation of terrorist assets, reporting on suspicious transactions linked to terrorism, providing assistance to other countries in terrorist financing investigations, ensuring that non-profit organizations are not misused to finance terrorism, imposing anti-money laundering requirements on alternative remittance systems, and strengthening customer identification measures in international and domestic wire transfers.[5]

The UN Security Council remained seized with the struggle against terrorism and issued other resolutions pertaining to national security.[6] UNSC Resolution 1624 (2005) dealt with border, travel and passenger security, prohibiting incitement to terrorism and exhorting states to deny safe haven to terrorists. At the same time this Resolution emphasized the importance of states respecting their obligations under international law, in particular international human rights law, refugee law, and humanitarian law:

> *Reaffirming also* the imperative to combat terrorism in all its forms and manifestations by all means, in accordance with the Charter of the United Nations, and also *stressing* that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law,

[4] UNSCOR, 56th Year, 4385th Mtg, UN Doc S/RES/1373 (2001).

[5] Donato Masciandaro, "Combating Black Money: Money Laundering and Terrorism Finance, International Cooperation and the G8 Role" (Paper delivered at the conference "Security, Prosperity and Freedom: why America needs the G8", Indiana University, Bloomington, 3–4 June 2004), available online: <http://www.g8.utoronto.ca/conferences/2004/indiana/papers2004/masciandaro.pdf>.

[6] Online: <https://www.un.org/en/terrorism/securitycouncil.shtml>.The UN website briefly outlines the history of UN Security Council involvement in combating terrorism, from the early 1990's to today.

> in particular international human rights law, refugee law, and humanitarian law[7]

Two fundamental questions quickly emerged from the events of 911: 1) Was international terrorism military or criminal in nature? 2) Should the international community's response be military or criminal? This entailed a deep search into what domestic and international criminal law and the law of armed conflict could bring to bear on combating terrorism. By describing this as a threat to international peace and security and calling on all states to ensure they were in a position to suppress terrorism domestically and cooperate internationally in its suppression, the UN Security Council's response suggested the international community viewed terrorism as having a double nature as both military threat *and* criminal activity.

As the international war on terrorism dragged on, so did an unresolved debate about its nature: was it an armed conflict justified by the right of self defence or a criminal law enforcement operation on a global scale? If the counterterrorism measures are framed as acts of self defence then humanitarian law principles apply (*Geneva Conventions* etc.). If the measures are more in the nature of criminal interdiction, then international and domestic human rights law apply.[8] This uncomfortable dichotomy is most apparent in relation to decisions to capture and detain or kill suspected terrorists (e.g. detention of "unlawful combatants" at Guantanamo Bay, and use of drone strikes in Pakistan and Yemen, countries that are not viewed as being involved in an armed conflict).[9] Because there are circumstances of terrorism that fit both crime and armed conflict paradigms and situations that shift

[7] UNSCOR, 60th Year, 5261st Mtg, UN Doc S/RES/1624 (2005)

[8] According to former Attorney General William Barr: "There's a basic tension as to whether to treat this as a law enforcement issue or a national security/military issue." Douglas W Kmiec, "Infinite Justice", online: (2001) National Review Online (October 11 2001) <http://www.nationalreview.mm/coment/commentkmiec101101.shtml>; Noah Feldman wrote about a striking asymmetry: on the one hand, criminals generally may not be killed by their pursuers if they pose no immediate threat, but may be punished after capture; adversaries in war, on the other hand, may generally be killed in pursuit without giving quarter, but generally cannot be punished after they are captured. (War criminals constitute a complicated hybrid category.) There is therefore reason to think that U.S. policy can and will treat international terrorists as war adversaries while they are being pursued and as criminals of some sort after they are captured. Noah Feldman, "Choices of Law, Choices of War" (2002) 25 Harv JL & Pub Pol'y 458 (available online: <http://old.911digitalarchive.org/crr/documents/1790.pdf>).

[9] *Ibid* at 461. Feldman suggests "four criteria: identity, provenance, intentionality, and scale" help in evaluating which set of rules apply in "hard cases on the border of the crime/war distinction". For an in-depth analysis see *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Study on Targeted Killings*, A/HRC/14/24/Add.6 (2 May 2010); Philip Alston, "The CIA and targeted killings beyond borders" (2011) 2 Harv Nat Sec J 283; *Public Committee Against Torture in Israel v Israel*, (2007) 46 ILM 375 (Supreme Court of Israel sitting as the High Court of Justice, 16 December 2006).

between the two; domestic, transnational and international law dealing with combating terrorism, armed conflict, humanitarian and human rights standards are increasingly entwined.[10]

DOMESTIC LAW CONTEXT

1. United Nations Suppression of Terrorism Regulations

In 2001, Canada passed the *United Nations Suppression of Terrorism Regulations*[11] under the *United Nations Act*[12]. The *United Nations Act* is the means by which Canada implements UNSC measures not involving use of armed force, decided under Art. 41 of the UN Charter:

> ARTICLE 41 — The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[13]

These Regulations provide for a list of individuals or entities believed to be involved in or associated with terrorist activity. They make it an offence for anyone in Canada, or any Canadian outside Canada, to provide or collect funds if they know

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[10] *Amnesty International Canada v Canada* (Canadian Forces), 2008 FCA 401, [2009] 4 FCR 149; *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125 (available on CanLII).

[11] *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, SOR/2001-360. The preamble explains that the Regulations are made to implement UNSC Resolution 1373 (2001):

> Whereas the Security Council of the United Nations, acting under section 41 of the Charter of the United Nations, adopted Security Council Resolution 1373 (2001) on September 28, 2001; And whereas it appears to the Governor in Council to be necessary to make regulations for enabling the measures set out in that resolution to be effectively applied; Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Foreign Affairs, pursuant to sections 2 and 3 of the United Nations Act, hereby makes the annexed United Nations Suppression of Terrorism Regulations.

[12] *United Nations Act*, RSC 185, c U-2.

[13] There is a long series of Regulations passed under the *United Nations Act* to implement economic sanctions decreed by the UN Security Council to address particular situations affecting international security. For example, *United Nations Al-Qaida and Taliban Regulations (United Nations Afghanistan Regulations)*, SOR/99-444. Section 1 lists the UN SC Resolutions being implemented in Canada through this regulation: "Security Council Resolutions" means Resolution 1267 (1999) of October 15, 1999, Resolution 1333 (2000) of December 19, 2000, Resolution 1373 (2001) of September 28, 2001, Resolution 1390 (2002) of January 16, 2002, Resolution 1452 (2002) of December 20, 2002, Resolution 1526 (2004) of January 30, 2004, and Resolution 1617 (2005) of July 29, 2005, adopted by the Security Council of the United Nations.

these would be for use by anyone on the list (schedule). The Regulations also make it an offence for anyone in Canada, or any Canadian outside Canada, to deal in any way with property if they know it is owned or controlled by anyone on the list. This includes any financial service or transaction relating to such property. It also includes making property available to anyone on the list.

2. Criminal law

After the September 11, 2001 terrorist attack the government immediately undertook an evaluation of existing federal legislation and legislative proposals that were in development. It was assessed that current legislation had to be amended in order to combat terrorism and to address the particular requirements of UN SC Resolution 1373. On October 15, 2001 the *Anti-Terrorism Act* was introduced as Bill C-36, "An Act to amend the *Criminal Code*, the *Official Secrets Act*, the *Canada Evidence Act*, the *Proceeds of Crime (Money Laundering) Act* and other Acts, and to enact measures respecting the registration of charities in order to combat terrorism."[14] The *Anti-Terrorism Act* added to or modified aspects of penal law, including new definitions of "terrorist activity" that incorporated offences defined in the numerous international Conventions on terrorism that Canada had ratified as well as principles of international humanitarian law,[15] new provisions for listing of terrorist entities,[16]

[14] *Anti-terrorism Act*, SC 2001, c 41.

[15] *Ibid*, s 83.01(1) "terrorist activity" means

> (*a*) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences:
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> (i) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on December 16, 1970,
>
> (ii) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on September 23, 1971,
>
> (iii) the offences referred to in subsection 7(3) that implement the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted by the General Assembly of the United Nations on December 14, 1973,
>
> (iv) the offences referred to in subsection 7(3.1) that implement the *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on December 17, 1979,
>
> (v) the offences referred to in subsection 7(2.21) that implement the Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on March 3, 1980, as amended by the Amendment to the Convention on the Physical Protection of Nuclear Material, done at Vienna on July 8, 2005 and the International Convention for the Suppression of Acts of Nuclear Terrorism, done at New York on September 14, 2005,
>
> (vi) the offences referred to in subsection 7(2) that implement the *Protocol for the*

Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on February 24, 1988,

(vii) the offences referred to in subsection 7(2.1) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at Rome on March 10, 1988,

(viii) the offences referred to in subsection 7(2.1) or (2.2) that implement the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, done at Rome on March 10, 1988,

(ix) the offences referred to in subsection 7(3.72) that implement the *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on December 15, 1997, and

(x) the offences referred to in subsection 7(3.73) that implement the *International Convention for the Suppression of the Financing of Terrorism*, adopted by the General Assembly of the United Nations on December 9, 1999, or

(*b*) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C), and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

[16] *Ibid*, s 83.05.

related reporting requirements of financial institutions,[17] provisions for seizure and forfeiture of terrorist assets,[18] new terrorism offences including participating in an activity of a terrorist group,[19] and financing terrorism.[20] There were new investigative hearings[21] and preventative detention,[22] both of which were subject to a five-year sunset clause.[23] The Bill also dealt with related issues of surveillance and identification, hate crimes, security of information and security intelligence. There was a provision for a comprehensive review of the Bill within three years of it receiving Royal Assent.[24]

A companion bill, C-55 *Public Safety Act*[25], 2002 amending over 20 other federal statutes was introduced shortly thereafter to deal with a broad range of public safety matters (transportation, explosives, navigation, aeronautics, health, export/import, shipping, hazardous substances, pest control, money laundering and proceeds of crime, radiation emitting devices etc.) and to implement Canada's obligations under the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*.[26]

The Preamble to the *Anti-Terrorism Act* is noteworthy for framing terrorism as a global, national and existential threat requiring domestic capacity to combat terrorism at home and to cooperate with other nations to combat terrorism. It stresses the need to implement into Canadian law the international standards for combating terrorism that have been articulated through UN Security Council Resolutions or international conventions:

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[17] *Ibid*, s 83.11.

[18] *Ibid*, s 83.14.

[19] *Ibid*, s 83.18.

[20] *Ibid*, s 83.02.

[21] *Ibid*, s 83.28.

[22] *Ibid*, s 83.3, Recognizance with conditions.

[23] *Ibid*, s 83.32, which provided that without an extension agreed on by both Houses of Parliament, the provisions would expire at the end of the 15th sitting day of Parliament following December 31, 2006. The sunsetted provisions did in fact expire in 2007 but were re-enacted in 2013 in Bill S-7.

[24] *Ibid*, s 145.

[25] *An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety*. SC 2004, c 15. A number of provisions are not yet in force, including those dealing with implementation of the Biological and Toxin Weapons Convention.

[26] The Convention entered into force on March 26, 1975.

> WHEREAS Canadians and people everywhere are entitled to live their lives in peace, freedom and security;
> WHEREAS acts of terrorism constitute a substantial threat to both domestic and international peace and security;
> WHEREAS acts of terrorism threaten Canada's political institutions, the stability of the economy and the general welfare of the nation;
> WHEREAS the challenge of eradicating terrorism, with its sophisticated and trans-border nature, requires enhanced international cooperation and a strengthening of Canada's capacity to suppress, investigate and incapacitate terrorist activity;
> WHEREAS Canada must act in concert with other nations in combating terrorism, including fully implementing United Nations and other international instruments relating to terrorism;
> WHEREAS the Parliament of Canada, recognizing that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the Canadian Charter of Rights and Freedoms;
> AND WHEREAS these comprehensive measures must include legislation to prevent and suppress the financing, preparation, facilitation and commission of acts of terrorism, as well as to protect the political, social and economic security of Canada and Canada's relations with its allies;

Founded primarily on the principle of the prevention of terrorist acts, the *Anti-Terrorism Act* included comprehensive terrorism offences: knowingly participating in, or contributing to, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity; knowingly facilitating a terrorist activity; commission of a serious (i.e. indictable) offence for the benefit of, at the direction of or in association with a terrorist group; knowingly instructing anyone to carry out a terrorist activity for a terrorist group; knowingly harbouring or concealing any person who has carried out or is likely to carry out a terrorist activity for the purpose of enabling the person to facilitate or carry out any terrorist activity; and collecting, providing or making available, using or possessing property for certain activities/purposes (terrorist financing).[27]

The *Anti-Terrorism Act* defined "terrorist group" as an entity that has as one of its purposes or activities the facilitating or carrying out of terrorist activity or that is an entity set out in a list established by regulation. The fact of being listed does not

[27] In 2013 the *Nuclear Terrorism Act*, SC 2013, c 13 added four new offences related to nuclear terrorism to the *Criminal Code*, implementing legislation amends to create. The enactment of these proposed amendments permits Canada to ratify the *Amendment to the (1980) Convention on the Physical Protection of Nuclear Material*, done at Vienna on July 8, 2005, and the *International Convention for the Suppression of Acts of Nuclear Terrorism*, done at New York on September 14, 2005.

itself constitute a criminal offence but it establishes an entity as a terrorist group, which can entail criminal consequences through application of other provisions in the Act. The Act amended the *Proceeds of Crime (Money Laundering) Act* (PCMLA)[28] to expand the mandate of Financial Transactions and Reports Analysis Centre of Canada (known as FINTRAC), Canada's financial intelligence unit, to include the detection and deterrence of terrorist financing. The *Anti-Terrorism Act* provided FINTRAC with the legislative framework to permit it to assist in combating and detecting terrorist financing and to enable Canada to comply broadly with the FATF Special Recommendations on Terrorist Financing. In addition, amendments provided law enforcement authorities and the Canadian Security Intelligence Service (CSIS) with information about suspected terrorist financing activities.

In a divided decision of the Supreme Court of Canada interpreting the provision on investigative hearings, *Re Application under s. 83.28 of the Criminal Code*,[29] a majority concluded it could be applied in a manner consistent with the *Charter*. Iacobucci and Arbour JJ., writing the main reasons, explained that courts, legislators and the executive in a democracy governed by rule of law all strive to maintain an equilibrium between liberty and security:

> 5 The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so. This is because Canadians value the importance of human life and liberty, and the protection of society through respect for the rule of law. Indeed, a democracy cannot exist without the rule of law…
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> 7 Consequently, the challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law. In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy. As eloquently put by President Aharon Barak of the Israeli Supreme Court:
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> This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a

[28] *Proceeds of Crime (Money Laundering) Act*, SC 2000, c 17.

[29] 2004 SCC 42, [2004] 2 SCR 248 (available on CanLII). McLachlin CJ and Iacobucci, Major and Arbour JJ for the majority, with Bastarache and Deschamps JJ concurring, and Binnie, LeBel and Fish JJ dissenting. Because the international scope of terrorism and terrorism investigation raises concerns about the use of information gathered under s. 83.28(10) in extradition or deportation hearings and by foreign authorities, the procedural safeguards found in s. 83.28 must necessarily be extended to those proceedings in order to meet the s. 7 *Charter* requirements (at para 75).

> democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties. (H.C. 5100/94, *Public Committee Against Torture in Israel v. Israel*, 53(4) P.D. 817, at p. 845, cited in Barak, *supra*, at p. 148.)[30]
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> 8 Although the constitutionality of a legislative approach to terrorism will ultimately be determined by the judiciary in its role as the arbiter of constitutional disputes for the country, we must not forget that the legislative and executive branches also desire, as democratic agents of the highest rank, to seek solutions and approaches that conform to fundamental rights and freedoms.

Binnie J. agreed with the majority that the provision could be interpreted and applied consistently with the *Charter* but dissented in that he considered that its application to the case before the Court constituted an abuse of process. He commented:

> 115 The challenge posed to our legal institutions by the current "war on terrorism" promises to be more enduring and difficult to manage than the more traditional wartime challenges to civil liberties previously experienced. The terrorist threat had no announced point of commencement and may have no end. The enemy is not conveniently dressed in uniforms or arranged in battlefield order. They operate among us in guerilla-style networks, where decisions can be made, adjusted, improvised and implemented in lower level cells… Efforts to counteract terrorism are likely to become part of our everyday existence for perhaps generations to come. In these circumstances we can take limited comfort from the declared intention of the government that the *Anti-terrorist Act* is a temporary measure. While its continued existence will depend on Parliament's appreciation of developments in the "war on terrorism", such temporary measures may well slide into a state of *de facto* permanence. The role of s.83.28 in our criminal law should be approached with that unhappy prospect firmly in mind.
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> 116 The danger in the "war on terrorism" lies not only in the actual damage the terrorists can do to us but what we can do to our own legal and political institutions by way of shock, anger, anticipation, opportunism or overreaction.[31]

There have been a number of prosecutions since the enactment of the *Anti-Terrorism Act*. It is notable that in interpreting and applying these new domestic *Criminal Code* provisions the courts have made reference to international law related to combating terrorism.

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[30] *Ibid* at paras 5-8.

[31] *Ibid* at paras 115-116, per Binnie J.

Thus, in *R v Khawaja*, a case involving a transnational terrorist plot,[32] the Supreme Court of Canada made reference to the international and domestic context observed:

> The *ATA* … [21] was passed in 2001, in the aftermath of the Al Qaeda attacks in the United States and Resolution 1373 of the United Nations Security Council, which called on member states to take steps to prevent and suppress terrorist activity (U.N. Doc. S/RES/1373). The purpose of the legislation is to provide a means by which terrorism may be prosecuted and prevented: *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248.
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> [22] While the immediate impetus for the legislation may have been concern following the terrorist attacks of September 11, 2001, the legislation has a much broader history and context. As the recitals to the U.N. Resolution make clear, these events were part of an unfolding and escalating international problem. Canada, which had experienced the Air India and Narita bombings, was no stranger to this problem. The legislation is not emergency legislation, but a permanent part of the criminal law of this country: *Application under s. 83.28 of the Criminal Code (Re)*, at para. 39.[33]

The Court also had to consider whether Kawaja's conduct fell within the armed conflict exception in the definition of "terrorist activity" in section 83.01(1),[34] which required it to consider the international law of armed conflict.

> [100] The purpose of the armed conflict exception is to exempt conduct taken during an armed conflict in accordance with applicable international law. There is no evidential foundation for the application of this exception in the present case: the conduct cannot be said to have been taken solely in support of an armed conflict, nor was it in accordance with applicable international law.
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> [101] First, the trial judge expressly found that the appellant knew that the Khyam group's terrorist activities extended beyond the armed conflict in Afghanistan, and supported these terrorist objectives (paras. 130-31). Thus, the appellant's actions were not "directed solely at supporting the insurgency in Afghanistan" (C.A., at para. 168). Even if the appellant's

[32] On October 29, 2008, Justice Rutherford of the Ontario Superior Court of Justice found Momin Khawaja guilty of offences under the *Criminal Code*: intending to detonate an explosive, making / possessing an explosive with intent to enable another person to endanger life or cause serious damage to property, enhancing the ability of a terrorist group to facilitate or carry out terrorist activity, instructing to carry out activity for a terrorist group, providing property and financial services for terrorist purposes, participating in an activity of a terrorist group and facilitating terrorist activity.

[33] *R v Khawaja*, 2012 SCC 69, [2012] 3 SCR 555 (available on CanLII) at paras 21-22.

[34] *Supra* note 14.

> efforts with respect to Afghanistan could be considered part of an armed conflict governed by international law, the verdicts would stand.
>
> [102] Second, the evidence is overwhelmingly contrary to the proposition that the appellant's acts were part of an armed conflict governed by international law. There is no air of reality to the suggestion that the appellant believed that the Khyam group intended to act in compliance with international law, or that he cared if it did. The evidence showed only that "the appellant was a fervent purveyor of hatred, anti-Semitism, religious bigotry and adulation for mass atrocities, who was making detonators, and providing other support, for 'amazing bros . . . who felt the same way'" (R.F., at para. 39). The violent jihadist ideology espoused by the appellant in his numerous communications is fundamentally incompatible with international law. The Geneva Conventions prohibit acts aimed at spreading terror amongst civilian populations, which are considered war crimes. The appellant, by contrast, did what he did in support of a group whose credo was to take arms against whoever supports non-Islamic regimes and that recognized that suicide attacks on civilians may sometimes be justified by the ends of jihad.[35]

In *R v Namouh*,[36] dealing with terrorism and explosives offences related to transnational terrorist activities, the Quebec Superior Court affirmed that "The fight against terrorism is based on international conventions", and cited at length from the preambles to two international conventions ratified by Canada in interpreting the *Criminal Code* provisions:

> [70] The Court cites the *International Convention for the Suppression of Terrorist Bombings*, which Canada has ratified:
> Having in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States,
> Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,
> …
> Recalling also the Declaration on Measures to Eliminate International Terrorism, annexed to General Assembly resolution 49/60 of 9 December 1994, in which, *inter alia*, "the States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods

[35] *Supra* note 33 at paras 100-102

[36] *R v Namouh*, 2010 QCCQ 943 (Quebec Superior Court) (available on CanLII) [*Namouh*]. Saïd Namouh, 37, was sentenced on February 17, 2010 in the Court of Quebec to life in jail for conspiring to deliver, discharge or detonate an explosive or lethal device in a public place contrary to s. 431.2 of the *Criminal Code*. In addition, he was sentenced to eight years in jail for extortion of a foreign government for the benefit, at the direction and in association with a terrorist group contrary to s. 83.2 of the *Criminal Code*, eight years for facilitating terrorist activity contrary to s. 83.19 and four years for his participation in a terrorist group contrary to s. 83.18.

> and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States",
> …
> Noting also that terrorist attacks by means of explosives or other lethal devices have become increasingly widespread,
> …
> Being convinced of the urgent need to enhance international cooperation between states in devising and adopting effective and practical measures for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators,
> Considering that the occurrence of such acts is a matter of grave concern to the international community as a whole….[32]
> [71] Moreover, the *International Convention Against the Taking of Hostages*, which Canada has also ratified, provides the following:
> Having in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of friendly relations and co-operation among States,
> …
> Considering that the taking of hostages is an offence of grave concern to the international community and that, in accordance with the provisions of this Convention, any person committing an act of hostage taking shall either be prosecuted or extradited,
> Being convinced that it is urgently necessary to develop international co-operation between States in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism[37]

In convicting and sentencing Mr. Namouh, Leblond J. stated:

> [88] Conspiring to commit a terrorist bombing that has as foreseeable consequences the death of many innocent people and significant material harm is a very serious offence and runs counter to our society's fundamental values. The fact that the attempt was to take place in another country changes nothing. As Rutherford J. notes in *Khawaja*:
> Canada must certainly not accept the exportation of terrorism from within its borders to victimize innocent people in other parts of the world.[38]

[37] *Ibid* at paras 70-71.

[38] *Ibid* at para 88. Other terrorism prosecutions include: Projet Osage (Toronto 18) - several accused were found guilty in Ontario Superior Court of participation in a terrorist group contrary to section 83.18(1) of the *Criminal Code*, which carries a maximum penalty of 10 years in prison. One of the accused was guilty of one count of counselling to commit fraud over $5000 for the benefit of a terrorist group contrary to section 83.2 of the Criminal Code, which carries a maximum sentence of life in prison. Prapaharan Thambithurai was sentenced on May 14, 2010 in the Supreme Court of British Columbia to 6 months in prison for a terrorism related-offence.

3. Immigration Law

Canadian immigration law illustrates the deep connection between international and domestic law and the challenges in balancing state sovereignty and national security with international humanitarian law obligations. The definitions in the *Immigration and Refugee Protection Act*[39] refer to the relevant international instruments: the UN Convention on Refugees[40] and the UN Convention Against Torture.[41] Section 3 sets out the Act's objectives with respect to immigration and refugees. On the latter, it articulates both international humanitarian and international justice objectives:

> Section 3(2) The objectives of this Act with respect to refugees are
> (a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;
> (b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;…
> (h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.[42]

Section 3(3) also provides the Act's own interpretative guide, including specific reference to the *Canadian Charter of Rights and Freedoms* and Canada's international human rights obligations.[43] Section 34 sets out that security risk is a

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[39] *Immigration and Refugee Protection Act*, SC 2001, c 27, s 2.

[40] "Refugee Convention" means the United Nations Convention Relating to the Status of Refugees, signed at Geneva on July 28, 1951, and the Protocol to that Convention, signed at New York on January 31, 1967. Sections E and F of Article 1 of the Refugee Convention are set out in the schedule.

[41] "Convention Against Torture" means the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed at New York on December 10, 1984. Article 1 of the Convention Against Torture is set out in the schedule.

[42] *Supra* note 39, s 3.

[43] *Ibid*, s 3(3):

> This Act is to be construed and applied in a manner that
>
> (a) furthers the domestic and international interests of Canada;
>
> (b) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;
>
> (c) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;
>
> (d) ensures that decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;

ground of inadmissibility and lists activities that render a person inadmissible on security grounds, including engaging in terrorism and being a danger to the security of Canada.[44] The need to balance compelling national security concerns and respect for human rights and reconcile international and domestic standards have been at the heart of developments in the security certificate process over the last twelve years.

In *Suresh v MEI*[45] the Supreme Court of Canada in one of its most controversial decisions declined to adopt a wholly internationalized interpretation of the *Immigration Act*,[46] which would have required an absolute rule against return to torture. Instead, the Court noted at paragraph 5, that

> …to deport a refugee to face a substantial risk of torture would generally violate s.7 of the *Charter*. The Minister of Citizenship and Immigration

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> (e) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada; and
>
> (f) complies with international human rights instruments to which Canada is signatory.

The interplay between international law standards and the *Immigration and Refugee Act* was also discussed in *Baker v Canada (Minister of Citizenship and Immigration*) [1999] 2 SCR 817, [1999] SCJ No 39 (dealing with the relevance of the *UN Convention on the Rights of the Child*, considered not to be implemented). *Egharevba v Canada (Citizenship and Immigration)*, 2013 CanLII 33228 (CA IRB) at para 75: "The Court in *Baker* accepted that the *Convention on the Rights of the Child* has not been implemented by Parliament and, therefore, its provisions have no direct application within Canadian law. Nevertheless, the Court regarded the values reflected in international human rights law as possibly helping to inform the contextual approach to statutory interpretation and judicial review."

[44] *Ibid*, s 34:

> (1) A permanent resident or a foreign national is inadmissible on security grounds for
>
> (a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;
>
> (b) engaging in or instigating the subversion by force of any government;
>
> (b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;
>
> (c) engaging in terrorism;
>
> (d) being a danger to the security of Canada;
>
> (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
>
> (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).

[45] *Supra* note 1 at para 5.

[46] *Immigration Act*, RSC 1985, c I(2).

> must exercise her discretion to deport under the *Immigration Act* accordingly. Properly applied, the legislation conforms to the *Charter*.

By leaving open the slightest possibility that there might be circumstances in which deportation to torture would be constitutionally permissible, the decision has generated considerable debate and criticism:

> 58 Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil. To repeat, the appropriate approach is essentially one of balancing. The outcome will depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel. On the one hand stands the state's genuine interest in combating terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security. On the other hand stands Canada's constitutional commitment to liberty and fair process. This said, Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere.
>
> 75 We conclude that the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the *Charter*.
>
> 76 The Canadian rejection of torture is reflected in the international conventions to which Canada is a party. The Canadian and international perspectives in turn inform our constitutional norms. The rejection of state action leading to torture generally, and deportation to torture specifically, is virtually categoric. Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*. To paraphrase Lord Hoffmann in *Rehman, supra*, at para. 54, states must find some other way of ensuring national security.
>
> 77 It follows that insofar as the *Immigration Act* leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.
>
> 78 We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1. (A violation of s. 7 will be saved by s. 1 "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like": see *Re B.C. Motor Vehicle Act, supra*, at p. 518; and *New Brunswick (Minister of Health and Community Services) v. G.*

> *(J.)*, [1999] 3 S.C.R. 46, at para. 99.) Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the Charter generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.[47]

With deportation to torture being a possibility in Canada, the Supreme Court has been assiduous in ensuring there are procedural safeguards in the security certificate process. In *Charkaoui v Canada (Citizenship and Immigration)*,[48] the Court found that the procedure under the *IRPA* for determining whether a certificate is reasonable and the detention review procedures both infringe s.7 of the *Charter*. The secrecy dictated by national security considerations denied the person named in the certificate an opportunity to know the case against him and to challenge that position. Without an adversarial testing of the facts and the law, the judge's ability to come to a decision based on all relevant facts and law was undermined.[49] After considering procedures before the Security Intelligence Review Committee (SIRC), the Special Immigration Appeals Commission (SIAC), the use of Special Advocates in the UK, the Arar Inquiry and the Air India trial,[50] all of which appeared to offer more procedural protections than found in the security certificate process, the Supreme Court concluded that the measures were not minimally impairing under s.1 of the *Charter*.

> Why the drafters of the legislation did not provide for special counsel to objectively review the material with a view to protecting the named person's interest, as was formerly done for the review of security certificates by SIRC and is presently done in the United Kingdom, has not been explained. The special counsel system may not be perfect from the named person's perspective, given that special counsel cannot reveal confidential material. But, without compromising security, it better protects the named person's s.7 rights.[51]

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[47] *Supra* note 1 at paras 58, 75-78

[48] *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 (CanLII), [2007] 1 SCR 350 at paras 25, 26.

[49] *Ibid* at paras 51, 52, 54.

[50] *R v Malik and Bagri*, 2005 BCSC 350, [2005] BCJ No 521 (QL), 2005 BCSC 350 (available on CanLII).

[51] *Supra* note 48 at para 86.

As a result of this decision, provision for special advocates in certificate proceedings was added to the *IRPA*.[52] The amended scheme has been challenged on constitutional grounds and a decision from the Supreme Court of Canada is awaited in *Harkat*.[53]

4. Intelligence Law

Canadian law relating to intelligence does not directly draw on international law. International law is relevant, however, to the question whether Canadian law has extraterritorial application. Whether international law expresses a position on the legality or otherwise of international intelligence collection is a question of growing interest since the *Snowden* leaks.

Prior to this new global interest in the question, Professor Craig Forcese considered the legality of spying under international law.[54] There appear to be two main arguments that intelligence gathering is illegal under international law. First, it may constitute a form of intervention in the domestic or external affairs of a sovereign state, contrary to the spirit of the *General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*.[55] Second, it may constitute an abuse or violation of diplomatic immunity protected by the *Vienna Convention on Diplomatic Relations (1961)*.[56] States tend to outlaw under their

[52] *Supra* note 39, s 85:

> (2) A special advocate may challenge
>
> (a) the Minister's claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person; and
>
> (b) the relevance, reliability and sufficiency of information or other evidence that is pro- vided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it.

[53] An appeal of the decision of the Federal Court of Appeal in *Harkat v Canada (Citizenship and Immigration)*, 2012 FCA 122 (CanLII). Other provisions of Canada's immigration laws, including provisions from the *Protecting Canada's Immigration System Act*, SC 2012 c 17 (response to *Sunsea* migrants), are under constitutional challenge e.g., *R v Appulonappa*, 2013 BCSC 31 (CanLII); *R v Appulonappa*, 2013 BCCA 79 (CanLII), stay of constitutional ruling on amended s.117 *IRPA* declined.

[54] Craig Forcese, "Spies Without Borders: International Law and Intelligence Collection" (2011) 5 Journal of National Security Law and Policy; December 6 2014 blog and December 21 2014 update online: <http://craigforcese.squarespace.com/national-security-law-blog/>.

[55] GA Res 2625(XXV), UNGAOR, 25th Sess, Supp No 18, UN Doc A/Res/25, (1970) 121

[56] Article 3(1)(d) specifically recognizes the intelligence gathering function of a diplomatic mission, i.e., "ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State." Article 40 provides for the inviolability of diplomats and diplomatic correspondence and communications.

domestic law such conduct as espionage and interception of private communications, but breach of such domestic laws by a foreign spy may not be sufficient to make intelligence gathering a violation of international law.[57] The eminent British jurist, Lassa Oppenheim, wrote about spying in a way that may suggest that while foreign spying was contrary to domestic laws it was not contrary to international law:

> Spies are secret agents of a state sent abroad for the purpose of obtaining clandestinely information in regard to military or political secrets. Although all states constantly or occasionally send spies abroad, and *although it is not considered wrong morally, politically, or legally to do so*, such agents have, of course, no recognized position whatever according to international law, since they are not agents of states for their international relations. Every state punishes them severely when they are caught committing an act which is a crime by the law of the land, or expels them if they cannot be punished. A spy cannot be legally excused by pleading that he only executed the orders of his government and the latter will never interfere, since it cannot officially confess to having commissioned a spy.[58]

In a seminar article on this question Julius Stone points out that if there is any illegality in cases of intelligence gathering, it may relate to conduct that amounts to a territorial intrusion or an abuse or breach of diplomatic privileges, but not to the intelligence gathering itself. He argued:

> …according to the principle stated in the *Lotus Case* it is for those who assert the existence of a rule of law restricting state activity to show that such a restrictive rule exists. And in any case it is not a self evidently sound approach to the newish problems of peacetime espionage to assume that it must be unlawful unless it can be justified on some specific grounds. In face of a situation of such rapid technological, strategic, and psychological change it seems to me to be particularly important rather to approach the matter by asking whether there are any principles, manifest in the practice of states, which evidence any existing restrictive rules, or any sufficiently close analogies. With the greatest respect, I can at present find none.[59]

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[57] Christopher Joye, "Vanishing point: there's no law against spying", *Financial Review Magazine* (19 November 2013) online: Afr.com <http://www.afr.com/p/national/vanishing_point_there_no_law_against_oNXFJfsyh0bcROqbS68DtJ>.

[58] Oppenheim, 1 *International Law*, at 455 (London, Longmans, 3d edition, 1920), quoted by Quincy Wright, "Espionage and the Doctrine of Non-Intervention in Internal Affairs," in Q Wright, J Stone, RA Falk, RJ Stanger; Edited by RJ Stanger With a Foreword by RA Falk, *Essays on Espionage and International Law* (Ohio State University Press, 1962) 3 at 17; online: <https://archive.org/details/essaysonespionag00stanrich>. Wright argued that if spying amounts to intervention it is contrary to international law, at 12-13.

[59] Julius Stone, "Legal Problems of Espionage in Conditions of Modern Conflict" 29, in Q Wright, J Stone, RA Falk, RJ Stanger; *Ibid* note 54 at 33, referring to the *Case of the SS "Lotus"*, Permanent Court of International Justice September 7, 1927 at 18:

Writing during the cold war, Stone emphasized that

> … in the future which is before us the cases of espionage where there is no collateral illegality are the very cases likely to be most vital for the future of mankind. Because, with satellites like Midas, and other technical developments, we are approaching a situation in which the military reconnaissance function can be exercised from outer space or from the periphery of territorial waters, and there will be no collateral illegality involved in the major spying activities. …[60]

He considered that the crucial question was

> … whether, *apart from collateral illegality* – there being for example no territorial intrusion when you're in outer space – espionage is a delinquency of the state which engages in it. … [A]s the law now stands, there is no sufficient warrant for saying that international law does not permit state-authorized espionage in peacetime.[61]

Forcese's review of the commentators finds "artful ambiguity" in the way the international community deals with espionage such that it is not completely clear that it is or is not contrary to international law. With this important contextual question left somewhat unresolved we turn to the domestic law on intelligence collection.

The *Canadian Security Intelligence Service Act*[62] defines "threats to the security of Canada"[63] and gives the Canadian Security Intelligence Service (CSIS)

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

[60] *Ibid* at 34.

[61] *Ibid*.

[62] *Canadian Security Intelligence Service Act* RSC 1985, c C-23.

[63] *Ibid*, s 2:

> "threats to the security of Canada" means
>
> (a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,
>
> (b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person
>
> (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of

the mandate in s.12 to collect "to the extent that it is strictly necessary…information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada".[64] Section 16 provides that CSIS "may, in relation to the defence of Canada or the conduct of the international affairs… assist the Minister of National Defence or … of Foreign Affairs, within Canada, in the collection of …intelligence relating to …any foreign state…"[65] Section 16 specifically excludes targeting of a Canadian citizen, permanent resident or Canadian corporation. Section 21 provides for judicial control through the requirement of judicial authorization of warrants (by the Federal Court of Canada), and section 34 establishes the Security Intelligence Review Committee as the reviewing agency for CSIS.[66]

> achieving a political, religious or ideological objective within Canada or a foreign state, and
>
> (d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,
>
> but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).

[64] *Ibid*, s 12:

> The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.

[65] *Ibid*, s 16(1):

> Subject to this section, the Service may, in relation to the defence of Canada or the conduct of the international affairs of Canada, assist the Minister of National Defence or the Minister of Foreign Affairs, within Canada, in the collection of information or intelligence relating to the capabilities, intentions or activities of
>
> (a) any foreign state or group of foreign states; or
>
> (b) any person other than
>
> (i) a Canadian citizen,
>
> (ii) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, or
>
> (iii) a corporation incorporated by or under an Act of Parliament or of the legislature of a province.
>
> (2) The assistance provided pursuant to sub- section (1) shall not be directed at any person referred to in subparagraph (1)(b)(i), (ii) or (iii).
>
> (3) The Service shall not perform its duties and functions under subsection (1) unless it does so (a) on the personal request in writing of the Minister of National Defence or the Minister of Foreign Affairs; and (b) with the personal consent in writing of the Minister.

[66] *Ibid*, s 34-55 deal with the roles and responsibilities of SIRC.

The role of the Communications Security Establishment (CSE) is set out in the *National Defence Act*, Part V.1.[67] Section 273.61 defines "foreign intelligence" and "global information infrastructure".[68] Section 273.64 (1) sets out the three-part mandate of CSE:

> 273.64 (1) The mandate of the Communications Security Establishment is
> (a) to acquire and use information from the global information infrastructure for the purpose of providing foreign intelligence, in accordance with Government of Canada intelligence priorities;
> (b) to provide advice, guidance and services to help ensure the protection of electronic information and of information infrastructures of importance to the Government of Canada; and
> (c) to provide technical and operational assistance to federal law enforcement and security agencies in the performance of their lawful duties.

Subsection (2) and (3) contain restrictions on this mandate, such that with respect to paragraphs (1)(a) and (b) the activities shall not be directed at Canadians or any person in Canada and shall be subject to measures to protect the privacy of Canadians; and with respect to paragraphs (1)(c) activities are subject to any limitations imposed by law on federal law enforcement or security agencies. Section 273.65 (1) provides for Ministerial authorization to permit interception of private communications for the purpose of obtaining foreign intelligence provided that it is directed at foreign entities located outside Canada and there are measures to protect the privacy of Canadians.[69] Section 273.66 provides that CSE "may only undertake

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[67] *National Defence Act* RSC 1985, c N-5.

[68] *Ibid*, s 273.61 definitions:

> "foreign intelligence" means information or intelligence about the capabilities, intentions or activities of a foreign individual, state, organization or terrorist group, as they relate to international affairs, defence or security.
>
> "global information infrastructure" includes electromagnetic emissions, communications systems, information technology systems and networks, and any data or technical information carried on, contained in or relating to those emissions, systems or networks.

[69] *Ibid*, s 273.65(1):

> The Minister may, for the sole purpose of obtaining foreign intelligence, authorize the Communications Security Establishment in writing to intercept private communications in relation to an activity or class of activities specified in the authorization.
>
> (2) The Minister may only issue an authorization under subsection (1) if satisfied that
>
> (a) the interception will be directed at foreign entities located outside Canada;

activities that are within its mandate, consistent with ministerial direction and, if an authorization is required under section 273.65, consistent with the authorization."

The interplay between these two statutory regimes has become a matter of interest to the Federal Court, the last CSE Commissioner, the Honourable Robert Decary Q.C. and the SIRC in its 2013 report as they grapple with questions about the extraterritorial reach of Canadian intelligence collection. In the public version of redacted reasons issued on November 22 2013, Mosley J. revisited his May 4, 2009 reasons for issuance of a warrant to intercept foreign communications, "so long as the interception of the telecommunications and seizures of the information took place from and within Canada."[70] He recalled that in June 2007 the Deputy Attorney General of Canada (DAGC) was seeking a warrant for interceptions abroad as a precaution because of uncertainty about whether the *Charter* and the *Criminal Code* might apply to such activities.[71]

While the matter was before Blanchard J. in 2007 the Supreme Court of Canada released its decision in *R v Hape.*[72] Applying that decision Blanchard J. concluded that the Federal Court had no jurisdiction to issue a warrant in respect to investigative activities in countries other than Canada.[73] He considered that the principles of international law had to be considered in order to answer the question before him. He wrote,

> In *Hape*, the Supreme Court affirmed the well-established principle of statutory interpretation that legislation is presumed to conform to

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> (b) the information to be obtained could not reasonably be obtained by other means;
>
> (c) the expected foreign intelligence value of the information that would be derived from the interception justifies it; and
>
> (d) satisfactory measures are in place to protect the privacy of Canadians and to ensure that private communications will only be used or retained if they are essential to inter- national affairs, defence or security.

[70] *In the Matter of an application by XXX for a warrant pursuant to sections 12 and 21 of the Canadian Security Intelligence Service Act, RSC 1985*, c C-23, 2013 FC 1275.

[71] *Ibid* paras 21-22.

[72] *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292.

[73] *Canadian Security Intelligence Service Act (Re)*, 2008 FC 301, [2007] FCJ No 1780. Blanchard J. noted

> The subjects of investigation are currently named in certain warrants in application SCRS-10-07 which I granted on April 25, 2007, in relation to the Canadian Security Intelligence Service (the Service or CSIS) investigation of [...] The warrants issued in April are for investigative activities within Canada and are valid for a period of one year from May 1, 2007 to April 30, 2008. All subjects of investigation, except for one, are Canadian citizens, permanent residents or refugees. The exception is a foreign national.

> international law. That decision also stated that customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation. It also declared that Parliament's "clear constitutional authority" to enact legislation with extraterritorial effect is informed by the "binding customary principles of . . . international law", which prohibit interference with the sovereignty and domestic affairs of other states.[74]

Blanchard J. considered that the intrusive activities contemplated in the warrant application clearly impinged "upon the … principles of territorial sovereign equality and non-intervention and are likely to violate the laws of the jurisdiction where the investigative activities are to occur."[75] Therefore a warrant authorizing such activities would

> …be authorizing activities that are inconsistent with and likely to breach the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations. These prohibitive rules of customary international law have evolved to protect the sovereignty of nation states against interference from other states. Antonio Cassese, a renowned international law jurist, cited in *Hape* …, referred to the "sovereign equality of nations" as "the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest"… these "prohibitive rules of customary international law" are directly incorporated into Canadian domestic law.[76]

Blanchard J. concluded that "absent an express enactment authorizing the Court to issue an extraterritorial warrant, the Court is without jurisdiction to issue the warrant sought."[77]

A few months after this decision Mosley J. was presented with a warrant application in respect to which he considered that there were sufficient factual and legal grounds to distinguish the application from that which was before Justice Blanchard.[78] The interceptions were to be conducted by CSE from *within* Canada, not by installing devices to intercept *outside* Canada. Mosley J. wrote:

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[74] *Ibid* paras 46-49.

[75] *Ibid* paras 50-51.

[76] *Ibid* para 52.

[77] *Ibid* para 55. At para 58 he stated, "The Charter serves as a constitutional instrument to enshrine rights. It does not endow any powers."

[78] *X (Re)*, 2009 FC 1058 (CanLII), [2010] 1 FCR 460, Mosley J. Comments at para 20 suggest the application was treated with an alacrity he may have later regretted:

> [I]n the present matter, I was satisfied that a warrant was justified and that there were exigent circumstances with respect to the nature of the threat which required that it be issued on an urgent basis. When I dealt with the application on January 26 2009 I considered whether it would be appropriate to appoint *amicus curiae*, as had

> What has been proposed in the present warrant does not, in my view, constitute the enforcement of Canada's laws abroad but rather the exercise of jurisdiction here relating to the protection of Canada's security.[79]

Noting that "it has been held by U.S. Courts of Appeal that a judge has the jurisdiction to authorize the interception of communications where the first location at which the communication will be listened to is within the judge's territorial jurisdiction,"[80] Mosley J. found that "In the present context, the interceptions for which authorization is granted will take place at the locations within Canada where the calls will be acquired, listened to and recorded."[81] Mosley J. took an expansive view of what the CSE can do under its mandate to assist in the execution of a warrant issued under the *CSIS Act*:

> The norms of territorial sovereignty do not preclude the collection of information by one nation in the territory of another country, in contrast to the exercise of its enforcement jurisdiction…
> Canada has given CSE a mandate to collect foreign intelligence including information from communications and information technology systems and networks abroad. It is restricted as a matter of legislative policy from directing its activities against Canadians or at any person within Canada, but it is not constrained from providing assistance to security and law enforcement agencies acting under lawful authority such as a judicial warrant. CSIS is authorized to collect threat-related information about Canadian persons and others and, as discussed above, is not subject to a territorial limitation.
> Where the statutory prerequisites of a warrant are met, including prior judicial review, reasonable grounds and particularization of the targets, the collection of the information by CSIS with CSE assistance, as proposed, falls within the legislative scheme approved by Parliament and does not offend the Charter.
> …Given the concern for the interests of Canadian persons evidenced by Parliament, it is preferable that such activities be authorized with prior judicial scrutiny as in this case.[82]

> been done by Justices Noël and Blanchard, to assist the Court with the jurisdictional question. Given the urgency of the situation laid before me and the facts and legal argument presented on behalf of the applicant, I determined that it would be inappropriate to delay the issuance of the warrant. Moreover, the question of whether extraterritorial warrant execution could be authorized had been thoroughly canvassed in the proceedings before Justice Blanchard.

[79] *Ibid* at para 66.

[80] *Ibid* at para 53, citing, *US v Denman*, 100 F 3d 399 (5th Cir 1996); *US. v Rodriguez*, 968 F 2d 130 (2d Cir 1992); *US v Luong*, 471 F 3d 1107 (9th Cir 2006); *US v Ramirez*, 112 F 3d 849 (7th Cir 1997) *US v Jackson*, 471 F 3d 910 (7th Cir 2000); *US v Tavarez*, 40 F 3d 1136 (10th Cir 1994); *People v Perez*, 848 NYS 2d 525 (NY Sup Ct) *contra*, *Castillo v Texas*, 810 SW 2d 180 (Tex Crim App 1990).

[81] *Ibid* at para 52.

[82] *Ibid* at paras 74-77.

A few years later, a comment in the CSE Commissioner's annual report roused Mosley J.'s concern that he may not have received sufficient disclosure of facts relevant to the issuance of that warrant. He appointed an *amicus curiae* and asked for submissions from the Crown.[83] His November 22, 2013 further reasons, currently under consideration by the Federal Court of Appeal, express his frustration about not being told that warrants granted for interception within Canada were being supplemented by requests by CSE for assistance from foreign partners to gather intelligence abroad. In his November 2013 "further reasons" Mosley J. underlined that such warrants were not to be used for seeking assistance from foreign partners to collect intelligence on Canadians. Commenting on the Blanchard decision, Mosley J. remarked:

> …nothing in Justice Blanchard's Reasons support an interpretation that CSIS officials do not need a warrant or other lawful authority, including that of the foreign state, to conduct intrusive intelligence collection activities abroad. He found, rather, that the Act did not provide for the issuance of such a warrant and that the *Charter* did not extend to such activities.[84]

Mosley J. required disclosure to the court and the *amicus curiae* of legal advice from the Deputy Attorney General of Canada. He notes that after the Blanchard J. decision, advice was provided to CSIS based on a new interpretation of s.12 in light of *Hape*, to the effect that "the interception of a target's communications outside Canada by a foreign agency at the Service's request… did not engage the jurisdictional issues raised by Justice Blanchard and … a warrant to authorize such requests was not required."[85] The record appeared to show that in respect to the 2009 warrant there had been no intention to ask for foreign assistance and none was sought during the life of the warrant. As a result of September 2009 guidance from the CSIS Director of Operations, however, it became the norm, where a warrant has

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[83] *Supra* note 77 at para 53 Mosley J. explained:

> Upon reading the CSEC Commissioner's Annual Report, I issued an Order on August 26, 2013 requiring that Counsel for CSEC and CSIS appear before the Court prepared to speak to the matter. More specifically I directed that: …counsel should be ready to speak as to whether the application of the CSE Commissioner's recommendation "that CSEC advise CSIS to provide the Federal Court of Canada, when the occasion arises, with certain additional evidence about the nature and extent of the assistance CSEC may provide to CSIS" relates to the evidence presented to the Court in the application to obtain CSIS-30-08 and all other similar applications since, and, if yes, whether the evidence would have been material to the decision to authorize the warrant(s) in CSIS-30-08 or any subsequent applications.

[84] *Ibid* para 30.

[85] *Ibid* at paras 33-34. Mosley J. noted that the advice did caution the Service to ensure that the assisting foreign party was acting in accordance with its own laws and did not give rise to serious violations of human rights.

been obtained for directed interception of foreign travel (DIFT), that there would be a request to foreign partners for assistance.[86]

Mosley J. concluded that the duty of candour had been breached by CSIS in consultation with counsel having "strategically" omitted information about their intention to ask for foreign assistance and as a result he had been led to believe the interception activity would "take place in or under the control of Canada."[87] He considered that he needed to express a view on the question, "*Does CSIS have the legal authority to seek assistance, through* [Communications Security Establishment Canada (CSEC)], *from foreign partners to intercept the telecommunications of Canadians while they are outside of Canada?"* because the annual reports of the CSEC Commissioner and the SIRC both suggested the Court had, by issuing the warrants, authorized such requests for foreign assistance. He observed that even if the foreign law permits an activity, it may violate the law of the third state in which it occurs as well as the customary international law principle of sovereignty recognized in *Hape* that can only be displaced by express domestic legislation.[88] Mosley J. concluded,

> There is nothing in the *CSIS Act* or in its legislative history, to my knowledge, that suggests that in enacting s 12 Parliament granted express legislative authority to CSIS to violate international law and the sovereignty of foreign nations either directly or indirectly through the agency of CSEC and the second parties. [89]

Later in his remarks, Mosley J. stressed the risks of this interpretation:

> The interpretation of s 12 asserted by the Service and the DAGC is not, I believe, consistent with the scheme of the Act as a whole nor with the position of the Supreme Court of Canada in *Hape* that the violation of international law can only be justified if expressly authorized by Parliament. CSIS and CSEC officials are relying on that interpretation at their peril and, as cautioned by the CSEC Commissioner and SIRC, incurring the risk that targets may be detained or otherwise harmed as a result of the use of the intercepted communications by the foreign agencies. Section 12 does not authorize the Service and CSEC to incur that risk or shield them from liability, in my view.[90]

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[86] *Ibid* at para 43.

[87] *Ibid* at para 90.

[88] *Ibid* at para 102, referencing the *Foreign Intelligence Surveillance Act of 1978*, Pub L 95-511, 92 Stat 1783, 50 USC ch36 (*FISA).*

[89] *Ibid* at para 103.

[90] *Ibid* at para 122.

He found that CSE's practice of only asking for foreign assistance when there was a warrant was using "the Court's warrant issuing authority as protective cover for activities that it has not authorized."[91] Mosley J. summarized his frustration:

> In my view, as soon as it was determined that the Service would rely on the general power to investigate set out in s 12 of the Act to request second party assistance with the interception of the communications of Canadian subjects abroad, that determination constituted facts known to the affiant which could lead the Court to find that there was no investigative necessity to issue a 30-08 warrant. The failure to disclose that information was the result of a deliberate decision to keep the Court in the dark about the scope and extent of the foreign collection efforts that would flow from the Court's issuance of a warrant.
>
> This was a breach of the duty of candour owed by the Service and their legal advisors to the Court. It has led to misstatements in the public record about the scope of the authority granted the Service by the issuance of the 30-08 warrants.[92]

Mosley J. stated, that going forward, warrant applications should include information about the results of any s.12 request for foreign assistance because the results may reveal that the warrant is not needed, and all warrants must be worded to make clear that they are not authorizing requests for foreign assistance. It is to be noted that the first point seems inconsistent with Mosley J.'s view that s.12 cannot be used in this way. Furthermore it is not entirely clear that asking a foreign state to collect intelligence on Canada's behalf would violate international law, given the earlier discussion of this issue. If all the collection is done through electronic means, and in compliance with the laws of the requested collector state, even if the collection violates the domestic laws of the state being targeted does this necessarily entail a violation of international law as well?

The somewhat evasive manner in which the international community deals with espionage is reflected in domestic laws that are not always entirely transparent so as not to offend the international community. Forcese suggests this puts CSIS officials and the federal court judges in a difficult position as they try to shoehorn international intelligence collection into a coherent legal frame.[93] After reading the latest judicial comments from Mosley J., Forcese commented:

> This whole situation is clearly now untenable. Note to the political executive and Parliament: Fix the CSIS Act or you will be putting the security service on the horns of an impossible dilemma: to wit, a choice

[91] *Ibid* at para 110.

[92] *Ibid* at paras 117-118.

[93] *Supra* note 54.

> between violating the law (and potentially attracting criminal culpability and civil liability) or giving up doing important elements of the job when the potentially dangerous people you are concerned about go abroad.

He notes, of course, that "it will be no simple thing" to fix the legislation. The Federal Court of Appeal has received correspondence from the Deputy Attorney General of Canada about this and is seized of the matter. One can expect further ink to be spilled by jurists and legislators before this question is fully settled.

5. Protection of Sensitive Information

The *Security of Information Act (SOIA)*[94] creates a number of offences and provides a scheme for binding individuals who work with sensitive material permanently to secrecy. The *SOIA* focuses on conduct, such as espionage, that is harmful to, or likely to harm, Canada. The concept of "harm to Canadian interests" (also known as a purpose "prejudicial to the safety or interests of the State") was defined to address a wide array of potential harms, including terrorist activity, interference with critical infrastructure, and the development of weapons of mass destruction in contravention of international law. The *SOIA* is designed to prevent harmful disclosures of information. There has been one conviction under this legislation, in the case of Sub-Lt. Jeffrey Delisle, who pled guilty and was also convicted for breach of public trust for having given sensitive information to the Russian Embassy. In an earlier matter, in which a journalist Juliet O'Neill challenged the validity of warrants executed against her home and office for alleged breaches of the *SOIA*, Ratushny J. declared certain elements of the offences to be unconstitutionally vague.[95]

The *Anti-Terrorism Act* made changes to sections 37 and 38 of the *Canada Evidence Act (CEA)* to address the judicial balancing of interests when the disclosure of information in proceedings would encroach on a specified public interest and, in particular, would be injurious to international relations, national defence or national security. The amendments to section 38 of the *CEA* were intended to improve the scheme by 1) introducing greater flexibility into the system, 2) offering the opportunity for evidentiary issues to be resolved early on in the proceedings and 3) safeguarding the federal government's ability to protect the confidentiality of national security information in proceedings in a manner consistent with the fair trial rights of parties.

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[94] RSC 1985, c O-5 (part 2 of the *Anti Terrorism Act* substantially amended the *Official Secrets Act,* which became the *Security of Information Act).*

[95] *O'Neill v Canada (Attorney General),* 2006 CanLII 35004 (ON SC), Ratushny J (sections 4(1)(a), 4(3) and 4(4)(b) of the SOIA violate s.7 and s.2(b) of the Charter, and cannot be saved under s.1, and therefore are of no force or effect).

More recently there have been *CEA* amendments in response to case law, *Toronto Star Newspapers Ltd v Canada*.[96] Bill S-7 amended CEA sections 38.04(4); 38.04(5)(*a*); 38.06(1) and (2); 38.11(1) and 38.12; and adds the new section 38.11(3).[97]

TRANSNATIONAL LAW CONTEXT

The relationship between international law and domestic law is most interesting and complex in the context of national security and anti-terrorism matters having transnational dimensions. In Resolution 1373 (2001) and those that followed, the UN Security Council exhorted nations to cooperate and collaborate in combating global terrorism. International information sharing for terrorism investigations, policing[98], extradition[99] and multi-national military operations[100] has raised challenging legal

[96] *Toronto Star Newspapers Limited v Canada*, 2007 FC 128, (the Toronto Star argued that the combined effect of these provisions was to deny it access to the Attorney General's section 38 application itself, as well as to all court records associated with the proceedings and that, as such, these provisions violated the open court principle and the right to freedom of expression guaranteed by section 2(*b*) of the *Charter*. Justice Lutfy found that the provisions in question violated section 2(*b*) of the *Charter*, and could not be saved under section 1 because they did not impair the rights of the applicant as minimally as possible. In an earlier case, *Ottawa Citizen Group v Canada (Attorney General)*, 2004 FC 1052 (CanLII) at para 44-45, Lutfy J. had already made *post script* remarks about the open court principle in relation to s.38 *CEA* proceedings: "The Supreme Court of Canada, in its recent consideration of another provision of the *Anti-terrorism Act*, has reiterated the importance of the public's access to court proceedings. The open court principle is a cornerstone of our democracy and "… is not lightly to be interfered with": *Vancouver Sun (Re)*, 2004 SCC 43 at sections [sic] 23–27. Section 38 is the antithesis to this fundamental principle. These *post scriptum* comments concerning the Court's experience in this and other section 38 proceedings may be relevant to those involved in the review of the anti-terrorism legislation. They may wish to consider whether certain provisions in section 38 unnecessarily fetter the open court principle").

[97] These modifications introduce wording changes to the *CEA* designed to ensure that that the open court principle is better respected in section 38 non-disclosure proceedings. For example, new section 38.04(4) adheres to the principle contained in current section 38.04(4) by ensuring that information, including documents filed with the court in a non-disclosure application, are initially kept confidential. However, when new section 38.04(4) is read in combination with new sections 38.04(5) and 38.12 of the *CEA*, the Federal Court now has the ability, after hearing representations made by the Attorney General of Canada to make documents relating to the proceedings, including court records, public. The exception is documents relating to the part of the court hearing that the judge determines should be heard in private and/or relating to a part of the hearing that was conducted *ex parte*. This is a power that the unamended provisions did not bestow on the court, although, since the *Toronto Star* case, the power had been available to the Federal Court through case law. Similarly, new sections 38.06(1) and 38.06(2), when read in conjunction with new section 38.04(5) and sections 38.11(1) and 38.11(3), allow Federal Court judges to order that a section 38 non-disclosure hearing be heard in private or, at the judge's discretion, in public. In addition, these new sections permit the judge to disclose the fact that the application has been made. The only portion of the hearing that must take place in private is the portion of the hearing that is conducted *ex parte*. The confidentiality of the *ex parte* portion of the proceedings is guaranteed by new section 38.11(3) of the *CEA*. Federal Court judges did not have these powers under the pre-existing provisions of the *CEA*, although since the decision of the Federal Court in the *Toronto Star* case, they exercised these powers through case law: online: <http://www.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.html>.

[98] *Supra* note 71.

[99] *Sriskandarajah v United States of America*, 2012 SCC 70.

issues. These cases have led courts into considering the conduct of other states in so far as it impacts on proceedings before them.

For more than a decade there has been an increasing international and transnational dimension to national security with more sharing of information and collaboration between intelligence and law enforcement agencies. It is therefore unsurprising that domestic courts dealing with cases that have international and transnational dimensions find themselves inquiring into the conduct not only of Canadian officials, but of their foreign partners as well. The courts are approaching this new challenge cognizant of the need to balance principles of comity, sovereignty, and the rule of law.

1. Act of State Doctrine

While state immunity remains mostly intact, see below, in the past decade there has been some adjustment of the principles and doctrines by which in the past courts might decline to adjudicate matters that impinge on sovereignty, comity, and conduct of foreign relations by the Executive branch. This "Act of State Doctrine" – as it is called in the United States – was articulated by the US Supreme Court in *Underhill v Hernandez:*

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[101]

This issue arose in an Australian case, *Habib v Commonwealth of Australia,*[102] where the plaintiff claimed civil damages against the Commonwealth of Australia based on it having been complicit in acts of mistreatment or torture at the hands of foreign officials in Pakistan and Egypt. Justice Jagot stated, "[t]he act of state doctrine has been described as 'a common law principle of uncertain application which prevents the [forum] court from examining the legality of certain acts performed in the exercise of sovereign authority within a foreign country or, occasionally, outside

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[100] *Amnesty International Canada v Canada*, 2008 FCA 401.

[101] *Underhill v Hernandez (1897)*, 168 US 250, (in *Banco Nacional de Cuba v Sabbatino* 376 US 398 (SSC) (1964), the US Supreme Court maintained this approach even where the state conduct arguably was a violation of international law. Despite the loss suffered by United States nationals, the Supreme Court upheld the Act of State Doctrine by assuming the validity of Cuba's domestic action and therefore rejected the claim of US nationals against Cuba for their lost investments. The harshness of the rule was subsequently mitigated through legislation, the *Hickenlooper* amendment).

[102] *Habib v Commonwealth of Australia*, [2010] FCAFC 12 (available on AustLII).

it'."[103] He noted that Australia and the other four countries implicated by the allegations (the US, Afghanistan, Pakistan and Egypt) are parties to the Geneva Convention III of 1949 and the Convention against Torture (except Pakistan which was only a signatory).[104] Justice Jagot observed that the case involved:

> [A]n Australian court considering and determining whether, as alleged, officials of its own government aided, abetted and counseled foreign officials to inflict torture upon an Australian citizen in circumstances where the acts of those foreign officials, if proved as alleged, would themselves be unlawful under Australian laws having extra-territorial effect.[105]
>
> …
>
> [T]he development of Anglo-American jurisprudence indicates that the act of state doctrine does not exclude judicial determination of Mr. Habib's claim as it involves alleged acts of torture constituting grave breaches of human rights, serious violations of international law and conduct made illegal by Australian laws having extra-territorial effect. Further, exclusion of the jurisdiction of Australian courts by reference to a doctrine which is a rule of the common law cannot be reconciled with Ch III of the Constitution or the content of the laws of the Parliament that proscribe torture and war crimes committed by any person anywhere.[106]

It should be noted that a recent decision of the United Kingdom Queen's Bench, *Belhaj & Anor v Straw & Ors*,[107] may cast some doubt or suggest some limitations

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[103] *Ibid* at para 51. Referring to *R. v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [2000] 1 AC 61 at 106 (Pinochet (No 1).*

[104] *Ibid* at para 60:

> The statement of claim (paras 5 and 6) records that the Commonwealth of Australia, the United States of America (the US), Afghanistan, Pakistan and Egypt are parties to the *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949 (the Third Geneva Convention*) and the *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (the Fourth Geneva Convention*). It also records that Australia and Egypt are parties to the *Protocol Additional to the Geneva Conventions of 12 August 1949* and relating to the *Protection of Victims of International Armed Conflicts (Additional Protocol 1).* Although not pleaded, it is also not in dispute that Australia, the US, Egypt and Afghanistan are parties and Pakistan a signatory to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (*the *Torture Convention).*

[105] *Ibid* at para 118.

[106] *Ibid* at para 135. Justice Black agreed, remarking at para 13, "[I]f a choice were indeed open, in determining whether or not the act of state doctrine operates to deny a civil remedy contingent upon breach of those Acts, the common law should develop congruently with emphatically expressed ideals of public policy, reflective of universal norms."

[107] [2013] EWHC 4111 (BAILII) (QB).

on the approach in *Habib*. In *Belhaj*, the act of state doctrine was held to bar claims brought against UK officials for alleged conspiracy or participation with foreign officials to commit unlawful abduction, kidnapping and illicit removal of the plaintiffs across state borders to Libya. Simon J ordered those claims struck out on the basis that they were non-justiciable, save to the extent that they relied on allegations of negligence.

There have been a few significant decisions in which Canadian courts have scrutinized the actions of foreign governments. In each case the court has prefaced its decision with a discussion of the importance of the principle of comity. In *R v Hape*,[108] Justice Lebel, writing for the majority of the Supreme Court of Canada, considered whether the *Canadian Charter of Rights and Freedoms* applied to conduct of Canadian officials collaborating with foreign police in a foreign land. While expressly acknowledging that comity generally governed transnational cooperation in criminal matters, Justice Lebel specifically left open the possibility that the *Charter* may have extraterritorial application in cases where fundamental human rights are at stake:

> In an era characterized by transnational criminal activity and by the ease and speed with which people and goods now cross borders, the principle of comity encourages states to cooperate with one another in the investigation of transborder crimes even where no treaty legally compels them to do so. At the same time, states seeking assistance must approach such requests with comity and respect for sovereignty. Mutuality of legal assistance stands on these two pillars. Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. *That deference ends where clear violations of international law and fundamental human rights begin.* If no such violations are in issue, courts in Canada should interpret Canadian law, and approach assertions of foreign law, in a manner respectful of the spirit of international cooperation and the comity of nations.[109]

This human rights exception was invoked in *Canada (Justice) v Khadr.*[110] In this case the Supreme Court of Canada relied on decisions by the US Supreme Court to the effect that the process at Guantanamo Bay did not comply with either US domestic law or international law. In the circumstances, the SCC concluded that "the comity concerns that would normally justify deference to foreign law do not apply in this case."[111] As a consequence the Court determined that "[t]he *Charter* bound

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[108] *Supra* note 72 at para 52.

[109] *Ibid*. [emphasis added]

[110] *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 SCR 125 at para 3.

[111] *Ibid* at para 26.

Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations."[112] It is arguable that the Canadian decision does not challenge the comity principle in that the Supreme Court did not have to form its own opinion about whether US conduct violated international law but simply relied on the opinion of the US Supreme Court**.**

2. Extradition

Examining the conduct of a foreign government may be inescapable in an extradition hearing where the alleged state sponsored misconduct is said to constitute an abuse of process. In *United States of America v Khadr,*[113] Sharpe J. writing for the Ontario Court of Appeal, dismissed the appeal from the stay granted by the extradition judge. Referring to the misconduct of US and Pakistani officials and noting Canadian officials were exonerated, he wrote:

> [44] (…)[A]s the extradition judge pointed out, at para. 133, there was a nexus between the requesting state's misconduct and the committal hearing:
> [T]he gross misconduct that occurred in Pakistan very much affects these proceedings in Canada. The basis of this case has its genesis in the serious misconduct by the Requesting State. The Requesting State is seeking a benefit from this court, committal, based on evidence derived from its own misconduct.
>
> [45] I agree with that analysis. To the extent that there must be a nexus between the conduct alleged to constitute an abuse of process and the committal hearing itself, one was made out on the facts of this case.[114]

Sharpe J. affirmed that proceeding with the extradition committal hearing threatened the court's integrity. He considered that the judicial stay was warranted in circumstances where the human rights violations committed by foreign governments were "shocking and unjustifiable" and the requesting state was implicated in the misconduct. Sharpe J. underlined the duty of courts to withstand temptation to sacrifice the rule of law in the fight against terrorism:

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[112] *Ibid*. Please also note: *Slahi v Canada (Justice)*, 2009 FC 160, finding that principles of comity ruled where there was no Canadian participation in the alleged wrongful conduct.

[113] *United States of America v. Khadr*, 2011 ONCA 358 at para 4, Sharpe J (the decision was summarized succinctly in para 2: "The Superior Court judge who conducted the extradition committal hearing concluded, at para 150, that 'the sum of the human rights violations suffered by Khadr is both shocking and unjustifiable.' The judge granted a stay of proceedings on the basis that to permit the proceedings to continue in the face of the requesting state's misconduct would constitute an abuse of the judicial process." *Attorney General of Canada on behalf of the United States of America v Abdullah Khadr*, 2011 CanLII 69662; 2011 CanLII 69663 (SCC), applications for leave to appeal dismissed).

[114] *Ibid* at para 44-45.

> [76] We must adhere to our democratic and legal values, even if that adherence serves in the short term to benefit those who oppose and seek to destroy those values. For if we do not, in the longer term, the enemies of democracy and the rule of law will have succeeded. They will have demonstrated that our faith in (…) our legal order is unable to withstand their threats. In my view, the extradition judge did not err in law or in principle by giving primacy to adherence to the rule of law.[115]

3. Joint International Military Operations

As the *Habib* case suggests, joint international military or security operations to combat terrorism may give rise to challenging legal issues if all partners do not share the same international law commitments and reasonably comparable domestic laws.[116] The challenge by Amnesty International and the British Columbia Civil Liberties Association to the transfer by Canadian Forces ("CF") of detainees to Afghan authorities raised some of these issues.[117] After losing their attempt to get an interlocutory injunction to enjoin the CF from transferring detainees the applicants agreed to argue a preliminary question of law as to whether the *Canadian Charter of Rights and Freedoms* applied to the detainee transfer process in Afghanistan. MacTavish J referred to the recent decision of the Supreme Court in *R v Hape*[118] and concluded that the *Charter* did not apply because the Government of Afghanistan had not consented to the application of Canadian law nor was Canada an occupying force able to impose its own laws. She also declined to apply a "control of the

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[115] *Ibid* at para 76. See also *Sriskandarajah v United States of America*, 2012 SCC 70 (CanLII), appeal with respect to a decision to extradite Canadian citizens to the USA dismissed. For reasons given in *Kawaja*, the criminal code provisions are not unconstitutional (at para 20 and 21):

> No compelling reasons have been shown to depart from the principles set out in *Cotroni*, *Kwok*, and *Lake*. These principles have been consistently and repeatedly upheld by this Court. The common theme is that extradition, unlike exile and banishment, does not lie at the core of the right to remain in Canada under s 6(1) of the Charter. A Canadian citizen who is extradited to stand trial in a foreign state does not necessarily become *persona non grata*: the accused may return to Canada if he is acquitted or, if he is convicted, at the end of his sentence or even to serve his sentence in accordance with the *International Transfer of Offenders Act*. Extradition does not violate the core values of s 6(1), but rather fulfills the needs of an effective criminal justice system. The appellants have not shown that the considerations on which *Cotroni* (1989), *Kwok* (2001), and *Lake* (2008) were based are no longer valid. If anything, the march of globalization calls for increased cooperation in law enforcement.

[116] *Supra* at note 102.

[117] *Amnesty International Canada v Canada (Chief of the Defence Staff)*, [2008] 4 FCR 546, 2008 FC 336 (CanLII); *Amnesty International Canada v Canada (Chief of the Defence Staff)*, 2008 FCA 401 (FCA), appeal dismissed; *Amnesty International Canada and British Columbia Civil Liberties Association v Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, 2009 CanLII 25563 (SCC), leave to appeal to the Supreme Court of Canada denied.

[118] *Supra* at note 72.

person" test[119] as she considered it impractical:

> … [T]he practical result of applying such a "control of the person"-based test would be problematic in the context of a multinational military effort such as the one in which Canada is currently involved in Afghanistan. Indeed, it would result in a patchwork of different national legal norms applying in relation to detained Afghan citizens in different parts of Afghanistan, on a purely random-chance basis.
>
> That is, an Afghan insurgent detained by members of the Canadian Forces in Kandahar province could end up having entirely different rights than would Afghan insurgents detained by soldiers from other NATO partner countries, in other parts of Afghanistan. The result would be a hodgepodge of different foreign legal systems being imposed within the territory of a state whose sovereignty the international community has pledged to uphold.
>
> This would be a most unsatisfactory result, in the context of a United Nations-sanctioned multinational military effort.[120]

She concluded that:

> [T]he appropriate legal regime to govern the military activities currently underway in Afghanistan is the law governing armed conflict—namely international humanitarian law.
>
> In particular, international humanitarian law prohibits the mistreatment of captured combatants… The application of international humanitarian law to the situation of detainees in Afghanistan would not only give certainty to the situation, but would also provide a coherent legal regime governing the actions of the international community in Afghanistan.[121]

On appeal Desjardins J., writing for the Federal Court of Appeal, disagreed with the appellants' assertion that the recent SCC decision in *R v Khadr*[122], was dispositive of their appeal in that it stood for the proposition that the *Charter* "applied extraterritorially in respect of fundamental human rights violations at international law." Desjardins J considered the *Khadr* decision to be more nuanced, noting how the SCC had summarized its earlier decision in *Hape*:

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[119] *Amnesty International Canada v Canada (Chief of the Defence Staff)*, 2008 FC 336, [2008] 4 FCR 546 at para 249, (referring to *Al-Skeini & Ors, R (on the application of) v Secretary of State for Defence*, [2004] EWHC 2911 (Admin) Queen's Bench Division Divisional Court where "the finding of exceptional extraterritorial jurisdiction with respect to Mr Mousa's claim was made by analogy to the recognized exceptions to territorially based jurisdiction relating to embassies, consulates, foreign-registered aircraft and vessels.").

[120] *Ibid* at paras 274-276.

[121] *Ibid* at paras 276-280.

[122] *Supra* at note 72.

> In *Hape*, however, the Court stated an important exception to the principle of comity. While not unanimous on all the principles governing extraterritorial application of the *Charter*, the Court was united on the principle that comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations. It was held that the *deference required by the principle of comity "ends where clear violations of international law and fundamental human rights begin"* (*Hape*, at paras 51, 52 and 101, *per* LeBel J.). *The Court further held that in interpreting the scope and application of the Charter, the courts should seek to ensure compliance with Canada's binding obligations under international law* (para. 56, *per* LeBel J.).[123]

With this, Desjardins J. concluded that the reasoning of Mactavish J. remained valid. Reviewing the arrangements between the Government of Afghanistan and Canada he found that the intention to be governed by international law and in particular international humanitarian law was clear:

> The *Charter* has no application to the situations therein described. There is no legal vacuum, considering that the applicable law is international humanitarian law. As found by the motions Judge (at paragraph 64 of her reasons):
>
> > Before transferring a detainee into Afghan custody, General Laroche must be satisfied that there are no substantial grounds for believing that there exists a real risk that the detainee would be in danger of being subjected to torture or other forms of mistreatment at the hands of Afghan authorities.[124]

Therefore the extreme differences in the Canadian and Afghanistan human rights standards and systems of justice were mediated through the application of international humanitarian law and bilateral agreements that provided undertakings on the part of the Government of Afghanistan to respect human rights and permit random inspection of detainees' prison conditions by Canadian officials. The following seem to have been important considerations for the courts in their disposition of this sensitive operational matter: international humanitarian law provided the most complete and widely adopted legal regime for dealing with persons detained in an armed conflict; it could provide a common standard for all the partners in the International Security and Assistance Force; the CF commander stated he applied its standards in making detainee transfer decisions; government witnesses

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[123] *Amnesty International Canada v Canada (Chief of the Defence Staff)*, 2008 FCA 401 at para. 19 [emphasis in the original].

[124] *Amnesty International Canada v Canada (Chief of the Defence Staff)*, [2008] 4 FCR 546, 2008 FC 336 (CanLII) at para. 64.

could show an improving, more rigorous and accountable system of prison inspections; and Canadian domestic law provided sanctions against breaches of the law of armed conflict.

Consideration of the conduct of foreign governments also occurred in two major national security inquiries of the last decade, namely the public inquiry regarding *Maher Arar* and the private inquiry regarding *Almalki, Elmaati, Nureddin.* In the Arar Inquiry Commissioner O'Connor wrote, "[b]ased on all of the evidence and information available to me, I conclude that the [Syrian Military Intelligence] tortured Mr. Arar while interrogating him during the period he was held incommunicado."[125] There are a number of civil suits currently before the courts alleging that Canadian officials were in some way implicated in wrongdoing by foreign governments.[126] In the cases referred to in this section the actions of foreign officials or foreign states are questions of fact and Canadian courts (or inquiry commissioners) seek to determine if the impugned actions violate international law, for the purpose of then determining whether the conduct also violates Canadian law giving rise to a possible remedy under Canadian law.

DEVELOPING INTERNATIONAL, TRANSNATIONAL, AND DOMESTIC TRENDS

The international, transnational, and domestic law relating to combating terrorism continues to evolve. In the following section there is a brief examination of developments relating to the UN Al Qaeda listing procedures, state immunity law in Canada, and the phenomenon of Canadians travelling to participate in terrorist activities. These examples illustrate the international nature of terrorism and the ongoing challenge of balancing security and human rights.

1. UN Al Qaeda Listing Procedures

One might reasonably assume that the UN, having exhorted states to cooperate with each other in combating terrorism and to comply with human rights standards in the process, would have satisfactorily resolved this balance in its own operations, but this was not entirely the case. Over the last decade as the efficacy of the UN Al Qaeda listing procedures have been strengthened by a series of UN Security Council Resolutions, there have also been calls for increased transparency and due process. By UN Security Council Resolution 1730 (2006) a focal point for de-listing requests

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[125] *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar: Analysis and Recommendations (Ottawa: Public Works and Government Services Canada, 2006).*

[126] For example, *Benatta*, *Almalki*, *Abou-Elmaati*, *Nureddin*, and *Omar Khadr*.

for all sanctions committees was established. Superseding the function of the focal point in respect to the Al Qaeda listing procedures, the Office of the Ombudsperson of the 1267 Committee was established through Security Council Resolution 1904 (2009) and amended by Resolution 1989 (2011) to serve as an independent and impartial intermediary to review requests from individuals, groups, undertakings, or entities seeking to be removed from the Al Qaeda Sanctions List.[127]

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, took up the call for procedural reform in his second annual report to the UN General Assembly:

> The concerns of the international community were summed up in 2009 by the report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights of the International Commission of Jurists. Referring to the "virtually uniform criticism of the system as it presently operates", the Panel agreed with the Council of the Europe Parliamentary Assembly that the sanctions regime "violates the fundamental principles of human rights and the rule of law" and was therefore "unworthy" of an international institution.
>
> The root of the problem lies in a conflict of international legal norms. Since the Security Council is a political organ, its traditional decision-making structures lack the procedural mechanisms necessary to protect the due process rights of the individual. These rights are enshrined in international human rights treaties, and are broadly reflected in national and regional legal systems. Some "core" due process rights are today recognized as rules of customary international law, including the fundamental axiom *nemo debet esse judex in propria sua causa* (no one may be a judge in his own cause). (footnote omitted)[128]

Emmerson recommended that in order to bring the Al-Qaida sanctions regime in full conformity with international human rights norms, the Ombudsperson should become an Independent Designations Adjudicator and make final determinations of requests for de-listing and humanitarian exemptions, with public reasons, thereby removing the review function from the political decision-making function.[129]

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[127] Canadian citizen Abousfian Abdelrazik was eventually removed from the Al-Qaeda Sanction List in November 2011. Paul Koring, "Canadian Abousfian Abdelrazik taken off United Nations terror list", *The Globe and Mail* (30 November 2011) online: Globe and Mail <http://www.theglobeandmail.com/news/world/canadian-abousfian-abdelrazik-taken-off-united-nations-terror-list/article4179856/#dashboard/follows/>.

[128] UNGA, 67th Sess, 396th Mtg, UN Doc A/67/396 (2012) at paras 14-15.

[129] *Ibid*, in Conclusions and Recommendations at 22-23.

Although there has been important progress on combating international terrorism, there is more to be done. A comprehensive international convention on terrorism would help provide guidance to member states. Canada seeks the conclusion of negotiations on this document as soon as possible but there appears to be ongoing debate about the definition of terrorism.

2. State Immunity Law in Canada

The cases reviewed under the heading Transnational Law Context, above, provide some evidence that domestic courts of one state will review the conduct of another state if it involves violations of international human rights and there is a link to conduct of the first state's officials. Notwithstanding these developments, courts are disinclined to change their approach to the issue of state immunity when presented with allegations of state-sponsored human rights violations. Canadian courts have thus far declined to broaden the exceptions to state immunity when invited to do so by plaintiffs arguing that states should not be immune from civil jurisdiction in foreign states for acts that involve grave breaches of international law or *jus cogens*.

In *Bouzari v Islamic Republic of Iran*[130] the Ontario Court of Appeal found that the plaintiff's civil claim for damages brought against Iran was barred by the *State Immunity Act*[131] and there was no principle of public international law that said otherwise. The Court further stated that the Act did not violate the *Charter of Rights and Freedoms*. The Court noted that this result balanced two important principles; namely, the prohibition against torture and the requirement that sovereign states not be subjected to each other's jurisdiction. Canadian courts will not look to the behaviour of foreign States in order to decide whether to accept civil jurisdiction over them, other than to decide whether the impugned acts fall under one of the exceptions listed in the *State Immunity Act*. Thus, the Quebec Superior Court ruled that the Estate of Mrs. Kazemi was barred by the Act from suing for her torture and death in an Iranian prison. The Court noted, however, that an exception in the *State Immunity Act* permitted her son, Stephan Hashemi to sue Iran for harm he suffered in Canada.[132] The Quebec Court of Appeal allowed Iran's appeal against Hashemi's claim, but otherwise dismissed the appeal. Writing for the Court Morissette J.A. stated:

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[130] *Bouzari v. Iran (Islamic Republic)* (2004), 243 DLR (4th) 406, 71 OR (3d) 675 (OCA). See also *Arar v Syrian Arab Republic*, [2005] OJ No 752 at paras 26, 28. See also, *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270, [2006] UKHL 26, at para 83. Lord Hoffman ruled that official acts of torture for the purposes of the *Convention Against Torture* are official acts for purposes of considering state immunity. The state can only act through its officials; therefore state immunity extends to them. International law imposes state immunity without discrimination between states and it would be "invidious in the extreme" to have the judicial branch pick and choose to what state it did or did not apply.

[131] *State Immunity Act*, RSC 1985, c S-18.

[132] *Kazemi (Estate of) v Islamic Republic of Iran*, 2011 QCCS 196.

> On the facts as alleged, Zahra Kazemi, a blameless Canadian, fell victim to a pattern of vicious misconduct by the agents of a rogue state. Such a situation causes instant revulsion in anyone who adheres to a genuine notion of the rule of law. But these acts took place in Iran and what consequences they had in Canada do not set in motion the exceptions to state immunity.[133]

The Canadian jurisprudence on this issue appears to be fully consistent with that of the United Kingdom. In the House of Lords decision in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* Lord Hoffman ruled that official acts of torture for the purposes of the *Convention Against Torture* are official acts for purposes of considering state immunity.[134] The state can only act through its officials; therefore, state immunity extends to them. International law imposes state immunity without discrimination between states and it would be "invidious in the extreme" to have the judicial branch pick and choose to what state it did or did not apply.

Jones as well as Canadian-British dual citizen, William James Samson, and two others brought their cases before the European Court of Human Rights (ECHR) where they argued that the grant of immunity to Saudi Arabia and Saudi Arabian officials allegedly involved in their torture amounted to an unjustified restriction on their access to a court, contrary to Article 6(1) of the *European Convention on Human Rights*.[135] In its comprehensive and recent decision, the ECHR declined to depart from the ECHR's ruling in *Al-Adsani v the United Kingdom*.[136] The ECHR found that Article 14(1) of the UN *Convention Against Torture*, which obliges a state party to ensure that a victim of an act of torture obtains redress, could not be interpreted as imposing an obligation on a state to provide redress for acts of torture when those acts were committed by another state in that other state. Canvassing the breadth of jurisprudence around the world on this issue, the ECHR observed that:

> [T]he recent judgment of the International Court of Justice in *Germany v Italy* …– which must be considered by this Court as authoritative as regards the content of customary international law – clearly establishes that, by February 2012, no *jus cogens* exception to State immunity had yet crystallised.[137]

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[133] *Islamic Republic of Iran c Hashemi*, 2011 QCCS 196, 2011 QCCS 196 (CanLII) at para 121; on appeal to the Supreme Court of Canada.

[134] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, [2007] 1 AC 270, [2006] UKHL 26, at para 83 (Mr. Samson died before the decision was rendered).

[135] No 34356/06 and 40528/06, ECHR Strasbourg 14 January 2014.

[136] [GC], No 35763/97, ECHR 2001,XI.

[137] *Supra* note 135 at para 198.

Noting the *Hashemi* case is before the Supreme Court of Canada, the Court stated:

> Having regard to the foregoing, while there is in the Court's view some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials, the bulk of the authority is … to the effect that the State's right to immunity may not be circumvented by suing its servants or agents instead.[138]

The Court confirmed and applied the rationale and ruling in *Al-Adsani*, finding no violation of Article 6 § 1 of the Convention in this case:

> [T]he grant of immunity pursued the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty. It was compatible with Article 6 § 1 because it reflected generally recognised rules of public international law on State immunity at that time.[139]

The ECHR acknowledged, however, that developments were underway in relation to state immunity and torture and that therefore state parties to the European Convention should keep this matter under review.[140]

The *State Immunity Act* was recently amended to lift immunity for listed foreign states with respect to their involvement in terrorist acts.[141] New section 6.1(1) of the Act provides that "A foreign state that is set out on the list referred to in subsection (2) is not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985." Section 6.1(2) provides for scheduling of states where "on the recommendation of the Minister of Foreign Affairs made after consulting with the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that the foreign state supported or supports terrorism." To date two states have been so listed, the Islamic Republic of Iran and the Syrian Arab Republic.

The *Justice for Victims of Terrorism Act (JVTA)*[142] is described as "An Act to deter acts of terrorism against Canada and Canadians." The Preamble refers to

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[138] *Ibid* at para 213.

[139] *Ibid* at para 196.

[140] *Ibid* at para 215.

[141] *Amendments to State Immunity Act*, SC 2012, c 1, s 5.

[142] *Justice for Victims of Terrorism Act* SC 2012, c 1, s 2.

United Nations Security Council Resolution 1373 (2001), the need for international cooperation to suppress terrorism, and the 1999 International Convention for the Suppression of the Financing of Terrorism to construct the rationale for lifting state immunity for state sponsors of terrorism.[143] The first cases under the *JVTA* have been launched by US judgment creditors who are seeking to have US damage awards for terrorist acts attributed to Iran enforced against Iranian assets in Canada.[144] The first Canadian to bring a claim under section 4 of the *JTVA* is Dr. Sherri Wise, a dentist who was injured in a bomb blast in Israel. She alleged that recognition of the "astronomical" US damage awards would deplete Iranian assets before Canadian victims could make a claim, and this would "shock the conscience of Canadians." Wise was granted leave by the Ontario Court of Appeal to participate in the hearing on the interpretation of section 4(5) of the *JTVA*.[145]

3. Canadians Travelling Abroad

Unfortunately terrorism has not diminished as the events of September 11, 2001 fade into history. There are now many hotspots of instability throughout the Middle East, the Maghreb, Egypt, the Horn of Africa, and places beyond. As terrorism evolves so does the response of the international community, national governments and the judiciary.

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[143] Preamble reads:

> Whereas the challenge of eradicating terrorism, with its sophisticated and trans-border nature, requires enhanced international cooperation and a strengthening of Canada's capacity to suppress and incapacitate acts of terrorism;
>
> Whereas United Nations Security Council Resolution 1373 (2001) reaffirms that acts of international terrorism constitute a threat to international peace and security, and reaffirms the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by acts of terrorism;
>
> Whereas Canada ratified the 1999 International Convention for the Suppression of the Financing of Terrorism on February 15, 2002;
>
> Whereas certain states that support terrorism should not benefit from state immunity in this regard.

[144] *Estate of Marla Bennett v Islamic Republic of Iran*, 2013 ONSC 5662; *Jacobsen v Iran action*, CV-12-464847; *Steen v Islamic Republic of Iran*, 2013 ONCA 30.

[145] A prime mover in the international effort to hold terror sponsors to account to their victims is Nitsana Darshan-Leitner and Shurat HaDin - Israel Law Center which is "an Israeli based civil rights organization and world leader in combating the terrorist organizations and the regimes that support them through lawsuits litigated in courtrooms around the world. Fighting for the rights of hundreds of terror victims, Shurat HaDin seeks to bankrupt the terror groups and grind their criminal activities to a halt - one lawsuit at a time." online: <http://www.israellawcenter.org>.

The phenomena of radicalization of young Canadians and their travelling abroad to participate in terrorism or join foreign conflicts create additional and urgent challenges.[146] The *Combating Terrorism Act*[147] amends the *Criminal Code*[148] to create four new terrorism offences relating to leaving or attempting to leave Canada to commit certain of the existing terrorism offences in the Code. These new offences allow for arrests and charges at the early planning stage of terrorist activity outside Canada, in other words, before a person even leaves Canada to commit a terrorist act.[149] Further legislative changes were introduced in Parliament recently which are aimed at removing citizenship from Canadians who have dual citizenship and engage in terrorism.[150] These new legislative responses will be tested in enforcement and adjudication as the quest for balance between liberty and security continues.

CONCLUSIONS: BALANCING LIBERTY AND SECURITY

This overview shows that the topic of national security has domestic, international, and transnational dimensions. The international community created a legal framework for preserving international security, protecting human rights, and

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[146] See e.g.: Stewart Bell & Adrian Humphreys, "Canadian Suspect Named in Deadly Bulgarian Bus Bombing Allegedly Trained with Hezbollah", *National Post* (25 July 2013) online: National Post <http://news.nationalpost.com/2013/07/25/canadian-identified-as-suspect-in-deadly-bulgarian-bus-bombing-of-israeli-tourists>; Tim Alamenciak, "Canadian Clear Leader in Algerian Gas Plant Terrorist Strike, Report Finds", *Toronto Star* (17 September 2013) online: Toronto Star <http://www.thestar.com/news/world/2013/09/17/canadian_clear_leader_in_algerian_gas_plant_terrorist_strike_report_finds.html>; Stewart Bell, "Canadian fighting in Syria Could Pose Immediate Threat to National Security When They Return: CSIS", *National Post* (3 February 2014) online: National Post <http://news.nationalpost.com/2014/02/03/canadians-fighting-in-syria-could-pose-immediate-threat-to-national-security-when-they-return-csis/>.

[147] *Combating Terrorism Act*, SC 2013, c 9. The Bill (S-7) also re-enacted the investigative hearings and recognizance with conditions measures and, as well as amendments to the *Security of Information Act* and the *Canada Evidence Act*. The Bill also responds to recommendations made by the Parliamentary Committees that reviewed the *Anti-terrorism Act* in 2007. The Bill was given Royal Assent on April 25, 2013.

[148] *Criminal Code* RSC 1985, c C-46.

[149] The preventive purpose behind the decision to introduce these new offences to the *Code* was underscored by remarks made by the sponsor of Bill S-7, Senator Linda Frum, during the bill's second reading in the Senate: "[T]he horrific nature of terrorism requires a proactive and preventive approach. These new offences will allow law enforcement to continue to intervene at an early stage in the planning process to prevent terrorist acts from being carried out. The new offences would send a strong deterrent message, would potentially assist with threat mitigation and would make available a higher maximum penalty than would otherwise apply." online: < http://www.lindafrum.ca/Speech_on_S-7.html>.

[150] Bill C-24, *Strengthening Canadian Citizenship Act*, 2nd Sess, 41st Parl, 2014; Joe Friesen, "Ottawa proposes sweeping new citizenship rules to crack down on fraud, better define national identity", *The Globe and Mail* (6 February 2014) online: Globe and Mail <http://www.theglobeandmail.com/news/national/ottawa-proposes-sweeping-new-citizenship-rules-to-crack-down-on-fraud-better-define-national-identity/article16745308/>.

combating terror. This body of law interacts with domestic law, particularly in the areas of criminal law, immigration law, and intelligence law. In recent years domestic courts wrestled with emerging transnational security issues as governments struggle with new international and domestic threats.

In enacting new laws to respond to terrorism Parliament has incorporated international law obligations into domestic statutes and used the international law context to explain new laws. The courts have also considered international, foreign, and domestic law in addressing the new international and transnational scenarios that have arisen over the past twelve years. In so doing they seek to maintain an equilibrium between security and liberty and to integrate and harmonize domestic, foreign, and international perspectives on rule of law wherever possible.

This balance is not easy to achieve because pressures at the international and domestic level often compound each other. As the threats and responses to international security evolve there is an ongoing need to strive for coherence in developing the globalized rule of law. Integration and harmonization of international and domestic standards and the quest for coherence and balance of rights and security remain a work in progress.